IN THE CIRCUIT COURT FOR THE NINTH JUDICAL CIRCUIT,
IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,

v.

LUCAS BARTHOLOMEW CLARKE, **Docket # 2012-CF-000289**

Defendant.
_____/

MOTION FOR POST-CONVICTION RELIEF PURSUANT TO
RULE 3.850 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE

COMES NOW, the Defendant, LUCAS BARTHOLOMEW CLARKE by and through 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 amended judgement of conviction and sentence entered against him in this Court on April 25, 2016. In support of the instant motion, Clarke states as follows and attaches the following exhibits:

Exhibit A – Orange County Sheriff's Office Incident Report # 12-7733

Exhibit B - Psychosexual Report of Dr. Toni Furbringer dated July 8, 2016

PROCEDURAL HISTORY

1. Clarke was arrested on January 12, 2012 and ultimately charged with the Use of a two way communication device to facilitate a felony in violation of Florida Statutes § 934.215. On February 6, 2013 the defendant pled no contest to the above charge and was sentenced to a term of 36 months probation.

2. On April 25, 2016 the defendant admitted to a violation of probation in this matter. Probation was revoked and terminated and defendant sentenced to a new term of 36 months'

probation, a special condition of which was to attend and complete a 12 month rehabilitation program at "Fresh Start Ministries."

3. Defendant completed approximately 8 moths of treatment (from April 26, 2016 to January 11, 2017) at Fresh Start Ministries but was subsequently rejected from this program due to an alleged violation of in-house policy.

4. Defendant has an open violation of probation pending before Osceola County.

STATEMENT OF RELEVANT FACTS

5. In January, 2012, Orange County Deputy Sheriff Phillip Graves was operating as a member of a task force of the Osceola County Sheriff's Office in conducting undercover internet operations designed to arrest people soliciting minors for sex.

6. On January 10, 2012, Officer Graves responded to an ad on Craigslist in the "personals, casual encounters" section. The ad's heading stated, "Bored. 420 some powder and the bed ~m4w-21 (Orlando)" and the body of the ad stated, "looking for a cool girl to hang out get a little fucked up then maybe have some fun. Not looking for relationship, just a good night. Only hot girls respond please." (**Exhibit A**).

7. Officer Graves responded to the ad by email stating "wow you sound fun I am younger if that is ok in the Kissimmee area" Id at 2.

8. Clarke responded with "that's cool ha-ha how old are you? I live near universal. Will you send a picture?" Id.

9. Officer Graves responded by stating "I am 14 but not new if you know what I mean I will send a pic will u?" Id.

10. Clarke responded with "you are 14 that's a little too young I'm 18." Id.

11. Defendant then broke off communication with Officer Graves.

12. Later, Officer Graves responded to the same ad posting, this time using a different email and assuming a different persona. After engaging in an email exchange, Defendant asked how old the person was, and Graves responded that "she" was a 19-year-old blonde female who attends Valencia college.

13. There is a discrepancy as to how this conversation occurred. Officer Graves incident report indicates that he emailed a reply stating, "no I am 19 and she is 14 but we are here together". Id. Defendant maintains that email conversation stopped at this point and he started receiving emails from a separate account on January 12, 2012. The renewed e-mail conversations stated that the user was a 19-year-old blonde female who attends Valencia college.

14. During the conversation between Officer Graves and Defendant, Graves attempted to convince defendant to have sex with a 14-year-old female by using sexual relations with the 19 year old female as incentive. *Id.* at 2.

15. Officer Graves acknowledged that defendant was nervous about the inclusion of the 14-year-old female and still pressed him to come over. Officer Graves specifically stated:

> ok listen baby for real answer the question we just had a mess up time where a guy said he was comin for her and backed out n only wanted me if you don't want to fuck her then tell me it is kewl and we all can just forget it and move on N yes I do lik anal but if you want that from me then you better bring lub and if you it form her she said she will try it but def!!!! need lub.

Id.

16. Defendant asked many times why he could not just engage in sexual activity with the 19 year old female. Defendant stated "why does the 14 year old have to be involved" Defendant

repeatedly maintained that he was only interested in the 19 year old female and was planning on only have sexual relations with her.

17. Officer Graves stated that Clarke responded by saying "okay I can get some and are you both clean? And im not gonna back out hah can u txt or call me? 7246851428".

18. The conversation continued via text message about defendant traveling to the residence.

19. Officer Graves sent a picture of a 19 year old blonde female and a picture of a female who had been age regressed to appear to be a fourteen year old female. Id. However, Defendant only received pictures of what appeared to be a 19 year old female.

20. Defendant arrived at a home used by the Osceola County Sheriff's Office for undercover sting operations in Osceola County on January 12, 2012. Upon entering the house he was forcibly placed under arrest and brought to an interview room where he invoked his Miranda rights.

21. This prosecution commenced thereafter. Defendant hired Musca Law, and Jeff Quisenberry, Esq. entered a notice of appearance as trial counsel.

22. From the inception of the representation, Defendant only met with Mr. Quisenberry in person on one occasion – the date he entered a no contest plea. Other than that one meeting, Defendant never met with counsel in person.

23. Defendant and counsel did not discuss the case over the telephone more than a few times. None of those conversations involved any in-depth discussions about the facts of the case, possible defenses to raise pre-trial or during trial, nor was there any discussion about trial itself.

24. During one of those conversations, Defendant asked counsel about entrapment, and counsel advised him "You don't want to go down that road." Ultimately, counsel never filed a motion to dismiss based upon entrapment.

25. Defendant and counsel did not review any discovery together, or any evidence in the case.

26. On February 6, 2013, Defendant appeared in this Court and met counsel in person for the first time. On that date, counsel urged Defendant to accept a plea bargain, informing him he had no other choice. On that advice, Defendant accepted the plea bargain and entered a plea of no contest, and adjudication was withheld.

27. Thereafter, a violation of probation was filed on June 7, 2013, and Defendant was arrested in April, 2016 in South Carolina and returned to Florida. He was resentenced on April 25, 2016, and adjudicated guilty. A judgment of conviction was entered thereafter.

28. Defendant has not filed a direct appeal from the judgment of conviction. This motion is filed within two (2) years of the date of entry thereof.

ARGUMENT

POINT I - THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO MOVE TO DISMISS THE INFORMATION BASED ON VIOLATIONS OF DEFENDANT'S RIGHT TO DUE PROCESS AND ENTRAPMENT, AND FAILED TO CONDUCT A MEANINGFUL INVESTIGATION INTO POSSIBLE DEFENSES TO RAISE ON DEFENDANT'S BEHALF AND TO PROPERLY ADVISE HIM WHETHER TO ACCEPT A PLEA BARGAIN OR PROCEED TO TRIAL

29. 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 due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

30. The 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." See Strickland v. Washington, 466 U.S. 668, 686 (1984). An ineffective assistance of counsel claim is a mixed question of law and fact subject to de novo review under the test set forth in *Strickland*; see also Rose v. State, 675 So.2d 567, 571 (Fla. 1996). Under Strickland, ineffective assistance of counsel is established when the defendant shows that (1) 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 (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

31. These standards have been adopted and consistently applied by the Florida Supreme Court. See King v. State, 597 So.2d 780, 782 (Fla. 1992); Kelley v. State, 569 So.2d 754, 758-59 (Fla. 1990). 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.

32. "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, 466 U.S. at 690.

33. Strickland cautions courts to refrain from second-guessing counsel's strategic decisions from the superior vantage point of hindsight. Id. at 689. "Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id. at 690-691. At the same time, virtually unchallengeable does not mean wholly unchallengeable. See Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001), see also Phoenix v. Matesanz, 233 F.3d 77, 82 (1st Cir. 2000). Certain defense strategies, however, may be so 'ill-chosen' as to render counsel's overall representation constitutionally defective." Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982).

A. Counsel's Failure to Move to Dismiss Based Upon Entrapment Constituted Deficient Performance Where Defendant Had a Viable Defense of Entrapment That Was Likely To Succeed

34. The Eleventh Circuit has further held that "so called 'strategic' decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference." See Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir. 2003). The Supreme Court described the duty to provide effective assistance as follows

> **The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing**. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.

Cronic, 446 U.S. at 656-67 (emphasis added).

35. Florida courts have held that counsel can render ineffective assistance by failing to present a defense of entrapment. See Cabrera v. State, 766 So.2d 1131 (Fla. 2d DCA 2000). In Cabrera trial counsel even investigated a possible entrapment defense but ultimately decided it was not a viable defense under the circumstances. Id. at 1133. The Second District found that not presenting the entrapment defense was not a reasonable decision because no defense was presented. Id.

36. "Society is at war with the criminal classes, and courts have uniformly held that in waging this warfare the forces of prevention and detection may use traps, decoys, and deception to obtain evidence of crime." They may not go too far though; "A different question is presented when the criminal design originates with the official of the Government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commissioning order that they may prosecute." Fla. Crim. Prac. & p. § 11.16, p. 125, Russell Crawford.

37. "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." Jacobson v. United States, 503 U.S. 540 (1992).

38. Munoz v. State, 629 So. 2d. (Fla 1993) provides the "Evolvement of the Entrapment Defense" through both the federal and Florida courts. Entrapment was first recognized as a defense by the United States Supreme Court in 1932. Id. at 629, citing Sorrells v. United States, 287 U.S. 435 (1932). In Sorrells the Court stated that "when government officials instigate the commission of a crime 'by persons otherwise innocent in order to lure them to its commission and to

punish them,' the defense of entrapment should be available to prohibit such behavior." Id. Munoz sets out the entire history of the entrapment defense under both Federal and Florida Law. This majority opinion focused entirely on the predisposition of the accused.

39. The dissenting opinion in Sorrells found that, while the defense should have been available to the accused, the proper focus should have been on the conduct of law enforcement rather than the predisposition of the Defendant. "To say that such conduct by an official of government is condone and rendered innocuous by the fact that the defendant had a bad reputation or had previously transgressed is wholly to disregard the reason for refusing the process of the court to consummate an abhorrent transaction…" Id. "The view of the majority and the view of the dissent subsequently came to be characterized, respectively, as the 'subjective' and 'objective' views of entrapment.' Id. Eventually, the Supreme Court incorporated both of the opinions from Sorrells into what is now recognized as the subjective test. See Sherman v. United States, 356 U.S. 369 (1958).

40. In contrast, Florida initially focused primarily on the behavior of law enforcement. In other words, the objective actions of law enforcement were the sole determination in matters of entrapment and such actions could potentially be the source of due process violations as a matter of law. A two-part test for objective entrapment was articulated in Cruz v. State. 465 So. 2d 516 (Fla. 1985) ((1) police conduct has its end in interrupting specific ongoing criminal activities and (2) it utilizes means reasonably necessary tailored to apprehend those involved in the ongoing criminal activity) seemed to be overturned by legislative action, which codified the federal subjective entrapment theory. Florida Statutes § 777.21

41. The Florida Supreme Court standardized three distinct theories of entrapment available to a defendant under Florida law in Munoz. First, the Court found that the objective

test from Cruz had indeed been overturned.by legislative action, but a Due Process theory of entrapment was available as a defense "in the presence of egregious law enforcement conduct under Fla. Const. Art. 1, § 9." Id. The Court did not entirely remove the concept of an objective analysis. Instead, the Court determined that that while the legislature "may overrule judicially established substantive principles that do not implicate e-established constitutional rights", the Court stated that the legislature could only overrule the objective test "to the extent that such objective test did not include due process concerns." Id. at 98 -99. As stated in the concurring opinion, "…the majority appear to toss "objective entrapment" out the front door but. then readmits essentially the same concept. into Florida Jaw via the rear entrance, with some minor tinkering as to analysis."' Id. at 102.

42. In articulating the second entrapment defense available to a defendant, subjective entrapment, the Court defined the terms and burden of proof involved in asserting a defense under Florida Statutes § 777.20. Id. at 99. The Court stated:

> The first question to be addressed. under the subjective test Is whether an agent of the government induced the accused to commit the offense charged. On this issue, the accused has the burden of proof and, pursuant to section 777.201, must establish this factor by a preponderance of the evidence. If the first question is answered affirmatively, then a second question arises as to whether the accused was predisposed to commit the offense charged; that is, whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense. On this second question, according to our decision in Herrera, the defendant initially has the burden to establish lack of predisposition. However, as soon as the defendant produces evidence, of no predisposition, burden then shifts to the prosecution to rebut this evidence beyond a reasonable doubt In rebutting the defendant's evidence of lack of pre-disposition, the prosecution may make "'an appropriate and searching inquiry"' into the conduct of the accused and present evidence of the accused's

> prior criminal history, even though such evidence is normally inadmissible. However, admission of evidence of predisposition is limited to the extent it demonstrates predisposition on the part of the accused both prior to and independent to the government acts… The third question under the subjective test is whether the entrapment evaluation should be submitted to a jury. Section 777.201 directs that the issue of entrapment be submitted to the trier of fact Such direction is consistent with the subjective evaluation, of entrapment because the two factual issues above ordinarily present questions of disputed facts to be submitted to the jury as the trier of fact.

Id.

43. The subjective entrapment defense is appropriate in scenarios where there are disputed issues of material fact which would require a determination by the jury as to the issue of inducement on the part of the government and predisposition on the part of the defendant.

44. Munoz extended the traditional "subjective entrapment" defense to include "subjective entrapment as a matter of law." Id. at 100. Under this third entrapment defense, the Court explained that, "if the factual circumstances of a case are not in dispute, if the accused established that the government induced the accused to commit the offense charged, and if the State is unable to demonstrate sufficient evidence of predisposition prior to and independent of the government conduct at issue, then the trial judge has the authority to rule on the issue of predisposition as a matter of law because no factual "question or predisposition" is at issue." Id.

45. In short, three entrapment defense are available under Florida law. Due Process and subjective entrapment as a matter of law are to be determined judicially. While Due Process entrapment may have disputed issues of fact, an assertion of subjective entrapment as a matter of law must not. If there is a disputed issue of material fact under defense of subjective entrapment, this affirmative defense becomes a jury question under § 777.201.

46. Defendant asserts that both a subjective and objective theory of entrapment would have resulted in the dismissal of his case.

1. Subjective Entrapment

47. For the subjective theory of entrapment, a defendant must show, by a preponderance of the evidence, that a government agent induced him or her to commit the offense and that he or she was not predisposed to do so; burden then shifts to the state to rebut this with evidence beyond a reasonable doubt. Cabrera v. State, 766 So. 2d 1131 (Fla.2d SCA 2000).

48. Florida Statutes § 777.201(1) states as follows, in pertinent part:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person { "pageset": "S1a acting as an agent of a law enforcement officer perpetrates an **entrapment** if, for the purpose of obtaining evidence of the commission of a crime, he or she induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

49. In applying the three part analysis from Munoz v. State, 629 So.2d 90, 99 (Fla 1993), the Court must first consider whether an agent of the government induced the accused to commit the offense charged." Id. at 99. Inducement includes "persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship." State v. Henderson, 955 So.2d 1193, 1195 (Fla. 4th DCA 2007), quoting Farley v. State, 848 So.2d 393,395 (Fla. 4th DCA 2003).

50. A defendant bears the burden to establish inducement by a preponderance of the evidence. Munoz, 629 So. 2d at 99. If the defendant meets that burden, then the defendant must

show lack of predisposition. Id. When the defendant produces evidence of no predisposition, the burden shifts to the state to rebut this evidence beyond a reasonable doubt. *Id.* If the State is unable to produce rebuttal evidence of predisposition, then the trial court must conclude the existence of entrapment as a matter of law. Farley, 848 So. 2d at 396-397.

51. The United States Supreme Court explained in Jacobson v. United States, 503 U.S. 540, 112 S.Ct. 1535, 1540-41 (1992):

> Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents.

Id.

52. Here, Officer Graves clearly induced defendant to commit the offense. Defendant initially responded by stating that 14 years old was too young. Officer Grave's response to the denial by defendant was to change his story to make himself a 19 year old female, that was looking to have a threesome with her younger sister.

53. Officer Graves offered sexual favors such as anal sex with the 19 year old as a reward and requirement to having sexual relations with the 14 year old female. This action by Officer Graves clearly had the effect of inducing defendant to commit the offense.

54. The second prong of Munoz requires the defendant to show a lack of disposition. Predisposition is not present when one has no prior criminal history related to the offense at issue. Nadeau v. State, 683 So.2d 504, 506 (Fla. 4th DCA 1995).

55. Florida courts have defined Predisposition as "whether the accused was awaiting any propitious opportunity or was ready and willing, without persuasion, to commit the offense." Farley, 848 So. 2d at 395. In Farley the prefix "pre" specifically means that the deposition had to exist before contact with law enforcement. Id.

56. In Farley, defendant was induced to commit a crime via unsolicited emails. The State argued the fact that Farley ordered videos containing child pornography was evidence of his predisposition. The court rejected that argument stating that prior to receiving the spam email, there was "no indication that Farley had any inclination to purchase or possess child pornography. Id.

57. Similarly in this case there is no indication that Clarke had any desire or inclination for sexual activity with underage girls and without the action of law enforcement it is likely that Clarke never would have considered engaging in sexual activity with a minor. Rather, there is evidence to the contrary.

58. A psycho sexual history and evaluation concluded that Clarke does not have an interest with children as sexual partners and was placed in the lowest risk group for sexual recidivism which includes crimes such as child sex abuse. In the report, it was concluded that sex offender treatment was not needed. (**Exhibit B**)

59. Defendant only engaged in the conversation after Officer Graves indicated he was a 19-year-old female. Defendant never asked to speak to the younger sister. Defendant was only

interested in the 19-year-old female. Officer Graves kept pushing the conversation toward the 14-year-old girl despite defendant only showing interest in the 19 year old female. Defendant inquired several times why the 14-year-old had to be involved.

60. The inducement and lack of predisposition are clear based upon the facts of this case. The State would be required to produce evidence of past deviant behavior or criminal activity on the part of defendant which they would be unable to do. Therefore, entrapment rather than an actual crime was at hand and trial counsel should have raised the defense of entrapment.

2. Objective Entrapment

61. In the alternative, the defendant alleges the charges should have been dismissed under an objective theory of entrapment as a matter of law. The Defendant asserts his rights under due Process were violated because the conduct of law enforcement was so outrageous as to constitute a denial of due Process. Nadeau, 683 So. 2d at 504. This is evidenced by the outrageous conduct of law enforcement officers, as well as the objective fact that this is a crime that does not exist outside of law enforcement's creation.

63. Florida courts have found several examples of law enforcement conduct that rises to the level of offending due process. In Farley the Fourth District Court of Appeal found that manufacturing child pornography and attempting to sell it unsolicited to the defendant violates due process. Farley, 848 So. 2d at 395.

64. A law enforcement officer's offer of sex with the defendant as inducement for the defendant to commit criminal activity constitutes conduct on the part of the law enforcement officer which is so egregious as to violate the due process rights of the defendant. See Madera v. State, 943 So. 2d 960 (Fla. 4th DCA 2006); Curry v. State, 876 So. 2d 29 (Fla. 4th DCA 2006).

65. In State v. Murphy, 124 So.3d 323 (Fla. 1st DCA 2013), the First District Court of Appeal held that law enforcement could offer sex with a minor for the inducement of a defendant to commit a crime. Id. at 327 (Fla. 1st DCA 2013). This was done for the purpose of "apprehending people bent on engaging in sexual activity with minors" The instant case is distinguished however as officers offered sex with a consenting adult to try and lure defendant into committing a crime. Offering sex with an Adult is the exact "sort of preying on human frailties and emotions" that the use of sex to advance an investigation has been held to constitute a violation of a defendant's due process rights. Id.

66. Here, Officer Graves not only initiated the conversation regarding sexual activity but also changed his story once defendant rejected him posing as a 14-year-old. Officer Graves offered Sex with the 14-year-old as necessary to also engage in sexual activity with the 19-year-old.

67. A law enforcement officer's offer of sex with the defendant as inducement for the defendant to commit criminal activity constitutes conduct on the part of the law enforcement officer which is so egregious as to violate the due process rights of the defendant. *See, Madera v. State,* 943 So. 2d 960 (Fla. 4th DCA 2006); *Curry v. State,* 876 So. 2d 29 (Fla. 4th DCA 2006).

68. Officer Graves continued to harass and push defendant even after defendant stated "you are 14 that's a little too young I'm 18". (**Exhibit A**) Officer Graves knew defendant was nervous about the fourteen year old being involved and yet continued trying to persuade defendant to engage in sexual activity. Id. This constituted objective entrapment, from which Defendant was entitled to relief.

B. Counsel's Failure to Review the Facts of the Case, the Evidence, the Discovery, and

Prepare a Possible Defense With the Defendant Constituted Deficient Performance

69. 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).

70. When trial counsel failed to provide Defendant 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.

71. Here, Clarke was unable to make an informed decision of whether he should accept the State's offer or proceed to trial because counsel refused to provide or discuss any of the State's potential evidence against him. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004) ("When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court." (quoting Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995)); see also Chamniss v. Tucker, 2012 WL

6840497 *6 (N.D. Fla. 2012) report and recommendation adopted, 2013 WL 140393 (N.D. Fla. 2013) (citing Gaddy v. Linahan, 780 F.2d 935, 943 (11th Cir. 1986)).

72. Florida Courts have recognized that a defendant cannot voluntarily waive defenses of which he is not informed. See Petruny v. State, 958 So.2d 612, 613 (Fla. 4th DCA 2007); see also Rouzard v. State, 952 So.2d 1290 (Fla. 4th DCA 2007); Wilson v. State, 871 So.2d 298 (Fla. 1st DCA 2004); Ethridge v. State, 766 So.2d 413, 414 (Fla. 4th DCA 2000).

73. That is precisely what occurred here. When Defendant, untrained in the law, recognized that entrapment may be a defense, his attorney shunned the idea without the analysis required of a reasonably competent attorney. Additionally, Defendant was never informed as to what the evidence against him would be, or what a potential defense would be. As such, this Court should find counsel's performance was deficient

C. Prejudice

74. Here, the failure to move to dismiss based upon an entrapment defense was clearly deficient performance. A motion to dismiss would have removed the possibility of conviction from the equation. "Courts are not required to condone unreasonable decisions parading under the umbrella of strategy." See Moore v. Johnson, 194 F.3d 586, 604 (5th Cir.1999). There was simply no valid strategic reason to fail to move to dismiss the information herein.

75. However, in addition to deficient performance, here the prejudice was patent. Defendant received punishment for a crime he was induced by law enforcement into committing.

75. But for counsel's failure to move to dismiss, Defendant would not have entered a plea of no contest, and ultimately, would not have been convicted of this offense. As a result, this Court should find prejudice and vacate the judgment of conviction.

CONCLUSION AND RELIEF REQUESTED

76. 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).

77. 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).

78. Therefore, the judgment and sentence entered against Mr. Clarke's on February 6, 2013, should be vacated and set aside as it is in violation of the United States and Florida Constitutions.

79. For the reasons set forth above, the Defendant respectfully submits that this motion should be granted because his Sixth Amendment right to effective assistance of counsel was violated.

WHEREFORE, the Defendant respectfully requests this Court (1) grant the within motion, vacate the judgment of conviction and sentence entered against him on April 25, 2016, order a new trial, or in the alternative; (2) set the matter for an evidentiary hearing to determine the merits of the motion; or (3) grant such other and further relief as this Court may deem just, proper and equitable.

Dated: _____

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy has been served by e-service delivery to the Office of the State Attorney for the Ninth Judicial Circuit and Clerk of Court, on _____

Patrick Michael Megaro, Esq.