IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff

v. Case No. 16-2013-CF-005095-AXXX-MA

DUSTIN SHANE DUTY,
Defendant
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AMENDED MOTION TO VACATE JUDGMENT AND SENTENCE

Defendant, Dustin Shane Duty, through undersigned counsel, respectfully moves this Honorable Court pursuant to Florida Rule of Criminal Procedure 3.850 for an order vacating and setting aside the judgment and sentence in this matter and as grounds thereof states as follows:

PROCEDURAL HISTORY

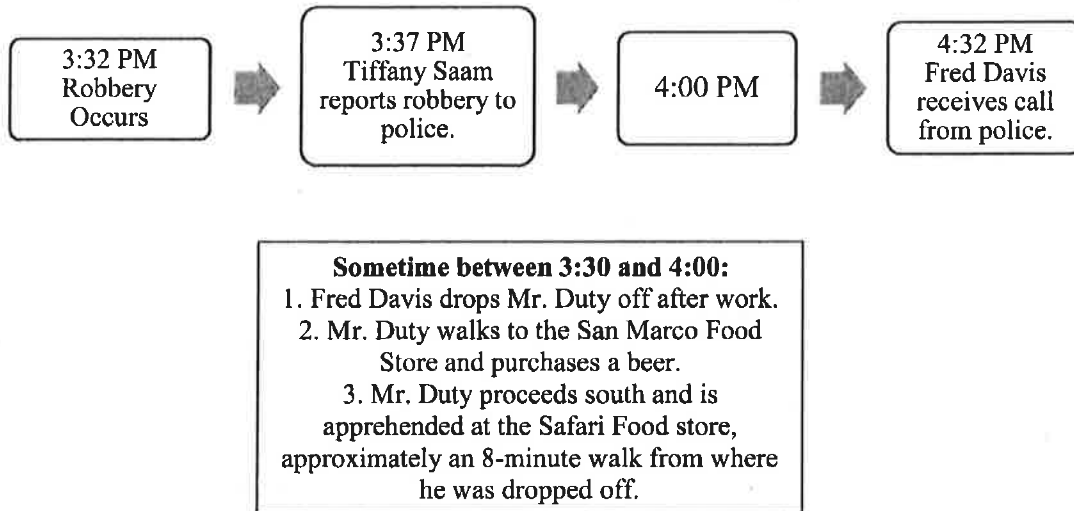
On July 10, 2013, Dustin Duty was charged with Armed Robbery in violation of section 812.13(2)(A), Florida Statutes (2013). Mr. Duty's trial began on December 16, 2013, with the Honorable Mark Husley presiding. Although he was innocent of the charges, he was found guilty by the jury and sentenced to 20 years' imprisonment on February 13, 2014.

Mr. Duty timely appealed to the First District Court of Appeal, which affirmed his conviction and sentence. *Duty v. State,* 163 So. 3d 1184 (Fla. 1st DCA 2014). The First District issued mandate on January 27, 2015. On March 12, 2015, Mr. Duty filed a Motion for Reduction of Sentence pursuant to Fla. R. Crim. P. 3.800(C). As of the date of this Motion, this Court has not issued an order on Mr. Duty's Motion for Reduction of Sentence.

On September 11, 2015, Mr. Duty filed a *pro se* Rule 3.850 Motion for Post Conviction Relief. Mr. Duty then engaged the Miami Law Innocence Clinic and the Innocence Project of Florida to represent him in his post conviction litigation. Thereafter, counsel filed a Notice of

Appearance and Motion for Leave to Amend Dustin Duty's *Pro Se* Rule 3.850 Motion. As of the date of this Amended Motion, this Court had not yet ruled on Mr. Duty's *Pro Se* Rule 3.850 Motion.[1]

TIMELINE OF EVENTS



STATEMENT OF THE FACTS[2]

On May 29, 2013, Dustin Shane Duty was at work with his boss, Mr. Fred Davis. (Exhibit 3, p. 1). Mr. Davis is in the painting business, and according to Mr. Davis, work concluded for the day sometime between 3:00pm and 4:00pm. (Exhibit 3, p. 1). Following work,

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[1] Although this Court has not yet granted leave to amend Mr. Duty's *pro se* Rule 3.850 motion, in an abundance of caution, Mr. Duty files this Amended Rule 3.850 Motion at this time in order to leave no question that he has properly preserved the claims herein for any future federal habeas corpus review should it be necessary.

[2] Citations to documents, pleadings, and testimony will be to the record on appeal in *Dustin Shane Duty, Appellant v. State of Florida, Appellee*, in the First District Court of Appeals, Case Number 16-2013-CF-005095-AXXX-MA. Reference shall be made by the symbol "R" followed by the volume and page number. Additional references will be made to letters from Mr. Duty to his trial counsel ("Exhibit 1"); transcripts of Detective Nieto's interview of Mr. Duty ("Exhibit 2"); a sworn affidavit provided by Fred Davis ("Exhibit 3"); the Jacksonville Police incident report ("Exhibit 4"); a copy of Fred Davis's phone records ("Exhibit 5"); and a deposition of Tiffany Saam ("Exhibit 6").

Mr. Davis dropped Mr. Duty off on the corner of Gary Street and San Marco Blvd. (Exhibit 3, p. 1). Mr. Duty exited the vehicle without a shirt on. (Exhibit 3, p. 1). Mr. Duty proceeded on foot four blocks south and stopped at a store to purchase a beer and a pack of cigarettes. He then walked further south toward the Safari Food Store. While drinking the beer, Mr. Duty spotted Officer Taylor sitting in his patrol car. (R. Vol. III, p. 223). Mr. Duty proceeded directly toward Officer Taylor. (R. Vol. III, p. 223). Officer Taylor exited the vehicle, pointed a gun at Mr. Duty, and placed him in handcuffs. (R. Vol. III, p. 223).

According to police records, Tiffany Saam called 911 at 3:37pm to report a robbery on Cedar Street in Jacksonville, Florida. (Exhibit 4, p.1). She described the suspect as a white male somewhere around five feet eleven inches tall and wearing a red Budweiser baseball cap, a green sweatshirt, and khaki cargo shorts. (R. Vol. III, p. 165). In her call to police, Ms. Saam stated that the suspect had light skin and did not have a tan. (Exhibit 4, p.1). Ms. Saam further described the suspect as being in his mid-thirties with light blue eyes. (R. Vol. III, p. 166). She stated she did not see his shoes. (R. Vol. III, p. 167). Ms. Saam explained that the weapon used was a serrated hunting knife, and that she handed the perpetrator around one hundred and fifty dollars ($150) from her wallet before he fled the scene. (R. Vol. III, p. 167). She stated that the incident occurred about five minutes before she made the call to police. (R. Vol. III, p. 168).

Thirty minutes after Fred Davis dropped Mr. Duty off, Mr. Davis received a phone call from police. (Exhibit 5, p. 1). According to Mr. Davis' phone records, this call was received at 4:32pm. (Exhibit 3, p. 3). The only question the officer asked during this call was whether Mr. Davis knew Mr. Duty. (Exhibit 3, p. 1). When Davis confirmed, the officer stated that Mr. Duty would not be working with Davis anymore because Mr. Duty had "robbed a lady." (Exhibit 3, p. 1). The officer subsequently hung up on Mr. Davis. (Exhibit 3, p. 1). Police did not confirm that

Mr. Duty was with Fred Davis earlier that day, nor did the officer confirm what time Mr. Duty was dropped off. (Exhibit 3, p. 1-2).

After speaking with Ms. Saam, police informed her that they found someone matching the description of the perpetrator that she had provided. (R. Vol. III, p. 173, 229). Police then drove Ms. Saam to the convenience store parking lot where Mr. Duty was being held. (R. Vol. III, p. 173). Ms. Saam testified that, from the backseat of the police cruiser, she saw Mr. Duty standing in the parking lot "with a few officers standing around him." (R. Vol. III, p. 174). Ms. Saam subsequently made a positive identification. (R. Vol. III, p. 174). When asked at trial what facts led Ms. Saam to positively identify Mr. Duty, she stated: "The clothes. I mean, the hoodie that I had first seen him in was gone. The baseball cap was gone. But the same shorts and just overall appearance and the way he moved and stood, it resonated as being the same person." (R. Vol. III, p. 174-75). Police later showed Ms. Saam the knife recovered from Mr. Duty's backpack at the police station. (R. Vol. III, p. 182). At that point in time, Ms. Saam told Detective Nieto that she could not be sure that it was the knife used by her assailant. (R. Vol. III, p. 183).

Mr. Duty was brought to the police station for further questioning. (Exhibit 2, p. 20). Throughout the interview, Mr. Duty told Detective Nieto on several occasions that he was at work, and that he wanted Detective Nieto to call his boss. (Exhibit 2, p. 20). Detective Nieto stated: "I am going to call your boss to verify that he dropped you off and what time he dropped you off." (Exhibit 2, p. 20). Further into the interrogation, after Mr. Duty repeated the same alibi, Detective Nieto confirmed what Mr. Duty had told him by stating: "you said your boss's card is in your bag?" to which Mr. Duty replied "Yes." (Exhibit 2, p. 25). When Mr. Duty asked if there

were cameras to prove where he was, Detective Nieto replied "you are in the south, they don't have cameras on a street corner." (Exhibit 2, p. 39).

Mr. Duty was arrested and held for forty (40) days before he was charged with armed robbery. (R. Vol. I, p. 11, 14). During this time, Mr. Duty wrote his appointed counsel, Assistant Public Defender Brian Crick on three separate occasions. (Exhibit 1, p. 1-6). On two such occasions, Mr. Duty urged his attorney to contact his alibi witness, Fred Davis. (Exhibit 1, p. 1, 3). On August 13, 2013, Mr. Duty filed a Judicial Notice informing the court that he had not heard from his trial counsel. (R. Vol. I, p. 17). Mr. Duty's letter to his defense counsel on September 30, 2013 expressed concern that Mr. Duty had not heard from his attorney for at least a month, and that defense counsel had not conducted a single deposition. (Exhibit 1, p. 5-6).

Six months after Mr. Duty's arrest, defense counsel eventually deposed Tiffany Saam on October 30, 2013. In this deposition, Ms. Saam explained that she was in the middle of texting her boyfriend "and really wasn't being completely aware" of her surroundings when she noticed her assailant walking toward her. (Exhibit 6, p. 7). She further explained that when her assailant grabbed her, she "kind of in [her] peripheral saw the knife and it came up under [her] chin." (Exhibit 6, p. 10). When asked for more information about the knife, Ms. Saam stated that she "never got like a really good look at it." (Exhibit 6, p. 21).

Prior to trial, Mr. Duty's counsel filed only three Motions, two Motions for Release and one Motion for a More Definite Address. (R. Vol. I, p. 8-11, 20-21). Mr. Duty's counsel did not challenge the show-up identification, nor did he move to suppress any evidence relied on by the state to obtain the conviction. Additionally, Mr. Duty's counsel did not inquire from any local businesses on San Marco Blvd. about the potential existence of surveillance videos, despite Mr. Duty's request for his counsel and detectives to do so.

Defense counsel did however file a Disclosure to the Prosecution, notifying the Prosecution that the defense planned to call Mr. Fred Davis—Mr. Duty's boss—as an alibi witness. (R. Vol. I, p. 26). The Judge even listed "Fred Davis" as a potential testifying witness during Jury Selection while inquiring if any members of the panel knew or were related to potential witnesses in the case. (R. Vol. II, p. 17). Despite this disclosure, defense counsel never issued a subpoena for Mr. Davis, nor did defense counsel conduct a formal interview or deposition of Mr. Davis.

Following jury selection, defense counsel stated that he wished to file a defense exhibit. (R. Vol. II, p. 121). Particularly, defense counsel wanted the ability to play Mr. Duty's police interrogation video "so that [he] would have the opportunity to use it on any cross-examination." (R. Vol. II, p. 121). The disclosure for the Interview Video Recording was filed at that time, without any objection from the Prosecution. (R. Vol. I, p. 28).

Mr. Duty's trial began on December 16, 2013. At the advice of his counsel, Mr. Duty did not testify. (R. Vol. III, p. 245). After the State's case-in-chief, Mr. Duty's counsel called a single witness, Detective Clement Nieto. (R. Vol. III, p. 246-50). Detective Nieto was specifically asked if he had heard of any witnesses that he would follow up with. (R. Vol. III, p. 248). In response, Detective Nieto stated: "I did not have any specific witnesses by name, like full name, address, phone number or anything like that. So, no, I did not." (R. Vol. III, p. 248). Defense counsel asked if Detective Nieto had interviewed Mr. Duty, and if that interview had been recorded. (R. Vol. III, p. 248). Detective Nieto conceded that he interviewed Mr. Duty and that the interview was recorded. (R. Vol. III, p. 248-49). Defense counsel then asked Detective Nieto if he followed up with any individuals besides the victim and Mr. Duty. (R. Vol. III, p.

249). Detective Nieto answered: "No, I did not." (R. Vol. III, p. 249). After a brief cross-examination by the prosecution, the defense rested. (R. Vol. III, p. 250).

Despite having listed Fred Davis as a witness to demonstrate that it was highly unlikely Mr. Duty could have committed the crime, defense counsel did not interview, subpoena, or call this witness to testify. (Exhibit 3, p. 1). Nonetheless, Mr. Davis voluntarily appeared at the courthouse ready to testify, but counsel never called him. Additionally, defense counsel did not obtain Fred Davis's phone records, which would have demonstrated that Mr. Davis received a call from police thirty minutes after Davis dropped Mr. Duty off, and this call was almost a full hour after the robbery. (Exhibit 3, p. 3). Finally, Mr. Duty's trial counsel never played the interview video for the jury even after successfully admitting it without objection. This video would have verified that Mr. Duty consistently notified detective Nieto of an alibi witness and vociferously maintained his innocence throughout the entire interrogation. (Exhibit 2, p. 20). Importantly, the video would have impeached Detective Nieto's testimony where he denied the existence of any additional witnesses, as well as impeached the quality and thoroughness of the law enforcement investigation. (Exhibit 2, p. 20).

The jury's confusion at the close of trial and the importance of a potential alibi was evidenced by a question submitted during deliberations. (R. Vol. I, p. 54). On December 17, 2013 at 5:45pm, the jury asked the following question, "The victim stated her assailant was dressed as a construction worker. Was the defendant employed and did he have an alibi for the time involved?" To which the court responded: "All the evidence has been presented. You will have to rely on your collective memories of that evidence." (R. Vol. I, p. 54). The jury subsequently convicted Mr. Duty. (R. Vol. I, p. 30). Citing the jury's question in support, Mr. Duty's counsel filed a Motion for a New Trial on February 13, 2014, and argued that the jury

instructions were improper because the jury may have inaccurately shifted the State's burden to the Defendant. (R. Vol. I, p. 93-94).

During the sentencing hearings while discussing the Motion, defense counsel admitted that he did not obtain the phone records from Mr. Davis. (R. Vol. I, p. 107). In response, the Judge stated: "did you not want to deal with it today, because you're waiting on new evidence?" (R. Vol. I, p. 109). Defense counsel did not ask for a continuance. Instead, he stated: "Your Honor, if the Court allows . . . we would submit [the Motion] for ruling on it today, and with the understanding that if there is any new evidence that we are able to present, that Mr. Duty can take the appropriate steps to address it at that time. And I think it would have to—at that point in time, it may have to be through a 3.850 motion." (R. Vol. I, p. 111).

GENERAL STATEMENT OF THE LAW

Claims for ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Pursuant to *Strickland*, a defendant must show that (1) defense counsel's representation was deficient, in that it fell below an objective standard of reasonableness, and (2) the deficient representation prejudiced the defendant, in that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 687. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* at 694. Additionally, "an ineffective assistance claim will warrant an evidentiary hearing where the defendant alleges specific facts which are not conclusively rebutted by the record, and which demonstrate a deficiency in performance sufficient to render the result unreliable." *Gibbs v. State*, 604 So. 2d 544, 546 (Fla. 1st DCA 1992).

GROUNDS FOR RELIEF

I. Trial Counsel was Ineffective For Failing to Investigate and Call an Alibi Witness to Testify at Trial.

To present a facially sufficient claim of counsel's ineffective assistance for failure to investigate and present an alibi witness at trial, a defendant must (1) identify the witness in the postconviction motion, (2) provide a description of what the witness's testimony would have been, (3) state that the witness was available to testify at the time of trial, and (4) allege that the defendant was prejudiced by the absence of the witness's testimony at trial. *Bulley v. State*, 900 So. 2d 596, 597 (Fla. 2d DCA 2004); *Garrett v. State*, 62 So. 3d 1274, 1276 (Fla. 2d DCA 2011) (citing *Nelson v. State*, 875 So. 2d 579, 582–83 (Fla. 2004)). Furthermore, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Thus, counsel was held ineffective where he conducted no pretrial investigation, advised the defendant not to testify, and ultimately failed to present any witnesses at trial that were helpful to the defendant. *Williams v. State*, 507 So. 2d 1122, 1123 (Fla. 5th DCA 1987).

A. Trial Counsel Failed to Investigate Mr. Duty's Alibi Witness and Obtain Exculpatory Evidence.

The First District Court of Appeal has recognized that once a defendant has informed counsel of a witness who may be able to cast doubt on the defendant's guilt, the failure to investigate by deposing that witness can constitute ineffective assistance of counsel. *Sorgman v. State*, 549 So. 2d 686, 686 (Fla. 1st DCA 1989); *Warren v. State*, 504 So. 2d 1371, 1372 (Fla. 1st DCA 1987); *Yarbrough v. State*, 871 So. 2d 1026, 1028-29 (Fla. 1st DCA 2004) (holding counsel ineffective where, after the defendant had informed him of a witness, defense counsel did not attempt to interview, depose, or subpoena that witness prior to trial). In assessing

reasonableness, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Salazar v. State*, 188 So. 3d 799, 817 (Fla. 2016) (citing *Wiggins v. Smith*, 539 U.S. 510, 527 (2003)).

Counsel is increasingly likely to be deemed ineffective for failing to investigate a witness in situations where a conviction was based on eyewitness identification testimony. *Raygoza v. Hulick*, 474 F.3d 958, 959 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 613 (2007). In a federal habeas corpus proceeding, the Seventh Circuit held an attorney's conduct ineffective after the attorney failed to both investigate potential alibi witnesses and offer phone records that could corroborate the alibi testimony. *Id.* There, witnesses had identified the defendant as the perpetrator, even though other witnesses and their phone records could have shown the defendant was at a different location at the time of the crime. *Id.* at 960. In holding trial counsel's conduct prejudicial to the defendant, the court emphasized that the "basis for trial court's guilty verdict was in large part based on defendant's lack of evidence supporting his alibi." *Id.* at 963.

Mr. Duty consistently informed his trial counsel of Fred Davis in various letters, yet his trial counsel never investigated Davis. (Exhibit 1, p. 1, 3). In fact, according to Mr. Davis, defense counsel never even interviewed or deposed him prior to trial. Instead, defense counsel simply called Mr. Davis to explain that Mr. Davis would receive a call if he were needed at trial. Without even interviewing Mr. Davis, defense counsel cannot be said to have made "a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In light of the victim's identification testimony, counsel's decision to not investigate and subpoena Fred Davis to present exculpatory alibi evidence fell below an objective standard of reasonableness. *Warren*, 504 So. 2d at 1372 ("an attorney's failure to at least interview an

identified available witness whose testimony might exonerate [his] client can constitute ineffective assistance of counsel"). *See also Raygoza,* 474 F.3d at 959.

As an unfortunate yet foreseeable consequence of failing to interview Fred Davis, Mr. Duty's trial counsel never obtained Mr. Davis's phone records to corroborate his client's alibi. These records, made readily available to the Miami Law Innocence Clinic, demonstrate that police called Mr. Davis at 4:32pm. (Exhibit 3, p. 3). According to Mr. Davis, he received this call about thirty minutes after dropping Mr. Duty off. (Exhibit 3, p. 2). In other words, because Ms. Saam called to report the incident to police at 3:37pm—an estimated five minutes after the incident had occurred—Mr. Duty could not have even committed the crime because he was not dropped off by Fred Davis until about 4:00pm. (R. Vol. III, p. 168). Thus, similar to the defense counsel in *Raygoza*, Mr. Duty's counsel's failure deprived the jury of crucial evidence that would have supported an alibi defense and challenged (and in this case rebutted) witness identification testimony. *Raygoza*, 474 F.3d at 963. Under these circumstances, the omissions resulting from trial counsel's failure to conduct a simple investigation seriously undermine the reliability of, and confidence in, the jury's verdict.

During the sentencing hearing, Mr. Duty's counsel openly admitted to not obtaining the phone records from Mr. Davis. (R. Vol I, p. 107). Rather than asking for a continuance to locate the records, defense counsel asked the Court to deny his own Motion for a New Trial. He then suggested that his client "take the appropriate steps to address it" in a Rule 3.850 motion, at a time where he would be incarcerated, not have a constitutional right to counsel and, instead, be forced to proceed without the benefit of legal representation or investigative resources. (R. Vol. I, p. 111). This is not a situation where an attorney conducted an investigation, then, based on the outcome of that investigation, made a "reasonable decision that ma[de] particular investigations

unnecessary." *Strickland*, 466 U.S. at 691. To the contrary, this is a situation where an attorney inexplicably decided an investigation of a crucial alibi witness was unnecessary before the investigation even commenced. Instead of advocating for his client and putting him in the best position to secure an acquittal at trial, Mr. Duty's counsel concluded that Mr. Duty could secure evidence himself and handle it postconviction. In other words, counsel admitted to his deficient performance but relegated his client's rights to the difficult and byzantine realm of postconviction litigation, presumably *pro se*.

Prior to trial, Mr. Duty's counsel learned from his own client that his client had an alibi, and that a witness and phone records could support it. (Exhibit 1, p. 1, 3). Mr. Duty's counsel decided not to interview the alibi witness, nor obtain the phone records. Then, counsel admitted he had not obtained them, and argued his client's rights to have that investigation done could be vindicated in postconviction. This is despite the fact that Mr. Duty's trial counsel was aware the victim had identified his client. Based on the "quantum of evidence already known to counsel" prior to trial, this conduct passed the realm of unreasonableness and proceeded into the territory of destructive representation. *See Salazar*, 188 So. 3d at 817.

B. Trial Counsel Failed to Call Mr. Duty's Alibi Witness to Testify at Trial.

"[T]he failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant's guilt." *Devaney v. State*, 864 So. 2d 85, 88 (Fla. 1st DCA 2003) (citing *Marrow v. State*, 715 So. 2d 1075, 1075 (Fla. 1st DCA 1998)). Further, "a determination that the failure of counsel to call witnesses was a tactical decision is generally inappropriate without an evidentiary hearing." *Bulley*, 900 So. 2d at 597.

The Sixth Circuit addressed a factual scenario similar to Mr. Duty's in *Foster v. Wolfenbarger*, 687 F.3d 702, 707-09 (6th Cir. 2012). There, defense counsel argued that failing

to call the alibi witness was strategic even though the defendant's entire defense was based on a theory of mistaken identification. *Id.* at 707-08. The court concluded that failing to call an alibi witness, even a poor one, is not a reasonable trial strategy under those circumstances. *Id.* Specifically, the court held that "this is not a situation where defense counsel is required to choose between two different avenues and pick the theory of the case that counsel believed was stronger. Instead, trial counsel chose not to investigate an avenue that potentially could have bolstered the defense that counsel was already pursuing." *Id.* at 708.

As stated previously, Mr. Duty placed his trial counsel on notice of his alibi witness in two of his letters. (Exhibit 1, p. 1, 3). In fact, defense counsel did call Mr. Davis on the day of the trial, and Mr. Davis rushed to the courthouse in response. However, defense counsel did not call Mr. Davis to the stand despite him leaving work early to be present at the courthouse ready, willing, and able to testify. Thus, Mr. Duty's alibi witness was available to testify because he was physically waiting in the courthouse at the time of the trial. Mr. Duty has met his obligations of identifying an alibi witness, describing his testimony had he been called, and establishing the witness was available to testify at his trial. *Garrett*, 62 So. 3d at 1274.

C. Failing to Investigate and Present an Alibi Witness is an Unreasonable Trial Strategy that Prejudiced the Outcome of Mr. Duty's Trial.

At trial, defense counsel failed to even mention to the jury the existence of Mr. Duty's alibi—he was with his boss at or around the time of the robbery, was dropped off at a time after the robbery occurred, stopped at a convenience store to buy a beer, and then walked four blocks to where he was apprehended—all in a short amount of time.[3] Under the facts of this case, no

[3] Not to mention, Mr. Duty would have had to change his wardrobe at least twice for it to have matched the victim's description, as he was apprehended in the exact condition Mr. Davis dropped him off in. Additionally, Mr. Duty was found with the beer he had just purchased on his possession, which corroborates his alibi.

competent counsel would have reasonably made the decision to forego interviewing and calling such a reliable witness; a local business owner who was already in the courthouse and willing to provide an alibi defense. Further, no competent counsel would have failed to obtain phone records that corroborated his client's alibi, then admit to their existence on the record. Finally, no competent attorney would have failed to even mention the existence of an alibi, thereby mitigating the effects of an absent alibi witness. Mr. Duty's counsel decided to pursue the defense that required the least amount of preparation, and instead relied on the hope that the jury would find reasonable doubt despite the absence of a meaningful defense. (R. Vol. III, p. 145-50, 267-85). A trial strategy to do nothing, and then limit your client's later opportunities in postconviction, is an objectively unreasonable trial strategy. *Law v. State*, 847 So. 2d 599, 601 (Fla. 5th DCA 2003) (citing *Williams v. State*, 507 So. 2d 1123 (Fla. 5th DCA 1987)).

Similar to the defense in *Wolfenbarger*, Mr. Duty's counsel attempted to cast doubt on the victim's identification. *Wolfenbarger*, 687 F.3d at 708. Thus, presenting Mr. Davis as an alibi witness would not have contradicted the theory that was already being pursued. To the contrary, as the court recognized in *Wolfenbarger*, Mr. Duty's trial counsel was ineffective by failing to present a witness "that potentially could have bolstered the defense that counsel was already pursuing." *Id.*

This is especially so given that the substance of Mr. Davis' testimony, corroborated by his phone records, demonstrates that Mr. Duty was misidentified and would have cast serious doubt on Mr. Duty's guilt. Specifically, police contacted Mr. Davis thirty minutes after he dropped Mr. Duty off. (Exhibit 3, p. 2). Mr. Davis's testimony, at a minimum, would have demonstrated that Mr. Duty could not have been at the scene of the crime when it occurred, since

he was still with Mr. Davis at this time. This information could have been corroborated with Mr. Davis's phone records, had Mr. Duty's counsel asked for and presented them.

Moreover, Davis would have testified that Mr. Duty was shirtless and actually left his hat behind when he exited the vehicle. This is significant because the victim reported that her perpetrator was wearing a shirt, sweatshirt, and hat, yet Mr. Duty was stopped by police shirtless and without a hat or a sweatshirt in his possession. (R. Vol. III, p. 229-30). These details would have supported Mr. Duty's alibi had one been presented, and these facts would certainly cast doubt on the victim's identification, and consequently on Mr. Duty's guilt. This is evidenced by the jury's question about an alibi during deliberations, which suggests that the jury would have reached a not guilty verdict had this alibi actually been presented.[4] (R. Vol. I, p. 54). Thus, had counsel not been deficient and, instead properly investigated Mr. Davis, presented him as a witness to the jury, and obtained and presented Mr. Davis' phone records, there is a reasonable probability that the jury would have acquitted. One cannot have confidence in this guilty verdict when counsel's failures deprived the jury of critical alibi evidence that showed Mr. Duty's innocence of this crime.

Mr. Duty has established that his identified witness was available, and that the failure to investigate and call this witness prejudiced his trial. Moreover, Mr. Duty has successfully demonstrated that the failure to call this witness or obtain and present the corroborating phone records could not have been a reasonable trial strategy, since doing so would have strengthened the strategy already employed. Accordingly, Mr. Duty has met all requirements and

[4] Notably, the jury panel contained several members that were prior victims of robbery and theft, and likely would not have been sympathetic to the defense's case. (R. Vol. II, p. 30-35). The fact that, despite their possible predisposition, they still asked about an alibi before reaching a decision reveals they had serious reservations about Mr. Duty's guilt, and that there is a reasonable probability that the jury would not have convicted him had counsel presented this alibi to the jury.

demonstrated that his counsel was ineffective for failing to investigate and call a witness at trial. *Nelson*, 875 So. 2d at 582–83.

II. Trial Counsel was Ineffective for Failing to Impeach Detective Nieto with Mr. Duty's Interrogation Video.

A defendant may raise a claim of ineffective assistance of counsel for failing to impeach a witness in a Rule 3.850 motion. *Jennings v. State*, 123 So. 3d 1101, 1118 (Fla. 2013); *Williams v. State*, 673 So. 2d 960, 961 (Fla. 1st DCA 1996) (reversing the trial court's decision that the claim was procedurally barred because it could have been raised on direct appeal). *See also Overton v. State*, 531 So. 2d 1382, 1384 (Fla. 1st DCA 1988). Similarly, counsel may be deemed ineffective for calling a witness to testify, when the testimony actually harms the defendant's case. *Henry v. State*, 652 So. 2d 1263, 1264 (Fla. 4th DCA 1995) (holding defense counsel's performance deficient where the defense called a witness "without ever having interviewed her, with the result that the [witness] gave no testimony helpful to the defendant but did give impassioned evidence corroborating testimony of the victim").

Failing to compare witness depositions has been deemed deficient performance where the comparison should have been used for impeachment purposes. *Overton,* 531 So. 2d at 1386. In *Overton*, the defendant's counsel failed to review deposition transcripts that successfully revealed the trial testimony of the government's witness was false. *Id.* Had the defendant's counsel made the comparisons, the defense would have been able to impeach the trial testimony of the state's key witness. *Id.* The court ultimately determined that the defendant made a *prima facie* showing of entitlement to post-conviction relief, since defendant's counsel was ineffective for both failing to conduct the investigation, and failing to impeach the witness at trial. *Id.* at 1388.

Here, Mr. Duty's trial counsel was similarly deficient because any reasonable attorney that had viewed Mr. Duty's interrogation video certainly would have presented it at trial. Notably, Mr. Duty vehemently maintained his innocence throughout the entire interrogation, and consistently told Detective Nieto that he was dropped off from work shortly before police stopped him. Mr. Duty even insisted that law enforcement locate cameras to corroborate his story. Nothing in this video under the circumstances of this case justified failing to expose it to the jury.[5]

Moreover, Mr. Duty's counsel failed to use the video as impeachment evidence despite having already disclosed it to the Prosecution and already obtaining this Court's permission to present it as evidence without any objection from the State. Specifically, Mr. Duty's counsel called Detective Nieto as a witness, and asked the Detective if he had heard of any witnesses. (R. Vol. III, p. 248). Had Mr. Duty's trial counsel played the video for the jury, he could have demonstrated that Mr. Duty explicitly told Detective Nieto that his boss's business card was in his backpack, and that Detective Nieto gave false testimony at trial when he denied being presented with any witnesses. Additionally, this video would have shown that Detective Nieto told Mr. Duty that he intended to call Mr. Duty's boss. This is significant because Detective Nieto never contacted Fred Davis, nor did police ever question Davis during their investigation apart from a brief phone call from an officer at the time of arrest asking Davis if he knew Mr. Duty. (Exhibit 3, p. 3).

If offered at trial as impeachment evidence, the interrogation video would have cast serious doubt on the victim's identification. First, the jury would have been exposed to the lack

[5] The only explanation is that Mr. Duty's trial counsel failed to watch it entirely, and did not want to be caught off guard by its contents. However, failing to watch it entirely would be equally deficient, as it would demonstrate a complete failure to conduct a pre-trial investigation.

of investigatory effort directed at resolving this crime. Specifically, the jury would have learned that Mr. Duty had an alibi, and that police did not confirm nor discredit the alibi before focusing solely on Mr. Duty as their suspect. This is significant considering only one suspect was shown to the victim during the identification—a suspect who, importantly, was not wearing the clothes described by the victim, did not have the money stolen from the victim, and was wearing a backpack and tool belt that was never mentioned by the victim during her initial description of the perpetrator. Under these circumstances, the fact that a suggestive show-up identification was conducted without investigating Mr. Duty's alibi or searching for additional suspects casts serious doubt on the reliability of the identification. In short, the video would have significantly impeached the quality, thoroughness, and reliability of the police investigation.

Calling Detective Nieto as a witness would have been a reasonable trial strategy had the defense played the video to demonstrate that police never investigated Mr. Duty's alibi. However, by failing to impeach Detective Nieto's misleading statements with the video's contents, Mr. Duty's trial counsel only subjected the jury to testimony that reinforced the State's narrative. Much like the defendant in *Henry,* Mr. Duty would have had a better defense had his counsel not called this witness at all. *Henry*, 652 So. 2d 1264. Apart from drawing attention to his years of experience in law enforcement, Detective Nieto's testimony only revealed to the jury that a recorded interview had taken place that the jury had not yet seen. By not then showing the video, the jury was left to presume that police conducted a thorough investigation before concentrating their efforts on Mr. Duty, and that Detective Nieto was never provided with an alibi. Accordingly, defense counsel called a witness that "gave no testimony helpful to the defendant," and this was an objectively unreasonable trial strategy. *Henry*, 652 So. 2d 1264.

For these reasons, had counsel shown the video to the jury, there is a reasonable probability that they would have rejected both the victim's and Nieto's testimony and acquitted Mr. Duty.

III. Trial Counsel was Ineffective for Failing to Move for Suppression of an Impermissibly Suggestive Show-Up Identification.

Due Process prohibits any conviction on the basis of unreliable identification testimony secured through impermissibly suggestive procedures. *Neil v. Biggers*, 409 U.S. 188, 199 (1972). To violate Due Process, an out-of-court identification must (1) be unnecessarily suggestive, and (2) under all the circumstances, create "a substantial likelihood of irreparable misidentification." *Anderson v. State*, 946 So. 2d 579, 582 (Fla. 4th DCA 2006). The United States Supreme Court has held that an attorney's failure to file a motion to suppress evidence can provide the basis for a claim of ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 384-85 (1986). Such claims may properly be raised in a Rule 3.850 motion. *Isidore v. State*, 181 So. 3d 1227, 1227 (Fla. 3d DCA 2015) (citing *Johnston v. State*, 63 So. 3d 730, 740 (Fla. 2011)).

A. Police Conducted an Unnecessarily Suggestive Show-Up Procedure by Aggravating the Circumstances of the Confrontation.

"[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor." *United States v. Wade*, 388 U.S. 218, 229 (1967). Courts have recognized that, regarding one-to-one show-up identifications, "such singling out, or indicating to the witness that the man in custody is the man the police believe to have committed the crime, is a classic example of impermissible suggestiveness." *Rudd v. Florida*, 477 F.2d 805, 809 (5th Cir. 1973). Moreover, a show-up identification will be deemed unnecessarily suggestive where police "aggravate the suggestiveness of the confrontation." *Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir. 1987).

Police notification to a victim or witness that they have found a suspect prior to conducting an identification procedure is often deemed impermissibly suggestive. *Smith v. State*, 362 So. 2d 417, 419 (Fla. 1st DCA 1978) (reversing where, prior to the identification, police officers told the witness that they had taken a suspect into custody that fit the witness's description). Here, police aggravated the suggestiveness of the confrontation by telling Ms. Saam they had found a suspect before bringing her to a location not far from the crime scene. (R. Vol. III, p. 173-74, 229). Police then exacerbated this by showing Mr. Duty to Ms. Saam while he was in custody, completely surrounded by uniformed law enforcement officers. (R. Vol. III, p. 173-74, 229).

The police further aggravated the inherent suggestiveness of the show-up by requiring Mr. Duty to wear clothing that matched the victim's description. In her call to police, Ms. Saam stated that the suspect was wearing a green sweatshirt over a white t-shirt and a red baseball cap. When police detained Mr. Duty, he was shirtless—specifically how his boss remembered dropping him off. (R. Vol. III, p. 229-30). Instead of presenting Mr. Duty to the victim in the manner in which he appeared when he was apprehended, police retrieved a white shirt from Mr. Duty's backpack and required him to wear it at the time of identification. Similar procedures have led courts to reverse a conviction. *See Foster v. California*, 394 U.S. 440, 443 (1969) (lineup procedure unconstitutional where defendant was made to wear a jacket similar to that described by the witness); *People v. James*, 8 N.Y.S.3d 400, 403 (N.Y. App. Div. 2015) (show-up unduly suggestive where police draped a shirt described by the witness over the shirtless defendant's chest); *People v. Conley*, 87 N.Y.S.2d 745, 746 (N.Y. App. Div. 1949) (same, where the defendant was asked to remove his glasses for the identification procedure).

In a situation resembling Mr. Duty's, a court held a show-up impermissibly suggestive when police told the victim beforehand that they had caught a suspect, and then placed a jacket similar to that described by the victim on the defendant during the procedure. *See State v. Jones*, 128 A.3d 1096, 1108 (N.J. 2016). The court ultimately reasoned: "[T]his show-up identification procedure was made even more suggestive by the use of distinctive clothing, even though defendant was not wearing the clothing when detained and arrested by the police." *Id.* Like the defendant in *Jones*, Mr. Duty was not wearing the shirt at the time of his apprehension, and Ms. Saam's identification occurred after police told her they had found a suspect matching her description. Thus, an already suggestive procedure was made increasingly suggestive by police conduct, and therefore should have faced suppression had counsel filed such a motion before trial.

The aggravating circumstances surrounding this procedure are problematic because, in her deposition, Ms. Saam expressly stated that her identification was based largely on Mr. Duty's clothing. Specifically, she explained: "Just his overall build, coloring, the shorts, and I mean of course I couldn't see the t-shirt but it was the same color as the one that was underneath the hoody that I could see from the collar." (Exhibit 6, p. 19). Based on this testimony, it is likely the police could have achieved a positive identification when presenting any Caucasian male of average height and build, so long as the individual was told to wear a white shirt and khaki shorts at the time of the identification.

B. The Victim's Identification was Unreliable.

In evaluating the chances of misidentification, courts consider: (1) the witness' opportunity to view the suspect at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the suspect; (4) the level of certainty

demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Anderson*, 946 So. 2d at 582 (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).[6] A failure to describe a striking feature of a suspect prior to a witness identification of that suspect can indicate that the witness lacked the opportunity to closely observe the assailant, or that the witness identified the wrong individual entirely. *Davis v. State*, 683 So. 2d 572, 574 (Fla. 4th DCA 1996). Both scenarios demonstrate a lack of reliability. *Id.*

Here, Ms. Saam did not have a strong opportunity to view the suspect, and openly admitted to her lack of attention. She even explained in her deposition that she was texting when the assailant approached her. (Exhibit 6, p. 7).[7] The only time Ms. Saam actually saw the perpetrator was while he was holding a weapon, and she immediately opened her wallet to pull out money. (R. Vol. III, p. 167). There is significant scientific data to suggest that focus on a weapon used during a crime can lead to diminished opportunity to view the suspect and, in turn, substantially reduce the likelihood of a correct identification. Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUMAN BEHAVIOR 413 (1992) (This meta-analysis of 19 studies with a total sample of 2082 participants indicated that the weapon focus effect was statistically significant and demonstrated impairment of identification accuracy).[8] Similarly, "high levels of stress can diminish an eyewitness' ability to recall and make an accurate

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[6] However, in light of modern scientific evidence, several courts have dispensed with this test and recognized that it is not an adequate measure for reliability. *State v. Henderson*, 27 A.3d 872, 878 (N.J. 2011); *State v. Lawson*, 291 P.3d 673, 706 (Or. 2012) (recognizing that "memory decay must be viewed in conjunction with other variables that affect the initial encoding of memories, such as cross-racial identification, weapon-focus, degree of attention, distance, lighting, and duration of initial exposure").

[7] Research demonstrates that impairments associated with texting while driving can be as profound as those associated with driving while intoxicated. *See* David L. Strayer, Frank A. Drews & Dennis J. Crouch, *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 HUMAN FACTORS 381, 381 (2006).

[8] The *Henderson* court discussed this in detail. *See Henderson*, 27 A.3d at 904-05.

identification." *State v. Henderson*, 27 A.3d 872, 904 (N.J. 2011). Consequently, any opportunity to initially view the suspect was adversely affected by Ms. Saam's admitted lack of attention, and this was worsened by the fact that she was forced to nervously multitask during the exchange. Under these circumstances, Ms. Saam's questionable degree of attention seriously undermines the reliability of her identification.

Moreover, Ms. Saam could not initially provide an accurate description of the suspect she later identified, and instead described only the assailant's clothing. First, Ms. Saam explained that the suspect was wearing a red baseball cap, a green hoodie over a white t-shirt, and cargo shorts. When police stopped Mr. Duty, he was wearing a backpack and a tool belt, was shirtless, and was wearing sneakers with tape wrapped around them. Had Mr. Duty been the perpetrator, Ms. Saam likely would have noticed the taped shoes, an obvious irregularity, either during the encounter or upon his escape. However, she stated she never noticed his shoes at all. (R. Vol. III, p. 167). This failure to describe a striking feature is demonstrative of the lack of reliability of her identification. *Davis*, 683 So. 2d at 574. Ms. Saam also stated that the perpetrator had pale skin, no tan, and blonde hair. (Exhibit 4, p. 1). Mr. Duty has dark brown hair, and the interrogation video reveals that he was actually sunburnt on the day of the crime.

The contents found on Mr. Duty are also inconsistent with Ms. Saam's description. Mr. Duty's backpack did not contain a green hoodie or a red baseball cap, and these items were never recovered. Additionally, Ms. Saam specifically mentioned that her attacker was not wearing a tool belt or a backpack, and never stated that he was dressed as a construction worker until after the show-up identification. Importantly, Mr. Duty was found with slightly over two dollars ($2.00) on his person, and had nothing of value that could have been purchased with the money that was stolen. Finally, Ms. Saam described the knife as "serrated," but Mr. Duty was found

with a straight-edged knife in a holster. These inconsistencies are not minor, considering Mr. Duty would have had to abandon all his possessions during the incident for Ms. Saam to have not identified them, then retrieved them before being apprehended.

From her deposition testimony, Ms. Saam recalled being relatively certain about this initial identification. It is not surprising that Ms. Saam felt confident—police had told her that they found a suspect before they conducted the identification, and "[i]nformation received by witnesses both before and after an identification can affect their memory." *Henderson*, 27 A.3d at 899. This is reinforced by the fact that police did not present any additional suspects for Ms. Saam to identify. Scientific studies have consistently shown that the confidence an eyewitness expresses in the identification during testimony is the most powerful single determinant of whether or not jurors will believe that the eyewitness made an accurate identification.[9] Yet, there is also a consensus within the scientific community that a statement of confidence, while compelling to the jury, is a weak predictor of the accuracy of the identification.[10]

While it is estimated that the show-up identification occurred between 45 minutes to an hour after the incident, this small timeframe is easily offset by the aggravating procedures employed by police while conducting the already inherently suggestive procedure.

When considering these reliability factors in their totality, in conjunction with the significant evidence pointing to Mr. Duty's innocence, there is a substantial likelihood that the impermissibly suggestive show-up identification procedure employed in this case led to

[9] *See* Cutler, Penrod & Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUMAN BEHAVIOR 185 (1990); Wells, Ferguson, & Lindsay, *The Tractability of Eyewitness Confidence and its Implications for Triers of Fact*, 66 JOURNAL OF APPLIED PSYCHOLOGY 688 (1981).

[10] *See* Elizabeth Loftus & James Doyle, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 3–12, at 67 (3d ed. 1997). This Florida Supreme Court has recognized as much. *See Simmons*, 934 So. 2d at 1124 (Pariente, C.J., specially concurring).

irreparable misidentification of Mr. Duty as the perpetrator. Thus, the admission of the victim's identification of Mr. Duty as the perpetrator violated his rights to due process under the Fourteenth Amendment of the United States Constitution and should have been suppressed.

C. Failure to Move for Suppression of Impermissibly Suggestive Identification Testimony is an Unreasonable Trial Strategy that Prejudiced the Outcome of Mr. Duty's Trial.

Where the primary evidence relied on for conviction is eyewitness identification testimony obtained through suggestive procedures, a defense attorney's failure to object to or file a motion to suppress such testimony is not sound trial strategy. *Thomas v. Varner*, 428 F.3d 491, 504 (3d Cir. 2005); *Glaser v. State*, 575 N.E.2d 329, 330 (Ind. 2d DCA 1991) (holding that counsel's failure to challenge identification testimony was prejudicial because the outcome of the defendant's trial turned on the identification of the perpetrator by the victim).

This is not a case where a defendant is challenging his attorney's decision not to file a wide range of futile pre-trial motions. This is a case where the defendant is illuminating his attorney's failure to challenge the only evidence relied on by the state to obtain a conviction—here, an impermissibly suggestive show-up identification. Considering Mr. Duty's trial counsel relied so heavily on the prosecution's lack of evidence, and even cited this as an excuse (albeit an unreasonable one) for not calling an alibi witness, there is virtually no reasonable explanation for failing to file the only motion that likely would have excluded the central piece of evidence to the State's prosecution of Mr. Duty.

Not only was failing to move for suppression objectively unreasonable under the circumstances, this omission undoubtedly prejudiced Mr. Duty's trial. Had counsel moved to suppress the suggestive show-up identification, it is probable that the motion would have been granted and the identification excluded as evidence. Because the identification would have been

suppressed, it is likely that Mr. Duty's case would not have proceeded to trial at all. Additionally, had Mr. Duty's counsel attempted to introduce expert testimony as to eyewitness identifications, it could have mitigated the prejudicial impact the victim's testimony produced.[11] However, Mr. Duty's counsel failed to pursue either strategy. Instead, the jury was left to consider the victim's identification testimony with the only challenge to its reliability occurring in opening and closing arguments.

"[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). Mr. Duty's counsel did not present an alibi witness, called a witness that provided harmful testimony, failed to impeach this lone witness with available evidence, and did not present any testimony challenging the victim's identification. Thus, the totality of the evidence presented to the jury in this trial was a knife that the victim could not initially identify, and the victim's unreliable identification testimony founded solely on the clothing of her assailant. Mr. Duty has established that his counsel's omissions were both objectively unreasonable and prejudiced the outcome of his trial. Under these circumstances, Mr. Duty's representation fell far below that required by *Strickland*, and but for his counsel's deficient performance there is a reasonable probability he would have been acquitted. Thus, this Court should grant his Motion.

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[11] *Peterson v. State*, 154 So. 3d 275, 285 (Fla. 2014) (Pariente, J., concurring) (explaining why eyewitness identification expert testimony should be generally admissible to assist the jury in determining the reliability of eyewitness identifications, especially in cases resting substantially or entirely on eyewitness testimony); *Jones v. State*, 197 So. 3d 1085, 1092 (Fla. 2d DCA 2015), reh'g denied (Feb. 24, 2016) (holding that because so many factors affecting the reliability of the eyewitness identification were present in the case, it was an abuse of discretion to exclude the eyewitness identification expert's testimony).

IV. Cumulative Error.

Every omission made by Dustin Duty's trial counsel had the unfortunate result of depriving the jury of the crucial knowledge that Mr. Duty was working, and was not dropped off by his boss, Fred Davis, until after the crime had occurred. "Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants." *Salazar*, 188 So. 3d 818 (citing *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009)). Thus, this Court should recognize that all the errors that occurred at Mr. Duty's trial cumulatively establish that Mr. Duty did not receive the fundamentally fair trial to which he was entitled under the Sixth and Fourteenth Amendments. *See State v. Gunsby*, 670 So. 2d 920, 925 (Fla. 1996).

Taken cumulatively, the errors of Mr. Duty's counsel left the state's case virtually unchallenged. Deprived of an alibi witness and exposed to victim identification testimony procured from impermissibly suggestive procedures, the jury's decision was the result of a highly prejudicial trial, evidenced from the jury's question during deliberations. The cumulative errors by counsel at Dustin Duty's trial illustrate an undue prejudice to Dustin Duty, as well as a reasonable probability that, but for his ineffective counsel, the results of the proceedings would have been different.

CONCLUSION

WHEREFORE, for the aforementioned grounds specifically alleged, Dustin Shane Duty respectfully requests this Honorable Court to enter an order granting his Motion for Post Conviction Relief and vacating the conviction and sentence, or, at a minimum, order an evidentiary hearing to present evidence to support the alleged entitlement to relief.

Respectfully Submitted,

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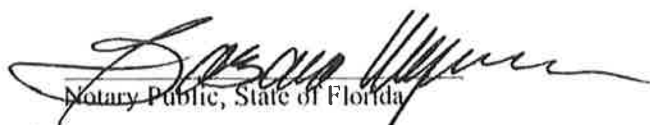
VERIFICATION

STATE OF FLORIDA)
)
JACKSON COUNTY)

Under the penalties of perjury, I, DUSTIN SHANE DUTY, swear that (1) I do speak, read, write and understand English, (2) I have read this Motion and discussed it with my counsel, (3) I understand its contents, and (4) that all the facts stated in the Motion are true and accurate to the best of my knowledge, this 25 day of January 2017.

DUSTIN SHANE DUTY

DUSTIN SHANE DUTY, swore to and subscribed before me that this Motion is true and accurate, this 25th day of January 2017, by producing GED ID Card DC# J51925 as identification or who is personally known to me.



Notary Public, State of Florida

Barbara Wynn
Printed Name

Commission Expires: 05/31/2019