IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,

-versus- **Case # 2013CF-004788-XX**

VICTOR NOEL CAMACHO,

Defendant.
_____/

DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

Defendant, VICTOR NOEL CAMACHO, by and through the undersigned counsel and pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, hereby moves this Court to vacate and set aside the conviction and sentence entered against him in this Court on December 12, 2014. The following exhibits are included and incorporated in the instant motion:

Exhibit A- Statement of V. Camacho, dated June 9, 2013

Exhibit B- 911 Transcript, dated June 9, 2013

Exhibit C- Prehospital Care Report Summary, dated June 8, 2013

Exhibit D- Statement of K. Jones, dated June 9, 2013

Exhibit E- Statement of R. Campos, dated June 9, 2013

Exhibit F- Deposition Kendra Jones, dated October 21, 2013

Exhibit G- Deposition Rosendo Compos, dated October 21, 2013

Exhibit H- Defendant's Motion in limine, filed June 16, 2014

Exhibit I- Request to Examine Evidence, filed June 16, 2014

Exhibit J- Jury Trial Transcript, held on June 16, 2014

Exhibit K- Jury Trial Transcript, held on June 18, 2014

Exhibit L- Defendant's Response to State's Response to Defendant's Request to Examine

Evidence, field August 6, 2014

Exhibit M- Order on Defendant's Request to Examine Evidence filed on July 18, 2014

Exhibit N- Order on Defendant's Amended Motion for Expert Access to Evidence for Forensic Testing and State's Response to Defendant's Amended Motion for Expert Access to Evidence for Forensic Testing, ordered on September 9, 2014

Exhibit O- Trial Transcripts Volumes 1 through 6

Exhibit P- State's Sentencing Memorandum, filed on October 8, 2014

Exhibit Q- Judgment Sentence, dated December 12, 2014

PROCEDURAL HISTORY

1. On July 1, 2013, Camacho was charged by information with second degree murder with a firearm in violation of Florida Statutes §§ 775.087 and 782.04. The case was tried before the Honorable Catherine Combee and a jury in this Court. Trial commenced on June 16, 2014 and the Court granted Camacho's motion for a mistrial on June 18, 2014. Camacho was retried in this Court on September 22, 2014 and found guilty of second degree murder with a firearm. On December 12, 2014, the Court sentenced Camacho to life imprisonment without parole. Camacho appealed to the Second District Court of Appeal, which affirmed, per curiam, the judgment and sentence on September 22, 2014, with the opinion being issued on June 15, 2016, and mandate being issued on July 19, 2016.

STATEMENT OF RELEVANT FACTS

2. Camacho was represented by the Public Defender's Office, Ruth Knight, Esq. and Emile Mufidi, Esq.

Date of the Accident

3. Throughout the day Camacho and his roommates were drinking beer at their home. None of them argued and there were no altercations amongst them. (Exhibit A, pp. 5-6). As the day grew later everyone started to go to bed. Roberto Arroyo, Rosendo Campos, Ubaldo Medrano, the decedent, and Camacho all slept in the living room. Camacho and Medrano were the last two awake and continued to socialize and make plans for the following day. Once Medrano went to sleep Camacho gathered fresh clothes for the shower. (Exhibit A, p. 2). In this same dresser drawer was the firearm. As Camacho moved the firearm it unintentionally discharged and Medrano was shot. (Exhibit A, pp. 2; 13; 16). In a panic, Camacho told Arroyo to call 911 and he left the home. (Exhibit A, p. 19).

911 Call

4. Roberto Arroyo ran across the street to Kendra Jones home and asked her to call 911. Jose Martinez, Jones' boyfriend translated Spanish to English for Jones to relay to dispatch. Arroyo stated Camacho was doing something with the gun, possibly cleaning, when it went off. (Exhibit B, pp. 2-3; 5).

Prehospital Care Report Summary

5. Paramedic Elsi Bonilla stated in her report:

> HISTORY OF EVENT/PRESENTING COMPLAINT: EXACT EVENTS LEADING TO PATIENTS DEATH CURRENTLY UNDER INVESTIGATION. AS PER NOTES RECEIVE BY DISPATCH PATIENT'S FRIEND AND OR FAMILY MEMBER ACCIDENTLY DISCHARGE A WEAPON CAUSING THE PATIENT TO BE SHOT IN THE HEAD.

(Exhibit C, p. 2).

Witness Statements

6. Kendra Jones confirmed in her recorded statement Roberto Arroyo said the firearm went off by accident. (Exhibit D, p. 2). Rosendo Campos explained prior to the discharge Camacho and Medrano had been joking around. (Exhibit E, pp. 3-4). Camacho never pointed the firearm at him and they were friends. (Exhibit E, p. 6).

Camacho's Statement

7. Camacho told law enforcement during his panic he left the home and threw the firearm in the woods and would show them where. (Exhibit A, pp. 11; 16). The orange shirt he was wearing when the police arrived had already been torn and was not the result of an altercation. (Exhibit A, p. 14). Besides explaining to law enforcement that the firearm unintentionally discharged he went with them to show them where he had disposed of it. (Exhibit A, pp. 2; 13-14; 16).

Depositions

8. On October 21, 2013, Kendra Jones, Cesar Arroyo, Pedro Arroyo, Roberto Arroyo, Octavio Arroyo-Gonzalez, Raul Arroyo, Philipe Campos, Rosendo Campos were deposed. Jones testified that Camacho and his roommates were all good friends. (Exhibit F, p. 7). Particularly, Camacho and Medrano she always saw them together. (Exhibit F, p. 7). On the day of the accident, her boyfriend Jose Martinez was telling her what her neighbor was saying so she could relay that information to 911. (Exhibit F, p. 11). The neighbors later told Martinez they did not see the firearm discharge and she did not understand why he was not there because he knew more than she did. (Exhibit F, pp. 13; 15). Another man in the house they called Camacho said a few days later that he heard Victor Camacho and Medrano get into an argument and Camacho shot at Medrano intentionally. (Exhibit F, p. 18-19). Another neighbor told her he saw

a man leave the house with a white T-shirt on before the police arrived. (Exhibit F, pp. 16-17). She let the attorneys know she was willing to go to Court if needed. (Exhibit F, p. 21).

9. Rosendo Campos testified that Camacho and Medrano were friends and got along with each other well. (Exhibit G, p. 9). The night of the accident, Roberto Arroyo and Medrano were sleeping when he came inside the home. (Exhibit G, p. 11). As he undressed for bed Camacho came in the home and Medrano woke up. (Exhibit G, p. 11). Medrano sat up and he and Camacho began talking and joking around as Campos lay down to go to sleep. (Exhibit G, pp. 11-12; 14; 19). As Camacho and Medrano were conversing he heard the firearm discharge. (Exhibit G, pp. 12; 22). During Camacho and Medrano's conversation their voices did not change, but stayed at a regular tone. (Exhibit G, p. 15). After the firearm discharged, Campos turned around and saw Camacho still sitting on the sofa adjacent to where Medrano had been sitting on his sofa bed. (Exhibit G, p. 15). Camacho appeared confused and ran out of the home. (Exhibit G, p. 16). Campos could not determine if the firearm discharged unintentionally, but confirmed that the events that had happened prior to the discharge were not abnormal. (Exhibit G, p. 16). Nor, did he believe that Camacho had any motive to intentionally shoot at Medrano. (Exhibit G, pp. 16-17). Prior to the accident, Campos had not seen Camacho with a firearm or a firearm in the home. (Exhibit G, p. 17). Campos could not remember if he was the person who had went to the neighbor's home to call 911. (Exhibit G, p. 17). Nor, did he recall telling law enforcement that Camacho had made any threats to Medrano. (Exhibit G, p. 20-21).

Pre-Trial Proceedings

10. On June 16, 2014, the defendant filed a motion in limine to preclude: evidence of confession without corpus delicti, officers' hearsay statements, officers from saying they were responding to reports of intentional shooting in the trailer, evidence of other bad acts or collateral

crimes, improper impeachment of witnesses with past criminal acts, evidence of statements not previously disclosed, evidence of flies on the deceased body, comment on failure to produce evidence, and improper bolstering of witnesses. (Exhibit H, pp. 31-32). Trial counsel also filed a motion to examine the firearm the day trial was set to commence. (Exhibit I, pp. 29-30).

11. The State agreed Camacho's statement would not be introduced, however, nor could trial counsel elicit any self-serving statements. (Exhibit J, pp. 7-11). The Court reserved a ruling to be determined after an objection. (Exhibit J, pp. 7-11). The State also agreed with the remaining preclusions unless the defense opened the door. (Exhibit J, pp. 12-21).

12. The State argued that the motion to examine the firearm was filed by trial counsel was for the purpose of delay and in bad faith, which trial counsel admitted was filed to support the motion for continuance that was previously denied. (Exhibit J, pp. 24-30). The defense had over a year to inspect the firearm and chose not to do so. (Exhibit J, pp. 24). This would prejudice the State because the witnesses were hard to find. (Exhibit J, pp. 27). The Court denied the motion because trial counsel had not contacted their listed expert, had not subpoenaed their listed expert, they did not know his availability or if he was even willing to inspect the firearm. (Exhibit J, pp. 30-44). Trial counsel also tried to get in contact with another expert Allen Greenspan, but only had his email. (Exhibit J, pp. 30-44).

Trial Commenced on June 17, 2016

13. During State's witness, Robert Arroyo's, examination the Court Interpreter misinterpreted what the witness said. (Exhibit K, pp. 242-44). Instead of interpreting gunshot she stated shotgun to the head. (Exhibit K, pp. 243-44). She also misinterpreted watching him instead of looking at him. (Exhibit K, pp. 248-49). The State moved to correct the record by correcting the interpretation. The Court instructed trial counsel to speak to Camacho and after

they did the defense moved for a mistrial. (Exhibit K, pp. 262-71). The Court granted the motion for a mistrial. (Exhibit K, pp. 271-72).

Second Pretrial Proceedings

14. On July 18, 2014, trial counsel filed Defendant's Response to State's Response to Defendant's Request to Examine Evidence. (Exhibit L, pp. 39-41). The Court denied the motion without prejudice until the defense provided in detail the extent of the examination, who would conduct the examination, and where the examination would occur. (Exhibit M, pp. 61-62).

15. On September 9, 2014, after the defense amended their motion the Court granted Defendant's Amended Motion for Expert Access to Evidence for Forensic Testing. (Exhibit N, pp. 63-64).

Second Trial

16. On September 22, 2014, Camacho was retried. After jury selection, the Court heard the defense's motion in limine. (Exhibit O, pp. 177-98). The State agreed to the defense's motion in limine except for officer's hearsay as prior consistent statement exception, which the Court took under advisement. (Exhibit O, pp. 177-98).

17. In regards to impeachment, the following transpired:

> MR. MUFDI: Yes. And just to remind the Court, last time in trial we had to go over the sources of impeachment for the witnesses because they can't read the transcript.
> THE COURT: Correct.
> MR. MUFDI: So if you want, State wants, we can do that once again outside the presence of the jury and that way, you know, take care of it.

(Exhibit O, pp. 189-90).

18. In regards to the defenses firearm expert the following was argued:

MR. ANONELLO: Okay. If, if and unless, what the State's concerned about this, it would be highly prejudicial to the State and simply not the truth if – I', concerned about if we call him, and we are going to call him, okay, the defense witness – did the Court get the copy of that?
THE COURT: Yes, sir.
MR. ANTONELLO: So the Court understands what the State is going to do as far as that witness.
THE COURT: Yes, sir. Yes, sir.
MR. ANTONELLO: And if the defense through questioning or through argument questions his qualifications and that, well, maybe this person's not qualified, how – you know, however and which is gonna imply that he never talked to him or he never – it may come out then that, well, you know, Mr. So and SO asked was he aware of your qualifications, was he – you know, isn't it a fact that he's the one who hired you to this test.
If he opens the door to it, Your Honor, to make it look like we, we have called an expert witness that is not qualified that they haven't had a chance to question him and they – or that he performed this test, well, who was at the test, Mr. Antonello was at the test, there were law enforcement at the test, implying that he wasn't at the test.
And when he's the one that set up the test and he's the one that called the witness to be there. And the jury's to be left with the impression that, man, this State is doing things all on its own here and who knows about the – they didn't even invite the defense, they got all these law enforcements all there, then we're calling him as a witness and then they're going to wonder what's the State paying this guy.
So if he gets into anything like that, I will do it where it will avoid any of those questions by Mr. Mufdi as far as what he's being paid, who's paying him.
And, well, the fact of the matter is he hired him, he paid him, he set up the test, he chose not to be there at the test. We fought this test for almost a year and then for him to come in and to let the jury think that we did this test and that this guy's not qualified and that they didn't have a right to be there and that we should put – if he opens the door to do that judge, then it's all coming out.
But I will have no problem presenting it in such a way that that door will not be opened and the jury will never know it. But if, if defense opens that door, cracks it open, we are going through it so the jury knows the truth about the qualifications and the unbiased of this witness.
And he is totally unbiased. Because he will testify that he went there to try to get the gun to misfire. That is what he was told by

> defense to do. And so that's what – I will say – I will go down there.
> So then for it to be flipped on where the State has not been fair to the defendant or anything in this case, he may open the door to it.
> But if he opens the door on any of these matters, the jury's going to know then, Your Honor, that he hired the expert, defendant hired the expert, and the defendant had a right to be there.

(Exhibit O, pp. 192-95).

19. The Court reserved ruling based on the testimony elicited. (Exhibit O, p. 198).

20. Before the State called their first witness the issue of how to impeach Rosendo Campos was addressed by the following:

> MR. ANTONELLO: The Court had requested of the State I know, and I'm not sure of the defense or not, to see what we can do to make the impeachment of Mr. Rosendo by using the deposition of October 21st, 2013, go smoothly and that proper procedure be followed by the defense and the State in regard to the use of that deposition and the obstacles that we have in regard to the interpretation of that deposition.
> We pondered it long last night and we tried to work on it to come up with a solution, and this is the best solution that we could come up with. And we just give it to the Court as to whatever the Court wishes to do.
> First, Your Honor, we would suggest – and I think we're going to have plenty of time today to do this – is that before Mr. Rosendo testifies that outside the presence of the jury without the witnesses present, just with the defense counsel and the State's counsel, that the defense proffer the method of impeachment that he would to use that deposition to impeach the witness.
> The State then during this proffer outside the jury would make an objection as it would in court as to whether or not the State feels that that method is a proper method in accord with the law.
> And then after that is done, Your Honor, both the State and the defense will look to the Court and the Court will instruct the defense and the State as to the proper method of doing this and how it should be done and how the Court is going to rule when – and that may avoid objections during trial and us having sidebars, et cetera, et, cetera.
> Now, that's one thing that – the only thing that we could come up with that might make this go smoother, your Honor.

And, again totally within the Court's control. The Court's going to say how it should be done by both the defense and the State after hearing arguments from – outside the presence of the jury.
Secondly, Your Honor, is – and I will get – let me just address this point. And I can't think of a good way to do this, but this is what we've come up with. Again, just a suggestion. Is that we feel that the proper way is – and I'm going to get to the point – is for let's say the defense counsel's using that deposition of October 21st, 2013, and the witness is on the stand.
The problem we have here is the witness does not speak English or read English and – or understand English to any extent.
So defense counsel would I presume ask this witness a question, a specific question and a pointed question, and he gets the answer from that witness.
Now, that is the first predicate. And defense counsel knows in the deposition that he has of October that this witness has given an inconsistent statement during the deposition, specifically to the question that he was asked then.
Then I would suggest that the proper procedure is for defense counsel to approach the witness with that page and line, place it before, and asks does this refresh your memory. Now we have problems with the transcript because he can't read English.
One way I was thinking – and I don't know if this is proper for the interpreters or the Court – would be for the interpreter to read that to him, say, okay, this was your deposition taken on – in Spanish, nobody's going to be able to understand it especially if he is talking low but he's talking – this was your deposition taken on October 21st, two-thousand- -- it says here they asked you this, you answered this, boom.
And then the interpreter can say I have read that to him. And then counsel can say does that refresh your memory. And either he's gonna say yes and come with a different answer or he's gonna say, no it doesn't, then I believe it's proper for counsel to read into the record the question and the answer during the deposition and then stop right there.
That's one way that – one possible way to handle that problem. Okay, so that's there. And we will leave this up – of course leave it up to the Court whether the Court wants to do this proffer ahead of time or not.
…
Number two, if they wanted this transcribed and used at trial, there is a way to do it properly and that is this. Is that there is a – there's a tape recording made and the Court may be aware of this, but this is what, what the rules – to avoid what we are in right now, that they have the Spanish interpreter on tape – well, what the witness says is Spanish is on a tape recording. And then the court – a

> Spanish-interpreting court reporter will type out that translation and then the court reporter who was there, there at the deposition, will type out what the, what the translator, the interpreter's saying there. So you have it in each column. And that stops that.
> But once again we're in this position. Once again defense chose the interpreter, they chose not to use an official court reporter – court-appointed interpreter and they chose not to have the deposition typed in that manner.
> So it can probably – and then it would be very easy to impeach him because we would have it, he could read Spanish. Okay, so we are in that position now.

(Exhibit O, pp. 208-15).

21. The Court ruled the testimony would be proffered outside the presence of the jury for the depositions and testimony from the first trial. (Exhibit O, pp. 222-24).

The State's Case

22. Casey Knox, a crime scene investigator with the Polk County Sheriff's Department, testified that she took aerial photographs of the 542 Peek Drive residence and surrounding area on June 20, 2013 in Haines City, which was admitted in evidence. (Exhibit O, pp. 226-28).

23. Michelle Rhoden, a crime scene investigator with the Polk County Sheriff's Department, identified photographs of the sofa bed, blood stains on a pillow cover, and a spent bullet casing from a .380 semiautomatic pistol that she collected. (Exhibit O, pp. 232-42).

24. Prior to calling Rosendo Campos it was discussed at length on how to properly impeach the witness because trial counsel did not have the deposition or first trial transcribed from English to Spanish. (Exhibit O, pp. 245-52). The Court later stated "Well, let me remind you we are on our forth witness, it's 1:30, and you have got these jurors coming in and out like yo-yos." (Exhibit O, pp. 328).

25. Rosendo Campos testified, through a Spanish interpreter, that on June 8, 2013, he lived in a trailer in Haines City with Ubaldo Medrano, Roberto Arroyo and Camacho. (Exhibit

O, pp. 255). They drank beer starting at 11:00 a.m. and they were drunk by the time they went to bed that evening. (Exhibit O, p. 265).

26. He was outside with Camacho, and when they entered the trailer to go to sleep, Arroyo and Medrano, were sleeping on the sofa bed in the living room. (Exhibit O, pp. 256-58). Camacho woke up Medrano by shaking him and pulling his hair. (Exhibit O, p. 258). Camacho sat down next to Medrano and they were talking and joking for about five minutes. (Exhibit O, pp. 258-59; 281). Medrano said something to Camacho, who responded that he was going to stay there like a dog also. (Exhibit O, p. 259). Camacho stood up from the sofa, pulled a gun from his waistband, shot Medrano, stood there for a moment, and ran out of the trailer. (Exhibit O, pp. 259-63). He identified a photograph of a man lying in the bed as Medrano. (Exhibit O, p. 262).

27. Trial counsel proffered to impeach Campos with his prior deposition that he did not did not say that Camacho woke up Medrano by shaking him and pulling his hair, to which Campos responded that he did not understand the deposition question. (Exhibit O, p. 269). Trial counsel also proffered that Campos did not tell law enforcement on the morning of the crime that Camacho woke up Medrano by shaking him and pulling his hair. (Exhibit O, pp. 269-72). The Court approved impeachment with the deposition, but denied impeachment with his prior statement to law enforcement. (Exhibit O, pp. 277-78).

28. On cross-examination, Campos repeated his direct testimony that he "saw [Camacho] put his hand on his waist pulling the gun out and shooting [Medrano]." (Exhibit O, p. 293). After trial counsel asked him to explain his failure to mention it during his prior deposition, he explained that he had laid down and did not see the gun until he heard the gunshot, then he turned around and saw Camacho with the gun in his hand. (Exhibit O, pp. 294-95).

29. On redirect, over the defense's bolstering objection, the State asked Campos about his deposition testimony regarding how Camacho woke up the victim, to which Campos answered "[h]e shook him and pulled his hair." (Exhibit O, p. 297). Over the defense's objections of hearsay, beyond the scope and improper impeachment, the State was further allowed to ask "[y]ou told us that Victor shook Ubaldo; is that correct? … you told us that Ubaldo and Victor never really had words with one another; is that correct?" (Exhibit O, pp. 297-99). The State then inquired whether Camacho had said something to Medrano outside the trailer that night, and Campos responded that Camacho had said that "he could hit him anytime he wanted with a hand." (Exhibit O, p. 299).

30. Then the following transpired:

> PROSECUTOR: Mr. Campos, the night of this incident, do you remember speaking to Detective Leonard and Detective Aguirre in their police vehicle?
> CAMPOS: Yes.
> PROSECUTOR: Now, that day the detective, did they put you under oath?
> DEFENSE: I am going to object as improper. The witness has not stated any problem with his recollection.
> COURT: Overruled.
> CAMPOS: Yes.
> PROSECUTOR: On that day did you give the detectives a recorded statement about what happened?
> CAMPOS: Yes.
> PROSECUTOR: May I approach, Judge?
> COURT: Yes, sir.
> PROSECUTOR: For defense counsel, this is page 4, lines 6 through 10.
> INTERPRETER: The one highlighted?
> DEFENSE: I am also going to object as bolstering and hearsay, Your Honor.
> PROSECUTOR: Yes.
> PROSECUTOR: Mr. Campos, the night of the incident, what Ubaldo – what did Victor tell Ubaldo?
> CAMPOS: He told him he could hit him or punch him anytime he wanted because it's like he was feeling stronger than him.

(Exhibit O, pp. 299-300).

31. Gustavo Aguirre, a Detective with the Polk County Sheriff's Department, testified that he was dispatched to the scene, and he helped interview Campos in Detective Jeanette Leonard's vehicle. (Exhibit O, pp. 316-18). The State instructed Detective Aguirre to "please tell the jury what Rosendo Campos told you at about 3:25, 3:15 a.m. on the morning of June 9th on Peak Drive, what he told you he saw with his own eyes the evening before." (Exhibit O, p. 319). Trial counsel objected and argued improper bolstering with a prior consistent statement. (Exhibit O, p. T 319). The Court agreed with the State that the prior consistent statement is an exception to hearsay because the defense raised a recent fabrication by indicating to the jury that Campos had made different statements in his deposition. (Exhibit O, p. 327). Detective Aguirre then testified that Campos "stated he observed the suspect in the case reach into his waistband, grab a firearm, and shot the victim in the head." (Exhibit O, p. 328).

32. On redirect, Detective Aguirre testified that Campos also stated "they were talking in the residence, made mentions of leaving to Mexico, there was joking back and forth between the victim and the suspect, which then later transpired that the victim told the suspect that he was going to stay like the dog that he was. After that the suspect then replied to the victim and told him that he could kill him." (Exhibit O, p. 335).

33. Roberto Arroyo Gonzalez testified that he lived in a trailer in Haines City with Rosendo Campos, Ubaldo Medrano and Camacho. (Exhibit O, pp. 337-38). On June 8, 2013, before he went to sleep, Medrano and Camacho were drinking alcohol and they appeared drunk. (Exhibit O, p. 343). Medrano came back in the trailer, laid in the bed and was watching television. (Exhibit O, pp. 343-44). Arroyo was sleeping, when he was awakened by the sound of gunfire. (Exhibit O, p. 339). He saw Medrano with blood on his head and Camacho was

standing next to the bed with the gun against his own body, looking at Medrano. (Exhibit O, pp. 339; 341; 345). He asked Camacho why he killed him, and Camacho repeated "I killed him" twice before he ran. (Exhibit O, pp. 339-40).

34. Sean Jones, a Deputy with the Polk County Sheriff's Department, testified that he responded to 542 Peak Drive on June 9, 2013, around 6:45 a.m., to relieve Deputy Garcia. He was directed to meet Deputy Garcia on East Johnson Avenue, about a mile and a half away, where he took custody of Camacho and transported him to the Sheriff's main operation center for interrogation. (Exhibit O, pp. 354-59). Later, he was instructed to transport Camacho to Kalogridis Road to locate a firearm. (Exhibit O, p. 361). When they arrived, Camacho led him to a small clearing in a wooded area, he motioned with his head where to look there, and Deputy Jones saw a black and silver handgun. (Exhibit O, pp. 362-63). Deputy Jones guarded it until crime scene investigators arrived, then he transported Camacho back to the operation center. (Exhibit O, p. 363).

35. Amy Losciale, a crime scene investigator with the Polk County Sheriff's Department, testified she collected and photographed a .380 handgun, an empty Winchester .380 ammunition box, .380 ammunition on the floor, and the scene where the gun was found, which were admitted in evidence. (Exhibit O, pp. 367-68; 371). She was able to lift five latent fingerprints from those items. (Exhibit O, pp. 379-80).

36. Jason McPherson, a Detective with the Polk County Sheriff's Department, testified he recovered a projectile from a blood-stained couch cushion. (Exhibit O, pp. 396-97).

37. Dr. Vera Volnikh, a forensic pathologist with the Polk County Medical Examiner's Office, testified she performed an autopsy of Medrano, concluded he died at the hand of another or homicide, and the cause of death was gunshot wound of the head. (Exhibit O, pp. 401; 409;

424-25). There was an entry and an exit wound with no soot or stippling, indicating the gun barrel was more than two to three and a half feet away. (Exhibit O, pp. 410-15). The bullet traveled from left to right, across the head to exit on his right ear, which indicates the gun barrel was perpendicular to the head. (Exhibit O, pp. 417-420).

38. On cross and redirect examinations, she testified that Medrano's blood alcohol level was very high, .4 grams, and a person would be sleepy or comatose at that level. (Exhibit O, pp. 426; 441). However, the victim was alive when he was shot because of the bleeding in the head. (Exhibit O, pp. 441-42). She conceded that she had testified during deposition that the range for stippling was three to three and a half feet. (Exhibit O, pp. 426, 433).

39. Jennifer Michelson, a crime laboratory analyst for the Florida Department of Law Enforcement, testified she analyzed the firearm, which was working properly. (Exhibit O, pp. 445, 459). The safety was working properly, and the trigger required six to six and a quarter pounds of force to pull it. (Exhibit O, pp. 453-55).

40. Prior to the State calling the defense's gun expert the following transpired:

> MR. MUFDI: …The examination of the firearm was done on Thursday and I only was able to have a brief conversation with Dr. Dow on Friday.
> His – the way that I reached him, Dow Arms, is not open on the weekend and I did not have a personal phone number for him. I have not – of course I have not had a chance to depose him since he was our witness. I am not asking for that.
> But given how recently the examination was, I would ask the Court's indulgence if I can talk to him ten minutes prior since I really haven't had a chance to talk to him about what happened…

(Exhibit O, p. 399).

41. Bruce Dow, the defense's firearm expert, testified that he tested the firearm and found it was functioning properly. (Exhibit O, p. 506).

42. After, the State rested, the Court denied the defense's motion for judgment of acquittal, which was based on the argument of insufficient evidence of a depraved mind to satisfy the third element of second degree murder. (Exhibit O, pp. 518-19; 529).

The Defense's Case

43. Cesar Garcia Chavez testified for the defense that Camacho and Medrano were friends. (Exhibit O, pp. 533).

44. The defense rested and renewed its motion for judgment of acquittal, which the Court denied. (Exhibit O, pp. 541; 544).

45. During the charging conference, the State requested the voluntary intoxication instruction, and trial counsel indicated that he had not and would not argue lack of intent due to intoxication. (Exhibit O, p. 546). During the State's rebuttal argument, the Court overruled the objection of mischaracterization when the State argued that the judge will instruct you voluntary intoxication is not a defense to a crime, but sustained objections to the comment "to disregard what defense counsel told you the law was." (Exhibit O, p. 600). After the defense's closing argument, the Court said that it would include voluntary intoxication in the instruction based on the defense's argument. (Exhibit O, p. 611).

46. The jury found Camacho guilty as charged (Exhibit O, p. 631). Sentencing was scheduled for November 7, 2014 to allow for a presentence investigation. (Exhibit O, pp. 632-33).

Sentencing

47. On October 8, 2014, the State filed a sentencing memorandum requesting the minimum mandatory of twenty-five (25) years to life incarceration. (Exhibit P, pp. 92-93). The Pre-Sentence Investigation recommended twenty-five (25) years' incarceration. Trial counsel

did file a sentencing memorandum, speak with Camacho's family, obtain or submit any character letters, or visit Camacho at jail pending the sentencing hearing.

48. On December 12, 2014, the Court adjudicated him guilty and sentenced him to life imprisonment without the possibility of parole. (Exhibit Q, p. 4).

ARGUMENT

POINT I – TRIAL COUNSEL WAS INEFFECTIVE AND VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHTS WHERE TRIAL COUNSEL FAILED TO FULFILL THE REQUIREMENTS OF COUNSEL AS DELINEATED BY *STRICKLAND, CRONIC,* AND THEIR PROGENY OF CASES

49. It is axiomatic that both the United States Constitution and the Florida Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

50. The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (i) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment;" and (ii) the deficient performance prejudiced the defendant enough to deprive him of the due process of law. Id. at 687.

51. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland at 690.

52. Under Strickland, a defendant must establish the following two components to demonstrate that counsel was ineffective: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 686.

53. Under the deficiency prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To prove the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 686. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id. at 694.

A. Trial Counsel Failed to Honor Defendant's Right to Participate in the Decisions Which Were Fundamental to His Defense and Failed to Honor His Right to be Informed of Important Developments in the Course of the Prosecution

54. Courts have continued to flesh out the responsibilities and actions counsel must take to be considered effective under the Sixth Amendment. One of the most critical duties of counsel is to properly prepare him or herself for an impending legal proceeding. This tenant stands particularly true for pre-trial preparation, because it is considered to possibly be the most

critical stage when it comes to preparing on behalf of a client. See Von Moltke v. Gillies, 332 U.S. 708, 721-23 (1948); Powell v. Alabama, 287 U.S. 45, 57 (1932).

55. When trial counsel failed to provide Camacho with the discovery, or review these documents as a whole with him, trial counsel violated Camacho's Sixth Amendment rights. "It is undisputed that a defendant has a constitutional right to participate in the making of certain decisions which are fundamental to his defense." Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). In order to protect this fundamental right and effectively represent one's client, counsel has an affirmative duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland v. Washington, at 689.

56. Here, trial counsel failed to provide or discuss the discovery they received prior to trial. Instead counsel constantly told Camacho they did not have time to discuss the discovery or go over the depositions because they had other clients to see at the jail. They never discussed what the strategy would be at trial, advise him about testifying on his own behalf, or what witnesses the State intended to introduce. Trial counsel had the ability to remedy this error by advising or explaining what the evidence against their client was. However, when requested and urged by Camacho to discuss the discovery, counsel simply said there was "nothing new" and just "get ready."

57. By refusing to provide or discuss the discovery in this case, trial counsel failed to keep the defendant informed of important developments during the prosecution. This failure kept Camacho from being able to participate in making fundamental decisions in his case. Specifically, Camacho was unable to participate in his own trial.

58. Trial counsel denied Camacho all the discovery and discussions related to such critical aspects of his case. Trial counsel's failure to inform Camacho and include him on fundamental decisions of his defense directly resulted in Camacho's Sixth Amendment rights being violated.

B. Failure to Properly Advise Defendant Regarding His Testimony

59. A criminal defendant's right to testify is a fundamental right under both the Florida and United States Constitutions. United States v.Teague, 953 F.2d 1525, 1532 (1992). A defendant has a Constitutional right to testify in his own defense at trial. People v. Carpenter, 52 A.D.3d 729, (2008); United States v. Van De Walker, 141 F.3d 1451 (11th Cir. 1998). "The decision whether a defendant should testify at trial is for the defendant to make," and "that trial counsel's duty of effective assistance includes the responsibility to advise the defendant concerning the exercise of this constitutional right." Brown v. Artuz, 124 F.3d 73, 74 (2d Cir. 1997).

60. Here, trial counsel never discussed Camacho testifying on his own behalf. Camacho had no choice in the matter because counsel refused to spend any time preparing him for trial at all, which ultimately affected his decision to testify on his own behalf. Since he was denied his right to testify in his own defense, this Court must vacate the judgment of conviction and order a new trial.

C. Failure to Investigate and Prepare

61. It is well-settled that under the United States and Florida Constitutions, effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. Shelito v. State, 121 So. 3d 445 (Fla. 2013); Davis v. State, 928 So. 2d 1089 (Fla. 2005); Freemen v. State, 858 So. 2d 319, 325 (Fla. 2003); see also Coles v. Peyton, 389 F.2d

224, 226 (4th Cir. 1968) (holding "the defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial"); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel). Moreover, "[t]rial counsel has a duty to investigate any potential . . . exculpatory evidence that may assist his or her client." Bell v. State, 965 So. 2d 48, 62 (Fla. 2007).

62. Although there is a strong presumption that trial counsel's decision not to call a witness is strategic, "counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case." Harrison v. Quarterman, 496 F.3d 419, 427-28 (5th Cir. 2007); see Moore v. Johnson, 194 F.3d 586, 604 (5th Cir.1999) ("The Court is ... not required to condone unreasonable decisions parading under the umbrella of strategy."). Furthermore, this complete lack of representation in and of itself bears forth the argument that trial counsel was ineffective per se.

63. In Code v. Montgomery, the Eleventh Circuit found trial counsel ineffective, holding that his failure to conduct appropriate factual investigation and speak with potential witnesses fell below the Constitutional standard. Notably, the Eleventh Circuit held that "failure to adequately investigate and present Code's alibi defense deprived Code of a fundamentally fair trial." 799 F.2d 1481, 1484 (11th Cir. 1986). The Eleventh Circuit also held that "counsel's shortcomings effectively deprived defendants of any defense whatsoever." Id.

64. Here, trial counsel refused to discuss what if any witnesses they did or did not interview or the reasons why. What was clear from the trial was that counsel attempted to prove

that the firearm was unintentionally discharged. However, trial counsel failed to present key witnesses that would have given the jury reasonable doubt to believe Camacho had any ill will, hatred, spite, or evil intent towards Medrano.

65. Specifically, trial counsel failed to interview or depose Paramedic Elsi Bonilla who reported she received information the weapon was accidently discharged. Nor did trial counsel call the 911 caller Kendra Jones as a witness who made numerous statements that she was told this was an accident.

66. "Ineffectiveness is generally clear in the context of a complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts in which such a decision can be made." United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989). It is clear in this case trial counsel had already made the decision, before the start of the trial, or before speaking with Camacho, not to bother investigating or calling these witness.

67. Here, "counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence." United States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989). In this case, as in Lloyd v. Whitley, counsel "did not choose, strategically or otherwise, to pursue one line of defense over another. Instead, [they] simply abdicated [their] responsibility to advocate [their] client's cause." 977 F.2d 149, 159 (5th Cir. 1992).

68. This lack of investigation was exasperated by counsel's failure to prepare the depositions or prior trial testimony to impeach the State's witnesses. The jury was constantly removed from the courtroom to deal with counsel's failure to follow the rules. The their testimony was completely disjointed and it cannot be said what if anything the jury remembered other than constantly being put in the jury room to deal with the situation. This Court even

acknowledged this was a problem.

69. As a result of the foregoing, there is a reasonable probability Camacho would not have been found guilty. On this basis, the Court should find Camacho has stated a facially sufficient claim of ineffective assistance of counsel and determine an evidentiary hearing is warranted.

D. Failure to Challenge The State's Expert

70. Generally, the decision whether to call a witness or not is a tactical or strategic decision. See United States v. Luciano, 158 F.3d 655, 660 (1998). However, in some "[c]riminal cases the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." Harrington v. Richter, 562 U.S. 86 (2011); Stapleton v. Greiner, 2000 WL 1207259 at *16 (E.D.N.Y. 2000) ("[I]n some circumstances, an attorney's failure to arrange for an independent expert examination of critical evidence may be so objectively unreasonable as to violate the Sixth Amendment."); Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007) ("[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable."); Dugas v. Coplan, 428 F.3d 317, 329 (1st Cir. 2005) (representation found deficient where counsel failed to investigate "not arson" defense and seek expert assistance or educate himself on techniques of defending arson).

> Expert testimony is so uniquely impressive upon jurors **that it needs to be rebutted** by evidence from experts. This policy has been described as the need to strike a "fair state-individual balance" as a matter of "fundamental fairness," and as a matter of "judicial common sense."

State v. Huff, 325 N.C. 1, 43 (1989) (internal citations omitted) (emphasis added).

71. Even the United States Supreme Court has weighed in on the topic, finding that prosecution experts can pose a significant threat to a criminal defendant's Constitutional rights

when their unchallenged testimony pointing to the defendant as the perpetrator of the crime is based on unsound science, an incompetent evidentiary foundation, or outright fraud. Hinton v. Alabama, 134 S. Ct. 1081, 1089-90 (2014). This is particularly so because an expert witness' testimony, received along with impressive credentials, cloaks what would otherwise be incredible testimony and makes it seem credible.

72. At the same time, the Supreme Court has recognized that this threat is mitigated when the defense attorney, exercising due diligence, retains a defense expert to examine the opinion of the prosecution expert, and challenge its veracity. Id.

73. Counsel waited until the eve of the trial to have an expert examine the firearm for negligent discharge. Counsel had no idea what the expert would testify to because they chose not to be present during the testing, chose not to speak with the expert after the testing was done, and made the excuse they did not even have his phone number to discuss the testing. This resulted in the State using the defense's expert to corroborate their expert that the firearm was working properly.

74. Such inaction by trial counsel caused Camacho irreparable harm, and epitomizes ineffectiveness and cannot be excused.

75. In Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001), the Second Circuit refused endulge a trial strategy trial counsel's failure to call certain witnesses because [counsel's] decision as to which witnesses to call was to avoid additional labor in preparing a defense that might ultimately prove unsuccessful. The decision not to call any witnesses... was thus "strategic" in the sense that it related to a question of trial strategy of which witnesses to call, and it was "strategic" also in that it was taken by him to advance a particular goal. Id. at 218. However, it was not a plausible trial strategy where the goal was to avoid working instead of providing effective

representation to his client. Id. at 218-19.

76. Like in Pavel, "there is no indication in the record that [trial counsel] had the education or experience necessary to assess relevant physical evidence, and to make for himself a reasonable informed determination as to whether an expert should be consulted or called to the stand." 261 F.3d at 225. What the record does clearly indicate was that trial counsel failed to effectively challenge the State's expert's testimony.

77. It is an unjustified trial strategy in a case of this magnitude to fail to review the evidence. But for trial counsel's actions, or lack thereof, Camacho would not have been prejudiced by counsel's deficient performance and is entitled to a new trial.

E. Failure to Present Mitigating Factors at Sentencing

78. Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because "any amount of [additional] jail time has Sixth Amendment significance." Lafler v. Cooper, 132 S. Ct. 1376, 1386 (2012) (quoting Glover v. United States, 531 U.S. 198, 203 (2001)).

79. In order to fulfill this duty to provide effective assistance, counsel has a duty to investigate his client's background for mitigation evidence to be used at sentencing. Gardner v. Dixon, 966 F.2d 1442 (4th Cir. 1992); see Kenley v. Armontrout, 937 F.2d 1298, 1300 (8th Cir.); Delo v. Kenley, 112 S.Ct. 431 (1991) ("counsel submitted no mitigating evidence"); Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991) (counsel conducted no investigation of mitigation and introduced no mitigating evidence); Blanco v. Singletary, 943 F.2d 1477, 1500-02 (11th Cir. 1991) (no mitigating evidence presented).

80. "[T]he topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Parker v. State, 3 So.3d 974, 985 (Fla. 2009).

81. Here, counsel failed to prepare a sentencing memorandum on behalf of Camacho, contact his family or even discuss sentencing with him, much like preparing for trial which was unreasonable under the circumstances, and therefore deficient. Instead, counsel relied on the State's Sentencing Memorandum and the Presentence Investigation report.

82. Here, counsel failed to adequately prepare for any aspect of the representation of Camacho. This failure began when counsel refused to discuss or review any of the discovery with Camacho. Counsel chose to forego the development, investigation, or preparation of Camacho's defense when they failed to discuss witnesses, trial strategy, or Camacho testifying on his own behalf. These failures compounded when counsel failed to call key witnesses that would have provided the jury reasonable doubt that Camacho harbored any ill will, evil intent, hatred, or spite against Medrano. Trial counsel continued downt he road of violating Camacho's rights to a fair trial when it completely and uterrly disregard ed the rules by failigm to translate the depositions or first trial testimony to properly impeach the State's witnesses to the point at least the jury knew what was going on. Counsel summed up their deficient performance by refusing to perform an investigation into mitigating evidence, file a sentencing memorandum on his behalf, submit character reference letters, or contact Camacho's relatives that could have assisted in this mitigation development.

83. Here, counsel violated their duty to provide zealous representation in seeking to advance the legitimate interests of their client – to mitigate the sentence. Under the reasoning of

Cronic, Camacho was denied his Sixth Amendment right to effective assistance of counsel at sentencing. See United States v. Cronic, at 659. Due to counsel's lack of presentation of mitigating facts the Court should find a presumption of prejudice to Beagle because counsel entirely failed to function as the client's advocate. See Darden, 708 F.3d at 1229 (11th Cir. 2013).

84. As a consequence, their representation of Camacho at sentencing fell far below the standard guaranteed by the Sixth Amendment. Counsel's complete failure to advocate on behalf of Camacho warrants a presumption of prejudice and a finding that Camacho received ineffective assistance of counsel at sentencing under the frameworks of both Strickland and Cronic.

F. Prejudice

85. The cumulative effect of the errors outlined above denied Camacho his Sixth Amendment right to effective assistance of counsel because each error, individually, rose to the level of deficient performance on trial counsel's part, which prejudiced Camacho. See Hurst v. State, 18 So.3d 975 (Fla. 2009) (where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant a fair and impartial trial). But for trial counsel's errors, there is a reasonable likelihood that the outcome of Camacho's case would have been different.

RELIEF REQUESTED

86. The Florida Supreme Court explained that "if the trial court finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, the trial court should hold an evidentiary hearing to resolve the claim." Jacobs v. State, 880 So.2d 548, 551 (Fla. 2004).

87. Furthermore, trial courts should grant evidentiary hearings on 3.850 motions unless the motion, files, and records conclusively show that the prisoner is entitled to no relief. Jones v. State, 478 So. 2d 346, 346-47 (Fla. 1985).

88. Therefore, the judgment and sentence entered against Camacho on December 12, 2016, should be vacated and set aside as it is in violation of the United States and Florida Constitutions.

WHEREFORE, the Defendant respectfully requests that this Court grant the instant motion and enter an order:

(1) vacating the judgment of conviction and sentences entered against him on December 12, 2016, and dismiss the charges against her; or in the alternative;

(2) vacating the judgment of conviction and sentences entered against her on December 12, 2016, and grant her a new hearing; or in the alternative; and

(3) grant such other and further relief as this Court may deem just, proper and equitable.

Dated: Orlando, Florida
June 14, 2017

Respectfully submitted,

/s/ Jennifer M. Manyen, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June 2017, I served a copy of the foregoing upon the parties listed below via electronic case filing:

State Attorney, Polk County

/s/ Jennifer M. Manyen
Jennifer M. Manyen, Esq.