Jan 4, 1996

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA

Criminal Division

THE STATE OF FLORIDA,

Plaintiff,

-versus-

CASE NO. CRC 89-11425 CFANO

KEVIN RICHARD HERRICK,

Defendant.

_____/

DEFENDANT'S AMENDED MOTION FOR POST-CONVICTION RELIEF[1]

1. Name and location of the court which entered the judgment of conviction under attack: 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: For Counts I and II, life imprisonment, and for Count III, fifteen (15) years imprisonment, with all of the sentences running concurrently with each other.

4. Nature of offense involved: Count I, burglary; Count II, sexual battery; and Count III, aggravated battery.

5. What was your plea?

(a)	Not guilty	XXXXX
(b)	Guilty	_____
(c)	Nolo contendere	_____

6. If you pleaded not guilty, what kind of trial did you

[1]As detailed below, this motion is respectfully submitted in accordance with the order of this Honorable Court summarily denying rehearing on my second motion for post-conviction relief, expressly holding that its denial was "without prejudice" to my filing of the instant amended motion for post-conviction relief "setting forth any reasons [I] may have for [my] failure to included all [my] arguments in the first motion for post-conviction relief." See Tanner v. State, 502 So.2d 1008, 1009 (Fla. 2nd DCA 1987); Shaw v. State, 528 So.2d 118 (Fla. 1st DCA 1988).

have?

(a) Six-person jury XXXXX
(b) Judge only ———

7. Did you testify at the trial or at any pretrial hearing.

Yes ——— No XXXXX

8. Did you appeal from the judgment of conviction?

Yes XXXXX No ———

9. If you did appeal, answer the following:

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

(b) Grounds raised: My direct appeal, unfortunately, was filed pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), or more specifically the question presented on appeal was, "Did any reversible error occur in the instant case?"

(c) Result: Per curiam affirmed.

(d) Date of result: My judgments and sentences were affirmed by an opinion dated July 17, 1992.

(e) Citation: Herrick v. State, 602 So.2d 536 (Fla. 2nd DCA 1992).

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

Yes XXXXX No ———

11. If your answer to number 10 was "yes," give the following information:

(a)(1) Nature of the proceeding: I filed a pro se motion requesting the appointment of counsel, and a pro se motion for post-conviction relief.

(2) Grounds raised: Concerning my motion requesting the

appointment of counsel, I alleged that, for a number of different reasons, I was unable to adequately prepare a motion for post-conviction relief without the assistance of counsel.

Regarding my motion for post-conviction relief, several months passed with no action being taken by this Honorable Court on my request for the appointment of counsel, and I was without sufficient funds to retain the valuable assistance of a skilled advocate to meaningfully present all of my claims for relief, so I was forced to rely solely upon the clearly incompetent legal advice and assistance from untrained, unskilled inmate law clerks, who profoundly misapprehended the most simplistic points of law and concepts of collateral relief proceedings.

In the unartfully drafted and researched motion prepared by the inmate law clerks, I attempted to assert the following issues: Ground One, I was denied effective assistance of trial counsel based upon his failure to make certain pre-trial motions to suppress; Ground Two, I was denied effective assistance of appellate counsel (which I now concede should have been presented to the district court of appeal in a petition for writ of habeas corpus); Ground Three, I was denied effective assistance of trial counsel based upon his failure to move to suppress my prior record so I could testify; Ground Four, I was denied effective assistance of trial counsel based upon his failure to object to the verdict forms and jury instructions which were cumulative, confusing, and not supported by any evidence advanced during my trial; Ground Five, my convictions were obtained by the use of evidence gained pursuant to an unconstitutional search and seizure; Ground Six, I was denied due process of law in that this Court erroneously permitted a videotaped deposition in the jury room for unrestricted review; Ground Seven, I was denied due process of law in that, while calculating my composite score under the sentencing

guidelines, this Court used a fundamentally defective sentencing guidelines score sheet which included victim injury points for a non-existent victim injury; Ground Eight, I was denied due process of law in that this Court failed to conduct hearing or render an order disposing of my "timely filed" motion for new trial; and Ground Nine, I was denied effective assistance of trial counsel based upon his overall poor performance, which probably was the result of stress caused by pending criminal cocaine charges, coupled with his possible suspension or disbarment from the practice of law.

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

Yes ——— No XXXXX

(4) Result: Both motions were summarily denied.

(5) Date of results: Both of my motions were denied by a single order dated November 23, 1993, and my timely motion for rehearing was dismissed by an order dated January 3, 1994, since I had erroneously filed a notice of appeal contemporaneously with my motion for rehearing.[2]

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

(1) Nature of the proceeding: I filed a another pro se motion requesting the appointment of counsel, and a another pro se

[2]The untrained, unskilled inmate law clerks erroneously advised me to file my motion for rehearing and notice of appeal at the same time, because, allegedly, if this Court denied rehearing, my notice of appeal would automatically "mature." However, it appears that the filing of my notice of appeal constituted an abandonment of the motion for rehearing, albeit completely unintentional on my part. Nonetheless, if I would have had a meaningful understanding of the correct procedure to employ, I would not have filed a notice of appeal unless this Court denied my motion for rehearing.

motion for post-conviction relief.

(2) Grounds raised: Concerning the second motion requesting the appointment of counsel, I alleged that had I had the valuable assistance of counsel when I submitted my original motion for post-conviction relief, it would not have been summarily denied, nor would have this Court's order summarily denying the motion been affirmed on appeal, and, for several different reasons, I was unable to adequately prepare a second motion for post conviction relief without the assistance of counsel.

This Court, however, summarily denied the motion requesting the appointment of counsel, and then I proceeded to file my second pro se motion for post-conviction relief asserting two sworn allegations of the denial of effective assistance of trial counsel which, as explained below, I could not possibly have presented in my original motion for post-conviction relief. And, I also included a number of allegations of the denial of effective assistance of trial counsel which the untrained, unskilled inmate law clerks I was forced to rely upon failed to adequately identify or present in my original motion for post-conviction relief.

Remarkably, when my original motion for post-conviction relief was prepared and filed, I had been led by my trial counsel, Mr. Leinster, to incorrectly believe that he had timely filed a motion for new trial following my conviction. In my original motion for post-conviction relief, therefore, I erroneously alleged that this Honorable Court erred by failing to conduct a hearing or enter a ruling on my "timely filed" motion for new trial.

It was only after this Court denied my original motion for post-conviction relief, finding that the motion for new trial was, in fact, "untimely filed," did I realize for the very first time that (1) Mr. Leinster had made a factual misrepresentation to me regarding the timeliness of his filing of the motion for new

trial, and (2) I had been denied effective assistance of trial counsel based upon his failure to timely file the motion for new trial. As a result, this sworn allegation of the denial of effective assistance of trial counsel was timely presented in my second motion for post-conviction relief as Ground XII, and is now properly before the Court in the instant amended motion for post-conviction relief with this explanation of why it was not included in my original motion for post-conviction relief.

Furthermore, when both my original and second motions for post-conviction relief were prepared and filed, I also had been led by my trial counsel, Mr. Leinster to incorrectly believe that the results of microanalysis testing conducted by the Florida Department of Law Enforcement (FDLE) on hair samples recovered from the crime scene and those voluntarily submitted for comparison by me were "inconclusive."

It was only after obtaining an order compelling the production of the my case file in a civil action for legal malpractice (See Herrick v. Leinster, circuit case number 94-563-CI-13), did I discover that Mr. Leinster had completely failed to investigate the results of the FDLE's microanalysis hair comparisons which he had characterized as "inconclusive." Then, after obtaining a copy of a report directly from FDLE detailing the actual test results, something Mr. Leinster did not possess in my case file, I discovered for the very first time, contrary to his factual misrepresentation that the test results were "inconclusive," the results were exculpatory, and would have supported my reasonable defense of mistaken identity had they been presented at trial. At this point, therefore, I realized for the very first time that (1) Mr. Leinster had made a factual misrepresentation to me regarding the results of FDLE's microanalysis hair comparisons, and (2) I had been denied effective

assistance of trial counsel based upon his failure to investigate and present the exculpatory results of the microanalysis hair comparisons. As a result, this sworn allegation of the denial of effective assistance of trial counsel was timely presented in my second motion for post-conviction relief through the filing of supplemental facts supporting the motion, and is now properly before the Court in the instant amended motion for post-conviction relief with this explanation of why it was not presented in my original motion for post-conviction relief.

Regarding the allegations of the denial of effective assistance of trial counsel which the untrained, unskilled inmate law clerks failed to adequately identify or present in my original motion for post-conviction relief, I did not knowingly, intelligently, or intentionally withhold or abandon them. In fact, had I known that my filing of the original motion for post-conviction relief, as it was unartfully researched and drafted by the inmate law clerks, would later frustrate the presentation of these particular sworn allegations of the denial of effective assistance of trial counsel in a another motion for post-conviction relief, then I would not have filed the original motion for post-conviction relief.[3]

[3]If all of the sworn allegations contained in this amended motion for post-conviction relief were to be found successive under Fla.R.Crim.P. 3.850, I would respectfully submit that my detention would continue to be unlawful based upon the denial of effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Therefore, since the remedy of habeas corpus still exists under Article I, Section XIII, of the Florida Constitution, this amended motion for post-conviction relief should be treated as a petition for writ of habeas corpus under Article V, Section II(a), of the Florida Constitution, which expressly provides, "The supreme court shall adopt....a requirement that no cause shall be dismissed because an improper remedy has been sought." This means the Court should not deny a remedy because the wrong cause of action is plead. See State v. Johnson, 306 So.2d 102, 103 (Fla. 1974).

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

Yes ——— No XXXXX

(4) Result: Both motions were summarily denied. However, this Court expressly clarified on rehearing that its summary denial of post-conviction relief was "without prejudice" to my filing the instant amended motion for post-conviction relief "setting forth any reasons [I] may have for [my] failure to included all [my] argument in the first motion for post-conviction relief."

(5) Date of results: My motion requesting the appointment of counsel was denied by an order dated July 26, 1994. My second motion for post-conviction relief was denied by an order dated June 5, 1995, and my timely motion for rehearing was denied by an order dated August 27, 1995.[4]

[4]I did not receive a copy of the order denying rehearing until December 8, 1995, so, prior to that date, I had absolutely no idea that the this Court's denial of post-conviction relief was "without prejudice" to my filing the instant amended motion "setting forth any reasons [I] may have for [my] failure to included all [my] argument in the first motion for post-conviction relief."

As set forth in an affidavit attached hereto as Exhibit "A", which is hereby incorporated herein by reference, my sister, Lori Russo, called the office of the Honorable Susan F. Schaeffer several times while attempting to find out the disposition of my motion for rehearing, which had been pending for several months. At some point in late November, she was informed that my case had been transferred to the Honorable Brandt C. Downey III. After several attempts, my sister learned from Downey's office that the motion for rehearing had been denied nearly three months beforehand. When this information was related to me, I had my sister call Judge Downey's office back to inform them that I had not received a copy of the order. Cindy told my sister that someone in the clerk's office was responsible for providing me with a copy of the order. However, during a telephone conversation with someone in the clerk's office, my sister was told that it was Judge Downey's responsibility to provide me with a copy of the order. Eventually, someone at the Criminal Courts Building forwarded a copy of the order to me in an envelope postmarked on December 6,

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

Yes XXXXX No ———

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

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

(2) Nature of the proceeding: I filed an appeal from this Court's order summarily denying my original pro se motion requesting the appointment of counsel and my original pro se motion for post-conviction relief.

(3) Grounds raised: Among other things, I was going to, but, as explained below, was precluded from, arguing on appeal that this Court reversibly erred by (1) failing to appoint counsel to assist me adequately prepare and file my original motion for post-conviction relief, and (2) failing to grant me post-conviction relief.

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

Yes ——— No XXXXX

(5) Result: Per curiam affirmed.

(6) Date of result: This Court's order summarily denying both of my pro se motions was affirmed by an opinion dated January 26, 1994, and my timely motion for rehearing was denied by an order dated February 23, 1994.

(7) Citation: Herrick v. State, 636 So.2d 514 (Fla. 2nd

1995, which I later signed for and received on December 8, 1995. A true and correct copy of the envelope is attached hereto and incorporated herein by reference as Exhibit "B".

DCA 1994).

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

(1) Name of court: The Supreme Court of Florida.

(2) Nature of the proceeding: I filed a petition for writ of habeas corpus.

(3) Grounds raised: The district court of appeal's per curiam affirmance of this Court's order summarily denying my original pro se motion requesting the appointment of counsel and my original pro se motion for post-conviction relief departed from the essential requirements of law, e.g., the district court of appeal prematurely affirmed the order under review before I could supplement or correct an error in the record on appeal, request oral argument, or file an initial brief on the merits of my appeal.

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

Yes ——— No XXXXX

(5) Result: The petition was summarily denied.

(6) Date of result: My petition was denied by an opinion dated March 16, 1994.

(7) Citation: Herrick v. District Court of Appeal, Second District, 637 So.2d 235 (Fla. 1994).

(c) As to any third petition, application, motion, et cetera, give the same information:

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

(2) Nature of the proceeding: I filed a petition for writ of habeas corpus.

(3) Grounds raised: I was denied effective assistance of appellate counsel during my direct appeal based upon her failure to (a) adequately review the entire record of the proceedings below

prior to submitting an Anders brief claiming that my direct appeal was frivolous, and (b) ensure that a complete record of the entire proceedings below was included in the record on appeal to enable the district court of appeal to adequately conduct its own constitutionally-required review of the entire proceedings below, which was mandated by Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and its progeny.

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

Yes ——— No XXXXX

(5) Result: The petition was summarily denied.

(6) Date of result: My petition was denied by an opinion dated September 14, 1995, and my timely motion for rehearing was denied by an order dated October 11, 1995.

(7) Citation: Herrick v. Singletary, —— So.2d —— (Fla. 2nd DCA 1995).

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

GROUND ONE: The Denial of Effective Assistance of Trial Counsel.

SUPPORTING FACTS: As detailed below, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, I was denied effective assistance of trial counsel, which prejudiced my defense at trial in such a manner as to render the proceeding fundamentally unfair and the results thereof unreliable, based upon one or more of the following particulars:

I.

I respectfully submit that I was denied effective assistance of trial counsel based upon Mr. Leinster's failure to (1)

investigate, interview, or depose prospective witnesses who would have presented exculpatory testimony at trial supporting my reasonable defense of mistaken identity, and (2) investigate exculpatory evidence consisting of a tag number of the vehicle observed fleeing the area immediately after the crime occurred.

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 allegations made against me. In addition to two telephone conversations relating as much as I knew about my arrest, Mr. Leinster requested that I write him letter detailing my activities around the night the crime occurred, and to provide him with any information and names of witnesses which I believed could assist in my defense. Accordingly, I complied with Mr. Leinster's request for information and advised him as follows:

On July 14, 1989, my friend, 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 a faulty thermostat, and both of us were soaking wet afterwards. Later that afternoon, at approximately 5:00 p.m., Patrick and I finished working on the car and returned to our apartment, which was in a triplex Patrick's mother, Theresa Porrey, owned. Mrs. Porrey, Patrick, and I lived in the south apartment in this triplex.

Shortly after arriving at the apartment, Patrick left to return the car to his girlfriend who lived in Tampa. I, on the other hand, proceeded to take a shower and go next door 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 Patrick and his mother, I developed a basic

friendship with Scott. And, on an earlier occasion, Scott and I had discussed playing chess, which was the purpose of my visit on this particular evening. When I arrived, however, Cheryl said that Scott had not yet returned home from work, but explained that if I wanted to, she would play a game of chess with me while waiting for Scott. So, for about twenty-minutes, Cheryl and I played chess. Scott returned home along with two of his friends, Tammy and Darryl, whom I had never met before.

After some casual conversation between everyone, Scott produced a sandwich bag containing some marijuana. All five of us, Scott, Cheryl, Tammy, Darryl, and I, smoked two marijuana cigarettes. Based upon my brief association with Scott and Cheryl, I believed that they were regular marijuana users, and it was probable from what I observed that they would have smoked more of the marijuana that night. After we were done, Scott and Cheryl said that they were going out for dinner, and if I didn't have anything to do, and if they were home, I could come back over to their apartment later that night. I returned home, made my own dinner, watched a little bit of television, and then went into my bedroom to read before going to sleep.

I was later awakened from sleep by a very excited Mrs. Porrey. She was screaming, "The girl next door is being raped!" I immediately jumped out of my bed, put on some pants, and ran to the front of the triplex to find out what was going on.

When I got outside, I saw one of my neighbors, David Stewart, who lives in the west apartment of the triplex, coming out of his apartment, writing down an automobile license plate number which Scott was repeating to him. I also observed Cheryl standing in her doorway, appearing very upset, crying hysterically, and repeatedly saying, "Don't leave me." 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 his chest area.

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

Up to this point, Scott and Cheryl gave absolutely no indication to anyone that they knew or even suspected that I may have been the man in their apartment. And, before the police arrived, the couple talked to me in the courtyard. I asked 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 the police were on their way.

Since I had observed earlier that Scott and Cheryl kept their marijuana in a record album on their coffee table in the living room, I told Scott to go inside and make sure that he did not leave the stuff out where the police might see it when they arrived.

Mrs. Porrey was very excited and having a hard time breathing, so I attempted to calm her down, and was able to get her to sit down in the kitchen of our apartment. I then went back outside to wait for the police, and when the first officer arrived, I waved him over to the triplex and directed him to where Scott and Cheryl were.

At this point, several other police officers arrived with some emergency medical personnel, so I just tried to stay out of the way with all of this new activity going on. However, while David and I were out in front of the triplex smoking a cigarette, an officer approached us and asked who we were and what we knew about what had

happened that night. After he was done questioning David, I told the officer who I was, and that I had been asleep when Mrs. Porrey woke me up, saying that the girl next door was being raped. I also told him that I was not really sure of what exactly happened to Scott and Cheryl before I came out of my apartment.

Eventually, Scott was transported to the hospital, all of the police officers and emergency medical personnel left the triplex, and things returned to normal. After determining that Mrs. Porrey was alright, I returned back to my bedroom and went to sleep.

Sometime while I was still asleep, Patrick returned home from Tampa and was advised about the incident. Patrick and David went over to Cheryl's mother's house to talk to Scott about what had happened. Both of them discussed the entire incident with Scott. During this conversation, Scott said that he thought I may be the man he saw in his apartment, but he was not sure. Afterwards, Patrick and David returned to triplex.

Around 3:00 a.m., I was awakened by Patrick, David, and Mrs. Porrey. I was questioned by Patrick and David about any involvement I may have had in the incident. After a long and heated discussion during which I denied any involvement, and Mrs. Porrey and David explained to Patrick that it simply was not possible for me to have been the perpetrator because (1) she woke me right after hearing Cheryl cry out; (2) she necessarily would have observed me exit and reenter our apartment; and (3) Scott had told everyone that the actual perpetrator had left the area in a white car which had got the tag number from, Patrick and David returned to Cheryl's mother's house to talk to Scott again.

Following another conversation with Scott regarding the incident, Patrick and David returned to the triplex and questioned me again. Patrick said that Scott thought that I may have been the perpetrator, but he was candidly admitting to him and David that he

was not sure.

Patrick, David, and I went outside the apartment to smoke a cigarette and continued to discuss the situation. Afterwards, David returned to his apartment, and Patrick and I returned to ours. About ten minutes later, there was knock at our front door. When I answered it, I observed a number of police officers standing outside the door. One officer asked me if he could have a word with me outside. Just as I stepped outside, I was restrained and handcuffed. One officer said, "We found your fingerprints on that door," indicating the front door leading into Scott and Cheryl's apartment, "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 sexual battery, attempted homicide, kidnapping, armed burglary, and possession of a firearm by a convicted felon. Two officers said that they had two eyewitnesses who positively identified me as the perpetrator. I was advised of my rights and asked if I would answer some questions. I said 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 asked for an attorney and was informed by the officers that I would be provided with an attorney once I got to jail. Then I was taken to a holding cell.

After some time, I was approached by two or three officers who asked 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 facts, I also advised Mr. Leinster that after an assistant public defender was appointed to represent me, none of the officers ever returned to submit their questions

which I agreed to answer once I was provided with an attorney. I told Mr. Leinster that I was ignorant of the allegations made against me, and that 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 she had taken a few depositions, and that my trial date was being continued because Ms. Brown had not yet deposed Patrick Porrey and David Stewart.

Concerning what Scott, Cheryl, and the other witnesses were alleging, I told Mr. Leinster that I knew next to nothing, except for what little I was able to discern from a police report compiled by an officer named Levigne, which was something my sister had purchased after not getting any information from Jane Brown.

In addition to the facts listed above, Mr. Leinster also was provided with information and discovery material which came from my case file created and maintained during my representation by an assistant public defender:

I was initially represented by an assistant public defender, Jane Brown, who created and maintained my case file containing, among other things, various letters from me, discovery depositions, the prosecution's witness list, and some previously served subpoenas for depositions.

The prosecution's witness list included the names of Patrick and Theresa Porrey, as well as David Stewart. When Mr. Leinster was retained to represent me, he was given my case file which plainly indicated that neither Patrick nor David had appeared at the depositions as directed. Plus, he knew from our conversations that my trial presently scheduled for January 23, 1990, was being postponed specifically because Patrick Porrey and David Stewart had failed to show up for the taking of their deposition testimony, and they would have to be rescheduled and deposed before I went to

trial.

I respectfully submit that Mr. Leinster took no reasonable action under the circumstances to investigate, interview, or depose Patrick and Theresa Porrey, and David Stewart, although it was apparent that they possessed relevant, exculpatory evidence supporting my reasonable theory of events. Moreover, Mr. Leinster took no steps to investigate the tag number of the vehicle observed fleeing the area just immediately after the crime occurred.

Remarkably, Mr. Leinster was provided with the same information regarding my case Ms. Brown was provided. It was this very same information, specifically my version of events that was provided to another attorney, namely Ms. Brown, which led her to a very reasonable decision to subpoena Patrick and David for depositions. Then when Patrick and David did not appear for their depositions as directed, Ms. Brown reasonably believed that their testimony was so essential to my defense of mistaken identity that it mandated a continuance until such time as she could depose them.

Review of the conflicting deposition testimony of Scott and Cheryl, coupled with a review of my brief account of the events on July 14, 1989, would induce a reasonable competent attorney to investigate, interview and depose Patrick and Theresa Porrey, as well as David Stewart, before making any decision on whether or not to proceed to trial with or without these witnesses. Clearly, this is what a reasonable attorney, Ms. Brown, believed.

I respectfully submit that Mr. Leinster's failure to act in this matter, under these particular circumstances, manifestly falls below the actions of a reasonable competent attorney handling a case of similar facts and circumstances, or, as the case may be with Ms. Brown, a case of absolutely identical facts and circumstances.

A.

Mr. Leinster was provided with information in my case file compiled by Ms. Brown and with all of the information I could provide based upon my limited knowledge of the allegations made against me. Thus, Mr. Leinster knew who Patrick and David were, where they lived, and that these prospective witnesses could offer crucial exculpatory testimony supporting my very reasonable defense of mistaken identity. And, not only bolstering my version of events, the exculpatory testimony of Patrick and David would have impeached the conflicting testimony of Scott and Cheryl, providing the fact finders with a complete account of the events from all witnesses who were known to possess relevant information to the offense charged.

Mr. Leinster also knew that after Scott was released from the hospital, Patrick and David had not only talked to him once, but twice, in great detail about what happened and what he observed that night. Most importantly, they talked to Scott before he made an identification to the police, and at that time, Scott was candidly admitting the fact that he was not really sure who he saw in his apartment that night.

My reasonable defense was that of mistaken identity. Mr. Leinster knew from the discovery material in my case file that Scott originally told Lieutenant Piehl of the Largo Police Department that he was not sure who the perpetrator was while he and the man were in his apartment during the incident; however, during his deposition, Scott claimed that he saw me inside his apartment while I, allegedly, was in his kitchen. He claimed that when he saw the man, contrary to his earlier statement, there was absolutely no doubt in his mind that I was perpetrator.

Notwithstanding those fundamental inconsistencies, Scott's testimony would have been refuted by the testimony of Patrick and

David explaining that after Scott was released from the hospital, they met with him before he called the police, and Scott said that he was not sure who he saw that night.

Mr. Leinster knew that David would not only be a witness to the conversations with Scott, which, in and of itself should have been reason enough to secure his exculpatory testimony, but he was the person who called the police right after the incident, wrote down the tag number of the car Scott told everyone he observed fleeing the area, and was present on the scene immediately following the incident, enabling him to testify as to his various observations, particularly establishing that I had ran out of my apartment moments after Scott returned from chasing the fleeing vehicle, which would have presented the jury with sufficient evidence to reasonably infer that there was insufficient time for me to (1) run away from the triplex with Scott in hot pursuit; (2) dispose of the bloody weapon and any other inculpatory evidence, e.g., bloody clothes and shoes; (3) run back to my apartment from somewhere in our neighborhood; (4) stealthily re-enter my apartment without alerting Mrs. Porrey, who was up watching television and could observe all possible avenues of re-entry from her position on the living room couch; (5) remove any remaining clothing and wash out the blood;[5] (6) wash the grease or hair cream out of my hair

[5]It should be noted that Scott was stabbed twice in the chest area and was bleeding profusely. Blood was everywhere, and the police discovered blood on the frame of Scott and Cheryl's bedroom door, sliding glass door, and front door leading into their apartment, which had been everything the perpetrator touched while fleeing from the crime scene. Therefore, whoever committed this crime necessarily left the apartment with blood on himself. However, the police did not find any blood on me, my clothes, anywhere in my bedroom, or anywhere in or outside of my apartment.

Nonetheless, the prosecutor implied that since my shoes and socks were wet, I either had run through wet grass while fleeing from Scott, or I had washed away all traces of Scott's blood from

(if Scott's identification is accepted); (7) climb back into bed, pull up the covers, and reduce my breathing so as to appear asleep for quite some time before Mrs. Porrey can enter the room and wake me just after hearing Cheryl scream, which was mere moments after the chase began.

David also would have testified that when he observed me run out the apartment, just after Mrs. Porrey woke me, (1) I was not wearing the remarkably large belt buckle Cheryl claimed I always wore, including, allegedly, during the attack; (2) I did not have any blood on me or my clothes, which was something I necessarily would have had if I was the perpetrator; (3) I did not have a noticeable limp;[6] (4) I did not appear to have just been in a fight;[7] (5) my hair did not appear to be wet or have been greased back; and (6) I appeared to have been just woke up from bed.

Presentation of all this exculpatory testimony from David and Patrick would have established my defense of mistaken identity, since there was insufficient time for me to have committed the crime and do all the things which would necessarily have had to been done if I was in fact the assailant to place me back in my bed when my alibi witness, Mrs. Porrey came back to my room to wake me

my shoes and socks. This inference, however, could have been rebutted since Mr. Leinster knew from the information I provided him that Patrick could have presented testimony establishing that he and I worked on his girlfriend's car at a self-service car wash, leaving both of us soaked with water in the process.

[6]I had previously advised Mr. Leinster that several years beforehand I had suffered a serious knee injury, so if I would have been the man Scott pursued and chased over an six-foot-high fence, then I probably would have returned back to my apartment with a noticeable limp. In fact, with my knee condition I would have had a real problem trying to evade Scott in the process.

[7]Patrick saw me just a few hours later and would also have testified that I did not appear to have been in a fight, nor did I appear to have any problems walking.

up moments after hearing Cheryl screaming for help. It also would have corroborated Mrs. Porrey's testimony that she immediately woke me after hearing Cheryl scream, thus refuting the prosecutor's argument that her testimony was embellished to shield herself from a non-existent lawsuit, which she testified there was no threat of.

Since no conclusive period of time could be established by the conflicting testimony of Scott, Cheryl, and Mrs. Porrey, all of whom can arguably be said to be interested witnesses, I submit that David's testimony would have presented the jury with an unbiased, disinterested statement of the events on the night in question, arguably more reliable than the testimony of two admittedly hysterical women, one of whom had just been attacked, and that of a wounded man. David also was interviewed by the same police officer that interviewed me. Later, this same officer testified that he only interviewed me, exclusively, and only did so because I looked so suspicious, and while so doing, he observed my heart beating through my t-shirt. Although being excited under the remarkable circumstances of that night was reasonable, the prosecutor argued it as being inculpatory.[8] Under these facts and circumstances, therefore, Mr. Leinster should have rendered me reasonably effective assistance of trial counsel by interviewing and deposing David Stewart.

Mr. Leinster knew that there was absolutely no physical evidence to link me to this crime, and exculpatory testimony of my alibi witness, coupled with the time frames involved, tended to

[8]It is interesting to note that this same police officer who allegedly examined me carefully enough to see my heart beating through my t-shirt did not observe anything which would indicate that I committed the crime, or more specifically he did not observe that (1) I appeared to have been in a fight; (2) I had a noticeable limp; (3) I was wearing the large belt buckle described Cheryl; or (4) I appeared to have any blood on me or my clothes.

refute the conflicting identification testimony of the victims.[9] Therefore, since Cheryl candidly admitted that she was not sure that I was the perpetrator, the entire case boiled down to the credibility and weight the jury placed upon Scott's identification testimony. Given our defensive posture of mistaken identity, Mr. Leinster should have investigated and cultivated the exculpatory testimony of Patrick and David which would have presented the jury with reliable evidence creating a reasonable doubt as to my guilt.

I submit, accordingly, that the testimony of Patrick and David would have had a dramatic effect upon the jury's acceptance and reliance upon Scott's identification testimony, the sole evidentiary basis for my conviction. For example, the exculpatory testimony of Patrick and David would have refuted critical areas of Scott's testimony, giving a complete account of the events and circumstances of the night in question, creating a reasonable doubt for the jury to subscribe a reason to return a verdict of not guilty, particularly because it would have refuted Scott's testimony:

> PROSECUTOR: Now when you saw him there was there any doubt in your mind that was him?
>
> BARFIELD: None whatsoever.

(R. 158).

* * *

> Q: Did you get a good look at him then?
>
> A: Yes.

[9]While Scott's identification testimony indicated a description of one person, Cheryl's identification testimony indicating, purportedly, the same person was, in fact, a description of someone else. Therefore, it did not matter whether you believed Scott or Cheryl, because the very belief of either witness created a reasonable doubt as to the identification testimony of the other witness.

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 there, 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).

You can see, if Scott was so sure that it was me, then why did he tell Patrick and David that he was not sure who the perpetrator was? Unfortunately, as a direct result of Mr. Leinster's failure to investigate, interview, or depose Patrick and David, Scott's uncontested testimony allowed the prosecutor to persuasively argue

to the jury:

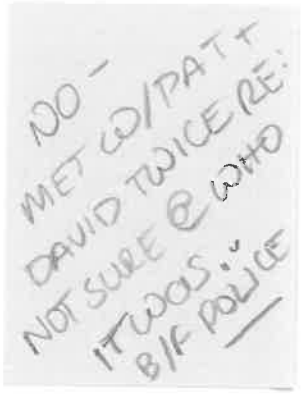
> He stated that there was no doubt in his mind that it was Kevin Herrick....

(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 that 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 who did it, and I know you'll do the right thing.

(R. 307).

Clearly, Mr. Leinster's failure to investigate, interview, or depose Patrick and David, who could have presented exculpatory testimony refuting the prosecution's version of events and

bolstering my very reasonable and truthful defense of mistaken identity, was absolutely fatal to my defense of mistaken identity under the facts of this case. I respectfully submit, therefore, that if Mr. Leinster would have investigated, interviewed, and deposed Patrick and David, the jury would have been better informed and had a reasonable doubt as to my guilt, causing a different outcome of my trial.

B.

Mr. Leinster's failure to investigate the exculpatory evidence consisting of the tag number of the vehicle originally reported by Scott as having fled the area immediately after the incident was highly prejudicial to my reasonable defense of mistaken identity, and, as explained below, under the facts of my case, that failure to investigate was fatal to my very reasonable defense of mistaken identity, rendering Mr. Leinster's assistance as counsel constitutionally deficient.

Mr. Leinster knew that Scott chased the perpetrator out of his apartment, past another triplex, and around a corner where he lost sight of the man. Scott believed that the perpetrator had jumped a nearby fence, so he jumped over the fence, too. On the other side, Scott claimed that he observed a man standing beside the driver's side of the car which he was able to memorize the tag number of before it drove away. Scott 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 pass along to the police, which happened just as I came out of my apartment into courtyard. Thereafter, Scott told everyone present that he observed the man flee the area in a white car which he memorized the tag number of. Even Cheryl corroborated this:

MR. LEINSTER: Isn't what [Scott] said is that he chased the assailant down the road and he saw the light 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 through 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?

A: Yeah.

(R. 141-142).

At some later date, however, Scott claimed that he made up the story about the tag number to divert the police's attention away from me. He said that he wanted to get me himself, but testified during his deposition and at trial that the tag number was the

actual tag number of a car he saw that night. I submit that Scott's allegation that he made up the story of the tag number to divert attention away from me is incredulous, and had Mr. Leinster made some sort of reasonable attempt to investigate the admittedly valid tag number, it would have produced exculpatory evidence supporting my reasonable defense of mistaken identity. In fact, an investigation may very well have led to the discovery of the actual perpetrator, which would have been the most crucial piece of exculpatory evidence a defendant could ever have.

As we already know, Scott was repeatedly calling out the tag number of the vehicle while he was running back to the triplex, giving it to David as I was coming out of my apartment into the courtyard. Thus, just prior to this point in time, Scott had absolutely no idea where I was, so he could not possibly have had any idea where to divert the police's attention from. And, Scott would not have any reason to divert the police's attention away from me, since the police would have no idea that I was involved in the incident, unless, of course, Scott told them that I was involved, which, according to his own sworn testimony, he did not. So, as far as Scott knew at that point in time, if, in fact, he really believed "beyond a shadow of doubt" that I was the perpetrator, I could have been anywhere in the neighborhood, most notably, departing the area in the vehicle he admittedly observed and believed that the perpetrator got in, which was what he had told me, Cheryl, David, David's wife Barbara, and Mrs. Porrey. Rather than diverting attention away from me by giving the police the tag number of the car, he could have been pointing them in my direction. That's just one of the reasons why his recantation is illogical and uncredible.

Remarkably, Scott did not immediately indicate the alleged identity of the perpetrator at the scene. And, remarkably, 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 may have been the perpetrator.

I believe that Scott later recanted the story about the tag number because of police misconduct: On the scene, Scott did not indicate to anyone the alleged identity of the perpetrator. In fact, Scott candidly admitted to Patrick and David, before calling the police to make an identification, he was not sure that the perpetrator was me. Nonetheless, some officer from the Largo Police Department later told Scott and Cheryl that my fingerprints matched the bloody fingerprints left at their apartment, and that they found the bloody knife used during the attack under my bed, along with some bloody clothing. Actually, none of the bloody fingerprints matched my fingerprints; the police did not recover the bloody weapon used during the attack from underneath my bed; and there were no bloody clothes recovered from my bedroom.

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 who the perpetrator was, but possibly suspected that it may have been me. Therefore, under the facts of my case known to Mr. Leinster, coupled with his recognition that my very reasonable defense was that of mistaken identity, he should have investigated the potential exculpatory evidence consisting of the tag number of the vehicle Scott gave to David to give to 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/owner lives in the area or what he was doing in the area at the time of night; (4) did the driver/owner know Scott and/or Cheryl; (5) whether there was blood on and/or inside the vehicle; (6) whether the driver/owner looks somewhat like me and had been in

a fight; and (7) whether the driver/owner has a prior criminal history of sexual assault.

The results of such an investigation could very well have produced exculpatory evidence supporting my defense of mistaken identity, or more specifically, the identity of the actual perpetrator. In any event, when presented with the facts of my case and my very reasonable defense of mistaken identity, a reasonably competent attorney would have investigated this crucial exculpatory evidence, simply because the fruits of such an investigation may very well have turned up the actual perpetrator.

As a result of Mr. Leinster's failure to investigate the admittedly valid tag number, Scott's allegation that he made up the story 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 that night. Thus, Mr. Leinster's failure to properly investigate this matter precluded the introduction of exculpatory evidence supporting my very reasonable defense of mistaken identity, and it denied me effective assistance of trial counsel.

C.

The failure of trial counsel to investigate, interview, or depose Theresa Porrey prior to videotaping her trial testimony the day before my trial was prejudicial to my very reasonable defense of mistaken identity.

There is no doubt the Mr. Leinster knew that Mrs. Porrey was my alibi witness, making her the most crucial witness supporting my defense of mistaken identity. So, a reasonable presentation of her exculpatory testimony was crucial to my defense: Mr. Leinster knew that while Mrs. Porrey was awake in our apartment, I was sound asleep in my bedroom. In order for me to exit and re-enter our

apartment to commit the crime, I necessarily would have had to stealthily pass Mrs. Porrey not only once, but twice -- once while exiting our apartment to get into Scott and Cheryl's apartment, and a second time while re-entering our apartment after being chased around in the neighborhood by Scott.

Mrs. Porrey knew that there was no way to pass through the sliding glass doors leading into my bedroom because of some building supplies and lumber stacked against them. But even if passage was possible, which it wasn't, Mrs. Porrey woke me up immediately after hearing Cheryl scream, clearly establishing that there was insufficient time for me to have committed the crime, return back to our apartment following a chase through the neighborhood, dispose of the inculpatory evidence I necessarily would have had to possess, and then get into my bed in the time it took her to run to my bedroom and wake me up. Moreover, a reasonable examination of Mrs. Porrey would have corroborated my defense of mistaken identity because she knew that (1) I never wore a remarkably large belt buckle which Scott and Cheryl claimed I always wore, including, allegedly, during the attack; (2) I did not appear to have been in a fight; (4) I did not have any blood on me or any of my clothes; (5) I did not appear to have a noticeable limp or any difficulty walking; (6) late that night, after being confronted by Patrick and David with Scott's accusations, I did not attempt to flee, but rather sat with her for approximately twenty minutes until they returned back to our apartment; and (7) her son and I worked on his girlfriend's car that afternoon, leaving both of us soaking wet in the process.

Despite the obvious importance and potential exculpatory nature of Mrs. Porrey's testimony, Mr. Leinster did not conduct a pretrial investigation, interview, or deposition of her. Instead, on the day before my trial (nearly ten months after being

retained), Mr. Leinster and an assistant state attorney videotaped Mrs. Porrey's trial testimony. Thus, Mr. Leinster was ill-prepared to examine my most crucial defense witness.

As a direct result of Mr. Leinster's complete lack of pretrial preparation, he could not conduct a reasonably effective examination of Mrs. Porrey, establishing exculpatory evidence allowing the jury to reasonably infer that I could not possibly have been the perpetrator because (1) I did not wear a remarkably large belt buckle; (2) I did not appear to have been in a fight; (4) I did not have any blood on me or any of my clothes; (5) I did not appear to have a noticeable limp or any difficulty walking; (6) late that night, after being confronted by Patrick and David, I did not attempt to flee, but rather sat with her for approximately twenty minutes until they returned back to our apartment; and (7) if my shoes and socks were indeed wet, it was because of the fact that her son and I worked on his girlfriend's car, at a car wash leaving both of us soaking wet in the process. All of this exculpatory testimony would have supported my defense of mistaken identity and been considered along with the exculpatory testimony of Patrick and David, had Mr. Leinster provided me with reasonably effective assistance of trial counsel.

Because Mr. Leinster failed to conduct a reasonable investigation, interview, deposition of Mrs. Porrey prior to videotaping her trial testimony the day before my trial, he was unable to establish all of the relevant exculpatory testimony supporting my very reasonable defense of mistaken identity, and it manifestly changed the result of my trial, since that relevant, exculpatory testimony was excluded from the jury's consideration, leaving the testimony adduced by the prosecution largely uncontested, appearing to be reliable when it actually was not.

II.

I respectfully submit that I was further denied effective assistance of trial counsel based upon Mr. Leinster's failure to inform and consult with me the details of my case, which would have enabled me to assist him in preparation of my defense by providing him the names and locations of prospective witnesses and exculpatory evidence that he may otherwise not have known were relevant, available and necessary to establish my defense of mistaken identity, and would have left me adequately informed to make an intelligent decision on whether to proceed to and/or testify at trial.

Mr. Leinster failed to inform or discuss with me any specific details of the allegations made against me. His action in that respect fell far below the action of a reasonably competent attorney handing a case of similar facts, and, as detailed below, his failure to do so clearly affected the outcome of my trial.

A.

It was not disputed by the defense at trial the manner in which the crime occurred; my very reasonable defense was that of mistaken identity, which is a defense that necessarily requires defense counsel to critically examine an eye-witness' identification testimony for any discrepancies in his or her identification of the alleged perpetrator, and to look for any direct and circumstantial exculpatory evidence to support the probability of an incorrect identification.

One proven way to test a putative identification is to carefully examine it and discuss in detail the specific details with the defendant in order to determine its validity. This, however, is exactly what Mr. Leinster failed to do.

Although Mr. Leinster knew from the very beginning that I

claimed I was innocent and knew very little about the details surrounding the allegations made against me, he never provided me with copies of, or permitted to review, the various statements and deposition the witnesses had made, nor did he ever, at any time, inform or discuss with me the detailed, but remarkably conflicting, descriptions of the perpetrator given by Scott and Cheryl, which, purportedly, led to a positive identification by one witness, but not by the other.

Mr. Leinster failed to advise me that Scott and Cheryl gave two conflicting descriptions of the perpetrator, e.g., while Cheryl said that the man had long, curly, fluffy hair, and was wearing a dark blue or black muscle shirt (no sleeves), Scott claimed that this same man had his hair greased back, pulled up in the back as to appear short, and was completely nude, but maybe he had on a pair of socks. The only common detail identified was that the perpetrator had a remarkably large belt buckle on his pants, the same remarkably large belt buckle they claimed I always wore.

The first I learned of the only common item identified was at trial, since Mr. Leinster never informed or consulted with me on Scott and Cheryl's identification, nor did he inquire whether I wore a remarkably large belt buckle. Had he 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 my apartment, I would have prepared to and testified in my defense that I never owned or wore such a remarkably large belt buckle, especially on the night of July 14, 1989, and I would have provided Mr. Leinster with the names of numerous witnesses, such as Lisa Torres, Michelle Gomez, Theresa and Patrick Porrey, all of whom could have testified that I have never owned or worn a large belt buckle of any kind.

I submit that my sworn exculpatory testimony, coupled with

that of the other witnesses testifying that I had 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 just moments after the attack, and refuting Cheryl's uncontested testimony that the large belt buckle on the perpetrator was the exact same one I always wore.

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, since it left Scott and Cheryl's identification testimony virtually contested, allowing the prosector 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. 275-276) (emphasis added).

* * *

> .... and she was able to see his outline, his features, see the shape of his 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)(emphasis added).

* * *

> 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) (emphasis added).

As previously stated, had Mr. Leinster advised me of the statements regarding the belt buckle, I would have testified and refuted the purported fact, and I could have provided him with the name of numerous witnesses who would have corroborated my testimony that I have never owned or worn a large belt buckle of any kind. In fact, Mr. Leinster could have examined Mrs. Porrey regarding the belt buckle while he was videotaping her trial testimony, but he didn't. Patrick, David, my parents, bothers, sisters, and former girlfriends, have all lived with me and could have testified that I have never owned or worn a large belt buckle of any kind. Moreover, David and his wife, both of whom live 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 my apartment.

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, remarkably large, belt buckle, which, unfortunately was not established at trial, since, as explained later, Mr. Leinster failed to effectively examine officer Joiner of the Largo Police Department, who collected the evidence.

Since this case boiled down to the credibility of witnesses, presentation of testimony establishing that I did not wear a large belt buckle, as claimed by Scott and Cheryl, would have affected the weight the jury would have given to their testimony, again creating a reasonable doubt which would mandate that they return a verdict of not guilty.

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 of my alibi witness, Theresa Porrey, while using a baby monitor. Mrs. Porrey was allegedly talking to an unknown, unheard party. Although Scott and Cheryl claim that they heard only part of the one-sided conversation, they allegedly 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 open.

Mr. Leinster never informed me of those seemingly inculpatory statements, nor did he inquire if and why my shoes and socks may have been wet, and why, if it at all, the sliding glass 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.[10]

The failure to inform and consult with me on this matter was absolutely fatal to my defense, since had I been advised of those statements, I would have prepared to and testified under oath that if my shoes and socks were wet, it was merely because Patrick and I had spent the better part of that afternoon working on his girlfriend's car at the car wash, leaving both of us soaking wet in the process. And, I would have testified that I knew for a fact that the sliding glass door was not open, as alleged by Scott and Cheryl's hearsay testimony, because I knew it was closed and impassable due to some building material and lumber stacked against

[10]It should be noted that during her videotaped trial testimony, Mrs. Porrey expressly denied having ever made any statement to the effect of or actually finding my shoes and socks wet, or having observed that the sliding glass door was slightly cracked open.

it. Moreover, I would have advised Mr. Leinster that we must have Patrick testify to the same.

My testimony would have corroborated the testimony of Mrs. Porrey and Patrick, and it would have had a significant impact upon the credibility and reliability of Scott and Cheryl's testimony. Importantly, my testimony would have shown, contrary to the prosecutor's innuendo, if my shoes and socks were wet, it was merely due to an innocent act, directly contrary to the prosecutor's argument, which was easily susceptible of being interpreted by the jury as being that I had wet shoes and socks from running on wet grass through our neighborhood while being pursued by Scott, or because I washed the blood off my shoes and socks which necessarily would have been there had I been the perpetrator.

For the reasons expressed above, I submit that Mr. Leinster's failure to inform me of the inculpatory statements of Scott and Cheryl precluded me from providing him with a witness, namely Patrick, who would have given exculpatory testimony refuting the implication their testimony was offered to establish, and it clearly prevent me from making an intelligent decision of whether to testify. Had I known about those statements, I would have prepared to and testified under oath in my defense, additionally refuting the implication Scott and Cheryl's testimony was offered to establish, which would have further corroborated and bolstered my very reasonable defense of mistaken identity.

C.

Mr. Leinster failed to inform me of the inculpatory deposition testimony of police officer Howard Crosby. During deposition testimony, officer Crosby stated:

I noticed that he was very nervous, and I

talked to him. I asked him what he was doing there and he said he lives in the next door apartment. So I got his name and everything and they 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 in a little more specific? What led you to that conclusion?
A: He wouldn't look at me in the eyes. I can tell that his 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 offered it as being inculpatory. The first I every heard of Crosby's statement regarding my alleged "suspicious" and "nervous" behavior was while he was testifying at trial.[11] I had been completely unaware that anyone thought or alleged that anything was unusual about my behavior. In fact, everyone else who saw me that night did not testify that they observed any "suspicious" and "nervous" behavior, and these were people who knew me personally, whereas Crosby did not.

[11]This, unfortunately, is a direct result of both Mrs. Brown and Mr. Leinster not providing me with any copies of the witnesses' depositions, or at least allowing me to review them in order to determine whether or not there was any relevant information I could provide them to assist in the preparation of my defense.

Had Mr. Leinster advised me of the alleged inculpatory statements, I would have informed him that, at the time, I had just been woken up from a sound sleep by a very excited Mrs. Porrey, screaming that the girl next door was being raped, and I was 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, and that, in general, I have always had difficulty looking people in the eyes while speaking with them, a fact that could easily be established through my testimony and corroborated by testimony from my friends and family. Therefore, had I known about Crosby's statement, I would have prepared to testify, and I would have testified under oath to the same. Further, I would have provided Mr. Leinster with the names and location of my family and friends whose testimony would have corroborated my testimony.

Specifically, I would have instructed Mr. Leinster to speak with my father Richard Herrick, my mother, Rita Herrick, my sisters, Shelley, Lori, Vicki, Debbie, Lisa, and my brother, Mark, all of whom know my personality trait and would testify that the characteristics Crosby observed and described as "suspicious" and "nervous," in all reality, is actually my normal behavioral traits when dealing with persons of authority.

I believe that my sworn testimony, coupled with that of these other witnesses, would have been competent evidence that could be interpreted by the jury as refuting the sly innuendo, asserted by the prosecution through officer Crosby's testimony, that my behavior the night of the crime was somehow indicative of guilt. It was not. Had Mr. Leinster reviled this putative piece of inculpatory evidence to me, he would have been provided with evidence to present to the jury which fully advised it of all pertinent material relevant to the case to adequately

determine a just verdict.[12]

Additionally, had I been advised of Crosby's statements, I would have advised Mr. Leinster to question Mrs. Porrey about my alleged nervous and suspicious behavior on the night in question during her videotaped trial testimony.[13] More importantly, as well as establishing everything as set forth above, knowledge of these statements would have changed my decision not to testify in my case. Had I known about the statements, I would have prepared to and testified at my trial. My trial testimony would have rebutted the prosecutor's argument made to the jury that:

> Officer Crosby was so suspicious 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's 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.

[12]During his deposition, officer Nielsen stated that he observed me standing in the courtyard area throughout the investigation of the incident. And, during the time the police were on the scene, there was no less than one police officer posted in the courtyard area. So, if I was the guilty party, why would I just stand outside, looking "suspicious" and "nervous" with a bunch of police officers?

[13]Mrs. Porrey was with me before, during, and after the police left the scene, and until I went back to bed. She also was present when Patrick Porrey and David Stewart woke me up after they had spoken with Scott. She could have testified that even after I learned Scott was saying that he thought I may have been the attacker, I did not attempt to leave the area; I was not nervous or suspicious, and that I sat with her in her kitchen patiently awaiting the return of David and Patrick. This again reflects on Mr. Leinster's failure to talk to me about the case so I could provide him with information he couldn't possibly know about.

(R. 302).

Mr. Leinster's failure to adequately inform me of Crosby's statements falls below the actions of a reasonably competent attorney handling a case of similar circumstances. He manifestly had a duty to advise me of any and all allegedly inculpatory statements, to insure that I was fully advised of all pertinent information so I could make rational and intelligent decisions on whether or not to proceed to trial, whether or not to testify at trial, and whether or not I could provide him with and information or witnesses I knew of who would assist in my defense.

If I would have been so advised, I would have provided Mr. Leinster with the above stated information and witnesses to assist him in preparing my defense. Moreover, I would have prepared to give my own testimony at trial and demanded that Mr. Leinster call me as a witness on my own behalf.

III.

I was further denied effective assistance of counsel in Mr. Leinster's failure to consult with me regarding what evidence and witnesses he would be presenting at my trial to support my defense of mistaken identity. Under the facts and circumstances of this case, Mr. Leinster's failure in this respect was fatal to my defense of mistaken identity and directly affected my decision on whether or not I should proceed to trial at that time and whether or not I should prepare to testify and in fact testify at my trial.

Mr. Leinster failed to tell me prior to my trial that he had not interviewed, investigated, or deposed the prospective witnesses that I had advised him possessed relevant, exculpatory testimony and evidence that would support my defense of mistaken identity. Specifically, Mr. Leinster never told me that he did not speak with

either Patrick Porrey or David Stewart.

When Mr. Leinster was originally retained to represent me in this matter, I advised him of the testimony I believed Patrick Porrey and David Stewart possessed. However, notwithstanding Mr. Leinster's failure to interview, investigate or depose Patrick or David as alleged previously, Mr. Leinster never advised me that (1) he hadn't done so; (2) he had no intentions of doing so; and (3) he was not going to present their testimony at my trial to support my defense.

Mr. Leinster's failure in that respect fundamentally deprived me of effective assistance of counsel which renders the result of my trial fundamentally unfair and unreliable, since his failure to tell me about his intentions not to call these witnesses, without at least interviewing them to determine the value of their testimony, installed a false sense of serenity in me regarding my defense, because I truly believed that since I had informed Mr. Leinster of these witnesses and their testimony, he would have and did investigated this information, and Patrick Porrey and David Stewart would be called as defense witnesses to give their exculpatating testimony under oath before the jury.

The false sense of serenity installed by this belief affected my decision at the time on whether or not to proceed to trial, and my decision on whether or not I should prepare to give my own sworn testimony at my trial.[14] Remarkably, in fact, had I known that not

[14]My decision not to testify at my trial was greatly affected by the other evidence that I believed would be presented: By weighing that evidence against the potential damage the prosecution would cause by impeaching my credibility, because I am a convicted felon, and believing that these witnesses would testify at my trial, the value of my own testimony decreased. However, without these witnesses' testimony, my testimony's value increased, and had I known they would not testify, I would have prepared to testify, and, in fact, would have testified during my trial to my innocence.

only had Mr. Leinster failed to interview, investigate or depose Patrick and David, but that he never had any intention of calling them as witnesses during my trial, I would have again requested a postponement of my trial and demanded that Mr. Leinster secure these witnesses crucial testimony for my defense.[15] Moreover, had Mr. Leinster advised me prior to my trial that he had no intentions of calling Patrick Porrey or David Stewart as witnesses at my trial, and refused to honor my demand that he speak with these witnesses I would have terminated his representation of me due to his gross incompetence, because 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 ny trial falls far below the actions of a reasonably competent attorney handling a case of similar circumstances, and that his failure prejudiced my defense in such a serious manner that the result was fundamentally unfair and unreliable since, had he told me that the actual defense he planned to present was only the videotape of Theresa Porrey, and that no other witnesses who possessed exculpatory evidence would be presented to support my defense of mistaken identity, I would not have proceeded to trial

[15]The court records show that my trial was continued numerous times because Mr. Leinster had not yet videotaped Theresa Porrey's testimony prior to those dates. Mr. Leinster did inform me on those dates that he had not yet gotten Mrs. Porrey's testimony, and that it was my choice to either go to trial without her testimony, or to postpone. Naturally, under the circumstances, I agreed that a postponement was in my best interests. Had Mr. Leinster informed me that Patrick and David had not been interviewed or deposed, and that they were not going to testify during my trial, again, knowing the importance of their respective testimony to my defense of mistaken identity, I would have again postponed my trial until their testimony could be secured.

at that point, and, I would have quite possibly discharged Mr. Leinster as incompetent.

IV.

I was further denied effective assistance of counsel by Mr. Leinster's failure to call witnesses known to him to posses exculpatory testimony and evidence supporting my defense of mistaken identity, or more specifically Patrick Porrey and David Stewart. Under the facts and circumstances known to him regarding the allegations against me, and the information he had been provided though me and the discovery material he received from both the prosecution and my public defender, his failure to present these witnesses testimony at my trial was fatal to my defense of mistaken identity, and rendered the result of my trial unreliable.

I submit that Mr. Leinster manifestly denied me effective assistance of counsel by his failure to call Patrick Porrey and David Stewart to testify at my trial. Based upon the information provided to Mr. Leinster, as detailed above, Mr. Leinster clearly knew of the exculpatory nature Patrick and David's testimony could provide to my defense of mistaken identity. Had he presented their testimony, under the facts and circumstances of my case, it is reasonable to conclude that the jury would have reached a favorable verdict, as they would have been presented with additional evidence surrounding the events and circumstances regarding the night of the crime that support my defence of mistaken identity. Thus, Mr. Leinster's failure to call these witnesses, under these facts and circumstances manifestly denied me effective assistance of counsel.

V.

I was further denied effective assistance of counsel by Mr. Leinster's failure to conduct an effective direct and cross-

examinations of various witnesses during my trial.

A.

Mr. Leinster failed to conduct and effective direct examination of my alibi witness Theresa Porrey. As well as testifying that at the time she heard Cheryl screaming in the courtyard she came and woke me up in my bedroom, Theresa Porrey possessed relevant information regarding the facts and circumstances surrounding the night of the crime. Mr. Leinster failed to inquire into any other areas of her personal knowledge surrounding these events or her observations, all of which would have greatly assisted the jury in determining the facts of this case. Specifically, Mr. Leinster failed to question Theresa Porrey as to her personal knowledge of (1) whether or not Patrick and I were wet when we came home from working on his girlfriend's car earlier in the day, and more specifically, if that was or could be the reason my shoes and socks might have been wet; (2) whether or not she was aware of a knee injury of mine that would have prevented me from eluding Scott in a chase through the neighborhood jumping over six-foot fences, or whether or not she noticed me having difficulty walking on the night of the crime; (3) whether or not I was a shy person; (4) whether or not she ever noticed me wearing a large belt buckle at any time either prior to or after the attack on Cheryl and Scott, and whether or not she ever noticed a large belt buckle in my belongings while I was staying there, or after my arrest; (5) whether or not on the night of the crime she noticed that I had appeared to have been in a fight, specifically whether or not she noticed any swelling of my facial features, or bruises or abrasions on my knuckles; (6) whether or not in the days immediately following my arrest she or anyone else in her household noticed any blood in or around the apartment that would indicate

that I brought blood into the house, and more specifically, whether or not she or any one in her household found any bloody clothes hidden;[16] (7) whether or not she noticed any blood on me or on my clothing when she came back to my room and woke me up; and, (8) whether or not she noticed or considered my behavior on the night of the crime anything other than normal.

I submit that Mr. Leinster's failure to inquire into these specific subject matters while conducting his direct examination of my alibi witness Theresa Porrey deprived me from presenting the jury with critical information for them to consider while deliberation their verdict. Further, under the facts and circumstances known to Mr. Leinster, regarding the physical evidence that would necessarily have had to have been present in Mrs. Porrey's apartment if I was, in fact, the assailant, and her opportunity to observe my behavior immediately after the crime, including my conversations with Scott and Cheryl in the courtyard, and my conversations with Patrick Porrey and David Stewart after they had spoken with Scott, Mr. Leinster's failure to conduct an inquiry into these areas falls far below a reasonable standard of effectiveness, since the complete lack of any tangible evidence, including the lack of bruises and abrasions on my person is, in and of itself, under these facts and circumstances, exculpatory evidence that supports my defense of mistaken identity.

Had Mr. Leinster properly conducted a reasonable direct examination of Theresa Porrey, these questions would have been answered and the jury would have been fully advised of all

[16]This fact certainly would have raised many questions in the minds of the jury, as Mr. Leinster would have been able to persuasively argue that no clothes were ever found in my apartment. And, if I really was the assailant, what did I do with the clothes? Could I possibly have hid them so well that they have not been found in a year and a-half?

pertinent information related to the crime and the night in question, and could in all probability have interpreted the facts differently and subsequently return a favorable verdict.

B.

Mr. Leinster failed to effectively cross-examine Largo police officer Howard Crosby establishing testimony supporting my defense of mistaken identity. Officer Crosby testified at my trial that he only interviewed me because I looked suspicious, and while doing so, Crosby testified that he was close enough to see my heart beating through my T-shirt. As shown previously, the prosecutor argued this observation as being a fact indicative of guilt.[17] Notwithstanding the fact that, as explained above, Mr. Leinster could have rebutted that allegation simply by discussing the case with me and informing me of the incredulous allegation asserted by Crosby that my behavior was suspicious, Mr. Leinster should have cross-examined officer Crosby as to the following specific areas: (1) whether or not he interviewed David Stewart in addition to interviewing me; (2) whether or not I appeared to have been in a fight; (2) whether or not I had any blood on me or my clothing; (3) whether or not I was wearing a large belt buckle; (4) whether or not I had a noticeable limp to my walk; and (5) whether or not he

[17]This argument could easily have been interpreted by the jury as a challenge for the defense to present some type of evidence to explain why I might have been nervous, or more specifically the prosecutions statements asked the jury, "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?" This could have no other effect than to focus the jury's attention on matters outside the parameter of the evidence before them, since no witness or other evidence could give any indication as to why or why not I might be nervous, and the only person able to answer such a question was me, and I didn't testify due to Mr. Leinster's ineffectiveness.

was familiar enough with my personality traits to reasonably determine whether my behavior and conduct was "suspicious" and "nervous" or that of my normal personality.

Had Mr. Leinster conducted an adequate cross-examination of Crosby, and inquired into these specific areas, the jury would have been advised of all relevant information that could and should affect the weight and credibility officer Crosby's testimony should be given while deliberating to reach their verdict.

C.

Mr. Leinster failed to effectively cross-examine officer Joiner of the Largo Police Department, which would have established testimony supporting my defense of mistaken identity. Officer Joiner testified as to what evidence, or lack thereof, was collected from both the crime scene, my bedroom, and the surrounding triplex area.

Mr. Leinster should have cross-examined officer Joiner as to why the police did not find physical exculpatory evidence supporting my defense of mistaken identity. For example, as the assailant left blood everywhere he touched while fleeing from the triplex, did the police search the surrounding area, specifically the fences in the immediate area that I would have had to have jumped over and touched with bloody hands to get back to the triplex. And, if they did search, what did they recover, if anything, and were there negative or positive results on the evidence?

The mere absence of blood on those fences is exculpatory evidence tending to support my defense of mistaken identity, because if I was the assailant, I would have had to touch these areas in order to get back to my apartment, before Theresa Porrey came to my room to wake me up.

Furthermore, Mr. Leinster should have questioned Joiner as to whether or not he looked for blood on the available entrances to the Porrey apartment. And, if so, what were the results of that search, negative or positive? Again, the absence of blood on any of the entry ways to the Porrey's apartment is exculpatory evidence tending to support my defense of mistaken identity, because if I was the assailant, I would have had to touch these areas in order to get back into the Porrey apartment, before Theresa Porrey came to my room to wake me up.

Additionally, Joiner should have been questioned as to whether or not he found a large belt buckle on me, in my room, anywhere in the Porrey apartment, or anywhere in the surrounding area. This testimony would have presented the jury with the obvious question of, if I was the assailant, "Where did his large belt buckle go? Did it drive away in the car Scott originally told everyone he saw leaving the scene?"

Had Mr. Leinster conducted an adequate cross-examination of Joiner, and inquired into these specific areas, the jury would have been advised of all relevant information that could and should be considered while deliberating their verdict. Specifically, the lack of any physical evidence that tended to link me to this crime.

D.

Mr. Leinster failed to conduct a reasonable or effective cross-examination of Scott and Cheryl concerning their use of marijuana on the night the crime occurred, and Scott's absence from the couples apartment the night before, leaving Cheryl home alone, while he attended a bachelor's party.

1. As stated before, when I retained Mr. Leinster I told him about my brief association with both Scott and Cheryl. He knew

that on just about every single time that I was around them, we smoked marijuana. Further, he knew that Scott, Cheryl, their two friends, and I smoked marijuana earlier that evening, and that Scott had supplied the marijuana. Mr. Leinster knew that from my association with them, I believed them to be regular marijuana smokers, and since Scott had a good amount of marijuana in the bag he produced earlier that day, I reasonably assumed, and told Mr. Leinster, they would have smoked more marijuana at the drive-in movie later that evening, which was just before the crime took place. However, even with this knowledge, Mr. Leinster failed to specifically cross-examine Scott and Cheryl regarding their use of marijuana on the night of the crime.

If Scott and Cheryl would have admitted their use of marijuana that night, it clearly would have affected the acceptance and reliance the jury placed upon their identification testimony, and could possibly be the significant factor in explaining why two witnesses who saw the exact same event and person, later gave two completely conflicting descriptions purportedly of the same person. On the other hand, if Scott or Cheryl denied their use of marijuana that night, I would have taken the stand to testify that I had in fact smoked marijuana with them earlier that evening, impeaching their testimony and reflecting upon their credibility.

In addition to my testimony, as stated before, had Mr. Leinster interviewed Patrick Porrey and called him to testify, Patrick also could corroborate the fact that Scott and Cheryl regularly used marijuana.[16] Thus, I believe that establishing the

[16]This is not mentioning the fact that had Mr. Leinster investigated Scott and Cheryl's two friends, Tammy and Darryl, they also could have testified that not only were Scott and Cheryl regular marijuana users, but that they had smoked marijuana earlier that evening with them.

fact that Scott and Cheryl used marijuana that night, coupled with their conflicting identification testimony, would have presented the jury with competent evidence that creates a reasonable doubt of my guilt, and could in all probability resulted in the jury returning a verdict of not guilty.

Under the facts and circumstances known to Mr. Leinster, his failure to inquire into these areas of examination was not reasonable, and clearly deprived me from presenting competent evidence the jury could look to return a not guilty verdict.

2. As stated before when I retained Mr. Leinster I told him that the night before the crime, on July 14, 1989, Patrick Porrey 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 to barrow a VCR cleaner the night before the crime, Cheryl invited Patrick and I to watch the movie with her because she didn't have anything else to do that night. Mr. Leinster knew that when Patrick and I arrived, Cheryl told us that Scott was attending a bachelor's party and wouldn't be coming home that night.

I submit that under the facts and circumstances known to Mr. Leinster regarding the manner and time in which this crime was committed, he should have established the fact that the night before I knew that Cheryl was home alone, all night, and that it is unlikely that I would have attacked her the following night when I would have no idea when Scott was going to be there, and if he wasn't, I still would have no idea when he would return.

Had Mr. Leinster brought these critical facts out during his cross-examination of Scott and Cheryl, he additionally would have been able to adequately rebut the prosecutor's closing 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).

By establishing the events of the previous night, the jury would have necessarily been presented with the reasonable question of why would I attack Cheryl, according to the testimony, nearly forty-five minutes after Scott had left the apartment, not knowing where he was going or when he would be back, when just the night before I knew for a fact that Scott wasn't home and wouldn't be home all night long.

I submit that under the facts and circumstances known to Mr. Leinster, his failure to adeqautely or effectively cross-examine Scott and Cheryl in this matter, deprived me from presenting the jury with competent evidence that, in all probability, would have had a substantial impact on the acceptance and reliance on the prosecutions theory of events, resulting in the jury returning a verdict of not guilty.

VI.

I was further denied effective assistance of counsel based upon Mr. Leinster's failure to make appropriate objections to, or

move to strike inadmissible and/or objectionable portions of Theresa Porrey's videotaped trial testimony when it was admitted into evidence during my trial.

Unbeknownst to me, Mr. Leinster simply presented one witness in support of my defense of mistaken identity at trial, which was my alibi witness, Theresa Porrey. Mrs. Porrey's trial testimony was recorded on videotape because she suffered from a severe illness that precluded her from actually testifying in person at my trial. Prior to her videotaped testimony being published to the jury, Judge Downey explained:

> Ladies and gentlemen of the jury. The defense witness Theresa Porrey is in ill health. She apparently has emphysema and connected to some sort of 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 beginning with regards to her disease. Her videotape is and will be presented at this time. Move the T.V. forward.

(R.).

At this time Mr. Leinster failed to object to or move to strike the inadmissible and/or objectionable portions of Mrs. Porrey's testimony. Instead Mr. Leinster negligently allowed the videotape testimony to be played in it's entirety before the jury, without

striking portions of her testimony that would have been excluded from the juries consideration had she actually been there in the courtroom and testifying.

While Theresa Porrey's testimony was being recorded at her home in Largo, Florida, numerous objections were made by both Mr. Leinster and the assistant state attorney, Mr. Bulone. However, since no judge was present during the taping of the trial testimony, absolutely no rulings were made as to each parties respective objections. When the videotape was moved into evidence and published to the jury, neither Mr. Leinster or Mr. Bulone requested that Judge Downey make any appropriate rulings as to those objections.

I submit that Mr. Leinster's failure to require a judicial determination as to the objections already on the videotape and then make further objections to portions of the videotape testimony that would have been excluded had Theresa Porrey been present and giving live testimony in the courtroom, falls below a reasonable standard of effectiveness, which, under the unique facts and circumstances of my case, was fatal to the defense presented.

Specifically, I submit that Mr. Leinster should have made an objection to the portions of Theresa Porrey's videotaped testimony where the prosecutor asked Mrs. Porrey questions that far exceeded the boundaries and scope of the direct examination, and which were collateral in nature to any material fact at issue in my trial. Mr. Leinster's failure to make an appropriate objection in this matter directly resulted in the prosecution being allowed to ask questions that were beyond the scope of his direct examination, elicit answers to collateral matters, and later reopen his case on rebuttal to impeach Theresa Porrey's credibility as my alibi witness by presenting extrinsic evidence of a prior inconsistent

statement she allegedly made on one of the collateral subjects.[19]

I submit that the following questions posed to Theresa Porrey during her videotape testimony by the prosecutor should have been objected to by Mr. Leinster, as being (1) beyond the scope of his direct examination; and (2) collateral to any material fact at issue in my trial:

> PROSECUTOR: Now, is it true that when you went back into Kevin's room you saw that his shoes, his socks were wet?
>
> PORREY: 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 and 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 the time?

[19]It must be stressed that Theresa Porrey's videotaped testimony was not a discovery deposition, but rather was secured as trial testimony specifically because she was unable to attend the trial in person, due to her health.

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 ask.

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).

Review of Mr. Leinster's direct examination of Mrs. Porrey demonstrates that the foregoing questioning by the prosecutor was beyond the scope of Mr. Leinster's direct examination, and under the circumstances should have been objected to as such, especially considering the fact that whether or not my shoes and socks were wet is completely irrelevant to any material fact at issue in my trial. By timely objecting to that line of questioning, Mr. Leinster would have placed me in a win-win situation, simply because an objection to these questions would have caused one of two possible situations, both favorable to me:

First, had Mr. Leinster objected and it was sustained, the questions and answers would have been edited from the videotape and therefore not presented to the jury for their consideration. Further the prosecutor would not have been permitted to reopen his case on rebuttal, introducing evidence through hearsay testimony that Theresa Porrey made a prior inconsistent statement on a collateral matter.

Second, had Mr. Leinster objected and it was overruled, the prosecutor would have been permitted to question Theresa Porrey beyond the scope of the direct examination, effectively, at least according to the law, making Mrs. Porrey his own witness, which would have been the only legal way he would be allowed to question her in those areas. However, he still would be precluded from eliciting answers from Theresa Porrey for the sole purpose of presenting extrinsic evidence of a prior inconsistent statement to impeach them later during the trial. And, since the questions and answers were collateral to any material fact at issue in the trial, the answers given by Theresa Porrey would have to be excepted as

true, not subject to the normal avenues of impeachment.[20]

Had Mr. Leinster made an appropriate objection either at the time the questions were being asked, or when the videotape was being moved into evidence and published to the jury, requiring a judicial determination as to the various objections, the videotape either would have been edited, or the prosecution wouldn't have been permitted to reopen it's case on rebuttal and present evidence of a prior inconsistent statement through hearsay testimony. In either event, by properly objecting, the only defense witness that Mr. Leinster presented, my alibi witness, would not have subsequently been impeached, and, the jury would not have had this evidence before them to consider while deliberating their verdict.

Since this case boiled down to the credibility of the witnesses, essentially a swearing contest, i.e. Theresa Porrey's exculpatory testimony verses Scott Barfield's inculpatory testimony, it can not be said that Mr. Leinster's failure to object was either harmless or reasonable under the circumstances known to him at the time.

A critical fact to be considered is Mr. Leinster's failure to review the videotaped testimony before making a determination as to (1) whether or not the videotape should be played to the jury, or (2) whether or not there were questions, answers or statements that he should object to prior to the videotaped testimony being

[20]When a witness testifys on cross-examination, any answer to a non-material, collateral matter is conclusive and cannot be impeached by normal means of impeachment, including by contradictory testimony of another witness. The test is whether the proposed testimony can be admitted into evidence for any other purpose independent of the contradiction. There are two types of evidence that pass this test: (1) facts relevant to a particular issue, and (2) facts which discredit a witness by pointing out the witness' bias, corruption, or lack of competency. See Gelabert v. State, 407 So.2d 1007. 1009 (Fla. 5th DCA 1981); DuPont v. State, 556 So.2d 457 (Fla. 4th DCA 1990).

published to the jury. We might gain some insight into Mr. Leinster's failure to make any appropriate objections by his own candid admission to the court immediately prior to the video being published to the jury:

> MR. LEINSTER: I have not seen the video. We took the video. It might be a good idea if we could at least take a look at the first part of it to make sure it came out.

(R. 226).

Mr. Leinster and Mr. Bulone took the videotape of Theresa Porrey's trial testimony on October 1, 1990, merely one day before my trial began. Although Mr. Leinster knew about Mrs. Porrey's severe health problems, he procrastinated in securing her testimony until the last possible day. The court records, should affirmatively reflect that my trial had been postponed numerous times simply because he had failed to secure Theresa Porrey's testimony. And, when he did finally secure her testimony, he never reviewed the tape prior to it being presented at trial to make a reasonable determine as to whether or not there were any appropriate objections he should make, or tactical decisions with regards to her testimony.[21]

I submit that Mr. Leinster's failure to act in this matter is

[21]From the depositions taken by the public defenders office before Mr. Leinster was retained, it was clearly evident that Mr. Leinster was aware of the fact and knew that both Scott and Cheryl claimed to have intercepted Theresa Porrey's alleged telephone conversation. With this knowledge, obviously, Mr. Leinster should have known that when Theresa Porrey denied making the statements during her testimony, the prosecution would attempt to present Scott and Cheryl's rebuttal testimony to impeach her credibility, which should have placed him on notice that some sort of appropriate action must be taken to preserve her credibility. An appropriate objection would have done just that.

not reasonable under the circumstances of my case known to him at that time. My alibi witness was simply too important to my defense to carelessly allow the prosecution to ask inappropriate questions that were irrelevant to any material fact at issue, knowing that they would be used in an attempt to impeach her credibility later in the trial. Moreover, had Mr. Leinster properly objected and it was overruled, allowing the prosecutor to question Theresa Porrey beyond the scope of the direct examination and into areas collateral to any material issue of fact, the issue would have been properly preserved for appellate review, which, unfortunately, it was not.

I submit that a reasonably competent attorney, under the same facts and circumstances known to Mr. Leinster would have (1) carefully reviewed the videotaped testimony before making a determination of whether or not the videotape should be used at trial; (2) carefully reviewed the videotaped testimony for any appropriate objection that should be made before allowing the videotape to be published to the jury; (3) required a judicial determination as to the various objections made during the making of videotape; (4) objected to and moved to strike those portions of the prosecutions cross-examination that where beyond the scope of the direct examination; and, (5) objected to the prosecution reopening it's case on rebuttal to impeach Theresa Porrey's credibility by offering extrinsic evidence of a prior inconsistent statement on a collateral matter. Mr. Leinster's failure in this respect falls below the reasonable standard of effectiveness and was fatal to my defense presented of mistaken identity.

VII.

I was further denied effective assistance of counsel by Mr. Leinster's failure to make an appropriate and timely objection to

the prosecutions failure to lay a proper predicate or foundation for impeachment of defense witness Theresa Porrey with extrinsic evidence of an alleged prior inconsistent statement on a collateral matter.

Mr. Leinster failed to object to the prosecutor reopening his case on rebuttal to impeach Theresa Porrey's videotaped trial testimony with extrinsic evidence of an alleged prior inconsistent statement on a collateral matter without first laying a proper predicate or foundation for impeachment in this manner. Under the facts of this case, Mr. Leinster's failure to do so falls below a reasonable standard of effectiveness that directly resulted in the only defense witness presented, my alibi witness, to be improperly impeached.

In order to lay a proper foundation to impeach a witness for an alleged prior inconsistent statement, the witness must first be specifically advised of the substance of the alleged prior inconsistent statement, the time and place the statement was allegedly made, and the person or persons the statement was allegedly made to.[22] It simply is not enough for the impeaching party to generally ask the witness if they ever made the prior inconsistent statement.[23] Here, in my case, the prosecutor failed to lay a proper foundation for impeachment of a prior inconsistent statement during his cross-examination of Theresa Porrey's testimony. Specifically, the prosecutor never advised Theresa Porrey of the exact substance of her alleged prior inconsistent statement, the time and place the statement was allegedly made, or specifically to whom the alleged statement was made to. In an attempt to establish his foundation the prosecutor simply asked

[22]See Kimble v. State, 537 So.2d 1094 (Fla. 2nd DCA 1989).

[23]See Hutchinson v. State, 397 So.2d 1001 (Fla. 1st DCA 1981).

Theresa Porrey the following questions:

> PROSECUTOR: Now, is it true that when you went back into Kevin's room you saw that his shoes, his socks were wet?
>
> PORREY: 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 and 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 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).

Since the prosecutor did not lay the proper foundation for impeachment of Theresa Porrey by proof of a prior inconsistent statement, Mr. Leinster should have made an appropriate objection as to the prosecutions failure to sufficiently advise Theresa

Porrey of the exact statement she has been said to have made, the time and place she is said to have made the statement, and to who she is said to have made it to. Further, he should have objected to Theresa Porrey being impeached on a collateral matter.[24]

It is clear from the trial record that Mr. Leinster, at least in theory, knew essentially what the prosecution was attempting to do with the alleged prior inconsistent statement. Prior to the prosecutor reopening his on rebuttal, Mr. Leinster argued to the court:

> MR. LEINSTER: 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 has 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 Mrs. Porrey.
>
> Mrs. 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

[24]As stated in Gelabert, supra, "[W]hen a question, posed on cross-examination, relates only to a matter collateral and non-material to any issue at trial, the witness' answer to the question is deemed conclusive. Consequently, the witness cannot be impeached with regard to this testimony by any of the normal means of subsequent impeachment, including contradictory testimony by another witness." Id. at 1009.

> intercom in the privacy of her own home, but she was never asked that question, never disputed when she 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 impeachment 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 it comes out. I think it's impeachment here. I'll allow the state to proceed at this point.

(R. 229-230).

Notwithstanding the foregoing reasons for objecting, Mr. Leinster should have requested voir dire of the prospective rebuttal witnesses, to determine the exact nature of the alleged impeachment testimony, simply because Mr. Leinster knew that with the complete lack of any physical evidence indicative of guilt the case was going to boil down to the credibility of the witnesses, specifically Theresa Porrey's alibi testimony versus Scott Barfield's identification testimony.

Had Mr. Leinster requested a voir dire, it would have rendered Cheryl's rebuttal testimony inadmissible as Cheryl did not testify that Theresa Porrey stated that "she did" observe or notice my

shoes and socks were wet, or that the sliding glass door was open. Cheryl testified:

> PROSECUTOR: What did you hear Theresa Porrey say?
>
> HAGEN: 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 sock 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).

As shown by Cheryl's actual rebuttal testimony, at no point does she testify that Theresa Porrey allegedly stated that "she saw" my shoes or socks wet or that "she saw" the sliding glass door was open. If, in fact she ever made the statements referred to by Cheryl, Theresa Porrey very well may have been commenting upon something someone else had told her, and was not based upon her own personal knowledge.[25] Thus Mr. Leinster should have made an objection to this clearly non-impeaching, but highly prejudicial, testimony that would be susceptible of being interpreted by the

[25]It is undisputed that the Largo Police misinformed both Scott and Cheryl that a bloody knife and bloody clothes were found in my room. However, that information was later proven to be completely false by FDLE laboratory testing. Given the circumstances, there is all the more possibility that Theresa Porrey might have been told the same thing, or possible information that was just as false.

jury as impeachment.

It is clear that although Theresa Porrey expressly denied that she said "she saw" the shoes and socks wet or that the sliding glass door open, Cheryl's testimony implied that she did in fact see them, when it is clear, at least by her denial, that she did not. This was not impeachment, but it is reasonable to conclude that the jury could believe that it was, and consider the discrepancy when weighing the witnesses credibility. In effect, this allowed the jury to be presented with evidence that could be inferred by them as showing the defenses alibi witness was lying when she expressly denied ever seeing or saying that she saw my shoes and socks wet or the sliding glass door open.

Additionally, Scott's rebuttal testimony also failed to demonstrate a clear prior inconsistent statement made by Theresa Porrey:

> PROSECUTOR: Did you hear any of the conversation at all?
> BARFIELD: Yes, sir. I did.
> Q: What did 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 fourth.

(R. 238).

Again, the testimony offered by the prosecution through Scott does not say that Theresa Porrey said "she saw" shoes and socks were wet

or that "she saw" the sliding glass door was open. Although Scott testifies that she "found" only my socks were wet, there is a difference between this rebuttal testimony and the questions poses to Theresa Porrey during her videotaped testimony.

If Theresa Porrey was going to be impeached, the only proper impeachment, which fundamentally, is still on a collateral matter, is whether or not she ever talked about this case to anyone over the phone. It was not proper to impeach her on whether or not she said she saw my shoes and socks were wet or whether or not the sliding glass door was open, simply because (1) whether or not she did, in fact, say that is collateral to any material fact at issue in my trial; and, (2) the actual testimony intended to impeach her was not proof of an inconsistent statement, but was merely a vague account of a partial conversation that neither proseuction witness listened to entirely, or could remember completely. Thus, although not actually impeaching Theresa Porrey's testimony, the rebuttal testimony could have been easily inferred by the jury as doing so. Therefore, Mr. Leinster should have (1) made an appropriate objection; and (2) requested voir dire of the perspective rebuttal witnesses to determine the validity of the alleged impeachment testimony before exposing the jury to the testimony that, although non-impeaching, could reasonably be inferred as such under the circumstances. As Judge Downey stated after hearing from both counsel:

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

(R. 229-230).

The way testimony was presented would appear to be impeachment. However, a closer examination reveals it for what it

truly was: An equivocal account of an partial conversation intercepted using a baby monitor in violation of Mrs. Porrey's constitutional right to privacy, not to mention the distorted version of the conversation from the victim's of the crime themselves.

Another purpose for this rebuttal 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. Something the prosecution had no evidence to prove during it's case in chief.[26] I submit that this was merely a vehicle used by the prosecution to insinuate to the jury, that (1) my shoes and socks were wet; (2) my sliding glass door was open; and (3) that Theresa Porrey's relevant testimony regarding waking me up immediately after hearing Cheryl screaming should not be believed because she denied saying that she saw my shoes and socks wet, a matter having no relevance or bearing on the case at all.[27]

I submit that the substance of the impeachment testimony could and should have been used to prove that a conversation did take place, not as substantive evidence that a ultimate fact did or did not exist.

Therefore, because Mr. Leinster failed to object or move for voir dire of the prospective rebuttal witnesses after determining

[26]See Gelabert, supra.

[27]It should be noted that the police thoroughly searched my room and, remarkably, they did not find wet shoes or socks, or my sliding glass door open. The prosecution reopening it case on "rebuttal" was merely a vehicle for it to infect the jury with non-existent evidence to insinuate I could get in and out of my room, and that my shoes and socks are wet because, as explained earlier, I either washed the blood off them, or I was running through the neighborhood. If Theresa Porrey did go into my room and see those things, it would have been after the police had been in there, and the police could have unsucessfully attempted to open the sliding glass door, leaving it slightly cracked open.

that the purported "impeachment" testimony was not actually impeachment of Theresa Porrey's videotaped trial testimony, as it was not inconsistent with any statement previously made by her, but was merely a sly innuendo of a fact that could not be established during the prosecutions case in chief, Mr. Leinster should have moved for an order granting a mistrial because the jury had been fatally exposed and contaminated with hearsay evidence which could reasonably be inferred as being impeachment of the only defense witness.

A mistrial should have been granted based upon a sufficient motion alleging (1) the prosecution failed to properly lay a foundation for impeachment; (2) the putative impeachment was on a collateral matter having no bearing or relevance to any material fact at issue in my trial, and the witness expressly denied making the statement on the collateral matter, so her answers had to be taken as true and could be subsequently impeached by normal avenues of impeachment; (3) the actual rebuttal testimony offered by the prosecution was not impeachment of the actual answers given by Theresa Porrey during her videotaped testimony; (4) the putative "impeachment" testimony was easily susceptible of undermining the credibility the jury placed upon Theresa Porrey's relevant trial testimony as my alibi witness; and (5) the hearsay "rebuttal" testimony could easily have been interpreted by the jury as being a substantive fact not established during the prosecution's case-in-chief. At the very least, this objection, a subsequent voir dire, and motion for mistrial, would have preserved the issue for appellate review. As an appeal is only as good as the objection presented at trial, Mr. Leinster's failure to object clearly precluded any further review of these issue.

For the forgoing reasons and authorities, I respectfully submit that Mr. Leinster's failure in this regard denied me

effective assistance of counsel which severely prejudiced my defense presented of mistaken identity.

VIII.

I 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 rebuttal testimony of my alibi witness, Theresa Porrey.

As I have previously mentioned, Theresa Porrey's ill health precluded her from traveling to the courtroom to testify in person, so her critical exculpatory testimony was recorded the day before my trial on videotape, and then it was played in its entirety to the jury at trial. Thus, securing a second, videotape containing rebuttal testimony from Mrs. Porrey was required to rehabilitate her after the apparent "impeachment" by the prosecution's aforementioned presentation of extrinsic evidence of a prior inconsistent statement on a collateral matter.

I submit that under the circumstances of this case, Mr. Leinster should have requested a brief recess in order to go record the rebuttal testimony of Theresa Porrey, which would have given her an opportunity to explain the alleged prior inconsistent statement, or again deny ever making the statement. Mr. Leinster's failure in this matter directly resulted in the prosecution's rebuttal testimony to go uncontroverted, allowing the jury to reasonably infer that Theresa Porrey was lying during her original videotaped testimony, when, had Mr. Leinster given her the opportunity to explain the inconsistent statement, she very well have admitted making it upon further reflection, or she could again deny making the statement.

Under the facts and circumstances known to Mr. Leinster, specifically that this case was going to boil down to the

credibility of the witnesses, i.e. Theresa Porrey's alibi testimony versus Scott Barfield's identification testimony, Mr. Leinster's failure to secure Theresa Porrey's rebuttal testimony was not reasonable, and can reasonably be presumed to have affected the weight and consideration the jury place on her credibility.

IX.

I was further denied effective assistance of counsel by Mr. Leinster's failure to object to the prosecutor presenting argument (1) bolstering the victim's credibility and testimony; (2) improperly asserting hearsay testimony as substantive inculpatory evidence of guilt; and (3) improperly begging the jury for "justice." Under the facts and circumstances known to Mr. Leinster at the time, his failure to object was not reasonable and, as detailed below, highly prejudiced to my defense of mistaken identity, thereby rendering the result of my trial fundamentally unfair and the result unreliable.

Mr. Leinster failed to object to the prosecutor's improper argument bolstering the witnesses credibility and believability of their testimony, such as the following:

> 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 and 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 is 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 it's not Kevin Herrick.

(R. 306).

As the prosecutor continued to improperly argue, Mr. Leinster

continued to fail to make an objection:

> 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 was 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 prosecutors earlier argument, that Mr. Leinster failed to object to:

> ...and sometimes, for good reason, our system does not have a great reputation and people don't have a 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 was have to live with it for a year and a half.
>
> The victim's come in here and they're treated as if they're on trial being victimized again plus he was just darn right angry.

(R. 278).

I submit that the foregoing argument made by the prosecution was improper and Mr. Leinster should have made an appropriate objection and then moved for a mistrial. His failure to do so permitted the jury to be improperly contaminated with highly prejudicial argument which it should not have been exposed to that can reasonably be said to have affected their deliberations and verdict, and would

not have been before them for consideration, had he timely voiced an appropriate objection.

X.

I was further denied effective assistance of counsel by Mr. Leinster's failure to object to the prosecutor's improper argument falsely asserting that Theresa Porrey had testified falsely because she feared a non-existent law suit.

Mr. Leinster failed to object to the prosecutor's improper argument falsely asserting that Theresa Porrey had testified falsely because she feared a non-existent law suit. I submit that the prosecutor's argument was not a fair comment upon the evidence advanced at trial and, as such, was improper, and under the facts and circumstances of this case were highly prejudicial to my defense of mistaken identity because the argument itself tended to impeach my alibi witnesses credibility when there otherwise was no basis for impeachment. 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 that 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 an 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. So she has an interest in that too. She wants to protect him and she wants to protect herself.

And we saw how she 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 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).

This argument is not a fair comment upon the evidence advanced at trial. In fact, the prosecutor's incredulous allegations are unequivocally refuted by the trial record. The only testimony regarding Theresa Porrey being afraid of being sued was initiated and expounded upon by the prosecutor himself during cross-examination:

PROSECUTOR: Let me ask you this. Were you ever afraid perhaps they might sue you because Kevin was living with you?

PORREY: 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 bringing up this suing -- I'm worried about it now -- you've got me scared.

(Defense Exhibit #1) (emphasis added).

At no point during her testimony did Theresa Porrey state that she is or was scared of being sued by Scott and Cheryl. Theresa Porrey expressly stated that she was not afraid of being sued because she was insured. Further, she even testified, as did Scott and Cheryl, that they never even threatened to sue her. It is clear that the prosecutor, in an attempt to discredit Theresa Porrey's exculpatating testimony, created his own bias, and literally scared Theresa Porrey with the possibility of her being sued, where she otherwise had no fear of it and clearly didn't fabricate or "embellish" her testimony to protect herself.

The prosecutor's argument to the jury was clearly improper, and when considering the fact that no physical evidence was introduced by the prosecution to support their theory of events, and, this case came down to the credibility of the alibi testimony of Mrs. Porrey versus the identification testimony of Scott Barfield, Mr. Leinster should have voiced an objection, moved for a curative instruction or a mistrial.

Under the facts and circumstances, his failure to object denied me effective assistance of counsel in such a manner as to adversely affected the outcome of my trial which allowed the jury to reasonably infer that Theresa Porrey was afraid of the non-existent law suit.

XI.

I was further denied effective assistance of counsel by Mr.

Leinster's failure to make a motion to suppress the contaminated testimony of Scott Barfield and Cheryl Hagen 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 that convinced these witnesses that I must be the assailant.

On July 14, 1989, the Largo Police Department was called to 4016 Audubon 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 to have been stabbed in the chest area during a physical confrontation with the man. During the police's investigation, as I have previously stated, Scott did not give any statement as to who he believed the man to be, and claimed the man left the area a vehicle of which he memorized the license plate number of. Scott was transported to the hospital.

Cheryl gave a general description of the assailant as being heavy set, with long curly, fluffy hair, wearing a dark blue or black T-shirt with no sleeves. She further stated that based upon the specific characteristics she observer, she believed the assailant could possibly be her next door neighbor, me, however, she candidly stated that she just couldn't be sure. The police completed their investigation and left the scene without making an arrest.

After being treated and released from the hospital, Scott called the police and gave a positive identification of the assailant as being me, so the police returned to the triplex and placed me under arrest. While do so, they conducted a search of my bedroom and personal property. They seized items they believed might have been used in the crime, or more specifically, the police recovered a red t-shirt with no sleaves, a pair of blue jeans, a

two-inch (2) pen knife, and a forty-four caliber pistol.

After taking all of those items into custody, the police informed both victims that they found inculpatory evidence corroborating Scott's positive identification, namely, Scott and Cheryl were told (1) my bloody fingerprints were found on their front door; (2) a bloody knife was found in my bedroom; (3) a pair of bloody pants were found in my bedroom; (4) a loaded firearm was found under my bed; and (5) I was a convicted felon.

I submit that under the facts and circumstances of this case known to Mr. Leinster, Scott and Cheryl's testimony should have been the subject of a motion to suppress, as the erroneous information irreparably contaminated them as prosecution witnesses.

The prejudice I suffered from the police's unethical disclosure of false information of such an inculpatory nature was so sever that under no circumstance could I or would I ever be able to get a fair trial with these witnesses testifying, simply because with the complete lack of any physical or tangible evidence to support or corroborate Scott's identification testimony, this case simply would come down to the credibility of the witnesses, and Scott and Cheryl's credibility had been irreparably infected and contaminated by the false information disclosed to them by the Largo Police Department. The false information could have no other effect then to convince both Scott and Cheryl that I had to be the assailant. Any doubt they may have had as to the true identity of the assailant was utterly destroyed when the police told them the bloody weapon use during the attack and some bloody pants were found in my bedroom, when they really were not.

This misinformation installed a completely unwavering conviction that I must be the assailant, infecting any probative value their testimony could have. For example, from the night of the crime, continuing through my trial, fifteen months later, Scott

and Cheryl truly believed that the information the police told them was in fact true. This misinformation manifestly caused such irreparable contamination to the victim's mentation, that their certainty and demeanor expressed before the jury as they testified was the product of the police misconduct, not an actual representation of what their certainty may have been had they not been irreparably infected.

As the trial record shows, both Scott and Cheryl openly admit the police fed them this misinformation:

> MR. LEINSTER: Isn't one of the reasons that you believe it's Mr. Herrick that did this is because you believe they found the weapon that was used on you?
>
> HAGEN: 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 a 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 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).

Scott also admitted to being contaminated by the misinformation, but, unfortunately, his contamination was so deep after fifteen months of believing it to be true, any attempt to explain or confront him with the truth resulted in his complete denial:

MR. LEINSTER: 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?

BARFIELD: 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 believe 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).

Further, a fact evident of their contamination is the fact that at no point prior to their deposition and trial testimony does Scott or Cheryl ever state that they though or suspected a firearm was or might have been involved in the crime. However, after being told

that a firearm was recovered from my bedroom, along with the bloody knife and bloody pants, and fifteen months for the misinformation to root itself into their minds, the non-existent evidence, and contamination become apparent. Cheryl testified at trial:

> PROSECUTOR: What happened next?
>
> HAGEN: 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 telling Cheryl that a gun was found, in addition to the knife and bloody pants, she never mentioned anything about seeing or suspecting that a firearm might have been present. Clearly her testimony in this regard is subconscious evidence of the police's misinformation working upon itself for fifteen months, and the witness actually believing the information to be fact. Unfortunately, the misinformation also effected Scott's testimony. He testified as follows:

> MR. LEINSTER: 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?
>
> BARFIELD: 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

car] because there might be a firearm in the car.

(R. 181).

I submit that both Scott and Cheryl's thought and testimony were so unbelievably infected with the police's misinformation that their entire demeanor, expression and testimony exhibited before the jury was the product of irreparable contamination caused by the police's misinformation and any probative value their testimony might have contained prior to the contamination was completely destroyed.

Under the facts and circumstances known to Mr. Leinster in this matter, he should have moved the court to suppress their testimony from the jury's consideration as they had been irreparably contaminated.[28] 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 Scott and Cheryl's testimony. And, considering the fact that this case came down to the credibility of the witnesses, it's admission deprived me of my constitutional right to a fair trial, in addition to Mr. Leinster's failure to suppress denying my effective assistance of counsel.

XII.

I was further denied effective assistance of counsel by Mr. Leinster's failure to timely file a motion for new trial.

On October 3, 1990, I was convicted following a two day jury

[28]It must be stressed that in Mr. Leinster's motion for new trial, which, remarkably, was untimely filed (See Issue XII), the second ground raised is that, as a matter of law, the conduct of law enforcement in this case renders the prosecution fatally defective as a denial of due process.

trial. The court record affirmatively reflects that Mr. Leinster did, in fact, file a motion for new trial, but, in it's order denying my first motion for post conviction relief, this Court determined that the motion for new trial was untimely filed by Mr. Leinster on October 29, 1990, some 21 days after the jury's verdict.

I submit that Mr. Leinster's failure to timely file the 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 sufficient to withstand a motion for judgment of acquittal, but the manifest weight of the evidence does not appear to support the jury's verdict, and is so tenuous as to warrant a new trial. It is well settled that this unique review in available only through a timely motion for new trial. This review enables the trial court to act as a safety valve, a "seventh" juror, with the responsibility of weighing the evidence and considering the credibility of the witnesses while entertaining the motion.

In my case there is a reasonable likelihood that had Mr. Leinster timely filed my motion for new trial as he had lead me and my family to believe, the motion would have been granted, since the case presented against me tended to be refuted by my alibi witness Theresa Porrey, as well as by the two conflicting identifications of Scott and Cheryl. No physical evidence was ever found or introduced to link me to the crime. In fact, under the facts of this case the mere absence of physical evidence indicative of guilt is exculpatory evidence that goes against the jury's unreasonable verdict. Furthermore, the conduct of the Largo Police Department informing Scott and Cheryl that they had found the previously mentioned, but non-existant, incriminating evidence in my room was fatal to the prosecution and denied me a fair trial, because it could have no other effect then to irreparably contaminate and

infect both witnesses' testimony. This was highly prejudicial as the case came down to the credibility of the witnesses, most of whom lacked credibility in critical areas.

Had Mr. Leinster timely filed the motion for new trial, supplemented the motion with a detailed argument at a proper hearing, it is reasonable to conclude that the motion would have been granted under 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.[29]

XIII.

I was further denied effective assistance of counsel by Mr. Leinster's failure to object to the use of a fundementally defective sentencing guidelines scoresheet which did not include or reflect 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 its consideration based upon my composite score.

The sentencing guidelines were created to set forth a uniform standard to guide the sentencing judge in the decision-making process. Fla.R.Crim.P. 3.701(b). The sentencing guidelines ranges include both *recommended* and *permitted* ranges. Fla.R.Crim.P. 3.701(d)(8). The *recommended* ranges are assumed to be appropriate for the composite score of the offender. The *permitted* ranges,

[29]While reviewing this claim, if the court finds that Mr. Leinster's failure to timely file the motion for new trial denied me effective assistance of counsel, I submit that the court should either (1) grant me a new trial upon the basis that ineffective assistance having been shown, or (2) appoint counsel to prepare and file a motion for new trial, and then submit an appropriate argument in support thereof. In addition, due to the complexity of my case, I would request that sufficient time be granted for a new attorney to become acquainted with the case.

however, allow the sentencing judge some additional discretion when the particular circumstances of a crime make it appropriate to increase or decrease the recommended sentence without a requirement of written justification to do so. Fla.R.Crim.P. 3.701(d)(8).

In my case, the court incorrectly calculated my composite sentencing guidelines score while utilizing a fundamentally defective sentencing guidelines scoresheet. (R. 71-72). This form had been implemented for the sentencing guidelines originally effective on July 1, 1984, at time in which no *permitted* ranges existed. By the time I was sentenced on January 4, 1991, however, the Florida Supreme Court had already approved an entirely new sentencing guidelines scoresheet which included both *recommended* and *permitted* ranges.[30] The new scoresheet expressly requires the calculation of both *recommended* and *permitted* sentences, and then requires an indication of the actual sentence imposed by the sentencing judge. A *permitted* sentence on the new scoresheet would appear to be a departure sentence on the scoresheet used to sentence me.

The transcripts of my sentencing proceeding show that neither Judge Downey, the prosecutor, or Mr. Leinster ever determined or discussed what my *permitted* sentencing range was, and incorrectly believed (relying on the fundamentally defective scoresheet) that a life sentence was the only sentence available under sentencing guidelines. However, under the *permitted* range on the new scoresheet I could have received a substantially lesser sentence of twenty-seven (27) to forty (40) years, which is definately

[30]See In re Florida Rules of Criminal Procedure 3.701 and 3.988, 566 So.2d 770, 790 (Fla. 1990); Fla.R.Crim.P. 3.988(j)(1991); Also see Florida Rules of Criminal Procedure re: Sentencing Guidelines, 522 So.2d 374, 375 (Fla. 1988)(expanding discretion of sentencing judges by implementing "permitted ranges").

something that should have been considered by the Court, since the sentencing scheme in Florida mandates that if you receive a life sentence under the sentencing guidelines you are, in fact, sentenced to die in prison.

Mr. Leinster, as defense counsel, manifestly had a duty to insure that a proper sentencing guideline scoresheet was utilized during my sentencing. However, he failed to object to the fundamentally flawed, outdated score sheet being used, never bringing the actual "permitted" sentencing ranges to the Court's attention. Thus, Mr. Leinster's failure to object to the old scoresheet, which clearly omitted any "permitted" sentencing ranges, coupled with his failure to inform the Court of those "permitted" sentencing options, directly resulted in me receiving a life sentence when I otherwise could have been sentenced to a term of years had the Court been properly informed and considered the ramifications of effectively imposing a death sentence.

In sum, Mr. Leinster's actions fell far below the actions of a reasonably competent attorney handling a case of similar fact and circumstances, and denied me effective assistance of counsel.

XIV.

I was further denied effective assistance of counsel by Mr. Leinster's failure to examine tangible, exculpatory evidence, and interview or depose prospective prosecution witnesses who he was expressly notified possesses relevant evidence to the offense charged, or to any defense of the person charged. Specifically, Mr. Leinster failed to investigate and present the exculpatory test results of microanalysis testing conducted by the Florida Department of Law Enforcement (FDLE) on hair fibers recovered from the crime scene and those I voluntarily submitted after my arrest.

Mr. Leinster was aware of the fact that when I was arrested on

July 15, 1989, at the request of officers Joiner and Crosby, I voluntarily gave hair samples to be compared with evidence recovered from the crime scene; I knew that I had not committed this crime so I knew that there couldn't be a match.

Under the facts and circumstances known to Mr. Leinster with regards to the complete lack of any physical evidence to link me to this crime, he had to have known that the results of the FDLE's microanalysis testing would play a critical role in establishing my defense at trial, e.g. a positive match would be fatal to my defense of mistaken identity, however, on the other hand, the return of negative test results would be a crucial exculpatory factor which the jury could consider supporting my reasonable defense of mistaken identity.

On March 26, 1990, an assistant state attorney served Mr. Leinster with an "Additional Witness List and Acknowledgment of Additional Tangible Evidence," which expressly advised him that Karen Ostman and Marriane Hildreth, both employees of the Florida Department of Law Enforcement, and FDLE report number 89-07-3-4303, "may be relevant to the offense charged or to any defense of the person charged with respect thereto." Additionally, on or about June 1990, Mr. Leinster was served with an "Additional List of Witnesses," expressly listing Steven Bentley, also an employee of the Florida Department of Law Enforcement, and, on June 13, 1990, he was further notified of "Additional Tangible Evidence," expressly listing "Examination Results (2 pages)."

Being otherwise fully advised that (1) hair was, in fact, recovered from the crime scene; (2) I voluntarily gave hair samples to be compared with the hair samples that were recovered; (3) a micro-anaylis hair comparison had been conducted; and (4) the FDLE technicians who performed the comparison, and the results thereof, were listed by the prosecution as being additional witnesses, and

tangible evidence existed which may be relevant to the offense charged, or to the defense of the one charged (emphasis added), Mr. Leinster took no reasonable action to discern whether the witnesses and tangible evidence was relevant to my defense, and if so, whether it was inculpatory or exculpatory in nature.

Mr. Leinster did not interview or depose any of the witnesses listed by the prosecution. He did not obtain a copy of FDLE report number 89-07-3-4303. Instead, Mr. Leinster told me that the test results were "inconclusive," which, as explained below, was anything but the truth.

Had Mr. Leinster adequately or effectively investigated the results of FDLE's micro-analysis testing, he would have learned that the witnesses and test results were clearly exculpatory, and he could have used this evidence at trial to help establish my defense of mistaken identity: contrary to Mr. Leinster's factual misrepresentation, FDLE report number 89-07-3-4303 expressly stated:

> No hairs microscopically like those contained in Herrick's known hair were found in the debris recovered from the bed sheets (1A).

(Exhibit C).

Thus, had Mr. Leinster adquately and effectively investigated the exculpatory test result and then presented them to the jury for their consideration, there would have been competent, substantial evidence which the jury could reasonably conclude proved my complete innocence, or at least created a reasonable doubt as to my guilt, which would have affected their verdict. Under the facts and circumstances known to Mr. Leinster at the time of my trial, his failure to investigate the exculpatating test results was fatal to my defense of mistaken identity, and directly precluded me from

presenting critical exculpatory evidence and testimony which necessarily would have created a reasonable doubt of my guilt in the minds of the jury. If not for his failure, there is a reasonable probability that the verdict returned would have been different.

XV.

I was denied effective assistance of counsel based upon the overall, cumulative effect of Mr. Leinster's above-stated errors and omissions. Whether viewed individually, or collectively, the foregoing errors and omissions certainly renders Mr. Leinster's representation of me during these criminal proceedings ineffective as counsel, as contemplated by the Sixth and Fourteenth Amendment to the United States Constitution.

13. If any grounds listed above in 12 were not previously presented on your direct appeal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

Although my direct appeal was, unfortunately, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), absolutely none of the allegations of denial of effective assistance of counsel could have been presented during my direct appeal because of the well-established, general rule that the question of trial counsel's effectiveness cannot be raised for the first time on an appeal from an adverse judgment, but rather must be presented initially to the trial court by way of a motion for post-conviction relief.

14. Do you have any petitions, application, or motions now pending in any court, either state or federal, as to the judgment under attack?

Yes ——— No XXXXX

15. Give the name, address, and telephone number, 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.

(b) At arraignment and plea: Same attorney as above.

(c) At trial: Roy Edward Leinster, P.A., 1302 East Robinson Street, Orlando 32801-2178, (407) 422-3937.

(d) At sentencing: Same attorney as above.

(e) On Appeal: Allyn Myers Giambalvo, Assistant Public Defender, Criminal Courts Complex, 5100 144th Avenue North, Clearwater, FL 34620, (813) 530-6594.

(f) In any post-conviction proceedings:

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

WHEREFORE, I pray that this Honorable Court will render an order:

1. Granting an evidentiary hearing in order to receive the sworn testimony and evidence which is outside of the record in this case conclusively demonstrating that I am entitled to post-conviction relief;

2. Granting me the assistance of a skilled advocate at an evidentiary hearing, and leave being granted, if requested, for the amendment this pro se motion to include any additional facts and arguments discovered following a careful review of this case by counsel;

3. Granting the services of an investigator to assist counsel or myself (1) discover whereabouts of the witnesses and evidence conclusively demonstrating that I am entitled to post-conviction relief, and (2) secure said testimony and evidence for presentation

at an evidentiary hearing;

4. Granting me a new trial based upon the denial of effective assistance of trial counsel, or, alternatively, a new sentencing hearing with consideration of the "permitted" sentencing options under the sentencing guidelines based upon my correct composite score; or

5. Granting me such other and further relief as this Court deems just and proper.

Respectfully submitted,

KEVIN RICHARD HERRICK #240583 MN#614
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

UNNOTARIZED OATH

UNDER THE PENALTIES OF PERJURY, I declare that I have read the foregoing motion and that the facts stated in it are true.

EXECUTED this ——— day of ————————————, 19———.

————————————————————

KEVIN RICHARD HERRICK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished by mail to the Honorable Bernie McCabe, State Attorney, P.O. Box 5028, Clearwater, FL 34618-5028, this 4 day of January, 19 96.

————————————————————

KEVIN RICHARD HERRICK #240583 MN#614
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072