

## **Ground 2 – Gross Ineffective Assistance of Counsel**

Petitioner is at a great disadvantage, as it has been his own counsel that has intentionally deprived him of the evidence necessary to prove that his conviction was based on fabricated evidence. There was no way for petitioner to know that counsel conspired with the prosecutor to permanently suppress exculpatory and impeachment evidence until 2011; when for the first time counsel claimed that the prosecutor made him sign a confidentiality agreement not to share the recordings with anyone, including his client before the prosecutor would turn the recordings over to him.

Counsel's actions not only denied petitioner a fair trial, he also deliberately kept exculpatory evidence out of the court record, so it could not be used on appeal. Counsel also refused to turn that evidence over to petitioner thus denying petitioner the evidence needed for post conviction relief on habeas. Counsel lied to judges, the court, attorneys, The State Bar, The State Supreme Court, petitioner, and petitioners family in order to deprive petitioner of evidence which both he and the prosecutor suppressed.

To fully understand the extent of counsel's crimes of moral turpitude in conspiring to deprive petitioner of the evidence necessary for post conviction relief. see: (exhibit G – Conspiracy to Suppress)

Petitioners conviction was a result of gross ineffective assistance of counsel on many points, when counsel failed to comply with petitioners direct instructions (McCoy v. Louisiana 138 Supreme Court 1500; 200 L. Ed. 821\*\*; 2018 U.S. LEXIS 2802\*; 86 U.S. L.W. 4271; 27 Fla. L. Weekly Fed. S 244; 2018 WL 2186174)

When Petitioner is “denied effective assistance of counsel” he is then entitled to relief” (Elmore v. Ozmint, 661 F. 3d 783). This is yet another violation of Petitioners CA Constitutional and U.S. Constitutional 6<sup>th</sup> Amendment Due Process Right to be given adequate defense.

**a. Supporting Facts:**

Petitioners defense counsel willingly suppressed exculpatory materials and evidence showing “counsel did not provide any assistance at all, let alone effective assistance”, Furthermore trial counsel failed to move to suppress or otherwise object to in-court identification by prosecution witnesses, when there were compelling grounds to do so. Absent counsel’s deficient performance, the result of the trial would likely have been different.

Counsel failed to follow through on the following courses of action which petitioner specifically instructed counsel to do:

Transcribe the 911 calls and witness interviews in accordance with CRC 2.1040 for the following reasons:

1. To effectively review the evidence and properly prepare for the trial testimony that was going to be used against petitioner
2. For impeachment of witnesses whose testimony contradicted their previous statements,
3. For the jury to not be denied exculpatory evidence, so they could make an informed decision based on all the facts.

To bring the recordings into the jail for petitioner to review,

To play the entirety of the recordings to the jury, once petitioner found out they were never transcribed,

To hire an expert in ‘Eye Witness Identification’ with the qualifications to review the recordings and speak on the specifics of petitioners case, as all prosecution expert witnesses were allowed to do, (the witness counsel hired was not allowed to review the recordings or give testimony on the specifics of petitioners case).

To have petitioners jacket tested for blood and pepper-spray,

To acquire Rhoads phone records for three reasons.

1. To determine what calls Rhoads made while waiting for the Police to rescue her from the laundry room. We had been informed that she called her civil attorney at that time which tends to her obsession regarding the civil suit she had against Petitioner’s step-father,

2. To determine the length of Rhoads 911 call, or whether or not there had been more than one attempt,
3. To show that there had been no calls FROM Petitioner or Petitioners family. However that Rhoads had been harassing Petitioner's family with multiple calls.

To acquire Rhoads eyeglass prescription. She wore glasses during the trial but there was no mention of her wearing glasses the day of the shooting. Her ability to see was the central issue of the case.

To acquire Gina Holland's phone records. Holland had testified that Petitioner claimed to have called her from his home earlier that morning. Petitioner attempted to call her after completing a job in Walnut Creek, however the call went to voicemail after several rings. Holland's mistaken testimony harmed the credibility of Petitioner to the Jurors. Holland's phone records would have proved that this call never made a connection.

Concerning these "phone related" items, Counsel never produced any of the material. Further, no record was ever produced that a request had been made.

To present to the jury photographic evidence of petitioners garage side door showing that it had been broken into. Photos were supplied to Counsel by petitioners family.

To enter into evidence receipts for damages done to Mendells and petitioners dad's work vehicles while parked at Rhoads' house, showing that vandalism was happening at her home long before her dispute with petitioner's parents. Evidence that would have rebutted Rhoads' claim that she did not have any other enemies.

To present to the jury Police reports which counsels investigator found regarding prior incidents, where the police had been called out to the Rhoads' house for disturbances, showing that Rhoads had issues at her home which had nothing to do with her civil suit against petitioners dad.

These failures by counsel were fatal to petitioners case.

After the denial of the motion to quash the search and arrest warrant, Counsel told Petitioner that the issues surrounding the warrant required a special type of hearing, a “Franks” hearing. Though this obvious follow up step was described to Petitioner, it was never pursued.

Lastly, Petitioner has provided a copy of the State Bar Complaint which was filed against Counsel. This was drafted at a time when Petitioner still had access to all of his records concerning what he tried to do to get the Witness Statements, and 911 calls. (See Exhibit D – State bar complaint)

**b. Supporting cases, rules or other authority:**

“When a client expressly asserts the objective of his defense... his lawyer must abide by that defense” and a “violation of a defendants sixth amendment – secured autonomy – ranks as error of the kind U.S. Supreme Court decisions have called “Structural”; when present, such an error is not subject to harmless error review. Structural error affects the framework within which the trial proceeds. An error may be ranked as structural if the right at issue is not designed to protect the defendant from erroneous conviction, but instead protects some other interest, such as the legal fundamental principal that a defendant must be allowed to make his own choices about the way to protect his own liberty.” (McCoy v. Louisiana, 138 S. Ct. 1500; Opinion/ Ginsburg, J., joined by Roberts, CH. J., and Kennedy, Breyer, Sotomayer, and Kegan, JJ.) (also The ABA Model Rule of Professional Conduct 1.2(a)(2016) provide that a lawyer shall abide by a clients decisions concerning the objectives of the representation (again written by Ginsburg, J. with some justices joining)).

When Petitioners own defense counsel willingly suppressed exculpatory materials and evidence showing “counsel did not provide any assistance at all, let alone effective assistance”, (Fields v. Bagley, 275 F.3d 478, Dec. 19, 2001) Furthermore Petitioners “trial counsel failed to move to suppress or otherwise

object to an in-court identification by the prosecution's central witness, when there were compelling grounds to do so. Absent counsel's deficient performance, the result of the trial would likely have been different," (Thomas v. Garner, 428 F. 3d 491).