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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

IN AND FOR PINELLAS COUNTY, FLORIDA

Criminal Division

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. CRC 89-11425 CFANO

KEVIN RICHARD HERRICK,

Defendant.

302912 /

DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

1. Name and location of the court which entered the judgment of conviction under attack: In the Circuit Court of the Sixth Judicial Circuit, In and for Pinellas County, Florida.

2. Date of judgment of conviction: October 3, 1990.

3. Length of sentence: On Counts I and II, life imprisonment with no possibility of parole, and on Count III, fifteen (15) years imprisonment, with all sentences running concurrently.

4. Nature of offense(s) involved (all counts): Count I, Burglary; Count II, Sexual Battery; and Count III, Aggravated Battery.

5. What was your plea? (check only one)

(a) Not Guilty XXXXX

(b) Guilty _____

(c) Nolo contendere _____

(d) Not Guilty by reason of insanity _____

If you entered one plea to one count, and a different plea to another count, give details:

Copy to Staff Atty 8/2/94

6. Kind of trial: (check only one)

(a) Jury XXXXX

(b) Judge only without jury _____

7. Did you testify at the trial or at any pre-trial hearing?

Yes _____

No XXXXX

If yes, list each such occasion:

8. Did you appeal from the judgment of conviction?

Yes XXXXX

No _____

9. If you did appeal, answer the following:

(a) Name of court: Second District Court of Appeal.

(b) Result: Per Curiam Affirmed.

(c) Date of result: July 17, 1992.

(d) Citation: Herrick v. State, 602 So.2d 516 (Fla. 2nd DCA 1992).

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc. with respect to this judgment in this court?

Yes XXXXX

No _____

11. If your answer to number 10 was "yes", give the following information (applies only to proceedings in this court):

(a) Nature of the proceeding: Motion for Appointment of Counsel and Motion for Post-Conviction Relief.

(2) Grounds raised: As to defendant's Motion for Appointment of Counsel, the defendant was unable to adequately prepare a motion for post-conviction relief.

As to defendant's Motion for Post Conviction Relief, the defendant attempted to assert the following: Ground One, denial of effective assistance of counsel in counsel's failure to make appropriate pretrial motions to suppress; Ground Two, denial of effective assistance of appellate counsel; Ground Three, denial of effective assistance of counsel in counsel's failure to make appropriate motions to suppress the defendant's prior record; Ground Four, denial of effective assistance of counsel in counsel's failure to object to verdict forms and jury instructions that were numerous, confusing, and were not supported by any evidence advanced at trial; Ground Five, conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure; Ground Six, denial of due process in that the Court erroneously permitted a videotaped deposition in the jury room; Ground Seven, denial of due process in that a sentencing guidelines scoresheet was used which included victim injury points for a non-existant victim injury; Ground Eight, denial of due process in that the Court failed to rule upon the defendant's motion for new trial; and Ground Nine, denial of effective assistance of counsel in counsel's poor performance at trial possibly due to stress caused by pending criminal cocaine charges and possible suspension from the practice of law.

(3) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____

No XXXXX

(4) Result: Motion Denied.

(5) Date of result: By Order dated November 23, 1993, and defendant's motion for rehearing was dismissed by Order dated January 3, 1994.

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions etc.

with respect to this judgment in any other court?

Yes XXXXX

No _____

13. If your answer to number 12 was "yes", give the following information:

(a)(1) Name of court: Second District Court of Appeal.

(2) Nature of proceeding: An appeal from the Court's Order Denying Defendant's Motion for Appointment of Counsel and Motion for Post-Conviction Relief.

(3) Grounds raised: The Court erred in granting no relief.

(4) Did you receive an evidentiary hearing on your petition, application, motion, etc.?

Yes _____

No XXXXX

(5) Result: Per Curiam Affirmed.

(6) Date of result: January 26, 1994, and defendant's motion for rehearing was denied on February 23, 1994.

(b) As to any second petition, application, motion, etc., give the same information:

(1) Name of court: Florida Supreme Court.

(2) Nature of the proceeding: Petition for Writ of Habeas Corpus.

(3) Grounds raised: The district court's per curiam affirmance departed from essential requirents of law, e.g., the district court affirmed before the defendant could correct an error in the record on appeal, supplement the record, request oral argument, and file his initial brief on the merits of his appeal.

(4) Did you receive an evidentiary hearing on your petition,

application, motion, etc.?

Yes _____ No XXXXX

(5) Results: Petition denied.

(6) Date of result: March 16, 1994.

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

GROUND ONE: Denial of Effective Assistance of Counsel.

SUPPORTING FACTS: As explained below, the defendant submits that he was manifestly denied effective assistance of counsel:

I. I submit that I was denied effective assistance of counsel in that counsel failed to investigate, interview, or depose prospective witnesses who would have presented exculpatory testimony supporting my defense of mistaken identity, and counsel further failed to investigate the exculpatory evidence of the tag number of the vehicle seen fleeing the area immediately after the crime occurred.

INFORMATION PROVIDED TO COUNSEL;

A. In early February 1990, when I privately retained my trial counsel, Roy Edward Leinster, I advised him that I had been provided with very little information regarding the facts, circumstances, and statements surrounding the serious allegations made against me. Mr. Leinster advised me to write him a letter detailing my activities around the night the crime occurred, and to provide him with any information and witnesses that I believed would assist in my defense. I promptly complied with Mr. Leinster's request and advised him as follows:

On July 14, 1989, Patrick Porrey and I spent the afternoon in Largo at a self-service car wash working on his girlfriend's car. Patrick and I were repairing, amoung other things, a faulty thermostat, and both of us were soaking wet afterwards. At approximately 5:00 p.m., Patrick and I finished work on the car, and returned home to a triplex that Patrick's mother, Theresa Porrey owned. Mrs. Porrey, Patrick, and I lived in the south apartment of the triplex.

Shortly thereafter, Patrick left to return the car to his girlfriend in Tampa. I took a shower and went next door to the east apartment in the triplex to visit our neighbors, Darren Scott Barfield ("Scott") and Cheryl Hagen. During the few weeks I had lived with the Porrey's, I developed a basic friendship with Scott. On an earlier occasion, Scott and I discussed playing chess, and this was the purpose of my visit this evening. When I arrived, Cheryl stated that Scott had not yet returned home from work, however, if I would like to, she would play a game with me while I waited for Scott. Cheryl and I played chess for approximately twenty minutes until Scott returned home with two friends that I had never met before.

After a casual conversation, Scott produced a plastic sandwich bag containing marijuana. All five of us, Scott, Cheryl, the two friends, and I, smoked two marijuana cigarettes. Based upon my brief association with Scott and Cheryl, I believed that they were regular marijuana users, and that they would have smoked more marijuana cirgarettes that night. Subsequently, Scott and Cheryl stated that they were going out for dinner, and if I didn't have anything to do, and if they were home, I could come over later. I returned home, made my own dinner, watched television, and went to my room to read before going to sleep.

I was subsequently awakened from sleep by a very excited Theresa Porrey.

Mrs. Porrey stated, "The girl next door is being raped!" I immediately jumped out of bed, put on some pants, and ran out of the apartment to the front of the triplex to find out exactly what was going on, and to see if I could help.

When I got outside, I saw David Stewart, who lives in the west apartment of the triplex, comming out of his apartment. David was writing down a license plate number that Scott was repeating to him. I also saw Cheryl standing in her doorway, appearing very upset, crying hysterically, and saying "don't leave me" over and over again. Scott was standing in the middle of the sidewalk in the triplex's courtyard, and he also appeared to be very upset. I noticed that Scott was breathing hard and bleeding from some sort of wound to the chest area.

While getting Scott to stand still to see how badly he was injured, I was able to ask him what happened. Scott stated that someone had raped Cheryl and that he had just chased the guy to his car which fled the area. Scott did not know what year or model the car was, but he thought it was white, and he was able to memorize its tag number before it got away. Scott said that he gave the tag number to David to give to the police.

Up to this point, Scott and Cheryl gave absolutely no indication that they knew or even suspected that I may have been the man in their house. I was able to ask Scott if he was alright, and he said that he was. I asked if anyone had called the police, and David said that he had and they were on the way.

As I had saw Scott and Cheryl kept their marijuana in a record album on the coffee table in the living room, I instructed Scott to go inside and make sure that he did not leave the marijuana where the police might see it.

Mrs. Porrey was still very excited and was having a hard time breathing. I attempted to calm her down, and was subsequently able to get her to sit down

in her kitchen. I went back outside to wait for the police to arrive. When the first police officer arrived, he stopped at the wrong triplex. I waved him over to our triplex, and then directed him to where Scott and Cheryl were. At this point, several other police officers arrived with the Largo Emergency Medical Technicians, so I just tried to stay out of the way with all of the new activity going on.

While David and I were out in front on the triplex smoking a cigarette, a police officer approached us and asked who we were and what we knew about what happened. I told the police officer who I was and that I had been asleep when Mrs. Porrey woke me, stating that the girl next door was being raped. I further stated that I was not really sure of what exactly happened to Scott and Cheryl before I came out of the apartment.

Eventually, Scott was transported to the hospital, the police left, and things returned to normal. After determining that Mrs. Porrey was alright, I returned to my bedroom and went back to sleep.

While I was still asleep, Patrick returned home from Tampa and was advised of the incident earlier that night involving Scott and Cheryl. Patrick and David went over to Cheryl's mother's house to speak with Scott regarding what happened. Both Patrick and David discussed the incident with Scott. During this conversation, Scott stated that he thought I may be the man he saw in his apartment, but he was not sure. Patrick and David then returned to the triplex.

Around 3:00 a.m., I was awakened by Patrick, David, and Mrs. Porrey. I was questioned by Patrick and David concerning any involvement I may have had. After a long and heated discussion where I repeatedly denied any involvement, and Mrs. Porrey stated that it was not possible I could have done it because (1) she woke me right after she heard Cheryl cry out; (2) she would have seen

me exit and reenter apartment; and (3) Scott was stating to everyone that the perpetrator left the area in a car he got the tag number from. Afterwards, Patrick and David returned to Cheryl's mother's house to talk to Scott again. Following another conversation, Patrick and David returned to the triplex and questioned me again. Patrick stated that Scott thought that I may have been the perpetrator, however, Scott was candidly admitting to them that he was not sure.

Patrick, David, and I left the apartment to go outside to smoke a cigarette. We continued to discuss the situation, and I continued to deny any involvement. Afterwards, David returned to his apartment, and Patrick and I returned to ours.

Approximately ten minutes later, the was a knock at our door. I answered the door and observed a large number of police officers standing just outside our door. One of them asked me if he could have a word with me outside. Just as I stepped outside, I was restrained and handcuffed. One of the police officers said, "We found your fingerprints on that door," indicating Scott and Cheryl's door, "and you have been convicted of burglary before." "We know you're the one who done this tonight."

I was taken to the Largo Police Department and informed that I was being charged with with sexual battery, attempted homicide, kidnapping, burglary, and possession of firearm by a convicted felon. Two officers stated that they had two eye witnesses who positively identified me as the perpetrator. The police officers then read me my rights and asked if I would answer their questions. I stated that I would cooperate in any way I could, however, I would not answer any of their questions or make any statements until an attorney was present. I then asked for an attorney and was informed by the police officers that I would be provided with an attorney once I got to jail.

I was then taken to a holding cell.

After some time, I was approached by two or three police officers who asked me if I would consent to the taking of various hair samples. I voluntarily gave my consent, and hair samples were taken from my scalp and pubic area. Subsequently, I was transported to the Pinellas County Jail.

In addition to the above, I further advised Mr. Leinster that after a public defender was appointed to represent me, the police officers never returned to present their questions that I agreed to answer once I was provided with an attorney. I advised Mr. Leinster that I was still ignorant of the allegations made against me, and I had not been informed as to the status of the investigation of my defense because I had very little contact with my public defender, Jane Brown. I did know, however, that a few depositions had been taken, and that my trial date was continued because Ms. Brown had not yet deposed Patrick Porrey and David Stewart.

I subsequently advised Mr. Leinster again that I knew next to nothing about what Scott, Cheryl, and the other witnesses were alleging, other than what I was able to discern from a police report my sister purchased. Further, when I was advised that Scott was suggesting that I had jumped a couple of six foot fences to get back to my apartment, I advised Mr. Leinster of my knee injury that necessarily would have left me with a noticeable limp if, in fact, I had jumped those fences.

B. In addition to above, Mr. Leinster was provided with pertinate information in my case file created by my original attorney.

I was initially represented by a public defender, Jane Brown, who created and maintained my case file which contained, amoung other things, various witness statements and depositions, the state's witness list, and the previously served subpoenas for depositions. The state's witness list

included Patrick and Theresa Porrey, and David Stewart. When Mr. Leinster was retained, he was presented with my case file that indicated that neither Patrick or David had appeared at deposition as directed.

COUNSEL'S ACTION WITH INFORMATION;

Mr. Leinster took no reasonable action under the circumstances to investigate, interview, or depose Patrick Porrey, David Stewart, or Theresa Porrey. Furthermore, Mr. Leinster did not investigate the tag number of the vehicle seen fleeing the area immediately after the crime.

REASONABLENESS OF COUNSEL'S ACTION;

Mr. Leinster was provided with the same basic information regarding my case as Jane Brown was provided. This very same information provided to another attorney, namely Ms. Brown, led that attorney to a reasonable decision to subpoena Patrick and David for depositions. Importantly, when Patrick and David did not appear for depositions as directed, Ms. Brown reasonably believed their testimony to be so essential to my defense of mistaken identity as to mandate a continuance until such time as she could depose the prospective witnesses.

I submit that a comparison of the deposition testimony of Scott and Cheryl coupled with a review of my account of the events on July 14, 1989, would induce a reasonably competent attorney to investigate, interview, and depose Patrick Porrey, David Stewart, and Theresa Porrey before making a decision on whether to proceed to trial with or without these witnesses. Clearly, this is what, a reasonable attorney, Jane Brown, believed.

I submit that Mr. Leinster's failure to act in this matter manifestly falls below the actions of a reasonable attorney handling a case of similar

facts and circumstances, or, as the case may be, a case of identical facts and circumstances.

As explained below, Mr. Leinster's failure to act in this manner so adversely prejudiced my defense at trial, it is reasonable to conclude that if not for his failure to investigate, interview, and depose these prospective witnesses, the outcome of my trial would have been different.

PREJUDICIAL EFFECTS:

A. The failure of Mr. Leinster to investigate, interview, or depose Patrick Porrey and David Stewart was highly prejudicial to my defense of mistaken identity. Under the facts of my case, I believe it was fatal.

Mr. Leinster was provided with the public defender's case file and all of the information I could provide based upon my limited knowledge of the serious allegations made against me. There is no doubt that Mr. Leinster knew who Patrick and David were, where they lived, and that these prospective witnesses could offer crucial exculpatory testimony to support my defense of mistaken identity. As well as bolstering my version of events, the testimony of Patrick and David would have impeached the testimony of Scott and Cheryl, and it would have provided the fact finders with a complete account of the events from all witnesses who possessed relevant information to the offenses charged.

Mr. Leinster knew that after Scott was released from the hospital, Patrick and David had talked with him not only once, but twice, in great detail about what happened and what Scott saw that night. They talked to Scott before he made an identification to police, candidly confiding with Patrick and David the fact that he was not really sure who he saw that night.

My reasonable theory of defense was that of mistaken identity. Mr. Leinster knew from reviewing Scott's deposition testimony that although Scott

did not inform or indicate to anyone immediately on the scene the alleged identity of the perpetrator. Scott was later claiming that when he saw the man in his apartment, there was absolutely no doubt in his mind that I was the perpetrator. This incredulous statement would have been refuted by Patrick and David.

Mr. Leinster knew that Patrick could have presented testimony supporting the fact that Patrick and I worked on his girlfriend's car at a self-service wash, leaving us soaked with water in the process.

Mr. Leinster also knew that David would not only be a witness to the conversations with Scott, but was the person who called the police and wrote down the tag number of the vehicle Scott told everyone he seen fleeing the area. David would have established that I had just ran out of my apartment just as Scott returned from chasing the fleeing vehicle. This exculpatory testimony would have manifestly proved that there was insufficent time for me to (1) run away from the triplex with Scott in pursuit; (2) dispose of the weapon and any inculpatory evidence; (3) run back to the apartment from somewhere in the neighborhood; (4) stealthly reenter the apartment without alerting Mrs. Porrey; (5) remove all of my clothing and wash out all of the blood; (6) wash out all of the grease or hair cream out of my hair (if you accept Scott's identification); (7) climb in bed and pull up the covers; and (8) reduce my breathing and appear to be asleep before Mrs. Porrey could enter the room and wake me just after hearing Cheryl scream.

It should be noted that Scott was stabbed twice in the chest area and was bleeding profusely. Blood was everywhere. The police discovered blood on the frame of Scott and Cheryl's bedroom door, sliding glass door, and apartment door where the perpetrator touched them while fleeing. Thus, whoever committed this crime necessarily left the apartment with blood on his person.

However, the police did not find any blood on me, my clothes, in my room, or anywhere in or outside of our apartment.

David could have testified that when he observed me run out the apartment, just after Mrs. Porrey woke me, (1) I was not wearing a large belt buckle; (2) I did not have any blood on me; (3) I did not have a noticeable limp; and (4) I did not appear to have just been in a fight. Further, David would have testified that I was not wearing the distinguishing large belt buckle. Moreover, as I previously stated, this exculpatory testimony would have bolstered my defense that there clearly was insufficent time for me have committed this crime and do all the necessary things to place me back in my bedroom when Mrs. Porrey woke me.

As well as bolstering my defense, David's testimony would have supported the testimony of my alibi witness, Theresa Porrey, that she immediately woke after hearing Cheryl scream, refuting the prosecutor's argument that Mrs. Porrey's testimony was embellished to shield herself from a non-existant lawsuit. Mrs. Porrey stated as much in her trial testimony.

As no conclussive period of time could be established by the conflicting testimony of Scott, Cheryl, and Mrs. Porrey, I submit that David's testimony would have presented the jury with an unbiased, disinterested statement of the events, arguably more reliable than the testimony of two admittedly hysterical women, one of whom had been attacked, and of a wounded man.

Patrick saw me just a few hours later and would have also testified that it did not appear that I had been in fight, nor was I having any problems walking.

David was also interviewed by the same police officer that interviewed me. Subsequently, this same police officer testified that he only interviewed me because I looked so suspicious, and while so doing, he could observe my

heart beating through my t-shirt. Although being excited that night under the circumstances was reasonable, the prosecutor argued it as inculpatory. It is interesting to note, however, that this same police officer who carefully examined me did not observe that (1) I appeared to have been in fight; (2) I had a noticeable limp; (3) I was wearing a large belt buckle, as described by Scott and Cheryl; and (4) I had any blood on me or my clothes.

As I previously advised Mr. Leinster, I suffered a serious knee injury, and if I would have been the perpetrator Scott pursued and chased over a fence, then I necessarily would have returned home with a noticeable limp. In fact, I would have had a serious problem attempting to evade Scott leaving the triplex.

Mr. Leinster knew that there was absolutely no physical evidence to link me to this crime. My alibi witness and the time involved tended to refute the identification testimony of the victims. Scott's identification testimony appeared to identify one person, while Cheryl's identification purportedly of the same person tended to identify someone else. Therefore, it did not matter if you believed Scott or Cheryl, because the very belief of either witness created a reasonable doubt as to identification testimony of the other witness. Importantly, Cheryl candidly admitted that she was not sure that I was the perpetrator. The case against me was going to boil down to the credibility and weight the jury placed upon Scott's identification testimony. Thus, given our defensive posture of mistaken identity, Mr. Leinster should have investigated and cultivated exculpatory testimony of Patrick and David.

I submit that the testimony of Patrick and David would have a dramatic effect upon the jury's acceptance and reliance upon Scott's indentification testimony. For example, the exculpatory testimony of Patrick and David would have created reasonable doubt for the jury to subscribe a reason to return a

verdict of not guilty because it would have refuted Scott's trial testimony:

Q. Now when you saw him there was there any doubt in your mind that was him?

A. None whatsoever.

(R. 158).

* * *

Q. Did you get a good look at him then?

A. Yes.

Q. And was it him?

A. Definitely, beyond a doubt.

Q. It was Kevin Herrick?

A. It was Kevin Herrick.

(R. 159).

* * *

Q. After you saw his outline in the bedroom and you saw his face and whole body here, and you saw his face and whole body here, was there any doubt in your mind that it was the defendant Mr. Herrick?

A. No doubt whatsoever.

Q. Is there any doubt now --

A. None.

Q. -- that it was him?

A. Not beyond a shadow of a doubt.

(R. 163).

* * *

Q. About how long after you got back did he emerge from the house?

A. It was a few, couple minutes, I was very traumatized.

Q. Did you know it was him at that point?

A. Yes, sir, I did.

(R. 161).

As a direct result of Mr. Leinster's failure to investigate, interview, or depose the prospective witnesses, Scott's uncontested testimony allowed the prosecutor to persuasively argue to the jury:

He stated that there was no doubt in his mind that it was Kevin Herrick....

(R. 278).

* * *

....and Scott, after he calmed down, and cooled down, told the police right after he got back from the hospital that he was sure it was Kevin Herrick, and it was Kevin Herrick.

(R. 298).

* * *

Cheryl told the police that I believe it was Kevin Herrick but I'm not a hundred percent sure and it was after taht that Scott told the police, yeah, I know who it was, I'm a hundred percent sure, I know exactly who it was, and it was Kevin Herrick.

(R. 298).

* * *

The reason that Cheryl said that she was pretty sure it was Kevin Herrick but couldn't be a hundred percent sure and the reason that Darren Scott Barfield said it was Kevin Herrick was for one reason, because he saw him and because it was Kevin Herrick. That's the man do did it and I know you'll do the right thing.

(R. 307).

Clearly, Mr. Leinster's failure to investigate, interview, or depose these

prospective witnesses who could have presented exculpatory testimony refuting the state's version of events, bolstering my defense of mistaken identity, was highly prejudicial to my defense under the facts of this case. I submit that if Mr. Leinster would have investigated, interviewed, and deposed the witnesses, the outcome of my trial would have been different.

B. Mr. Leinster's failure to investigate the clearly exculpatory evidence of the tag number of the vehicle originally reported by Scott as fleeing the area immediately after the incident was highly prejudicial to my defense of mistaken identity. Arguably, under the facts of my case, the failure to investigate this exculpatory evidence supporting my theory of defense was fatal.

Mr. Leinster knew that Scott chased the perpetrator out of his apartment, past another triplex, and around a corner where he momentarily lost sight of the man. Scott believed that the perpetrator jumped a nearby fence, so he jumped the fence, too. On the other side, Scott claims he observed a man standing beside the driver's side of a white vehicle. Scott memorized the tag number of the vehicle before it drove away, and then ran back to the triplex, repeatedly yelling out the tag number so he would not forget it.

When Scott arrived back at the triplex, he gave the tag number to David to give to the police as I came out of my apartment. Thereafter, Scott told everyone present that he observed the man flee the area in a white vehicle that he memorized the tag number of. Even Cheryl testified as follows:

> MR. LEINSTER: Isn't what [Scott] said is that he chased the assailant down the road and he saw the lights of a car turn on; isn't that what he said?
>
> CHERYL: Yes.

Q: Right?

A: I believe so.

Q: Okay. And you did hear him say something about the assailant leaving in a car and writing down a tag number?

A: I said I (sic) he thought he saw him leaving in the car, but I guess he realized that it wasn't [Kevin].

Q: Later on you found that out, but right there on the scene what he was saying to Dave was the assailant left in the car and he got the tag number, correct?

A: No, not in those words. Even after he saw the car leave he was looking around for him because he thought he might have run behind a bush or house, but he couldn't find him, so he assumed he drove away in the car.

(R. 140-141).

* * *

Q: And did you not hear him also say, as he went though some bushes, that he saw a car pulling out and he thought that he had got in a car and, you know, drove away?

A: That's what he thought.

Q: That's what he said, isn't it?

A: Yeah.

(R. 141-142).

At some later date, Scott alleged that he made up the story about the tag number to divert the police's attention away from me. Scott stated that he wanted to get me himself. Nonetheless, Scott testified at deposition and trial that the tag number was the actual tag number of a car he saw that night. I submit, however, that Scott's asertation that he made up the story

of the tag number to divert attention away from me is incredulous. Had Mr. Leinster made some sort of reasonable attempt to investigate the admittedly valid tag number of vehicle seen in the immediate area of the crime scene, it would have supported my defense of mistaken identity. Arguably, this investigation may very well have led us to the actual perpetrator, a crucial piece of exculpatory evidence.

As we already know, Scott was repeatedly calling out the tag number as he ran back to the triplex, giving it to David as I was comming out of my apartment. Thus, prior to this point, Scott had absolutely no idea where I was. Therefore, he would not have known where to divert the police's attention from. Moreover, Scott would not have had any idea that the police would have had any idea that I was involved, unless, of course, Scott told them. As far as Scott knew at that point, if, in fact, he really believed "beyond a shadow of a doubt" that I was the perpetrator, I could have been anywhere in the neighborhood, notably, departing the area in the vehicle he saw and later told me, David, David's wife, Cheryl, and Mrs. Porrey.

Scott did not indicate the alleged identity of any perpetrator at the scene. Furthermore, I was face to face with Scott and Cheryl that night, and neither of them gave any indication to me or anyone else that they even suspected that I was the perpetrator.

I believe that Scott later recanted the story about the tag number because of police misconduct. On the scene, Scott did not indicated to anyone the alleged identity of the perpetrator. In fact, Scott candidly admitted to Patrick and David that he was not sure that it was me. Nonetheless, the Largo Police Department later told Scott and Cheryl that my fingerprints matched the bloody fingerprints at their apartment, and that they found the bloody knife used in the attack under my bed, along with some bloody clothing. To the

contrary, none of prints recovered matched mine, the police did not recover the bloody weapon under my bed, and there were no bloody clothes in my room.

I believe, therefore, that the police misconduct induced Scott and Cheryl to make a positive identification when they otherwise stated that they were not sure, and Scott claimed to have chased the man and watched him leave the area in a white vehicle. Therefore, under the facts of my case coupled with my defense of mistaken identity, Mr. Leinster should have investigated the potential exculpatory evidence of the tag number Scott gave David to give to the police. With this information, Mr. Leinster should have determined (1) who owns the vehicle; (2) who was driving the vehicle on the night in question; (3) whether the driver lives in the area or what the driver was doing in the area at that time of night; (4) did the driver know Scott and/or Cheryl; (5) whether there was blood on and in the vehicle; and (6) a physical description (does he look like me?) and examination of the driver (has he been in fight?). The results of such an investigation would have either corroborated Scott's allegation that he made up the tag number to divert attention away from me, or the results of the investigation would have produced exculpatory evidence supporting my defense of mistaken identity. In any event, when presented with the facts of my and the defense of mistaken identity, a resonably competent attorney would have investigated this crucial exculpatory evidence. As a result of Mr. Leinster's failure to investigate the tag number, Scott's allegation that he made it up went completely uncontested at trial, and I did not have the benefit of producing this potential exculpatory evidence or witnesses implicating the actual perpetrator who was driving the vehicle. Thus, Mr. Leinster's failure to properly investigate this matter precluded the introduction of exculpatory evidence supporting my defense of mistaken identity, and it denied me effective

assistance of counsel.

C. The failure of counsel to investigate, interview, or depose Theresa Porrey prior to videotaping her trial testimony was prejudicial to my defense.

There is no doubt that Mr. Leinster knew that Mrs. Porrey was my alibi witness, and that she was the most crucial witness for my defense of mistaken identity. A reasonable presentation of her exculpatory testimony was crucial. Mr. Leinster knew that while Mrs. Porrey was awake in the apartment, I was sound asleep. In order for me to exit and reenter the apartment, I necessarily would have had to stealthily pass an alert Mrs. Porrey not only once, but twice--once exiting the apartment, and a second time after being chased by Scott. Further, Mrs. Porrey knew that there was no way to pass through the sliding glass doors because of building supplies and lumber stacked against them. Importantly, Mrs. Porrey woke me immediately after hearing Cheryl scream, clearly establishing that there was insufficent time for me to have committed the crime, return home in time to dispose of any inculpatory evidence and get into bed. Mrs. Porrey would have further corroborated my defense of mistaken identity because she knew that (1) I never wore a large belt buckle; (2) I had a old knee injury; (3) I did not appear to have been in fight; (4) I did not have any blood on me or my clothes; and (5) I did not appear to have a noticeable limp.

Despite the importance of Mrs. Porrey's exculpatory testimony, Mr. Leinster did not conduct a reasonable pretrial investigation, interview, or deposition of Mrs. Porrey. Instead, on the day before trial, Mr. Leinster and the assistant state attorney videotaped Mrs. Porrey's trial testimony. Mr. Leinster was ill prepared to examine my crucial alibi witness.

As a result Mr. Leinster's lack of pretrial preparation, counsel did not

establish that I could not possibly have been the perpetrator because (1) I did not wear large belt buckle; (2) I did not appear to have been in fight; (3) I did not have blood on me or my clothes; (4) I could not jump six foot fences without having a noticeable limp; and (5) if my shoes and socks were indeed wet, the fact that her son and I worked on his girlfriend's car that afternoon. All of the foregoing exculpatory testimony would have corroborated my defense of mistaken identity.

Importantly, Mr. Leinster should have been prepared to ask Mrs. Porrey about and explain the operation of her cordless telephone, a matter which the prosecutor subsequently used to "impeach" her on with an alleged prior inconsistant statement.

Because Mr. Leinster failed to conduct a reasonable investigation, interview, or deposition of Mrs. Porrey prior to videotaping her trial testimony, counsel was unable to establish all of the relevant exculpatory testimony supporting my defense of mistaken identity, and it manifestly changed the results of my trial.

II. The defendant was further denied effective assistance of counsel by Mr. Leinster's failure to inform and consult with the defendant regarding the details of his case. Under the facts of this case where the defense was mistaken identity, the failure to inform and consult with the defendant regarding the details so he could assist counsel by providing the names of prospective witness and exculpatory evidence, leaving the defendant adequately informed to make an intelligent decision on whether to proceed or testify at trial, cannot be deemed harmless.

Mr. Leinster failed to inform and consult with me regarding the specific details of the allegations made against me. Mr. Leinster's action in that

respect fell far below the action of a reasonably competent attorney handling a case of similar facts, and, as detailed below, manifestly affected the outcome of my trial.

A. It was not disputed at trial the manner in which the crime occurred. My reasonable defense was that of mistaken identity. This particular defensive posture necessarily requires that defense counsel critically examine a witness's identification testimony for any discrepancies in his or her identification, and to look for any direct and circumstantial exculpatory evidence supporting an incorrect identification. One proven way to test an identification is to discuss in depth the specific details of the putative identification. This, however, is exactly what Mr. Leinster failed to do.

Although Mr. Leinster knew from the very begining that I claimed I was innocent and knew very little about the details surrounding the serious allegations made against me, and that I specifically requested to review or be provided copies of the various statements and depositions the witnesses had made, Mr. Leinster never permitted me to review or provided me with copies of the various statements and depositions the witnesses had made. Further, Mr. Leinster never, at any time, informed or consulted with me regarding the specific descriptions given by Scott and Cheryl that purportedly led to a positive identification by one witness, but not the other.

Mr. Leinster failed to advise me that Scott and Cheryl gave two conflicting descriptions of the perpetrator, e.g., Cheryl stated that he had long, curly, fluffy hair, and was wearing a dark blue or black muscle shirt (no sleeves), and Scott stated that the perpetrator had greased back hair, pulled up in the back to appear short, and was completely nude, but maybe had on a pair of socks. The only common detail identified by Scott and Cheryl was

that the perpetrator had a large belt buckle on his pants, a belt buckle they claimed I always wore.

The first I learned of the only common item identified was at trial. Mr. Leinster never informed or consulted with me on the victims' identification, nor did he inquire on whether I wore a large belt buckle.

Had Mr. Leinster properly informed and consulted with me regarding the infamous large belt buckle, I would have advised him that I have never owned or worn a large buckle of any kind. Further, I would have advised Mr. Leinster of the numerous witnesses who could have testified that I have never owned or worn a large belt buckle. Importantly, if Mr. Leinster had informed and advised me of the incredulous allegation that (1) I always wore a large belt buckle; (2) I was wearing a large belt buckle during the attack; and (3) I was later wearing a large belt buckle when I exited the apartment, I would have definitely testified in my defense that I never owned or wore such a large belt buckle, including on the night of July 14, 1989. I submit that my sworn exculpatory testimony, couple with that of other witnesses testifying that I never owned or wore a large belt buckle, would have bolstered my defense of mistaken identity, further corroborating the testimony of my alibi witness that she woke me from a sound sleep moments after the attack.

I submit that Mr. Leinster's failure to inform and consult with me in depth regarding the specific details of the identification testimony was highly prejudicial to my defense of mistaken identity, and it clearly left the identification testimony of Scott and Cheryl virtually uncontested. Thus, the prosecutor was able to persuasively argue:

> She stated I thought it was him because of his body build, his shape, his hair, the fact that he left by the sliding glass door was an additional thing, and by the belt buckle.

(R. 275-76).

* * *

....and she was able to see his outline, his features, see the shape of this body and see that big old belt buckle that she recognized so well when he came out of the apartment, eventually, the last person out, wearing the same belt buckle.

(R. 276).

* * *

Then once the police get there Cheryl told the police the exact same thing that from the shape of the body and the hair and the whole outline and the belt buckle and the whole thing that she thought it was Kevin Herrick, but wasn't a hundred percent sure.

(R. 298).

Had Mr. Leinster advised me of the statements regarding the belt buckle, I would have testified and refuted the purported fact. Moreover, I could have provided Mr. Leinster with numerous names of witnesses who would have corroborated my testimony that I have never owned or worn a large buckle. In fact, Mr. Leinster could have cross-examined Mrs. Porrey regarding the belt buckle. Patrick, David, my parents, brothers, sisters, and former girlfriends have all lived with me and could have testified to the same if Mr. Leinster had informed me. Moreover, David and his wife, both of whom lived in the same triplex with me, could have testified that they never saw me wear a large belt buckle, particularly on the night in question when I came out of the apartment.

Additionally, the fact that I did not own or wear a large belt buckle was corroborated by the fact that the police searched (1) me; (2) my apartment; (3) the triplex; and (4) the surrounding neighborhood, but they did not find

the infamous belt buckle.

B. Mr. Leinster failed to inform me that in the deposition testimony of Scott and Cheryl they claim to have intercepted a cordless telephone conversation purportedly of my alibi witness, Theresa Porrey, while using a baby monitor. Mrs. Porrey was allegedly talking to an unknown and unheard person. Although Scott and Cheryl claim that they heard only part of the one sided conversation, they purportedly heard Mrs. Porrey state that she could not believe that I did it, but my shoes and socks were wet (from the car wash), and the sliding glass door was was slightly cracked open.

Mr. Leinster never informed me of those inculpatory statements, nor did he inquire if and why my shoes and socks were possibly wet, and why, if at all, the sliding glass door was slightly cracked open. The first I learned of this testimony was at trial when the prosecutor reopened his case on "rebuttal" to impeach Mrs. Porrey.

Mr. Leinster's failure to inform and consult with me on this matter was absolutely fatal to my case. If I had been advised of those statements, I would have taken the stand and testified under oath that if my shoes and socks were wet, it was because Patrick and I had spent the better part of that afternoon working on his girlfriend's car at the car wash. Further, I would have testified that I knew for a fact that the sliding glass door was not slightly cracked open, as alleged through hearsay by Scott and Cheryl, because I knew for a fact that the sliding glass door was closed and impassable because of the buidling material and lumber stacked against it. Additionally, I would have advised Mr. Leinster that we must have Patrick testify to the same.

My testimony would have corroborated that of Mrs. Porrey and Patrick, and it would have had a signifficant impact on the credibility of Scott and Cheryl. Importantly, my testimony would have shown, contrary to the prosecutor's innuendo, if my shoes and socks were wet, it was simply due to an innocent act, and was not from running through the neighborhood in my socks that night. It should be noted, however, Mrs. Porrey expressly denied making any statement or finding my shoes and socks wet, or the sliding glass to be slightly cracked open. Further, this testimony would have refuted Scott's testimony that the perpetrator he chased had his shoes in his hands, which were certainly bloody hands according to the facts presented, testimony that subsequently allowed the prosecutor to insinuate inculpatory evidence during his argument that was easily susceptible of being interpreted by jury as "he washed the blood from the shoes."

For the reasons expressed above, I believe that Mr. Leinster's failure to inform me of the inculpatory statements of Scott and Cheryl precluded me from providing counsel with a witness (Patrick) who would have given exculpatory testimony refuting their testimony, and it clearly prevented me from making an intelligent decision on whether to testify. If I would have known of those statements, I would have testified under oath in my defense, refuting the incredulous statements, and further corroborating and bolstering my defense of mistaken identity.

C. Mr. Leinster failed to inform me of the inculpatory deposition testimony of officer Howard Crosby:

> I noticed that he was very nervous, and I talked to him. I asked him what hw was doing there and he said he lives in the next door apartment. So I got his name and everything and the way he was

looking -- and he was looking around. He was acting very suspicious and nervous.

(P. 5).

* * *

Q. Now you say the defendant was acting nervous. Would you be a little more specific? What led you to that conclusion?

A. He wouldn't look at me in the eyes. I can tell that this chest was pounding. I could tell he had a rapid heart beat.

(P. 6).

Although my behavior was certainly not remarkable under the extraordinary circumstances of that night, the prosecutor argued them to be clearly inculpatory. The first I ever heard of officer Crosby statement regarding my alleged "suspicious" and "nervous" behavior was while the witness testifying at trial. I was completely unaware that anyone thought or alleged that anything was unusual about my behavior. On the other hand, everyone else who saw me that night did not observe any "suspicious" and "nervous" behavior. They all knew me personally, whereas officer Crosby did not. Had Mr. Leinster advised me of the alleged inculpatory statements, I would have informed Mr. Leinster that I had just been woken from a sound sleep by a very excited Mrs. Porrey, and that I was very concerned about Scott and Cheryl. I would have further advised Mr. Leinster that I am basically a shy and fidgety person, who is easily intimidated by persons of authority. In general, I have always had a problem looking people in the eyes while speaking with them, a fact easily corroborated by my family and friends. Therefore, had I known about Crosby's statement, I would testified under oath to the same, and provided Mr. Leinster with the names of family and friends who would have corroborated my testimony. I believe my sworn exculpatory testimony, coupled with that of the other

witnesses, would have refuted the sly innuendo that my behavior that night was somehow indicative of guilt. It was not.

Additionally, had I been advised of Crosby's statement, I could have advised Mr. Leinster to examine Mrs. Porrey about my alleged behavior on the night in question during her videotaped trial testimony.

As well as establishing everything as set forth above, my testimony would have refuted the prosecutor's argument that:

> Officer Crosby was so suspicous of him that he did what's called an FIR which is to get information on him. Well, if he's not the person who did it, what does he have to be so nervous about? He was sleeping like a rock. Why is he so nervous? Because he did it, that's why. He's afraid of being caught, that's why. Because he knows that he's the man.
>
> (R. 302).

Mr. Leinster's failure to adequately inform me of Crosby's statements falls below the actions of of a reasonably competent attorney. Mr. Leinster manifestly had a duty to advise me of those allegedly inculpatory statement. If I would have been so advised, I would have presented Mr. Leinster with relevant information to assist him in presenting my defense. Moreover, Mr. Leinster clearly had duty to make sure that I was reasonably advised of all the relevant facts and information surrounding the serious allegations against me so that I could make a knowingly and intelligent decision on whether to testify. Had I known of these statements, I would have testified under oath to my complete innocence.

III. The defendant was further denied effective of counsel in Mr. Leinster's failure to consult with the defendant regarding what evidence and

witnesses would be presented at trial to support the defense of mistaken identity. Under the facts of this case, Mr. Leinster's failure to inform me in this matter was fatal to my defense of mistaken identity, and it affected my decision on whether to proceed to trial and testify.

Mr. Leinster failed to inform me prior to trial that he had not interviewed, investigated, or deposed the prospective witnesses that I had previously advised him of that possessed exculpatory testimony and evidence.

When Mr. Leinster was retained, he was advised of the exculpatory testimony and evidence detailed above that Patrick Porrey and David Stewart could provide to my defense of mistaken identity. Nonetheless, Mr. Leinster did not investigate, interview, or depose any of these crucial prospective witnesses, nor did Mr. Leinster ever advise me that he failed to do so, and that he did not intend on presenting their testimony at trial.

Mr. Leinster's failure to inform and consult with me in regards to this aspect of my defense installed a false sense of serenity in me because I truly believed that Mr. Leinster had investigated, interviewed, and deposed Patrick and David, and that they would be called at trial to present their exculpatory testimony supporting my defense of mistaken identity.

I submit that this false sense of serenity affected my decision at the time on whether to proceed to trial. Had I known that Mr. Leinster had not investigated, interviewed, or deposed Patrick and David, I would have requested that Mr. Leinster seek a continuance until such time as their testimony could be secured for trial. In the event Mr. Leinster denied my reasonable request, I would have terminated his representation of me due to his gross incompetence; The exculpatory testimony of Patrick and David was absolutely essential to my defense of mistaken identity.

I submit, therefore, that Mr. Leinster's failure to keep me reasonably informed as to what evidence and witnesses he would be presenting at trial falls far below the actions of reasonably competent attorney handling a case of similar circumstances. Had Mr. Leinster advised me of the actual defense he planned to present at trial (only the videotaped testimony of Mrs. Porrey), without the testimony of known witnesses who possessed exculpatory testimony and evidence supporting my defense of mistaken identity, I would not have proceeded to trial at that point, and, quite possibly, discharge Mr. Leinster as incompetent.

IV. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to call at trial witnesses known to him that possessed exculpatory testimony supporting the defense of mistaken identity. Under the facts of this case, the failure to present said testimony was fatal to the reasonable defense of mistaken identity.

I submit that Mr. Leinster manifestly denied me effective assistance of counsel by his failure to call Patick Porrey and David Stewart to testify at trial. Based upon the information provided to Mr. Leinster in my case file and by me, Mr. Leinster clearly knew of the exculpatory testimony and evidence Patrick and David could presented at trial supporting my defense of mistaken identity. Had Patrick and David testified at trial, under the facts of my case, it is reasonable to conclude that the jury would have reached a different result. Thus, Mr. Leinster's failure to call Patrick and David to testify manifestly denied me effective assistance of counsel.

V. The defendant was further denied effective assistance of counsel by Mr. Leinster's failure to effectively examine and cross-examine witnesses

during trial.

A. Mr. Leinster could have bolstered my reasonable defense of mistaken identity by effectively examining Theresa Porrey as to her personal knowledge of (1) the impossibility of anyone being able to stealthly exit and reenter the apartment while she was watching television in the living room; (2) the presense of building materials and lumber leaning against the sliding glass door which clearly precluded any passage through it; (3) how her son and I appeared with wet clothes when returning home from working on Patrick's girlfriend's car; (4) my old knee injury and ambulatory abilities; (5) me being a shy and fidgity person; (6) whether I ever owned or wore a large belt buckle as described by Scott and Cheryl; (7) my appearance of not having been in a fight; (8) my appearance of not having any blood on me or my clothes; (9) the complete absense of blood anywhere in our apartment and on the fences surrounding the triplex; and (10) my behavior that night, namely, whether I appeared nervous or suspicous, as described by Howard Crosby.

I submit Mr. Leinster's failure to effectively examine Mrs. Porrey to establish the foregoing supporting my defense of mistaken identity adversely affected the outcome of my trial, and, accordingly, denied me effective assistance of counsel.

B. Mr. Leinster failed to effective cross-examine Largo police officer Howard Crosby establishing exculpatory testimony supporting my defense of mistaken identity. Crosby testified that he only interviewed me because I looked suspicous, and while so doing, Crosby testified that he was close enough to see my heart beating through my t-shirt. The prosecutor argued this as being inculpatory.

Mr. Leinster should have cross-examined Crosby whether he additionally interviewed David Stewart along with me, and, while being so close to me, did he observe (1) whether I appeared to have been in fight; (2) whether I had any blood on me or my clothes; (3) whether I had a noticeable limp; (4) whether I was wearing a large belt buckle, as described by Scott and Cheryl; and (5) whether Crosby was familiar enough with me to reasonably determine whether my behavior and conduct was indicative of actual guilt or innocence.

C. Mr. Leinster failed to effectively cross-examine Largo police officer Stephen Joiner establishing exculpatory testimony supporting my defense of mistaken identity. Joiner testified as to what evidence, or the lack thereof, was collected from the triplex and surrounding neighborhood. Further, Joiner possessed the hair samples I voluntarily submitted while cooperating with police.

Mr. Leinster should have cross-examined Joiner as to why the police did not find physical exculpatory evidence my defense of mistaken identity. For example, as the perpetrator left blood everywhere he touched while fleeing the from triplex into neighborhood, the police did not find blood on the six foot fences I necessarily would have had to touch, in the dark, to get back to my apartment if I was in fact the perpetrator. The absense of blood on those fences is exculpatory evidence tending support my defense of mistaken identity. Therefore, Mr. Leinster should have questioned Joiner regarding the police's failure to discover this obvious evidence (the lack of blood) that would tend show that I was not the perpetrator.

Further, as I voluntarily gave hair samples from my scalp and pubic area, Mr. Leinster should have questioned Joiner regarding the fact that my hair did not match the hair found inside Scott and Cheryl's apartment. Moreover, if

Mr. Leinster would have inquired in this area, he may have found not only didn't my hair match, but Scott's hair didn't match either. I submit that this is clearly crucial exculpatory evidence strongly supporting my defense of mistaken indentity. Therefore, Mr. Leinster should have cross-examined Joiner regarding the results of hair samples I gave and those collected from the crime scene.

Importantly, Joiner could have testified, if Mr. Leinster would have cross-examined him, that the police did not discover a large belt buckle (1) on me; (2) in my apartment; and (3) anywhere in the surrounding neighborhood. This testimony would have presented the obvious question of if I was the perpetrator, where did my large belt buckle go? Or, did the actual perpetrator drive away wearing it?

b. Mr. Leinster failed to effectively cross-examine Scott and Cheryl concerning their use of marijuana on the night the crime occurred, and concerning Scott's absence from the couple's apartment the night before, leaving Cheryl home alone, while he attended a bachelor's party.

1. Mr. Leinster knew my relationship with Scott and Cheryl, and that we smoked marijuana earlier that night. During most of the occasions I was around Scott and Cheryl they would offer to smoke marijuna with me. I reasonably believed, therefore, that the couple were regular marijuana users. Mr. Leinster knew that I had observed approximately a quarter of sandwich bag of marijuana remaining when I left the apartment earlier that night. I also reasonably assumed and told Mr. Leinster that Scott and Cheryl smoked more marijuana that night while at the drive-in and later, when they returned home.

Mr. Leinster failed to cross-examine Scott and Cheryl regarding their use of marijuana. If they would have admitted their use of marijuana that night,

it clearly would have changed the acceptance and reliance the jury placed upon their identification testimony, probably explaining why two witnesses who saw the exact same event and person, later gave two conflicting descriptions purportedly of the same person. Further, if Scott or Cheryl would have denied their use of marijuana that night, I would have taken the stand to testify that I had smoked marijuana with them earlier that evening. Thus, I believe Scott and Cheryl's use of marijuana that night, coupled with the conflicting identification testimony supports my defense of mistaken identity, e.g., Scott and Cheryl's use of marijuana produced a mistaken identification of me as the perpetrator. Therefore, I was denied effective assistance of counsel when Mr. Leinster failed to cross-examine Scott and Cheryl, producing exculpatory testimony, regarding their use of marijuana that night.

2. Mr. Leinster was advised that the night before the incident, on July 13, 1989, Patrick and I watched a videotape with Cheryl in her apartment while Scott was attending a bachelor's party.

Mr. Leinster knew that when I came over to Cheryl's apartment earlier that evening to borrow a VCR cleaner, Cheryl stated that she would like to watch the movie with Patrick and I because she didn't have anything else to do that night. Cheryl said that Scott was going to be out all night at a bachelor's party. All three of us watched the movie, and subsequently Patrick and I returned to our apartment. Scott apparently did not return home until that morning.

I submit that this testimony would have established the unlikelyhood that I would attack Cheryl, and it would have been a fair rebuttal to the prosecutor's argument that:

We know from the victims that the defendant would often hang around

the apartment and we know that Scott left and at that moment the attacker, the defendant, came in after Scott left. So he would have to be someone who would see Scott leave to know that it's time to go in and do the dastardly deed. Who would that be, a neighbor? No one was as close as Kevin Herrick. The neighbor adjacent. He would know if Scott left or not. He would know that.

(R. 298-299).

Thus, by establishing the events of the previous night, the fact finders would have necessarily been presented with the reasonable question of why would I attack Cheryl nearly forty-five minutes after Scott leaves, not knowing where Scott is going and how long he would be there, when, just the night before, I knew for a fact that Scott would be gone all night? Importantly, as the adjacent neighbor, wouldn't I wear a mask or something to conceal my identity from the people I live in the same triplex with?

I submit that the prosecutor's spin on the facts could have been easily refuted by an effective cross-examination of Scott and Cheryl, producing a different result at trial. Therefore, Mr. Leinster's failure in this respect denied me effective assistance of counsel.

VI. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to object to, or move to strike, the inadmissible and/or objectionable portions of Theresa Porrey's videotaped trial testimony when it was admitted into evidence at trial.

Mr. Leinster presented only one witness at trial, my alibi witness, Theresa Porrey. Mrs. Porrey's trial testimony was videotaped because she suffered from a severe illness that precluded her from testifying in person at my trial. The Court explained:

Ladies and gentlemen of the jury. The defense witness Theresa Porrey is in ill health. She apparently has emphysema and is connected to some sort of a life support device, oxygen and some other things. Her doctor said she shouldn't come in to testify, although, he did say it was alright if they had a deposition of her and put it on videotape. That's what we have done and that's why she's on tape and not here, in case you were wondering.

I think there is a statement at the very begining with regard to her disease. Her videotape is and will be presented at this time. Move the T.V. forward.

At this point, Mr. Leinster failed to object to, or move to strike, the inadmissible and/or objectionable portions of Mrs. Porrey's videotaped trial testimony. Instead, the videotape was played in its entirety, inadmissible and objectionable portions included.

While Mrs. Porrey's trial testimony was being videotaped, objections were made, however, since there was no judge present during the taping, there were no rulings as to the objections. When the videotape was moved into evidence, no rulings were requested or made. On the tape, the prosecutor went into cross-examination of the Mrs. Porrey far beyond the scope of Mr. Leinster's direct examination. Subsequently, the prosecutor was able to persuade the Court to reopen its case on "rebuttal" to impeach Mrs. Porrey on a collateral matter which brought out by the prosecutor himself on cross-examination that was beyond the scope of Mr. Leinster's direct examination. Mr. Leinster should have objected, or moved to strike, the inadmissible and objectionable portions of the videotaped trial testimony when it was moved into evidence. The failure to do so directly resulted in the only defense witness, my alibi witness, subsequently being impeached on a collateral matter on rebuttal.

Under the facts of my case, e.g., a case that boiled down to the credibility of the identification witnesses versus the exculpatory testimony of my alibi witness, it cannot reasonably be said that Mr. Leinster's failure to object, or move to strike, was harmless.

Mr. Leinster was fully aware that it is well settled that objections may be made at trial to receiving into evidence any deposition, or any part of it, for any reason that would require the exclusion of it if the witness were then present and testifying. Thus, if Mrs. Porrey's trial testimony presented on the videotape would have been been objectionable if she would have been present and testifying at trial, then it clearly was objectionable when it was moved into evidence at trial. I submit the following cross-examination by the prosecutor was objectionable beyond the scope of Mr. Leinster's direct examination:

> Q. Now, is it true that when you went back into Kevin's room you saw that his shoes, his socks were wet?
>
> A. No, I did not see no socks. He did not wear socks -- he had flip-flops and he didn't have nothing on his feet.
>
> * * *
>
> Q. Well, did you observe at a later time -- that night that his shoes --
>
> A. He came out -- he was outside earlier, I guess he was outside earlier, we all were.
>
> Q. Did you observe that his shoes or socks were wet?
>
> A. No. I did not. Don't know nothing about it -- he didn't have no socks, he had flip-flops, no such thing as socks.
>
> Q. Did you notice that the sliding glass door was open when you went back there?

A. There was no sliding glass door open. There was no sliding glass door open.

Q. Did you have a cordless phone at that time?

A. Yes, I had a cordless phone.

Q. Isn't it true that you were talking to someone on the phone --

A. -- No. That's false because they were never home in the evening.

Q. How about if I ask the question first, then you can deny.

A. Okay. Go ahead.

Q. Isn't it true that you were talking to someone on the phone a day or two later, and you stated that you observed that --

A. -- I have never talked --

Q. Hold on a second.

A. I have never talked about this case to anybody before you even asked.

Q. Okay. Okay.

A. So, don't even bother asking.

Q. Well, just listen to the question. Okay?

A. Okay.

Q. The question first, and then if you want to deny go ahead.

A. Okay.

Q. Did you tell someone on the phone a day or two after this happened that you noticed that Kevin's shoes and socks were wet and you also noticed that the back door was open?

A. No. I never told nobody that. Never in a million years. I never talked about it. That is a lie.

(Defense Exhibit #1).

As the foregoing questions and answers were clearly beyond the scope of the direct examination, Mr. Leinster should have objected to and moved to strike that videotaped trial testimony presented to the jury. By objecting, Mr. Leinster would have been in a win-win situation; by objecting, one of two possible situations were possible, both of which being favorable to me: (1) if the objection would have been sustained, the questions and answers would have been striken; or (2) if the objection would have been overruled, the prosecutor would have had to take Mrs. Porrey as his own witness to continue on that line of questioning, invoking the well established prinicpal that you cannot impeach your own witness. Gelabert v. State, 407 So.2d 1007, 1009 (Fla. 5th DCA 1981). Thus, the prosecutor would have been precluded from reopening his case on rebuttal to impeach his own witness, e.g., the witness' answers to questionns on collateral matter would have to be taken, regardless of the answer, and the prosecutor could not have subsequently impeached Mrs. Porrey on rebuttal. In either event, by objecting, the only defense witness, my alibi witness, would not have been impeached. Since this case boiled down to the credibility of the witnesses, it cannot be said that Mr. Leinster's failure to object was harmless because it directly resulted in my abili witness being impeach on a collateral matter.

We might gain some insight into Mr. Leinster's failure to object by his own candid admission:

> I have not seen the video. We took the video. It might be a idea if we could at least take a look at the first part of it to make sure it came out.
>
> (R. 226).

It is clear that Mr. Leinster had not even reviewed the videotaped testimony prior to the trial to determine whether there were inadmissible and/or

objectionable questions and answers. I submit that a reasonably competent attorney would have reviewed the videotape prior to trial, and objected to and moved to strike the objectionable portions of the videotape when it moved into evidence at trial. Mr. Leinster's failure in this respect was fatal to my defense of mistaken identity as it directly resulted in the subsequent impeachment of my alibi witness.

VII. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to object to the prosecutions failure to lay a proper predicate or foundation for impeachment of defense witness Theresa Porrey with extrinsic evidence of alleged prior inconsistant statement on a collateral matter. Mr. Leinster's failure to object directly resulted in allowing the prosecutor to reopen his case on "rebuttal" to impeach Mrs. Porrey with extrinsic evidence of an alleged prior inconsistant statement on a collateral matter without first laying the proper foundation for impeachment. Under the facts of this case, this failure clearly resulted in the only defense witness, the defendant's alibi witness, being impeached, and it cannot cannot be deemed harmless.

In order to lay the proper predicate for impeachment by an alleged prior inconsistant statement, the witness must first be advised of the substance of the prior inconsistant statement, the time and place the statement was allegedly made, and the person to whom the statement was made. Kimble v. State, 537 So.2d 1094 (Fla. 2nd DCA 1989). It simply is not enough to generally ask if the prior statement was made. Hutchison v. State, 397 So.2d 1001 (Fla. 1st DCA 1981). In this case, the prosecutor failed to lay the proper foundation for impeachment on cross-examination of Mrs. Porrey during her videotaped trial testimony. For example,

Q. Now, isn't it true that when you went back into Kevin's room you saw that his shoes, his socks were wet?

A. No. I did not see no socks. He did not wear socks -- he had flip-flops and he didn't have nothing on his feet.

* * *

Q. Did you observe that his shoes or his socks were wet?

A. No. I did not. Don't know nothing about it -- he didn't have no socks -- he had flip-flops, no such thing as socks.

Q. Did you notice that the sliding glass door was open when you went back there?

A. There was no sliding glass door open. There was no sliding glass door open.

* * *

Q. Did you tell someone on the phone a day or two after this happened that you noticed that Kevin's shoes or socks were wet and you also noticed that the back door was open?

A. No. I never told nobody that, never in a million years. I never talked about it. That is a lie.

(Defense Exhibit #1).

Thereafter, the prosecutor was permitted to reopen his case on rebuttal to impeach Mrs. Porrey's videotaped trial testimony on using extrinsic evidence of an alleged prior inconsistant statement on a collateral matter. Mr. Leinster argued:

> I'm anticipating what this is. If I'm wrong, I'm wrong. There has been discussions concerning what was overheard on the child's intercom. The state questioned someone about that during the trial and this relates to something that Cheryl allegedly overheard on a

intercom. It would be hearsay unless it was being brought in as impeachment of Ms. Porrey.

Ms. Porrey on her tape never said that she did or did not say anything in the presence of her own home. She testified that she did not tell anyone this, that or the other. So, what they're going to do is try to say that Cheryl overheard her say something over a baby's intercom in the privacy of her own home, but she never was asked that question, never disputed when she have said that at random. So it's not impeachment.

PROSECUTOR: It is impeachment because I asked her first if she ever saw the defendant's shoes or socks wet and she said no. Then I asked if she had a cordless phone and she said yeah. Then I asked if she ever on the phone mentioned that to anyone else and she said no. So that's clearly impeachement when she says that she did not see the shows (sic) or the sliding glass door open. And then if I have evidence that she said something different to someone else, that's clearly impeachment.

THE COURT: Let's see how the question comes out. I think it's impeachment here. I'll allow the state to proceed at this point.

(R. 229-230).

The prosecutor did not have a proper foundation for impeachment because Mrs. Porrey was not confronted with a specific time and place she was to have made the alleged statement to "anyone." It is not enough to ask if witness ever said something to "anyone."

At this point, Mr. Leinster should have requested voir dire of the prospective rebuttal witnesses. Had Mr. Leinster done so, it clearly would have rendered Cheryl's rebuttal testimony inadmissible as Cheryl did not

testify that Mrs. Porrey allegedly stated that "she did" observe or notice my shoes and socks were wet or the sliding glass door was open. Cheryl testified:

> Q. What did you hear Theresa Porrey say?
>
> A. Well, she was like -- she was going on and on real hyper and she said, I can't believe he would do that, but his shoes and socks were wet, or something like that. And then she said the door was open and then she said you better get a good attorney. She just kept going on and on, and stuff like that.
>
> Q. Did she say the sliding glass door was open.
>
> A. Yes.
>
> (R. 232)(emphasis added).

At no point in Cheryl's rebuttal testimony did she testify that Mrs. Porrey allegedly stated that "she saw" my shoes or socks were wet or that "she saw" the sliding glass was open. If, in fact, she ever said that, she may have been commenting upon something someone else told her, and not based upon her own personal knowledge. Thus, Mr. Leinster should have objected to this clearly non-impeaching, but highly prejudicial, testimony that was easily susceptible of being interpreted by jury as being impeachment. It is clear that although Mrs. Porrey expressly denied that she said "she saw" the shoes and socks were wet or that the sliding glass door was open, Cheryl's testimony implied that Mrs. Porrey stated that she did, in fact, see them, when it is clear that she did not. This was not impeachment, but it is reasonable to conlude that the jury believe it was. This allowed the jury to believe that the only defense witness, my alibi witnesss, was lying when she expressly denied ever saying that my shoes and socks were wet and the sliding glass door was open.

If Mrs. Porrey was going to be impeached, the only proper impeachment, which is still on a collateral matter, is on whether she discussed my case with "someone" on her cordless telephone. It was not proper to "impeach" Mrs. Porrey on whether my shoes and socks were wet, and whether the sliding glass door was open.

Another purpose for this line of testimony was to argue the rebuttal witnesses' testimony as substantive evidence that the shoes and socks were, in fact, wet, and that the sliding glass door was open. I submit that this was merely a vehicle to improperly insinuate to the jury by innuendo and hearsay that my shoes and socks were wet, and that the sliding glass door was open. I submit that the substance of the impeachment testimony should have only been used to prove that a coversation took place, not being used as substantive evidence that a ultimate fact did or did not exist. Therefore, Mr. Leinster should have objected to failure to lay the proper foundation for the subsequent impeachement of Mrs. Porrey in the manner in which the prosecutor sought to impeach her.

Additionally, Scott's "rebuttal" testimony failed to demonstrate the substance of the alleged prior inconsistant statement:

> Q. Did you hear any of the conversation at all?
>
> A. Yes, sir. I did.
>
> Q. What do you remember hearing?
>
> A. She was talking to someone and saying how she couldn't really believe that he did it, but that I had seen him and she went in there later and found wet socks in his room. His socks were wet and the sliding glass door was open, and then she was saying that they should get a good lawyer and she kept going back and forth.
>
> (R. 238).

Again, we see that there is no alleged testimony of Mrs. Porrey that "she saw" my shoes or socks were wet or that "she saw" the sliding glass door was open. Although Scott says that she "found" only my socks were wet, there is a difference in between this "rebuttal" testimony and the question presented to Mrs. Porrey. Scott said that the sliding glass door was open, not that "she saw" that it was open. Thus, Scott's rebuttal testimony should have been additionally been objected to as no proper foundation had been laid for the actual impeachment subsequently presented by the prosecutor. A voir dire examination would have established the differences in the testimony, keeping the jury from being tainted. Instead, it was determined that

> Let's see how the question comes out. I think it's impeachment. I'll allow the state to proceed at this point.
>
> (R. 230).

After determining that the purported "impeachment" testimony was clearly not impeachment of the videotaped trial testimony of Mrs. Porrey, but sly innuendo of a fact clearly not established during the state's case-in-chief (whether my shoes and socks were wet, and whether the sliding glass door was open), Mr. Leinster should have objected and moved for a mistrial as the jury was fatally exposed the purported hearsay "evidence" that my shoes and socks were wet, and that the sliding glass door was open, as argued by the prosecutor as a substantive fact indicating guilt. A mistrial should have been granted based upon a sufficent motion alleging that (1) there was no foundation for the impeachment on collateral matter; (2) the defense witness expressly denied making the statement on the collateral matter, thus answer must be taken, and the witness cannot subsequently be impeached on that same matter; (3) the actual rebuttal testimony presented was not impeachment of the actual answers given; (4) the putative "rebuttal" testimony was easily susceptible of

undermining the credibity the jury placed upon my alibi witness; and (5) the hearsay rebuttal testimony could easily be interpreted by jury as being a substantive fact not established during the state's case-in-chief (whether my shoes and socks were wet, and whether the sliding glass door was open). At the very least, this objection and motion for mistrial would have preserved the error for appellate review, and under the facts of this case, was fatal to my defense of mistaken identity. As an appeal is only as good as the objection presented at trial, the failure to object clearly precluded any further review of this error. I submit, therefore, that Mr. Leinster's failure in this matter clearly falls far below the standards exercised by other reasonably competent attorneys, seriously damaging my case.

VIII. The Defendant was further denied effective assistance of counsel by Mr. Leinster's failure to request a short recess, approximately one hour, during my trial to secure and present the videotaped rebutal testimony of the only defense witness, the defendant's alibi witness, Theresa Porrey.

As the Court already knows, Mrs. Porrey's ill health precluded her from testifying in person at trial. Thus, securing the badly needed rebuttal testimony of this witness necessarily required that it be done by videotape (similar to her trial testimony). This was clearly necessary to rehabilitate Mrs. Porrey after the state's rebuttal witnesses testified to something different. Mrs. Porrey's testimony would have either explained her alleged prior inconsistant statement, or, once again, denied that she ever made the statement.

I submit that Mr. Leinster's failure to request a brief recess for this purpose directly resulted in the prosecutor's attempt to impeach Mrs. Porrey with extrinsic evidence of an alleged prior inconsistant statement on collater

matter to go clearly unrebutted, and it deprived me of the reasonable possiblity that Mrs. Porrey would have recalled making such statements or again denied ever seeing or making a statement that she saw that my shoes and socks were wet, and the the sliding glass door was open. If Mrs. Porrey admitted seeing or stating that my shoes and socks were wet, Mr. Leinster could have inquired whether this was due to the fact that her son, Patrick, and I worked on his girlfriend's car at the car-wash, leaving us soaked with water. Under the facts of my case, the failure to secure and present my alibi witness' rebuttal testimony was fatal to defense of mistaken identity. Had Mr. Leinster done so, Mrs. Porrey's rebuttal testimony would have affected the reliance and weight given her videotaped trial testimony, and it would have produced a different verdict, a verdict of not guilty.

IX. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to object to the prosecutor presenting argument (1) bolstering the victims' testimony; (2) improperly asserting hearsay testimony as a substantive inculpatory evidence of guilt; and (3) begging for justice. Mr. Leinster's failure to object was highly prejudicial to my defense of mistaken identity, and it adversely affected the results of my trial.

At trial, the prosecutor improperly argued:

> Now, we have the thing with the intercom. Ladies and gentlemen, we know that that's true. You say how do we know that that's true? We know that that's true because who in the world would make that up? Who in the world would make that up without hearing a cordless phone conversation on the intercom? More importantly, who would make up the statement? Who would say that she said that, oh, I can't believe it's him, but the sliding glass door was open and his shoes

and socks were wet. But the sliding glass door was open but the shoes and socks were wet. If they were out to get this guy aren't they going to say, well, I overheard a conversation and she knew that Kevin did it because she told me. Who in the world in going to make up that the sliding glass door was open and that the shoes and socks were wet?

(R. 304-305).

* * *

Did Scott have a reason not to tell the police right away that it was Kevin Herrick? Yeah, he had a reason, and we might not agree with it a hundred percent, but we understand it.

* * *

But is there a reason for him to make up the fact that it's Kevin Herrick if it's not? There is no reason. There is no reasonable doubt. He said he saw him and he did see him There is no reasonable (sic) for him to make that up. Let's not forget his wife was raped, his baby was threatened, and he was stabbed. What he wants out of this is what we all want out of this, justice. He's not after anything else. He and his family were brutalized, were victimized and that's what he wants out of it. So there is no reason for him to make this up if its not Kevin Herrick.

(R. 306).

As the prosecutor continued to beg for justice, he improperly argued:

Now it's true it's a travesty of justice if an innocent man is found guilty, but equally so it's a travesty of justice if a guilty man is not found guilty. This case calls out for justice. We're asking for justice. The criminal justice system does work and I ask you to

make it work.

(R. 306-307).

That argument further bolstered the prosecutor's earlier argument:

....and sometimes, for good reason, our system does not have a great reputation and people don't have a whole lot of confidence in it, and I guess you can see why. It takes a year and a half for things to happen before we finally have the trial, and we have to live with it for a year and a half.

The victims come in here and they're treated as if they're on trial being victimized again plus he was just darnright angry.

(R. 278).

The foregoing argument was clearly improper, and Mr. Leinster's failure to object to it and move for mistrial permitted the jury to contaminated, adversely affecting the verdict returned.

X. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to object to improper prosectorial argument falsely asserting that Mrs. Porrey was testifying falsely because she feared a non-existant lawsuit.

Mr. Leinster failed to object to improper prosecutorial argument that falesly asserted that Mrs. Porrey was testifying falsely because she feared a non-existant lawsuit. I submit that the prosecutor's argument was not a fair comment upon the evidence advance at trial and, as such, was improper and highly prejudicial to case of mistaken identity because the prosecutor himself tended to impeach the only defense witness, my alibi witness. Thus, Mr. Leinster should have objected to improper argument. Under the facts of my case, the failure to object was fatal and clearly undermined the credibility

of my alibi witness. For example, the prosecutor argued:

> Let's talk about Theresa Porrey for a minute. The judge will instruct you that it's your duty to weigh the evidence to try and figure out what testimony you should believe and not believe. Well, here's a lady that does have a bit of interest, at least in her own mind, and that's all that counts. Kevin Herrick was a friend of the family, his family was a friend of their family. He was a friend of her son Patrick Porrey. She wants to protect him, that may or may not be rational, **but she's also afraid of being sued because the attacker came out of her apartment.** So whether that's rational or not doesn't matter, **but she's afraid of being sued** and on the tape she stated she spoke to Cheryl about that, that Cheryl **and Cheryl and Scott did not threaten her that,** that she had talked to her sister about that and to Cheryl about that. So she has an interest in that too. **She wants to protect him and she wants to protect herself.**
>
> And we saw how see embellished things, didn't we? She said that she went back there right away. She ran back there to tell Kevin in the room about this and she tried to wake him up and shake him. We know that's not true because she was out in the courtyard with everyone else and the victim Cheryl when this happened. **So she tries to embellish, she tries to protect, that's exactly what she's trying to do.**
>
> (R. 303-304)(emphasis added).

The foregoing in not a fair comment based upon the evidence advanace at trial. Most of the prosecutor's incredulous allegations are clearly refuted by the record. In fact, the only testimony regarding Mrs. Porrey being afraid of

being sued was initiated by the prosecutor himself during cross-examination:

> Q. Let me ask you this: Were you ever afraid perhaps they might sue you because Kevin was living with you?
>
> A. No. I'm not scared. I've got insurance. I'm covered in insurance.
>
> * * *
>
> Q. Did you speak to [Cheryl] about the possibility of you being sued?
>
> A. No. No. No. Anything -- no I didn't say nothing about being sued -- who's bring up this suing -- I'm worried about it now -- you've got me scared.
>
> (Defense Exhibit #1)(emphasis added).

At no point prior to this did Mrs. Porrey state that she was scared of being sued; Mrs. Porrey expressly stated that she was not afraid of being sued because she was insured. Clearly, the prosecutor scared her at the conclusion of her testimony on cross-examination, creating his own bias. Therefore, Mr. Leinster should have objected to the prosecutor's improper and misleading argument that was not fair comment based upon the evidence advanced at trial.

XI. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to make a motion to suppress the tainted identification testimony of Scott and Cheryl on the grounds that they had been irreparably infected by the Largo Police Department's unlawful, unethical disclosure of completely false and misleading inculpatory evidence calculated to obliterate any reasonable doubt in these witnesses' minds of the accuracy of the two conflicting identifications, arguably inducing Scott and Cheryl to make a positive, but incorrect, identification.

On July 14, 1989, the Largo Police Department was called to 4016 Audabon Drive in Largo, Florida, to respond to what appeared to be an attempted sexual battery. Cheryl claimed to have been sexually battered by an intruder, while Scott claimed that he had been stabbed in the chest area during a physical confrontation with the man. At this point, Scott did not give any statement as to who he believed the intruder was, and claimed the man left the area in white car. Scott was then transported to the hospital. Cheryl gave a general description of the perpetrator as having long curly, fuffy hair, wearing a dark blue or black muscle shirt with no sleeves. She further stated that based upon the perpetrator's physical characteristics, coupled with Scott's telling her that the man attempted to leave by the sliding glass door, led her to believe that the man "looked like the guy next door." Officer Crosby, in his initial report and deposition, stated that I appeared to be nervous and acting suspicious, prompting him to perform a field interrogation consisting basic questions, such as my name, where did I live, what did I know about what happened, etc. After this interview, I had no further contact with the police until my untimely arrest. The investigation continued.

The police completed their investigation, collected evidence, and then departed the area without making an arrest.

During the early hours of July 15, 1989, after being treated and released for two puncture wounds to the chest, Scott called the Largo Police Department to give a identification of the man he believed that he saw, subsequently implicating me.

The police returned to the triplex, placed me under arrest, and searched my apartment, bedroom, and personal property. The police recovering a red shirt with no sleeves, a pair of blue jeans, a two-inch (2") pen knife, and a forty-four caliber pistol. After taking the foregoing into custody, the

police informed Scott and Cheryl that they recovered inculpatory evidence corroborating Scott's identification of me, e.g., Scott and Cheryl were informed that (1) my bloody finger prints were found on their door; (2) a regular size knife covered in blood was discovered under my mattress; (3) my blue jeans had Scott's blood on them; (4) a firearm was recovered from my bedroom; and (5) I had previously been convicted of a felony. This information was proffered to Scott and Cheryl to assure them that they had picked "the right man."

I submit that the prejudice I suffered from the improper disclosure of the purported inculpatory evidence was so severe that under no circumstances would Scott or Cheryl ever consider that they may have made a mistake. Whatever suspicion they started with was clearly manipulated by the police's blatant misconduct to install a completely unwaivering conviction that I must be the perpetrator, ignoring all evidence to the contrary. From the night of the crime, continuing through my trial, Scott and Cheryl honestly belived that the police found the bloody weapon used during the attack, my bloody finger prints were on their door, and Scott's blood was on my blue jeans. Notwithstanding what the police told Scott and Cheryl, they did not find the bloody weapon under my mattress, my bloody finger prints on the door, nor Scott's blood on my blue jeans. I submit that under these circumstances, it would be impossible for me to have a fair trial using Scott and Cheryl's tainted identification.

This misinformation manifestly caused such irreparable damage to the victims' identification that it completely rendered it entirely prejudicial to my case. For example, at no point prior to my arrest does Scott or Cheryl ever say that a firearm was involved in the crime. This fact is easily corroborated by the police reports, witness statements, depositions, etc.

However, after being told that a firearm was recovered along with the bloody knife and clothes, and permitted fifteen months for the misinformation to root itself in their minds, the non-existant "evidence" affected the victims' later identification testimony. Cheryl testified:

> Q. What happened next?
>
> A. Well, him and Scott were just fighting back and forth and, you know, I wasn't sure if a gun was going to go off or if he was going to get stabbed or anything.
>
> (R. 111).

Prior to the police's miscoduct, Cheryl never mentioned anything about seeing, or even suspecting, that a firearm was present. It follows, therefore, that this is subconscious evidence of the police's misinformation working upon itself for fifteen months, and the witness believing it to be true. Unfortunately, this misinformation also affect Scott's testimony:

> Q. And since you were so incensed that you were chasing the possible assailant and, as you said, if you caught him [you] might have attacked him, why did you simply squat in the bushes and take down the tag number and go home?
>
> A. Because there were other individuals at the car. And I didn't know if there was a gun in the car.
>
> (R. 178-179).

* * *

> ....and I decided against it [approaching the vehicle] because there might be a firearm in the car.
>
> (R. 181).

As you can see, the police's misinformation, giving the witnesses fifteen months to dwell upon it, tainted their identification testimony. These

witnesses could never accept the fact that the police lied to them. Cheryl testified:

Q. Isn't one of the reasons that you believe that it's Mr. Herrick that did this is because you think they found the weapon that was used on you?

A. One of the reasons?

Q. Yeah.

A. One of the many reasons, yes.

Q. Whether it is true or not true, you were told that they found the knife and it was a regular knife, correct?

A. Yes.

(R. 134).

* * *

Q. Who told you they found the knife and it was a regular knife?

A. A police officer.

(R. 135).

* * *

Q. Did that reconfirm for you your suspicions when a police officer told you that?

A. Yes. The police officer told me that they found the knife and that it had blood on it, it looked like blood on it, and they found a gun under his mattress and all that.

(R. 135).

And Scott was irreparably tainted, too:

Q. Did you tell Cheryl that the police found the weapon and Kevin's clothes with your blood on them; did you ever tell her that?

A. Did I ever tell her that?

Q. Yeah.

A. We both knew that.

Q. You both knew that to be true?

A. Yes, sir.

Q. And you still believe that to be the case today?

A. Do I belive that to be the case today?

Q. Yes.

A. You mean do I -- they might not have found the right knife and right clothing, no. They might not have sent the right stuff to the lab or the lab might have made a mistake.

(R. 195).

Clearly, Scott's thoughts and testimony were so unbelievably infected with the police's misinformation that any attempt to explain the truth to him resulted in denial. I submit that Scott's entire demeanor, expression, and testimony on the stand was affected by the misinformation.

Under the facts of this case, Mr. Leinster should have moved to suppress the tainted identification testimony of Scott and Cheryl, and the state should have proceeded to trial with its other alleged inculpatory evidence, direct and circumstantial, if possible. Clearly, the police's misconduct and the results therefrom were not my fault. The failure to move to suppress this testimony was fatal to my defense of mistaken identity. The misinformation utterly destroyed any reliability or probative value of the identification testimony. I submit that its admission denied my right to due process and a fair trial. Thus, Mr. Leinster's failure to move to suppress it denied me effective assistance of counsel.

XII. The defendant was further denied effective assistance of counsel in

Mr. Leinster's failure to timely file a motion for new trial.

On October 3, 1990, I was convicted after a two day jury trial. The record affirmatively reflects that Mr. Leinster untimely filed my motion for new trial on October 29, 1990, twenty-six (26) days after the jury's verdict.

Rule 3.590(a) clearly mandates that a written motion for new trial must be filed within ten (10) days of the jury's verdict. Thus, the record in this case clearly demonstrates Mr. Leisnter's failure to comply with the well established rule for filing a motion for new trial. I submit that this failure clearly fell far below the acceptable action of a reasonably competent attorney handing a similar case after an adverse jury verdict.

I submit that Mr. Leinster's failure to timely file a motion for new trial manifestly denied me the one and only opportunity for the authorized judicial review of my conviction where the evidence is technically sufficent to convict, but the manifest weight of the evidence does not appear to support the jury's verdict or is so tenuous as to warrant a new trial. It is well settled that this type of review is available to a criminal defendant exclusively through a timely motion for new trial. This enables the trial court to act as a safety valve, a "seventh" juror, with the power and responsibility to examine all of the physical and circumstantial evidence advanced at trial, while also considering the credibility of the witnesses, when entertaining a motion for new trial.

There is a reasonable likelyhood that had Mr. Leinster timely filed my motion for new trial, the motion would have been granted as the case presented against me tended to be refuted by my alibi witness' sworn testimony and the two conflicting identifications of the victims. No physical evidence was ever found linking me to the crime. Under the facts of this case, the mere absense of evidence is exculpatory, and the police misconduct was fatal to my defense

of mistaken identity because it clearly tainted the victims' identification. Overall, this was highly prejudicial as the case boiled down to the credibility of the witnesses, most of whom lack credibility in critical areas.

Had Mr. Leinster timely filed a motion for new trial, supplemented with a detailed argument at a subsequently requested hearing, it is reasonable to conclude that the motion would have been granted based upon the unique facts and circumstances of my case, or, alternatively, the issue would have been properly preserved for appellate review in the event of an adverse ruling.

While reviewing this claim, if the Court determines, unremarkably, that Mr. Leinster's failure to timely file a motion for new trial, and request a hearing therefor, denied me effective assistance of counsel, I would submit that the Court should either (1) grant me a new trial based upon the denial of effective assistance of counsel having been shown; or, alternatively, (2) appoint counsel to prepare and file a motion for new trial, and to submit appropriate argument in support thereof. In the event of the later, due to the complexity of my case and the unfamiliarity of a new attorney with it, counsel would have to be permitted sufficent time to do so.

XIII. The defendant was further denied effective assistance of counsel in Mr. Leinster's failure to object to the use of a sentencing guidelines scoresheet that did not include any "permitted" sentencing ranges for the Court's consideration, and based upon Mr. Leinster's failure to inform the Court of the "permitted" sentencing range options for the Court to consider based upon the defendant's composite score.

The sentencing guidelines scoresheet used at my sentencing clearly did not include any "permitted" sentencing ranges for the Court's consideration. Based upon my composite score, the only possible "recommended" sentence

reflected on the sentencing guidelines scoresheet was "life." At no point during my sentencing hearing did anyone ever discuss any other possible sentences other than those in the "recommended" ranges. Mr. Leinster did not advise the Court of any "permitted" sentencing options based upon composite score. As a result, I received the only possible "recommended" sentence of life imprisonment with no possiblity of parole ever, e.g., death in prison.

It is well settled that a sentencing judge may sentence a defendant anywhere within the "permitted" range based upon his composite score without providing a written reason. The sentencing guidelines scoresheet and my attorney did not inform the Court of the "permitted" sentencing options.

Based upon my composite score at sentencing, the Court was "permitted" to sentence me to a term of twenty-seven (27) to forty (40) years or life, a possible substantial reduction from what appeared to be a mandatory life sentence in the "recommended" range. I submit, therefore, that if a proper sentencing guidelines scoresheet had been used and/or my attorney had informed the Court of the possible "permitted" sentencing options, I very well may have received a substantially lessor sentence than my current life sentence which mandates that I die in prison. I believe I would have been sentenced to a term of imprisonment between twenty-seven (27) to forty (40) years. Thus, Mr. Leinster's failure to object to the old scoresheet that clearly omitted any "permitted" ranges, coupled with his failure to inform the Court of those "permitted" sentencing options, directly resulted in me receiving a life sentence, which, it goes without saying, denied me effective assistance of counsel.

XIV. The defendant was denied effective assistance of counsel based upon the cummalative effect of the foregoing errors and omnissions when considered

in light of the unique facts and circumstances of this case.

15. If any of the grounds listed in 14 were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons why they were not presented: Defendant's claim of denial of effective assistance of counsel was not presented on direct appeal as it is well settled that claims thereof are not cognizable on direct appeal, but are more properly raised in a motion for post-conviction relief.

16. Do you have any petition, application, appeal, motion, etc. now pending in any court, either state or federal, as to the judgment under attack?

Yes _____ No XXXXX

17. If your answer to number 16 was "yes", give the following information:

(a) Name of court:

(b) Nature of proceeding:

(c) Grounds raised:

(d) Status of the proceedings:

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At the preliminary hearing: Jane Catherine Brown-Hooker, Route 67 Box 220, Cullowhee, NC 28723; (704) 293-3352; (former assistant public defender).

(b) At arraignment and plea: Jane C. Brown-Hooker (see above).

(c) At trial: Roy Edward Leinster, P.A., 1302 E. Robinson Street, Orlando, FL 32801-2178; (407) 422-3937; (privately retained).

(d) At sentencing: Roy Edward Leinster, P.A. (see above).

(e) On appeal: Allyn Giambalvo, Assistant Public Defender, 5100 144th Avenue North, Clearwater, FL 34620; (appellate division).

(f) In any post-conviction proceedings:

(g) On appeal from any adverse ruling in a post-conviction proceeding:

WHEREFORE, the Defendant prays that the Court will grant all relief to which he may be entitled to this proceeding, including, but not limited to the following:

1. A new trial based upon the denial of effective assistance of counsel claims; or

2. A new sentencing hearing with consideration of the "permitted" sentencing options under the sentencing guidelines based upon my composite score; or

3. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

Kevin Richard Herrick

KEVIN RICHARD HERRICK #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

Defendant

UNNOTARIZED OATH

PENALTIES OF PERJURY I declare that I have read the foregoing motio t-conviction relief and that the facts stated in it are true. Secti 2), Fla.Stat. (1991).

s 25 day of July, 19 94.

Kevin Richard Herrick

KEVIN RICHARD HERRICK #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

Defendant