RULE 3.987. MOTION FOR POSTCONVICTION RELIEF

MODEL FORM FOR USE IN MOTIONS FOR POSTCONVICTION RELIEF PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

In the Circuit Court of the
Second Judicial Circuit,
in and for
County, Florida

State of Florida,

v.

De Shon Thomas
(your name)

Criminal Division

Case No.: 2011-CF-441 ; 2012-CF-2662
(the original case number)

MOTION FOR POSTCONVICTION RELIEF

Instructions — Read Carefully

(1) This motion must be ~~legibly handwritten or typewritten, signed by the defendant, and contain either the first or second oath set out at the end of this rule~~ typewritten or handwritten in legible printed lettering, in blue or black ink, double-spaced, with margins no less than 1 inch on white 8 1/2 by 11 inch paper. No motion, including any memorandum of law, shall exceed 50 pages without leave of the court upon a showing of good cause. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts that you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted in support of your legal claims (as opposed to your factual claims), they should be submitted in the form of a separate memorandum of law. This memorandum should have the same caption as this motion.

(3) No filing fee is required when submitting a motion for postconviction relief.

(4) Only the judgment of one case may be challenged in a single motion for postconviction relief. If you seek to challenge judgments entered in different cases, or different courts, you must file separate motions as to each such case. The single exception to this is if you are challenging the judgments in the different cases that were consolidated for trial. In this event, show each case number involved in the caption.

(5) Your attention is directed to the fact that you must include all grounds for relief, and all facts that support such grounds, in the motion you file seeking relief from any judgment of conviction.

(6) Claims of newly discovered evidence must be supported by affidavits attached to your motion. If your newly discovered evidence claim is based on recanted trial testimony or a newly discovered witness, the attached affidavit must be from that witness. For all other newly discovered evidence claims, the attached affidavit must be from any person whose testimony is necessary to factually support your claim for relief. If the required affidavit is not attached to your motion, you must provide an explanation why the required affidavit could not be obtained.

(7) Your motion must also be submitted under oath and state as follows:

(a) that you are the defendant in the cause,

(b) that you understand English or, if you cannot understand English, that you have had the motion translated completely into a language that you understand, along with the name and address of the person who translated the motion and a certification from that person that he or she provided you with an accurate and complete translation,

(c) that you have either read your motion or had it read to you,

(d) that you understand all of its contents,

(e) that your motion is filed in good faith, with a reasonable belief that it is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court,

(f) that all of the facts stated in your motion are true and correct, and

(g) that you are subject to sanctions, whether imposed by the court or administratively by the Department of Corrections, including but not limited to forfeiture of gain time, if your motion is found to be frivolous, malicious, or otherwise made in bad faith or with reckless disregard for the truth.

(8) When the motion is fully completed, the original must be mailed to the clerk of the court whose address is Leon (county where sentence was imposed) County Courthouse, 301 N. Monroe St. (address of clerk), ~~Florida~~ as stated in Florida Rule of Appellate Procedure 9.420.

MOTION

1. Name and location of the court that entered the judgment of conviction under attack: Circuit Court, Second Judicial Circuit, Leon County

2. Date of judgment of conviction: Dec. 16, 2013 after a jury trial conducted on Oct. 15-18, 2013.

3. Length of sentence: 2 terms of natural life (consecutive) to be ran consecutive with 30 yrs.

4. Nature of offense(s) involved (all counts): As to counts 1 and 2: First Degree Murder (statute no. 782.04(1)(a)1. As to count 3: Solicitation To Commit First Degree Murder (statute no. 777.04(4)(b))

5. What was your plea? (check only one)

✓ (a) (Not guilty)

(b) Guilty

(c) Nolo contendere

(d) Not guilty by reason of insanity

If you entered one plea to one count and a different plea to another count, give details:

6. Kind of trial: (check only one)

✓ (a) Jury

(b) Judge only without jury

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

(Yes) ✓ Yes No

If yes, list each such occasion: Defendant testified at a pretrial hearing on Oct. 09, 2013 and at trial on Oct. 17, 2013

8. Did you appeal from the judgment of conviction?

(Yes) ✓Yes No

9. If you did appeal, answer the following:

(a) Name of court: District Court of Appeal of Florida First District

(b) Result: Affirmed, Per Curiam

(c) Date of result: July 15, 2015; Mandate issued Aug. 11, 2015

(d) Citation (if known): Case No.: 1D14-0111

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

(Yes) ✓Yes No

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

(a) (1) Nature of the proceeding: Motion to Correct Illegal Sentence pursuant to Fla. R. Crim. P. 3.800(a)

(2) Grounds raised: Illegal Sentence

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

Yes No ✓ (No)

(4) Result: Denied

(5) Date of result: December 8, 2016

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

(1) Nature of the proceeding: _____

_____

(2) Grounds raised: _____

_____

_____

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

Yes _____ No

(4) Result: _____

(5) Date of result: _____

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

Yes _____ No

13. If your answer to number 12 was "yes," give the following information:

(a) (1) Name of court: _____

(2) Nature of the proceeding: _____

_____

_____

(3) Grounds raised: _____

_____

_____

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

Yes _____ No

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

Yes _____ No

(5) Result: _____

(6) Date of result: _____

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

For your information, the following is a list of the most frequently raised grounds for postconviction relief. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds that you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that your conviction or sentence is unlawful.

DO NOT CHECK ANY OF THESE LISTED GROUNDS. If you select one or more of these grounds for relief, you must allege facts. The motion will not be accepted by the court if you merely check (a) through (i).

(a) Conviction obtained by plea of guilty or nolo contendere that was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(c) Conviction obtained by a violation of the protection against double jeopardy.

(d) Denial of effective assistance of counsel.

(e) Denial of right of appeal.

(f) Lack of jurisdiction of the court to enter the judgment or impose sentence (such as an unconstitutional statute).

(g) Sentence in excess of the maximum authorized by law.

(h) Newly discovered evidence.

(i) Changes in the law that would be retroactive.

PRELIMINARY STATEMENT

This is a motion for postconviction relief pursuant to Florida rules of criminal procedure 3.850 from a judgement and sentence for two counts of first degree murder, capital felonies, and solicitation to commit first degree murder, a first degree felony. Proceedings below were held before the Honorable Judge Jackie Fulford in the Circuit Court for Leon County, Florida. DeShon Thomas was the defendant in the trial court and will be referred to as "DeShon" in this motion.

References to the five-volume record are by "R" and the volume number followed by the page number, all in parentheses. References to the eight-volume trial transcript are by "T" and the volume number followed by the page number, all in parentheses. References to the State's Exhibits are by "SE" followed by the exhibit number. References to the Defense Exhibits are by "DE" followed by the exhibit number.

Summary of Grounds Raised and Facts in Support:

As to all Grounds arguing ineffective assistance of counsel, the following memorandum is inconporated by reference: Legal Standard for claims of ineffective assistance of counsel: "The Sixth Amendment guarantees criminal defendants effective assistance

of counsel. That right is denied when a defense counsel's performance falls below an objective standard of reasonableness and thereby prejudices the defense." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (per curiam) (citing Wiggins v. Smith, 539 U.S. 510, 521 (2003), and Strickland v. Washington, 466 U.S. 668, 687 (1984). Per the United States Supreme Court's decision in Strickland and its progeny, the Florida Courts have held that for ineffective assistance of counsel claims to be successful, two requirements must be met. These are commonly referred to as: 1) "deficiency" or "deficient performance"; and 2) "prejudice."

"First the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards." Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). In order to meet this first prong of the Strickland test, "the defendant must prove that counsel's performance was unreasonable under 'prevailing professional norms'," Floyd v. State, 18 So. 3d 432, 443 (Fla. 2009) (quoting Morris v. State, 931 So. 2d 821, 828 (Fla. 2006).

"Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined." Maxwell, 490 So. 2d 927, 932. To establish prejudice, the defendant must show that "there is a reasonable probability [redacted] that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

For the second prong "Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different." Wong v. Belmontes, 130 S. Ct. 383, 390-91, 175 L. Ed. 2d 328 (2009)(quoting Strickland, 466 U.S. at 694). Strickland does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish a probability sufficient to undermine confidence in [that] outcome." Porter v. McCollum, 130 S. Ct. 447, 455-56, 175 L. Ed. 2d 398 (2009) (alteration in the original)(quoting Strickland, 466 U.S. at 693-94). Everett v. State, 54 So. 3d 464, 472 (Fla. 2010). Both prongs of the Strickland test present mixed questions of law and fact.

A. Ground 1A: Trial counsel was ineffective for failing to seek suppression of evidence obtained in violation of DeShon's Sixth Amendment right to counsel.

Supporting FACTS: On Feb. 7, 2011 in Leon County Case No. 2011-CF-441 (hereinafter "11-441"), DeShon was charged by Information with two counts of first degree murder. On Aug. 29, 2012 while awaiting trial for 11-441 DeShon was charged by Information in Leon County Case No. 2012-CF-2662 (hereinafter "12-2662"), with solicitation to commit first degree murder. The Information alleged that DeShon conspired to kill Trentin Ross, his former roommate and coworker, who had provided law enforcement with information in 11-441 and who claimed to have been with DeShon the night the homocides occurred. (R4. 712-18.)

Assistant Regional Counsel Daren L. Shippy was appointed counsel for DeShon then, before Mr. Shippy ever met DeShon, Mr. Shippy filed a motion to withdraw from DeShon's case on Mar. 18, 2013 (R1. 103-05.) which was denied Mar. 26, 2013 (R1. 135.) On Aug. 01, 2013 Mr. Shippy filed a motion to dismiss based upon entrapment pertaining to the solicitation charge in 12-2662. (R4. 778-81.) A motion hearing was held for this issue (R2. 291-401.)(R3. 402-37.) where the trial court subsequently denied said motion. The issue was not

appealed and there was no other motion filed to challenge the evidence in 12-2662. On Aug. 22, 2013 Mr. Shippy filed a motion to consolidate cases 11-441 and 12-2662 for purposes of trial. (R4. 776-77.)

Trial counsel was ineffective for failing to seek suppression of evidence obtained in violation of DeShon's Sixth Amendment right to counsel: DeShon met Dawaun Williams in the Leon County jail in June 2012, sixteen months after being charged with double homocide. After Mr. Williams realized he and DeShon were both in the Bloods gang, he used their affiliation to get details pertaining to DeShon's 11-441 case. (R4. 713.) DeShon showed Mr. Williams several documents pertaining to 11-441, one of which was DeShon's arrest/probable cause affidavit (R1. 53-4.) just as James Madison (former Leon County jail inmate) testified. (T6. 706.) Mr. Williams, armed with this information, used entrapment tactics on DeShon to hatch a fake murder plot and contacted law enforcement.

On June 28-29, 2012 Mr. Williams met with law enforcement (investigators from the Leon County Sheriff's Office (hereinafter "LCSO")), then agreed to become a confidential informant and cooperate with LCSO's investigators for an investigation into a solicitation for murder case against DeShon. (R4. 713.) Mr. Williams bonded out of jail and continued meeting with law enforcement after their initial meeting. In one particular meeting, in early July 2012, Mr. Williams went to the LCSO after Investigator Jason Newlin of the State Attorney's Office requested the meeting where Mr. Newlin provided Mr. Williams a cell phone for the purposes of obtaining evidence against

DeShon to support this solicitation case. (T4. 499-500.)

Through the course of Mr Newlin's investigation, he monitored and recorded several conversations between DeShon and Mr Williams discussing the alleged murder of Trentin Ross. (SE. DD.) Said conversations became a major feature in this trial where as excerpts from said recordings were played in the presence of the jury during the testimony of Mr Williams (TS. 539-77.) and DeShon. (T7. 857-58.) Also, the jury requested said evidence during their deliberation. (T8. 1037.)

In addition to law enforcement providing said cell phone for Mr Williams to obtain evidence from DeShon, at law enforcement's behest Mr Williams went to the LCSO to draft a letter written in gang code to further induce DeShon into committing criminal solicitation. (DE. 2A.; SE. EE.; DE. 2B.) This is confirmed by Mr Newlin's testimony. (T4. 508.) Furthermore, in a video recording of the creation of said letter (DE. 4.), Sergeant Ron O'Brien of the LCSO is present during the drafting, reading, and approval of said letter and he also testified to providing the envelopes and stamps which were to be used for said letter. (T6. 674-77.)

Due to testimony and physical evidence it is clearly shown that law enforcement deliberately elicited incriminating evidence from DeShon outside the presence of counsel. Prior to LCSO's investigation in 12-2662, DeShon had been arraigned and had retained counsel. Before any phone calls or correspondence happen between DeShon and Mr Williams - DeShon never waived his right to counsel. Although Mr Shippy was not DeShon's counsel during said

investigation, Mr. Shippy should have filed a motion to suppress evidence (i.e. jail phone calls and all correspondence between DeShon and Mr. Williams) in that it would have been showed the most significant evidence used against DeShon was unlawfully obtained and the motion would have been granted causing the probable cause of DeShon's arrest in 12-2662 to be lacking and the solicitation charge would have been dismissed.

The motion to suppress should have been filed and argued to at least preserve the issue for appellate review had it been denied. Had the issue been properly preserved, reversal would have resulted. Prejudice resulted when counsel allowed unlawfully obtained evidence against DeShon to be introduced to the jury without properly challenging it. There is a reasonable probability that, but for counsel's deficient performance in failing to seek suppression of said evidence elicited by a government agency from DeShon outside the presence of counsel, the result of DeShon's trial would have been different. Counsel's performance was deficient in that it fell below the objective standard of reasonableness.

Ground 1B: Trial counsel was ineffective for failing to seek suppression of DeShon's open court admission.

Supporting FACTS: In trying to contest the State's case against DeShon for criminal solicitation, Mr. Shippy filed a motion to dismiss based upon entrapment (R4. 778-81.) on August 01, 2013 which was denied and not appealed.

Mr. Shippy advised DeShon in order to claim entrapment (subjective) DeShon had to admit to committing the crime charged (in 12-2662) which is an incorrect statement of law. Mr. Shippy did not inform DeShon that when filing a motion to dismiss, in order for it to be granted, no material facts can be in dispute. Had DeShon known this then he would not have incriminated himself at a pre-trial motion hearing on Oct. 9, 2013 (R3, 402-39,), because DeShon knew, from his 12-2662 arrest affidavit, the main dispute was going to be whether Mr. Williams approached DeShon first. Since DeShon thought entrapment was his only viable defense to solicitation, he cooperated with his attorney. [redacted]

The statements DeShon made at his Oct. pretrial hearing became a feature of his trial where the prosecutor and his cocounsel read exerpts from said hearing to the jury (T5, 616-21,), and the jury actually had said exerpts read back to them during their deliberation. (T8, 1059.) Since DeShon's statements were derived as a direct result of law enforcement violating his Sixth Amendment, trial counsel should have sought suppression of said statements under the fruit of poisonous tree doctrine of the U.S. Const. Amend. IV or the corpus delicti rule had the original unlawfully obtained evidence been suppressed. Prejudice resulted when counsel allowed tainted evidence to be presented to the jury without properly challenging it. There is a reasonable probability that, but for counsel's deficient performance in failing to properly challenge tainted evidence, the result of this trial would have been different.

MEMORANDUM (applies to Grounds 1A and B): DeShon's claim that evidence against him was obtained by law enforcement in violation of his Sixth Amendment right to counsel is supported by state and federal law.

Citing Sosnowsky v. State, 989 So. 2d 686 (4th DCA 2008); Overview: While defendant was an inmate following his arrest for attempted second degree murder, he tried to arrange, through a cell mate to have the victim and witness killed. Through the cellmate, defendant was placed in touch with an undercover officer who was represented to be a hit man, and solicited the officer to commit murder. Although the solicitation was not the charge in that trial, the trial court, over defendant's objection, admitted taped conversations involving the solicitation and alleged killings of the victim and witness by the hit man. The appellate court found that, because defendant was represented by counsel his statements to the undercover officer were not admissible. Neither was defendant's gun, which was discovered through these statements. Outcome: The judgement was reversed for a new trial.

In Massiah v. United States, 377 U.S. 201 (1964), the Court held that incriminating statements elicited by a government agent outside the presence of counsel cannot be admitted in evidence. United States v. Henry, 449 U.S. 264 (1980), interpreted Massiah to require suppression of statements made to a jail house informant who was placed by the State in the same cell as defendant and instructed to be alert to any incriminating statements made by the defendant. See also U.S. v. Terzado-Madruga, 897 F. 2d 1099 (11th Cir. 1990) (court suppressed statements made by the defendant to an undercover

informant, even though the government's alleged purpose was to investigate an unrelated crime not involving the defendant.)

Instant case: DeShon was arrested and had retained counsel before law enforcement's 12-2662 investigation began. DeShon's case is parallel to Sosnowsky's case despite solicitation not being Sosnowsky's charge and instead of an actual police officer eliciting statements, as done to Sosnowsky, a confidential informant worked in conjunction with law enforcement to elicit statements from DeShon. Just as the gun in Sosnowsky's case had to be suppressed becaause the discovery of it came from statements made to a government agent outside the presence of counsel, so should DeShon's open court admission be subjected to suppression under the same pretext as Sosnowsky's gun. Therefore, DeShon's open court admission is fruit of a poisonous tree. The poisonous tree being law enforcement's investigation.

In determining whether evidence should be excluded as "fruit of the poisonous tree," the "question... is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, 371 U.S. at 488 (quoting John MacArthur Maguire, Evidence of Guilt 221 (1959))

In DeShon's case, the State was using the illegally obtained evidence in 12-2662 to exploit DeShon's alleged guilt. There is no way DeShon's open court admission can be purged of the primary taint, because if there was not a violation of DeShon's Sixth Amendment right, then DeShon would not have

had to be held accountable for reacting to the State's unlawful methods of obtaining evidence.

Even if DeShon's admission statements did not meet the "fruit of the poisonous tree" rule, the statements would have been excluded from trial pursuant to the legal principle of corpus delicti, had counsel sought and was granted suppression of the unlawfully obtained evidence against DeShon in 12-2662.

Citing State v. Allen, 335 2d. 823 (Fla. 1976), the Supreme Court of Florida described the corpus delicti rule as follows:... A person's confession to a crime is not sufficient evidence of a criminal act where no independent direct or circumstantial evidence exists to substantiate the occurrence of a crime... Id. at 825 (footnote ommitted) (emphasis added). Under this rule the State is required to present evidence that a crime occurred and evidence establishing each element of the crime before the defendant's confession can be admitted. (Bradley v. State, 918 So. 2d. 339, 339 (Fla. 1st DCA 2005).

Had DeShon's counsel sought suppression of the unlawfully obtained evidence in 12-2662 and been successful, the State's only remaining permissible evidence of solicitation would have been the word of confidential informant Dawaun Williams whose word alone is hearsay and not substantial enough to establish a prima facie case of the crime charged. Thus, DeShon's statements or admission would not have been properly admitted into evidence under the corpus delicti rule.

See Burks v. State, 613 So. 2d 441, 444 (Fla. 1993)("The corpus delicti cannot be proven solely by a confession or admission.")(quoting Deiterle v. State, 101 Fla. 79, 134 So. 42, 43 (1931)); Snell v. State, 939 So. 2d 1175, 1178 (Fla. 4th DCA 2006)("Ordinarily, proof of the corpus delicti of the crime charged is required before a confession or admission against interest may be received in evidence.")(quoting Garmon v. State, 772 So. 2d 43, 46 (Fla. 4th DCA 2000)).

B. Ground 2: Trial counsel was ineffective for failing to conduct an independent competency hearing for the State's key witness.

Supporting FACTS: In case number 2011-CF-441 (Leon County) the State's only alleged eyewitness against DeShon was, his then roommate, Trentin Ross. Mr. Ross was the only witness who allegedly seen DeShon in close proximity to the victim's residence on the night in question. During LCSO's investigation in 11-441, Mr. Ross made several conflicting statements to LCSO detectives in several interviews, in which he outright denied being with DeShon on Jan. 27, 2011. Also, Mr. Ross made several statements to detectives about his alcohol and drug abuse, as well as the effects said abuse have on his mind/body.

Defense counsel Daren Shippy was in possession of said recorded interviews of Mr. Ross, but instead of deposing Mr. Ross before trial, Mr. Shippy filed a

motion in limine (pertaining to Mr. Ross' alcohol and drug use) (R1. 163-71.) on May 10, 2013. At DeShon's trial Mr. Ross testified about his lack of memory and his substance abuse during the times he claimed to have been with DeShon on the night in question. (T2. 190-95.)

On the cross-examination of Mr. Ross, he was not able to recall over what period of time he had consumed the alcohol and how much marijuana he smoked. (T2. 201-02.) Mr. Ross testified his memory was not better than it was in 2011. (T2. 211.) Mr. Ross stated no less than 15 times "I don't recall" or "I can't remember." (T2. 198-222.) Mr. Ross even had conflicting answers to the same question from his direct examination to his cross-examination such as: by Mr. Campbell: "Q: Where did y'all go first after you left your apartment? A: Over to B.J.'s." (T2. 194.) On cross by Mr. Shippy: "Q: Okay. When you left your residence as you testified on the early morning hours of January 29th of 2011, where is it that you first went? A: I don't recall sir." (T2. 198-99.)

Not only did Mr. Ross lack the capacity to perceive and recollect facts, he also made statements, at DeShon's trial, that were in complete conflict with the State's own evidence, i.e. Laquecia Herring's (the victim in 11-442) cell phone/records. (SE. S.) Mr. Ross testified he allegedly witnessed DeShon talking on the phone with Ms. Herring about an abortion on the way to Ms. Herring's residence after he and DeShon left their apartment in the early morning hours of Jan. 29th, 2011. (T2. 195-96.) The mere possibility of such conversation taking place is/was thwarted by physical evidence (SE. S.)

and Brian Pearson's (2cso sgt.) testimony that Ms. Herring's last cell phone activity was 10:59 p.m. January 26th of 2011. (T2. 165-66.)

Mr. Ross' lack of capacity to understand the duty of a witness to tell the truth was exemplified when asked by Mr. Campbell on his direct examination: "Q: Why did you lie? Why did you tell them you didn't know all this that you've told us about today? A: The reason that I supposedly had lie was because of the fact that the sheriff that was, I guess, they call it interrogating me, didn't approach me the right way. They got down and started -- they started accusing me rather than trying to talk to me about doing something. So almost anybody would sit there and lie..." (T2. 184-85.) Obviously, Mr. Ross' inclination to lie, he reasons, is justified as some sort of defense mechanism and is appropriate to the point that "almost anybody would sit there and lie."

Defense counsel Mr. Shippy spent the better half of Mr. Ross' cross-examination attempting to impeach him using his prior inconsistent statements, which Mr. Ross repeatedly answered "I can't/don't recall/remember." Had Mr. Shippy deposed Mr. Ross, it would have been revealed that Mr. Ross was an incompetent witness due to his lack of ability to perceive and remember the facts when testifying and/or his lack of capacity to understand the duty of a witness to tell the truth - making Mr. Ross subject to disqualification from testifying. There is a reasonable probability that, but for counsel's deficient performance in failing to raise the issue of Trentin Ross' competency, the result of DeShon's trial would have been different. Prejudice

resulted when counsel allowed a potentially incompetent witness to testify without challenging the competency of said witness. The performance was deficient in that it fell below the objective standard of reasonableness.

MEMORANDUM: A witness is presumed competent to testify until a party places competency at issue. See 90.601, Fla. Stat. (2013); Z.P. v. State, 651 So. 2d 213, 213-214 (Fla. 2d DCA 1995).

Citing Coney v. State, 643 So. 2d 654, 655 (Fla. 3d DCA 1994) (determining that in addition to failing to "adequately inquire into the victim's competency at the time of trial," the error "was further exacerbated by the fact no finding was made that the victim understood the duty to tell the truth").

Citing State v. Green, 733 So. 2d 583; the court held: A person may be disqualified to testify as a witness if he/she lacks the capacity (1) to communicate in such a manner as to be understood, (2) to understand the duty of a witness to tell the truth, or (3) to perceive and recollect the facts when testifying.

In DeShon's case, the State's key witness, Trentin Ross, testified that he could not remember over what period of time he had consumed large quantities of drugs and alcohol before and during the times he claims to have been with DeShon on the night in question. (T2. 201-02.) Mr. Ross also testified his memory was not any better at that time than in 2011. (T2. 211.)

Mr. Ross made so many inconsistent statements to law enforcement that he could not recall few, if any, of them. Due to the previous stated reasons, there was no reasonable strategy from counsel that would have prevented counsel from deposing Mr. Ross and challenging his competency as a witness.

C. Ground 3: Trial counsel was ineffective for failing to investigate facts of the case and call the proper defense witnesses for a motion in limine hearing (pertaining to a Tec-9 mm firearm).

Supporting FACTS: DeShon's counsel, Daren Shippy, filed a motion in limine (seeking to exclude evidence of a Tec-9mm) on Jul. 31, 2013. (R1. 180-81.) As part of the investigation in 11-441, law enforcement recovered a Tec-9 from the residence of Terfricia Murray due to statements from Trentin Ross. The trial court addressed said motion at an Aug. 19, 2013 hearing. (R3. 466-559.) During this hearing, defense counsel and the State agreed that the firearms examiner concluded that the bullet fragments recovered from the victims in 11-441 were fired from either a .38- or a .357- caliber firearm and were not consistent with the Tec-9. (R3. 493-95.)

The only witness Mr. Shippy called at said hearing regarding said issue was LCSO Sgt. Kenneth Ganey. After arguements from the defense and the State, the trial court reserved ruling until trial. (R3. 481.) At DeShon's

trial, during a side bar continuance of the motion in limine hearing to determine a ruling, when talking about the potential testimony of Ms. Murray, the following was discussed: the Court: "Did you-all depose her?" Mr. Shippy: "I did not. I listened to her recorder interview though." The Court: Mr. Campbell is she going to testify that they came there that evening and that this defendant left the Tec-9 there?" Mr. Campbell: "That's my understanding. I'm looking at the report if the court will take that... She said she put the bag in a room and never looked at it. She remembers this to have been around 0300 in the morning... Ross is going to say that they went there that night at 3:00 a.m. and left the Tec-9. That's what I'm tying together..." (T2. 243-44.) After more debate about Ms. Murray's potential testimony, the trial court denied the defense's motion in limine and admitted the Tec-9 into evidence.

Clearly, the Tec-9 was not forensically related to this case, but the State used it in an attempt to repair Mr. Ross dubious credibility. Had Mr. Shippy called Ms. Murray at the motion in limine hearing, Ms. Murray would have testified that she did not remember what date or time DeShon came to her residence - only that it was "sometime after midnight," (T4. 465-66.) and not exactly 3:00 a.m. as the State mislead the trial court to believe. Additionally, Ms. Murray would have testified that the contents of the bag were never taken out and place on her counter, (T4. 466.) conflicting Mr. Ross' testimony to the contrary. (T2. 249.) Furthermore, had counsel called DeShon himself at the motion hearing, he would have testified to taking

the Tec-9 to Ms. Murray's residence days before Jan. 27, 2011 (T7. 847.), showing an even further disconnect between the Tec-9 and the night in question.

Terfricia Murray's residence address was on the record as 1561 Blountstown Street, number 306. (T2. 243.) DeShon was present and willing to testify at the motion in limine hearing. Instead of counsel debating at trial what Ms. Murray's testimony would be, at the least, counsel should have deposed Ms. Murray. Had counsel called Ms. Murray and DeShon at said hearing, the irrelevancy of the Tec-9 would have been established causing its exclusion to have been granted.

In 11-441, the murder weapon was never found by law enforcement, leaving the State without the powerful visual symbol of a physical firearm to bring into the courtroom besides the irrelevant Tec-9. Prejudice resulted when counsel failed to investigate facts of this case and properly challenge highly prejudicial evidence. Counsel's performance was deficient in that it fell below the objective standard of reasonableness and this deficient performance undermined the confidence in the outcome of DeShon's trial.

MEMORANDUM: In a rule 3.850 motion, a defendant must therefore assert facts that support his or her claim that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance. Under the circumstances of this case, a defendant would be required

to alleged what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case. Reaves v. State, 826 So. 2d 932, (Fla. 2002).

For evidence of a firearm to be admissible as relevant in a criminal trial, "the State must show a sufficient link between the weapon and the crime." Jackson v. State, 25 So. 3d 518, 528 (Fla. 2009).

Strategic decisions by trial counsel do not automatically rise to the level of ineffective assistance of counsel if counsel's decision was "reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

In DeShon's 3.850 motion he has asserted facts to support his claim that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. DeShon alleges that himself and Tertricia Murray would have given testimony to negate the State's spurious arguement in which the State alleged Ms. Murray would corroborate Mr. Ross' testimony, thus trying to show a clear link between the Tec-9 and the crime, which swayed the trial Court to grant its admission into evidence. There is no reasonable strategy the defense counsel had that prevented the calling of a witness who took the Tec-9 to Ms. Murray's residence (DeShon) and the witness whose residence the Tec-9 was taken to (Ms. Murray) when trying to challenge the relevancy of otherwise inadmissible evidence.

Said firearm was highly prejudicial in that some jurors had not even

heard of a Tec-9, prior to this trial, and had to ask what it was. (T2. 268-69.) Also, the State used the Tec-9 to berate DeShon during his testimony. (T1. 847.) Seeing the Tec-9 would have had a high probability in being seen as a substitute for the murder weapon in the minds of the jurors. There is a reasonable probability that, but for counsels deficient performance in failing to investigate facts and call the proper witnesses at the proper time to properly challenge otherwise inadmissible evidence, the result of the proceedings would have been different.

D. Ground 4: Trial counsel was ineffective for failing to object and argue substantively to erroneous jury instructions.

Supporting FACTS: DeShon was charged by information, while still in the Leon County jail, in case number 12-2662 (Leon Co.) for Solicitation to Commit First Degree Murder on Aug. 27, 2012. (R4. 112-18.) The allegations in 12-2662 stemmed from a complaint made to law enforcement from Dawaun Williams (then county jail inmate turned confidential informant), which led to an investigation from LCSO against DeShon. (R4. 113.) Obviously, Mr. Williams never committed the alleged murder nor did he attempt to commit criminal solicitation in conjunction with DeShon's charge in 12-2662.

For the previous stated facts, the principal instructions did

not apply to DeShon being as though it also negated DeShon's only defense of entrapment. When trying to contest the relevancy of these principal instructions, at trial, counsel stated the following: by Mr. Shippy: "It doesn't give me the biggest heartburn, but I am objecting to the principal instruction because I don't think it applies either, as Mr. Thomas is charged or based upon the evidence in this case. So I don't understand its relevance to the charges, so I'm objecting." (T. 772-73.)

The Court's response to Mr. Shippy was: by the Court: "I can't anticipate a potential arguement from the defense in closing that would, in hindsight, give a necessary instruction on the principal instruction. So I believe that it's appropriate to stay in in the event that that becomes an arguement that the defense would make. You certainly can say it doesn't apply in your arguement to the jury, but [redacted] -- or that you don't think the evidence supports that, but I can't say it doesn't apply because I'm going to instruct them on it. You can say that the facts weren't supported by the evidence... There was something you wanted to address previously, Mr. Shippy, on the order of something?" Mr. Shippy: "And I do remember that, and I had the oppertunity to review the instructions, and I will withdraw my concerns that I raised before." (T. 774-75.)

Basically, defense counsel made a half-hearted objection by stating the jury instruction issue did not give him "the biggest heartburn"

and stated he "did not understand its relevance," but failed to explain to the Court in detail as to why it did not apply, which left the Court the decision to keep the instruction. After the Court made that decision, defense counsel "withdrew" his concerns he raised before. Furthermore, counsel allowed the Court to imply that he can argue against the instructions during his closing arguements - absent an objection - which had great potential to mislead/confuse the jury as to whom they should listen - the Court or defense counsel?

There was a confusing and misleading jury instruction and verdict form on "Principals" (RS. 888-910.) at DeShon's trial which, at a minimum, caused the jury to convict him improperly. The State even put emphasis on this misleading principal instruction during his closing arguements. (T8. 968.) Prejudice resulted when counsel failed to object substantively to the erroneous principal instruction related to the offense in 12-2662. Absent a contemporaneous objection, the error was not preserved for appeal. Counsel's performance was deficient in that it fell below the objective standard of reasonableness. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

MEMORANDUM: The jury instruction that was used at DeShon's trial for entrapment reads as follows: <u>3.6 (J) ENTRAPMENT</u>: "... On the issue of entrapment, the defendant must prove to you

by the greater weight of the evidence that a law enforcement officer or agent induced or encouraged the crime charged. Greater weight of the evidence means that evidence which is more persuasive and convincing. If the defendant does so, the State must prove beyond a reasonable doubt that the defendant was predisposed to commit Solicitation To Commit First Degree Murder. The State must prove defendant's predisposition to commit Solicitation To Commit First Degree Murder existed prior to and independent of the inducement or encouragement..."

The jury instruction that was used at DeShon's trial for principals reads as follows: 3.5(a) PRINCIPALS: "If the defendant helped another person or persons commit or attempt to commit a crime, the defendant is a principal and must be treated as if he had done all the things the other person or persons did if: 1. the defendant had a conscious intent that the criminal act be done and 2. the defendant did some act or said some word which was intended to and which did incite, cause, encourage, assist, or advise the other person or persons to actually commit or attempt to commit the crime. To be a principal, the defendant does not have to be present when the crime is committed or attempted.

At DeShon's trial, he raised the defense of entrapment due to

his lack of predisposition to commit the crime charged in 12-2662 and the inducement of (government agent) Dawaun Williams. In 12-2662 DeShon was the only defendant subjected to prosecution and the information alleged that DeShon solicited Mr. Williams, not DeShon helped Mr. Williams commit or attempt to commit criminal solicitation. Everything Mr. Williams did in the investigation of DeShon was at law enforcement's behest and at no time did Mr. Williams commit nor attempt to commit any crime at the direction of DeShon.

The principal instruction negated DeShon's only defense of entrapment because it mislead the jury into believing they could properly convict DeShon based on the principal theory regardless if DeShon was [redacted] entrapped. The conflicting instructions confused the facts and negated each other in their effect, and therefore negated their possible application to DeShon's only defense.

As the Court in Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985), explained: [W]here, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant. See also Grier v. State, 928 So. 2d 368 (Fla. 3d DCA 2006)(explaining that fundamental error exists when incorrect jury instructions negate defendant's sole defense).

D. Ground 4: _____

Supporting FACTS (tell your story briefly without citing cases or law):

15. If any of the grounds listed in 14 A, B, C, and D were not previously presented on your direct appeal, state briefly what grounds were not so presented and give your reasons they were not so presented:

Grounds were not raised on direct appeal because defense counsel failed to file appropriate motions or make contemporaneous objections to preserve the errors for review.

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

Yes No ✓ (No)

17. If your answer to number 16 was "yes," give the following information:

(a) Name of court: _____

(b) Nature of the proceeding: _____

(c) Grounds raised: _____

_____

_____

(d) Status of the proceedings: _____

_____

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At preliminary hearing: Justin Ward ; address unknown.

_____

(b) At arraignment and plea: Gregory Cummings ; address : P.O. Box 546 East point, FL 32328

(c) At trial: Daren Shippy ; address : P.O. Box 1019 (32302) 227 N. Bronough St. Suite 1000 Tallahassee, FL 32301

(d) At sentencing: Daren Shippy ; address : 227 N. Bronough St. Suite 1000 Tallahassee, FL 32301

(e) On appeal: Melissa Ford ; address : 227 N. Bronough St. suite 1000 Tallahassee, FL 32301

(f) In any postconviction proceeding: DeShon Thomas (defendant), pro se.

_____

(g) On appeal from any adverse ruling in a postconviction proceeding:

NA

WHEREFORE, movant requests that the court grant all relief to which the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. Reverse convictions and remand for a new trial.

2. Such other and further relief as the court deems just and proper.

OATH

Under penalties of perjury and administrative sanctions from the Department of Corrections, including forfeiture of gain time if this motion is found to be frivolous or made in bad faith, I certify that I understand the contents of the foregoing motion, that the facts contained in the motion are true and correct, and that I have a reasonable belief that the motion is timely filed, I certify that this motion does not duplicate previous motions that have been disposed of by the court. I further certify that I understand English and have read the foregoing motion or had the motion read to me, or the foregoing motion was translated completely into a language which I understand and read to me by _____ whose address is _____

and whose certification of an accurate and complete translation is attached to this motion.

/s/_____
Name _____
DC # _____

CERTIFICATE OF MAILING

I certify that I placed this document in the hands of _____

_____

for mailing to _____

_____

_____

on this _____ day of _____, 20____.

/s/_____
Name _____
Santa Rosa Correctional Institution
5850 East Milton Road
Milton, Florida 32583
DC # _____

CERTIFICATE OF AN ACCURATE AND COMPLETE TRANSLATION

(To be used if translation of the motion was necessary).

I certify that a complete and accurate translation of this motion was provided to the Defendant in this case on the _____ day of _____, 20____.

/s/_____
Name _____
Santa Rosa Correctional Institution
5850 East Milton Road
Milton, Florida 32583
DC # _____