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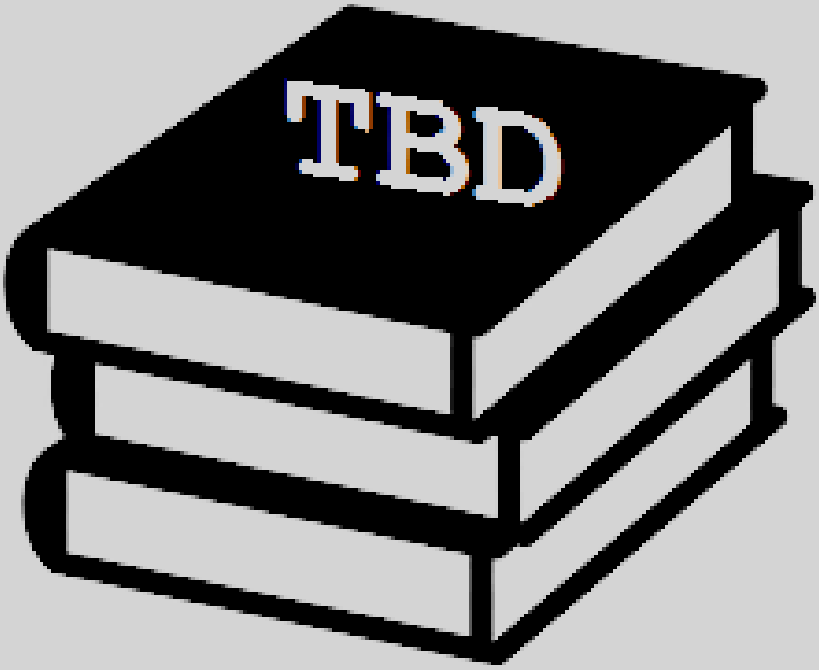

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IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL
2011 JUL -8 AM 10:09
CLERK, SUPREME COURT
BY

SAMUEL J. GARDNER,
Petitioner,

v.

Case No. SC11-1415
L.T. Case No. 86-15197

WILLIAM N. MEGGS,
JACK L. POITINGER,
STATE OF FLORIDA,
Respondents.
_____/

PETITION FOR WRIT OF QUO WARRANTO

Pursuant to Fla. R. App. Proc. 9.100, Samuel J. Gardner, pro se, respectfully petitions the Court for a Writ of Quo Warranto directed to William N. Meggs, State Attorney for the Second Judicial Circuit of Florida, to show cause within (30) days as to why this petition should not be granted.

Petitioner, Samuel J. Gardner, D.O.C. # 108632, avers and shows the following as cause for the above styled petition to be granted:

JURISDICTION

This Court has jurisdiction to issue a Writ of Quo Warrant under article V, section 3 (b)(8) of Florida Constitution; the Bill of Rights of Article I, U.S. Constitution and Fla. R. App. Proc., Rule 9.030 (a)(3).

A Writ of Quo Warranto is the appropriate remedy to challenge actions that are beyond the authority granted to state officials. See Carey v. State, 349 So. 2d 820 (Fla. 1977). The acts of the above named Respondent as stated herein caused

the Petitioner to suffer prejudicial injury and deprived Petitioner of due process of law constituting additional injury of deprivation of liberty. Although the District Court of appeals and circuit court also have a general constitutional power to issue a Writ of Quo Warranto, this petitioner in this cause is properly filed in this Court:

The Supreme Court "shall" have jurisdiction to issue writs of Quo Warranto to state officers and state agencies. William N. Meggs is a duly elected state attorney, in and for the second judicial Circuit of Leon County, Florida, and as such, appointed or designated Jack L. Poitinger to act as assistant state attorney, whom acting under colors of office, did file information charging the Petitioner with a Capitol offense of Sexual Battery contrary to section 794.011 (2), Florida statutes on May 15, 1986: (case no. 86-1709 CF) Petitioner avers that Jack L. Poitinger committed intentional fraud upon the Circuit court in filing the aforesaid information because Jack L. Poitinger was not qualified to act as state's attorney, not having been an active member of the Florida Bar the required (5) years and therefore could not be lawfully designated by State Attorney William N. Meggs to act as State's Attorney. Wherefore, due to the foregoing reasons, jurisdiction to issue a Writ of Quo Warranto lies in the Supreme Court. See, Smith v. Brummer, 443 So. 2d 957 (Fla. 1984)

The Court "shall" take judicial notice:

STATEMENT OF THE CASE:

Jack L. Poitinger, acting as State Attorney for William N. Meggs, duly elected State Attorney for the Second Judicial Circuit of Florida, Charged that in Leon County, Florida, the above-named Petitioner on or about an unknown date between the 29th day of April 1982 and the 1st day of February 1986, inclusive, did unlawfully commit a Sexual Battery upon [redacted] D.O.B. 4/29/75, a person less than twelve years of age, by penile and/or digital penetration and the Petitioner was eighteen years of age or older, contrary to section 794.011 (2), Florida Statutes.

The Petitioner proceeded to trial by jury on the charge filed in Information by Jack L. Poitinger, who also was the prosecutor at Petitioner's trial, and was convicted as charged in Information by the jury on August 20, 1987.

The Circuit court Judge Honorable Judge McClure, adjudicated the Petitioner guilty and imposed a natural life sentence with a mandatory-minimum of (25) years in prison and retained one-third jurisdiction of Petitioner's sentence.

A timely notice of appeal was filed and direct appeal taken to the district court of appeal, First District of Florida. Result: affirmed. See Gardner v. State, ____ So. 2d ____ (Fla. 1st DCA 1998)(June 23, 1988)(Case No. 87-998)

STATEMENT OF THE FACTS

The Petitioner was seized, arrested and imprisoned without due process of law under color of office of State Attorney and was held accountable for an alleged capital crime without the proper party named or designate in the filing of the charging document, to wit: Information filed by assistant Sate Attorney Jack L. Poitinger, and without an indictment for the Capitol offense rendered by a Grand jury.

Due to the unlawful filing of the Capitol Offense by Jack L. Poitinger, who legally could not act as State's Attorney because of Florida Bar requirement of having to be an active member of Florida Bar for a period of (5) years prior to designated to act as, or in behalf of State attorney, which excluded Jack L. Poitinger from being a designated assistant State Attorney, having been an active member of Florida Bar for only two years, the Circuit Court in this cause lacked both personal and subject matter jurisdiction to try, convict, and sentence this Petitioner to a natural life sentence with a mandatory-minimum (25) years and retain jurisdiction upon one-Third of Petitioners sentence. Jack L. Poitinger, an non-elected assistant State Attorney, was not designated to act as State attorney in Petitioner's case No. 86-15196 and failed to secure a formal, sworn to, and signed Information from William N. Meggs, the State attorney for the Second Judicial Circuit of Leon County, Florida wherein Petitioner was charged, tried by jury,

convicted and sentenced. Therefore, and Information that failed to bear the true name and signature of State Attorney William N. Meggs, and placed into evidence in the Court of record, resulted in a Constitutional violation of Petitioner's rights to due process of law.

Petitioner did not waive constitutional rights to due process of law requiring a valid information being filed prior to trial, or at any time during trial proceedings, thus, the prosecution of Petitioner by an unlawful charge in a null and void Information constituted fraud upon the Court by Jack L. Poitinger and as such, violated Petitioner's Fourth, Fifth, Sixth, and Fourteenth Amendment rights of U.S. Constitution, section 10 D.R. And Article I, Section 15 of Florida Constitution, and section 904.01, Florida statutes. Petitioner invokes the jurisdiction of the United States Constitution (1789)(E), and in accord with the Bill of Rights, Article I.

This Petition is timely filed as there is no time limit when the trial court was without subject matter jurisdiction.

Petitioner was initially taken into custody by the Leon County police and Miranda rights given to petitioner were legally insufficient because police failed to advise Petitioner of Constitutional rights to have an attorney present at all times during interrogation of Petitioner by police, therefore, incriminating statements made to police by Petitioner were inadmissible as fruit of the poisonous tree and should not have been allowed to be used as evidence in Petitioner's trial.

While Petitioner was being held in custody at the Leon County Jail April 10, 1987, the State's Attorney submitted a (30) year plea offer to Petitioner's counsel in exchange for a guilty plea by Petitioner.

Petitioner's counsel, Baya Harrison, allegedly conveyed the State's (30) year plea offer to Petitioner via U.S. postal mail but Petitioner never received the plea offer and was not aware of the plea offer prior to trial. Several years after Petitioner had been sentenced and in prison serving a life sentence, Petitioner requested a friend, Mr. Bill Collins, to send some legal documents that Bill Collins was keeping in his care and upon Petitioner receiving the legal documents, Petitioner discovered the State's plea offer.

On July 20, 1987, assistant State Attorney Jack L. Poitinger was granted leave to amend the Information by the trial court because the trial court was without authority to proceed to trial of Petitioner upon the original Information filed by Jack L. Poitinger.

Jack L. Poitinger was not a lawfully designated assistant State Attorney and is not shown to have any authority to act as State Attorney pursuant to section 10 D.R. of Florida Constitution, to use an Information as an accusatorial document to charge a Capitol crime. Assistant State Attorney Jack L. Poitinger prosecuted Petitioner using false information and testimony of a single child that was inconsistent, ambiguous and in conflict with dates charged in information that

offense allegedly occurred. The perjured testimony of alleged victim, [redacted] was knowingly and intentionally used by Jack L. Poitinger to obtain the conviction and constituted fraud upon the court. The lower tribunal erroneously instructing the jury that digital Capitol battery could be established by State's proof of union, denied Petitioner due process of law.

Petitioner's trial counsel was ineffective in his failure to investigate Petitioner's case history and failing to preserve or proceed with the motion to discharge Petitioner from custody that was filed by counsel Baya Harrison in court of record on March 18, 1987.

Therefore, Petitioner is currently being illegally detained in the Florida Department of Corrections located at Hamilton Corrections Institution, 11419 Southwest County Road #249, Jasper, Florida. 32052, in violation of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment United States Const.

Nonetheless Petitioner has filed multiple unsuccessful motions/ petitions in the lower tribunal whereas been prohibited from filing any further petitions absent counsel.

SUMMARY ARGUMENT:

A court must affirmatively show proof of jurisdiction and serve proper process information upon proper parties to maintain jurisdiction over the action.

Jurisdiction over subject matter: Criminal jurisdiction involves concepts of

subject matter jurisdiction and personal jurisdiction.

Indeed to try a person for the commission of a capital crime/capital offense, a trial court must have both personal jurisdiction over the defendant and subject matter jurisdiction. Encompasses those matters upon which a court has power to act, and refers to the court's authority to determine a particular kind of case, not merely the particular case then occupying the court's attention, while personal jurisdiction deals with the authority of a court to bind the party's to action.

The term jurisdiction over the subject matter means authority of the court to hear and determine the class of action to which the one adjudicated belongs and authority to hear and determine a particular question which it assumes to determine.

Jurisdiction cannot be presumed in any court, even in preliminary stages pursuant to United States v. Chiarito, 69 F. Supp. 317 (D 1946); nor no sanction can be imposed absent proof of jurisdiction Standard v. Olesen, 98 L. Ed 1151 74 S. Ct. 768 (1954).

"Whether the error is one that is procedural, or one caused by the lack of one or more of the officers of the court."

Mr. Jack L. Poitinger committed fraud, according to § § 382.009 (2) Florida Statute, causing Petitioner to suffer an unconstitutional loss of liberty without due process of law. (Article 1, section 9, Florida Constitution), and is being illegally

detained and his remedy is found under Article 1, sections XIII and XXI of the Florida Constitution.

Pursuant to Miranda v. Arizona, 384 U.S. 116, 16 L. Ed 2d 694, 86 S. Ct. 1602 (1966). Where rights are secured by our constitution are involved; There can never be no rule making or legislation which abrogates them.

Petitioner's attorney rendered ineffective assistant of counsel when he negated to adequately convey the State's plea offer.

Mr. Jack L. Poitinger allowing false information and testimony to go uncorrected constitutes fraud on the court.

Fraud on the court by Mr. Jack L. Poitinger deserves no protection and due process requires that every opportunity to expose fraud and obtain relief from it be given. Petitioner now relies on this court decision. In Re, Booker v. State, 503 So. 2d 888 (Fla. 1987).

Time and Place: This provision is consistent with present Florida Law. See Morgan v. State, 51 Fla. 76, 40 So. 2d 828 (1906). As to time, see Rimes v. State, 101 Fla. 1382, 133 So. 550 (1931).

Pursuant to rule 3.140 (g) signature, oath and certification, information: section 10 D.R. Florida Constitution: Information must be under oath of prosecuting attorney of the court, in which the information is filed pursuant to Article V Section 9(5) Florida Constitution, and Florida Statute, § 906.04, citing

Champlin v. State, 122 So. 2d 412 (Fla. 2nd DCA 1960).

It should be noted here that the prosecutor's statements under oath is defined as to the purpose serve by the signature.

The Leon County State Attorney's office in the instant case # 86-15197 failed to secure a formal information, signed and sworn to by William Meggs, Bearing the true name and Bona-fide signature.

Whereas, no information signed and sworn to by the State Attorney or his duly designated assistant state attorney being placed into evidence in the court of record amounts to a constitutional violation of the rights to life, liberty and property without due process of law.

Mr. Jack L. Poitinger, a non-elected assistant state attorney, was without authority pursuant to section 10 D.R. Florida Constitution & §§ 904.01 Florida Statute to use information as an accusatorial writ to charge a capital crime.

Miranda warnings given Petitioner by Leon County Police was legally insufficient to fully advise him of his constitutional rights to have attorney present at all right times during custodial interrogations.

The misleadings and incorrect jury instruction given to the jury that digital sexual battery could be established by the state's proof of union.

POINT 1:

PETITIONER'S JUDGMENT IS VOID FOR LACK OF SUBJECT MATTER JURISDICTION BASED UPON UN-SWORN; UNAUTHORIZED PERSONNEL'S FAILURE TO ALLEGE A CAPITAL CRIME.

Petitioner was allegedly charged by way of information for capital crime.

On May 16th 1986, Mr. Jack L. Poitinger filed an information under case no: 86-15197;

> "That this Defendant is charged with in Leon County on or about an unknown date between the 29th day of April 1982, and the 1st day of February 1986. Inclusive did unlawfully commit a sexual battery upon [redacted] date of birth April 29th 1975. A person less that twelve years of age. By Penile and/or digital penetration, and the Defendant was 18 years of age or older. Contrary to section 774.011 (2) Florida Statute.

However, Mr. Jack L. Poitinger on July 20th 1987, moved the court for leave to amend and was granted over defense objection.

Mr. Jack L. Poitinger amended the State's information after jury selection prior to trial with written insert "union" of dates and elements with attempt to allege a crime under Florida Law.

Despite the State's fatal "union" the "and or about" phrase used in the original information was so vague as to allege a crime, which was material upon the defense statement of particulars for a more specific time frames in which the alleged sexual abuse occurred.

Moreover, the trial judge denying the defense's request for extension of time to prepare a defense for the State's amendment subjected Petitioner to prove dates and elements of the crime. Particularly when the information alleges "on or about an unknown date." Impermissibly shifts the burden of proof to Mr. Gardner. See, Spark v. State, 273 So. 2d 74-76 (Fla. 1973); & State v. Theriault, 590 So. 2d 993 (Fla. 5th DCA 1991). Especially when the jury found Mr. Gardner guilty based on the and/or union" an element of the amended information. Miller v. State, 918 So. 2d 415-416-17 (Fla. 2nd DCA 2006); Cochrane v. Florida East Railway Co., 107 Fla. 431, 145 So. 217, 218-19 (1932), is fundamental error. Inasmuch, a charging instrument is fundamentally defective if it is vague inconsistent and indefinite as to have misled the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of new prosecution for the same offense. See, Fulcher v. State, 766 So. 2d 243, 244 (Fla. 4th DCA 2000).

What is more, the State's Amended information was "un-sworn" to because if the information is amended in a matter of substance, such information "should" be re-signed' re-sworn; and re-filed with the clerk of courts. Alverez v. State, 25 So. 2d So. 2d 661, 157 Fla. 254 (Fla. 1946), and see, also Alba v. State, 541 So. 2d 747 (Fla. 3rd DCA 1989); State v. Clemont, 903 So. 2d 919-921 (Fla. 2005); Anderson v. State, 537 So. 2d 1373 (Fla. 1989); Thomas v. State, 714 So. 2d 626

(Fla. 5th DCA 1998).

Here, the state-amended information in this cause is whether the information charging Petitioner with the "capital crime/capital offense of sexual battery on the victim was fatally defective. M.F. v. State, 583 So. 2d 1383-87, (Fla. 1991).

There is a denial of substantive due process of law when there is a conviction on a charge not made in the information to sufficiently charge a crime, it must follow the statute, clearly charge each of the essential elements, and sufficiently advise the accused of the specific crime with which he is charged. Burrel v. State, 602 So. 2d 626 (Fla. 2nd DCA 1992); & State v. Gray, 435 So. 2d 816-818 (Fla. 1983).

At best, the amended information was no better than the original, because the written inclusive "union' was so fatally vague as to allege a crime, even/less a "capital crime," despite the fact that the amended information was not sworn to by the State Attorney 'Williams Meggs' nor his duly designated assistant, where the convicting court lacks / lacked subject matter jurisdiction, Martinez v. State, 981 So. 2d 449 (Fla. 2008).

> "Fundamental error doctrine applies in rare cases where jurisdictional error appears or where the interest of justice present a compelling demand for it's application." Id

Finally, a conviction on a charge not made by the indictment or information

even if valid under Florida Law, is a denial of due process of law, and is a defect that can be raised at any time and thus, can be asserted before trial; after trial on appeal or by way of habeas corpus. White v. State, 973 So. 2d 638 (Fla. 4th DCA 2008).

This issue must be reversed with direction to discharge Petitioner, immediately.

POINT 2:

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN HIS FAILURE TO CONVEY STATE'S PLEA OFFER TO PETITIONER.

Petitioner contends that his plea of "not guilty" was involuntary. Due to trial counsel's failure to adequately convey the state's plea offer of thirty (30) years denied him effective assistance of counsel, which was guaranteed under the Sixth Amendment United States Constitution.

It has been well-settled that Petitioner has a constitutional right to accept or reject a plea offer see, United States v. M^{c}kinnon, 995 F. Supp. 1404-1410 (M.D. Fla. 1998).

Herein the case at "bar," counsel deprived Petitioner of his substantive rights by trial counsel undermining the State's plea offer with his own personal aspiration of proceeding to trial in lieu of adequately informing his client of the plea. In any event, this omission to adequately inform the client of the State's plea offer,

subjected him to be sentenced to a greater form of imprisonment. See, Harris v. State, 974 So. 2d So. 2d 1149, 1150 (Fla. 3rd DCA 2008), particularly when Petitioner never gained receipt or knowledge of the letter until subsequent date upon request of legal documents kept in care of his friend when he learns a plea offer had been proffered by the State. See Cottle v. State, 733 So. 2d 963 (Fla. 1999).

Collectively, with Petitioner's contention that he did not gain receipt of the plea offer, he additionally concedes that he would have accepted the plea in lieu of going to a trial provided his counsel had adequately conveyed the plea offer to him see, Young v. State, 608 So. 2d 111, 112 (Fla. 5th DCA 1992); Ash v. State, 767 So. 2d 1260 (Fla. 1st DCA 2000); and Diaz v. United States, 930 F.2d 832, 835 (11th Cir 1991).

Furthermore, as evident by the record, trial counsel has conceded that the "Defendant"/ Petitioner's plea of guilty to a lesser included offense would earn him gain time making him eligible for release with fifteen (15) years, demonstrates counsel's inaction of a likelihood of Petitioner's understanding to accept or reject the plea, constitutes ineffective assistance of counsel. See, Eristma v. State, 766 So. 2d 1095, 1096 (Fla. 2nd DCA 2000); and also Johnson v. Duckworth, 793 F.2d 898, 902 (7th Cir 1986).

Petitioner's assertion of whether or not his counsel ever communicated the

plea offer to him had been predicated by the letter sent to Mr. Collins. The Petitioner was not adequately informed of the State's plea offer, and his trial counsel's failure to communicate the totality of said plea offer left Petitioner to accept or reject the plea with an incomplete reasonable understanding of his fate, where the outcome would have been different. Young, @ 112

The denial of counsel at critical stage of a criminal prosecution is always prejudicial. See, Davis v. Alabama, 596 F.2d 1214 (C.A. 5th Cir. 1979).

Counsel's failure to represent client zealously, failure to communicate effectively with client and failure to provide competent representation are all serious deficiencies' even when there is no evidence of "intentional misrepresentation or fraud found. See, Fla. Bar. v. Roberts, 689 So. 2d 1049 (Fla. 1997).

Thus, trial counsel's performance in the cause at "Bar", deprived Petitioner of the effective assistance of counsel guaranteed under Sixth, and Fourteenth Amendment of the United States Constitution a manifest miscarriage of justice. See Hunt v. State, 922 So. 2d 452 (Fla. 4th DCA 2005); Ross v. State, 901 So. 2d 252-254 (Fla. 4th DCA 2005); Adams v. State, 957 So. 2d 1183-87 (Fla. 3rd DCA 2006); (Quoting Baker v. State, 878 So. 2d 1236, 1246 n.1 (Fla. 2004).

Petitioner asserts that he's unlawfully detained in the Florida Department of Corrections due to the trial counsel failure to adequately inform him of State's plea

offer, and thus, deprived Petitioner the effective assistance of counsel guaranteed under Sixth Amendment. Warranted a writ of Quo Warranto. See, In Re Carneley v. Cochran, 123 So. 2d 249, 251 (Fla. 1960). Secure substantial justice, M^{c}Daniel v. State, 219 So. 2d 421 (Fla. 1969).

At the conclusion of this argument in general Petitioner has been tried and convicted of a void judgement, because trial counsel's performance fell outside of the wide range of competent counsels deprived Petitioner of the due process of law guaranteed. See, Cash v. Culver, 122 So. 2d 179 (Fla. 1960).

> "Where one is convicted of a crime as a result of deprivation of organic due process; judgment of guilt is void," and must be set aside in light of justice, even after appeal period has expired.

Because it has been well established principle of law binding upon the court to conduct an independent investigation to determine whether counsel's performance constitutes ineffective assistance of counsel that violates substantive due process, causing Petitioner to be unlawfully detained in the Florida Department of Corrections. See, State ex rel Price v. State, 128 Fla. 637, 175 So. 299 230 (1937).

Under this claim Petitioner is entitled to reversal because his trial counsel negated to adequately inform him of the State's plea offer, whereas, had his counsel adequately informed him of the plea offer, he would have accepted the

plea offer as opposed to going to a trial.

POINT 3:

WHETHER MR. JACK L. POITINGER ALLOWING FALSE INFORMATION AND TESTIMONY TO GO UNCORRECTED CONSTITUTES FRAUD ON THE COURT?

Petitioner contends that Jack Poitinger committed fraud on the court when he failed to correct the alleged victim's false statements known to be false concerning the crime charged.

"Sub judice" Petitioner was charged in the information filed and signed by Jack L. Poitinger that "on or about" an unknown date between April 29th 1982, and February 1st 1986. Petitioner, inclusive did commit a sexual battery on [redacted], D.O.B. 4/29/75 a person less than twelve years of age, by penile and/or digital penetration, and the Defendant was eighteen (18) years of age or older, contrary to Florida Statutes 794.011 (2).

In the present case, it had been well known by Jack L. Poitinger (prosecutor) that the victim [redacted] has a propensity to convey false testimony in which Petitioner was charged, tried, convicted and sentence without any physical evidence being presented.

The nodule described by the victim's physician was considered by national experts as a normal variance change of a hymen.

The victim testified in trial via sworn testimony that she turned nine and ten

years old in New York and when she came back to Florida, she turned eleven year old with her grandmother making it virtually impossible for Petitioner to have committed any of the sexual acts upon the victim, because she resided in New York when the alleged acts were supposed to have been committed. The petitioner's wife even wrote a letter to her sister-in-law dated February 3, 1985 stating where the alleged victim lived. The jury was allowed to hear the false testimony [redacted] even though the child was clearly shown to be in New York with her Grandmother in 1984 and 1985.

Assistant State Attorney Jack L. Poitinger knew that [redacted] testimony was false but failed to correct the perjured evidence. [redacted] was not in Florida at the time Petitioner allegedly committed the offense charged by Information, to wit: 1984 and 1985. Therefore, if the offense of Sexual Battery occurred in New York, the charges should have been filed in New York and subsequently jurisdiction in the State of Florida, Leon County Circuit Court is void. The alleged victim was born April 29, 1975 and turned seven on April 29, 1982 She testified that Petitioner did not commit the crime until she was nine and ten years old. During those years she was in New York. However, the information alleged that Petitioner committed the crime during April 29, 1982 through February 1st, 1986!

Nonetheless, on July 22nd 1987, the jury found Petitioner guilty as charged

for the crime of sexual battery, occurred between April 29th 1985. And February 1st 1986, of a child under twelve (12) by a person eighteen (18) years of age or older, due to Mr. Jack Poitinger's failure to correct the victim's testimony known to be false, constitute fraud on the court, see State v. Burton, 314 So. 2d 316 (Fla. 1975); State v. Glover, 564 So. 2d 191 (Fla. 5th DCA 1990); State v. Crews, 477 So. 2d 984 (Fla. 1985); Anderson v. State, 574 So. 2d 87-91 (Fla. 1991); Routly v. State, 590 So. 2d 397 (Fla. 1991); and Giglio v. United States, 405 U.S. 150, 153 (1972).

In Re State v. Burton, Supra, This court made clear "any orders; Judgment or decrees, which are product of fraud collusion, deceit, mistake etc., may be vacated, modified, opened or otherwise acted upon "at any time. Burton, supra, @ 138. However, the victim's mother did not move out of the Petitioner home until late August 1985 and the victim was still in New York.

However, the victim's testimony that the sexual acts committed by Petitioner against her when she was nine (9) and ten (10) was false, because she turned nine (9) and ten (10) years old in New York during the years of 1984 and 1985. Also turned (11) with her grandmother in Florida, also the victim's mother testified that her daughter was still living with her grandmother in 1985 and 1986 where the Petitioner was charged and convicted for, see trial transcripts.

In Re State v. Glover, supra, the Fifth District Court of Appeal has stated:

> A final order procured by fraudulent testimony against Defendant in criminal case deserves no protection, and

due process requires that Defendant be given every opportunity to expose fraud and obtain relief Glover, Id. @ 192-93.

Most importantly, the prosecution knew the victim's testimony was false, because she resides in New York with her grandmother when she was nine (9) and ten (10). When Petitioner is alleged to have committed these sexual acts.

Whereas the prosecution allowed this false evidence to go uncorrected, causing Petitioner to be convicted and sentenced to life in prison, constitutes a substantive due process violation, resulted in a manifest injustice.

In Re, Routly v. State, supra, he asserts the prosecutor knowingly allowed O'Brien to commit perjury at deposition and trial and failed to correct material false statements in violation of Giglio v. United States, 405 U.S. 150 (1972), and United States v. Bagley, 473 U.S. 667 (1985).

Under these cases the prosecutor has a duty to correct testimony he or she knows is false when a witness conceals bias against the Defendant through that false testimony. United States v. Meros, 866 F.2d @ 1309. If there is a reasonable probability that the false evidence may have afforded the judgment of the jury, a new trial is required i.e.... In the instant case at bar the dismissal of the information based on the due process clause of the Fourteenth Amendment to the United States Constitution; and Article 1, section 9 Florida Constitution; Cash v. Culver, 122 So. 2d 179 (Fla. 1960) (Where one is convicted of a crime as a result of deprivation or

original due process, judgment of guilt if void, and may be set aside at any time. Even after appeal period has expired). Especially when the victim testified she was in New York when Petitioner committed these sexual acts, and the prosecutor allowed the false testimony to go uncorrected constitutes denial of due process under Anderson v. State, 574 So. 2d 87-91 (Fla. 1991).

These acts of misconducts by Mr. Jack L. Poitinger's failure to correct material false testimony, constitutes a manifest injustice and fraud upon the court. See, Hunt v. State, 922 So. 2d 452 (Fla. 4th DCA 2006); Ross v. State, 901 So. 2d 252, 254 (Fla. 4th DCA 2005); Adams v. State, 957 So. 2d 1183, 1186-87 (Fla. 3rd DCA 2006); and Travelers Indem Co. v. Gare, 761 F.2d. 1549, 1551 (11th Cir 1985); Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 236, 244 (1944).

Fraud upon the court embraces only that species which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the Judicial machinery cannot perform in the usual manner it's impartial task of adjudging cases, that are presented for adjudication 761 F.2d @ 1551.

It's true in the present case, that the prosecution knew the victim's testimony was false, but allowed it to go uncorrected perpetrated fraud on the court, facilitating an information and conviction of Petitioner's life imprisonment, 574 So. 2d @ 91.

Although not soliciting Mr. Jack Poitinger's misconduct in allowing the

presentment. This omission is consistent with apparent legislative construction placed on this section, section 904.01 Florida Statute provides:

> "All Capital offenses shall be tried by indictment by a grand jury."

Not just because Petitioner may not be sentenced to death for capital sexual battery, pursuant to section 794.011 (2) Florida Statutes, does not mean the offense is not a capital offense that must be presented to a grand jury for an indictment.

Mr. Jack L. Poitinger's failure deprived Petitioner of fundamental due process of law under Article 1, section 9, Florida Constitution.

Mr. Jack L. Poitinger also failed to place the information under oath by the state attorney, William Meggs, violation of Article V, section 9, (5) Florida Constitution, which contains the same requirements concerning information's being filed by the prosecuting attorney in a criminal court of record.

This proposal also does not deviate from present Florida statutory law as found in section 906.04 Florida Statutes, which received judicial approval, see, Champlin v. State, 122 So. 2d 412 (Fla. 2nd DCA 1960).

The state attorney's statement under oath is defined as to the purpose served by the signature.

Therefore, a non-elected assistant state attorney statement under oath commits fraud upon the court and denied Petitioner a substantive due process of

law, resulted in manifest injustice.

A dismissal of a void judgment for want of subject matter jurisdiction.

Because where a judgment or decree is void as a matter of law, no discretion exist, but to give proper relief. See, Booker v. State, 497 So. 2d 957 (Fla. 1st DCA 1986); Jacobson v. Ross, 882 So. 2d 431 (Fla. 1st DCA 2004); and ;for personal jurisdiction, see, Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002).

The de novo standard review applies to an order on a petition to dismiss for lack of both personal and subject matter jurisdiction, State v. Clement, 903 So. 2d 919, 921 (Fla. 2005).

POINT 5:

> WHETHER THE LOWER TRIBUNAL COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY THAT DIGITAL SEXUAL BATTERY COULD BE ESTABLISHED BY THE STATE'S PROOF OF UNION?

The fact of this case are similar to those in Gill v. State, 586 So. 2d 471 (Fla. 4th DCA 1991), Gill involved allegations that the defendant digitally penetrated a young boy's anus. After a jury trial, the court gave the correct standard instruction for a digital penetration case, see Fla. Std. Jury Instr. (Crim) 167. However, the court also instructed the jury that union is an alternative to penetration and means coming into contact. During closing argument, the prosecutor indicated that the jury could find the defendant guilty if his finger penetrated or had union with the

victim's anus. The court held that the trial court's instruction to the jury was fundamental error because when coupled with the prosecutor's comments it misled the jury as to a required specific elements of the crime charge.

In the present case, the doctor's testimony confused the concepts of penetration and union.

The prosecutor in this case, like the prosecutor in Gill, stated that Petitioner would be guilty of sexual battery if even his fingers penetrated or had union with the victim's vagina. These are incorrect statements of law, rather than correct these mis-statements the court exacerbated the problem by reading an instruction that deviated from the standard instruction. The court instructed the jury that capital sexual battery was proven if state established that the finger of Defendant penetrated or had union with the vagina of the victim.

As in Gill this court should find there was a fundamental error in this case where the instruction itself was erroneous and where there were misleading comments made during the trial. Richards, 738 So. 2d 415.

Wherefore, Petitioner prays this Honorable Court granted de novo review for this cause and reverse for a new trial, where it is always necessary in light of justice, manifest miscarriage of justice a sure fact, and/or any other relief deemed just and proper within this court's authority.

POINT 6:

> WHETHER PETITIONER SUFFERED PREJUDICIAL INJURY FROM COURT'S ADMISSION OF HIS STATEMENTS TO POLICE ATTAINED UNDER CONSTITUTIONALLY DEFECTIVE MIRANDA WARNINGS?

Petitioner avers that the Miranda rights form used by the Leon County Police was not the effective and express explanation of the right to counsel required by Miranda.

Miranda requires a clear understandable warning from law enforcement officer that conveys all of a Defendant's rights, and only through such a warning is there ascertainable assurance that the accused was aware of his rights.

> In Miranda, supra, The Supreme Court states: "The right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. The court described the right to counsel warning which must be given:
> "We, hold that an individual held for interrogation must be clearly informed that he has the right to consult with lawyer and to have the lawyer with him during interrogation as with the [other] warnings. This warning is the absolute prerequisite to interrogation."

The Miranda warning form used in Petitioner's case read as follows:

1) You have the right to remain silent.
2) Anything you say can be used against you in a court of law.
3) You have the right to talk with a lawyer.
4). If you cannot afford a lawyer, one will be appointment to represent you before any questioning if you wish.

No where does the form advise Petitioner of his rights to have a lawyer present during the interrogation.

Miranda warnings that did not include the advisement of right to have lawyer present during questioning were inadequate to fully inform Petitioner of his constitutional rights, and error in trial court's admission of Petitioner's statements to police was not harmless. Pursuant to Miranda v. Arizona, 384 U.S. 436-471-72, 86 S. Ct. 1602, 16 L. Ed 2d. 694 (19660, & West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004).

The authority supporting the view that a Miranda warning which fails to advise of the gifted right to counsel during interrogation makes a confession inadmissible as a matter of law. See, United States v. Bland, 908 F.2d 471 (9th Cir 1990).

Wherefore, Petitioner prays that these authorities and facts will have the court well aware of his injury, and to grant de novo review for this cause and reverse in light of justice, and or any other relief deemed just and proper within this court's authority.

POINT 7:

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN HIS FAILURE TO INVESTIGATE PETITIONER'S CASE HISTORY AND ADOPT OR PRESERVE DISCHARGE MOTION?

Trial counsel's failure to represent client zealously, failure to communicate effectively with client, failure to investigate case history and adopt, and/or preserve issue for appellate review, and failure to provide competent representation are all serious deficiencies, even when there is no evidence of intentional mis-representation or fraud found, relies upon Florida Bar v. Roberts, 689 So. 2d 1049 (Fla. 1997).

During case "sub judice," Petitioner retained attorney Baya Harrison, P.A., for his representation on March 18th 1987, Mr. Harrison filed in the trial court. (Motion for discharge)

"Defendant's motion for discharge, under speedy trial rules and Florida and United States Constitutions."

However on April 20th 1987, Mr. Baya Harrison withdrew from Petitioner's case.

On June 9, 1987, the trial court appointed the public defender's office in the Second Judicial Circuit in and for Leon County Florida for the State's representation.

On July 21-22, 1987, took Petitioner to proceeded to a trial, and knowingly the jury found him guilty as charged.

Petitioner contends that his state appointed counsel rendered ineffective assistance at a critical stage of his criminal prosecution, when he negated to

investigate and adopt, or preserve motion for discharge pending before the court filed by his former attorney Mr. Baya Harrison, is an prejudicial injury he's now aggrieved by. See, Bartley v. State, 689 So. 2d 372 (Fla. 1st DCA 1997); and Davis v. State, 710 So. 2d 116 (Fla. 2nd DCA 1999).

In so doing Petitioner, the aggrieved party, suffered a substantial prejudice, because the motion for discharge was abandoned,[1] by his state appointed counsels' failure to investigate; adopt or preserve the motion for a appellate review. See, Greeson v. State, 729 So. 2d 397 (Fla. 1st DCA 1998); and Strickland v. State, 732 So. 2d 1195 (Fla. 1st DCA 1999).

Trial counsel's performance fell outside the range of competent counsel when he omitted his investigation, adoption or preservation of the motion for discharge, especially when Petitioner's speedy trial time had expired, warranting immediate discharge based on the facts and laws in "Defendant's motion for discharge under speedy trial rule and Florida and United States Constitutions," properly filed by his former attorney Baya Harrison, thus, had Petitioner's trial counsel investigated, adopted or preserved the motion the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687(1984).

[1] Fla. R. App. Proc. 9.020.

This judgment must be reversed with direction to immediately discharge.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, by Rationale articulated here in above, amply supported by fact and law, Petitioner respectfully asserts that he has demonstrated sufficient grounds to show this Honorable Court that he suffered prejudicial injury which entitled him the relief sought, herein and thereof, and why this Honorable Court now grant all relief sought after conducting a full de novo review of Petitioner's cognizable Constitutional claims that were violated in the lower tribunal.

And then issue an order immediately to release Petitioner, dismiss information and/or for a new trial, or any further or different relief as deemed appropriate by this court as supported by the facts, matters, and law in order to meet the substantive ends of justice.

Petitioner contends that the issues set forth in this collateral action rise with ease to the level of constitutional infirmities and as such, all issues "sub judice" are cognizable in the instant proceedings. All claims conclusively unrebutted by the record or opposing counsel must be taken as true unless otherwise resolved by an evidentiary hearing. Anthony v. State, 660 So. 2d 374, 376 (Fla. 4th DCA 1995); Rose v. State, 617 So. 2d 291, 296 (Fla.); Cert. denied, 510 U.S. 903 (1993).

Federal Courts are in accord., (e) (g) See, Townsend v. Sain, 372 U.S. 293 (1963); and also Stano v. Dugger, 901 F. 2d 898 (11th Cir 1990).

These *pro se* pleadings were prepared by a "next friend" / fellow inmate under the doctrine of Johnson v. Avery, 393 U.S. 483 (1969), for Petitioner who is a layman to the law and as such, Petitioner seeks this Honorable Court's indulgence in viewing these *pro se* pleadings under less stringent standards than formal pleading drafted by highly skilled government attorneys. Haines v. Kerner, 92 S. Ct. 594 (1972); Code v. Montgomery, 725 F. 2d 1316 (11th Cir 1984) and Boag v. MacDougal, 102 S. Ct. 700 (1982).

Petitioner moves this Honorable Court for a full evidentiary hearing with appointment of an attorney to represent him in the instant action by this Honorable Court appearance which is critical to the fair administration of justice. See, Michigan v. Jackson, 106 S. Ct. 1404 (1986).

Respectfully Submitted,

/s/ Samuel J Gardner

Samuel J. Gardner, *pro se*
DC# 108632
Hamilton Correctional Inst. – Annex
11419 SW County Road # 249
Jasper, Florida 32052–3735

DECLARATION / CERTIFICATE OF SERVICE

Having read the foregoing statements containing in this Petition for Writ Quo Warranto. I, Samuel J. Gardner DC# 108632, swears under Penalties of Perjury that all states herein and thereof are true and correctly complete, and certify that a true and correctly completed copy of this Petition has been furnished via U.S. Mail to:

Office of the Attorney General
Criminal Appeals Division
The Capitol PL–01
Tallahassee, Florida 32399–1050

This 5th day of July 2011 ~~2010~~.

/s/ Samuel J Gardner

Samuel J. Gardner, *pro se*
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Jasper, Florida 32052–3735

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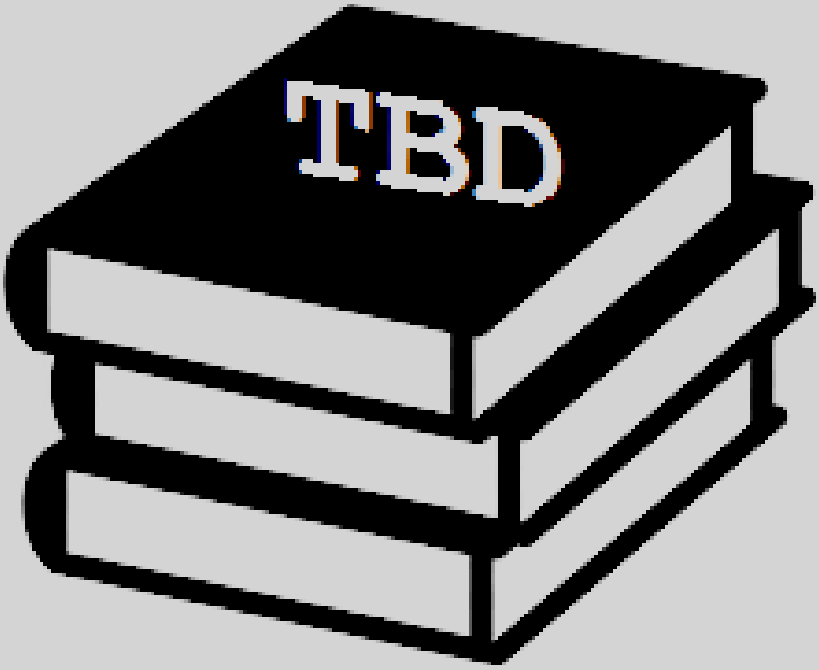

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