IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, STATE OF FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. **Case No.: 08-1177CFFA**

BRANDON E. WASHINGTON,
Defendant,
_____/

MOTION FOR POSTCONVICTION RELIEF

COMES NOW, Defendant Brandon E washington files this petition 3.850, for Post conviction Relief

CASE HISTORY

1. The Seventh Judicial Circuit in and for Flagler County Florida is the Court that entered the judgment.
2. Court entered judgment November 2, 2011.
3. Defendant was initially sentenced to 4 life sentences on counts 1 through 4 and 15 years for the 5th count.
4. The courts were 1) R.I.C.O. 2) Conspiracy to R.I.C.O. 3) 2nd degree felony murder 4) Principle to armed burglary 5) Principle to attempted home invasion robbery.
5. Defendant plead not guilty.
6. Judgment resulted from a jury trial.
7. Defendant did testify at trial or any pre-trial hearings.
8. Defendant appealed judgment of conviction.
9. Defendant appealed conviction I the 5th District Court of Appeals.

A) Courts decided that courts violated the double jeopardy clause in the 5th count. Count 5 was dropped and the last 4 counts was affirmed.

B) The judgment was entered on September 6, 2013, sentence became final on October 31, 2013.

10. Concerning this conviction defendant filed a 3.800(A) and 9.141(C) both motions were denied pertaining to the 3.8000(A) defendant raised the

following grounds: 1) State violated double jeopardy by sentencing him for both 2nd degree felony murder and the underlining felony. 2) State lacked authority to prosecute case because the statue of limitations run out. 3) Defendant was sentenced illegally under gang enhancement where evidence showed gang was not in existence. 4) Defendant was sentenced for armed burglary which exceeded maximum sentence. 5) Defendant was sentenced to life in prison for armed burglary when he was only charged with simple burglary.

A) Pertaining to the 9.141(C) motion defendant raised the following grounds 1) Defendant should have been charged with simple burglary than armed burglary. 2) Failing to file on trial counsel for failing to file pre-trial motion to dismiss for failing to tell the truth on search and arrest warrants. (2)(A) failing to file on trial counsel for not filing motion to suppress evidence from false search and arrest warrants. (2)(B) failing to file on trial counsel for not filing pre-trial motion on that the courts jurisdiction was not properly invoked, do to false arrest and search warrants 3) Not filing on trial counsel for failing to object to states inappropriate remarks in opening statements. 4) For not raising that trial court errored in not granting defendants J.O.A. (4)(A) for not raising on trial counsel for failing to ask for a new trial. (4)(B) for not raising on trial counsel for failing to object to defendant being charged with gang enhancement when gang was not in

existence. 5) For not filing on trial counsel for failing to object to principle instruction being given in connection with conspiracy count. 6) For failing to file on trial counsel for not asking for accomplice jury instruction. 7) For not filing on trial counsel for failing to ask for the independent act jury instructions. 8) For failing to file on trial counsel for not asking for the defense on conspiracy to be read. 9) For Cumulative errors. 6) defendant did not receive an evidentiary hearing for either motion.

GROUND I

TRIAL COUNSEL WAS INEFFECTIVE FOR NOT ONLY FAILING TO OBJECT BUT AFFIRMATIVELY AGREEING TO DEFENDANT BEING CHARGED WITH ARMED BURGLARY WHEN DEFENDANT WAS CHARGED

STATEMENT OF FACTS

- Pertaining to count 4. Defendant was initially charged with principle to armed burglary with a firearm. F.S. 810.02(1) & (2)(b), 775.087(1) & 777.011
- In a fourth amended information defendant was charged with armed burglary 810.02(1) & (2)(b) & 777.011 in the title
- After trial had begun and before the State rested a charge conference took place and there was a discrepancy between the title of the information and the actual body of the information.

- ❖ The title of the information charged defendant with armed burglary and cited the correct statute but the body of the information depicted a simple burglary and did not make mention to any weapon whatsoever.
- ❖ The State argued their position and asked that they be able to charged defendant with armed burglary. Before making a decision the judge asked trial counsel his position and trial counsel affirmatively agreed with armed burglary.
- ❖ Defendant was tried and found guilty.

ARGUMENT

Defendant argues that trial counsel was ineffective for not only failing to object but for affirmatively agreeing to defendant being charged with armed burglary when he was only charged with simple burglary. In a result defendant was convicted for a crime that he was not charged with by information which is a violation of his due process. U.S. Ct. Const. Amend. 147 F.S.A. R. Cr. P. Rule.

During the charge conference when the discrepancy is brought up the states says the defendant is charged "with armed burglary but the judge states "now that's not how its charged" (v12-1721)

The State contends "it's charged that way judge, I believe"

Court responds "count 4 is just burglary with nothing" (v 13-1721)

The State then concedes "I think the court is right with that" (v 13-1721)

The Court "yeah, it's not charged while armed.

State "It's not in the body, you're right Judge" (v 13-1722)

So, it is made clear and the State concedes that in the body of the Information Defendant is only charged with simple burglary.

The State does not wish to charge Defendant with just simple burglary so he ask the judge to readdress it the following day. The State argue that the statue for armed burglary is there in the body and Defendant is put on notice therefore Defendant can be charged with the armed burglary.

The judge asks trial counsel for his position and he replied "well, first of all, I think it was me that objected yesterday. But, aside from that, my only objection yesterday was the word firearm in the count 4 information instructions, page 38, number one through three, or it should have been three. And that's what I asked to be removed yesterday and that's the only thing I'm asking to be removed today." (v 14-2015)

The Judge decided to allow Defendant to be charged with armed burglary and give the jury instruction as what the elements are for armed burglary. Thereafter trial counsel made no objection and affirmatively agreeing to Defendant being charged with armed burglary. Therefore counsel's ineffectiveness waived the deficiency in the Information and allowing Defendant's due process to be violated by being convicted of a crime that he was not charged with.

The Defendant argues that when a discrepancy exist between the Information heading and the crime depicted in the body of the instrument the offense described in the body of the instrument is the one which Defendant is charged (see *Troyer v. State,* 610 So.2d 530 (Fla. 2d DCA)

It can not be refuted that in the body of the Information that Defendant was only charged with simple burglary.

Defendant argue that he was only charged with simple burglary.

State tries to argue that Defendant was on notice and the correct statute was sighted, therefore there is no violation.

This is not true, due process prohibits an individual from being convicted of an uncharged crime. *Cole v. Arkansas,* 333 U.S. 196, 201 (1948) violation of this prohibition constitutes fundamental error, *Jalmes; Ray v. State,* 403 So.2d 956, 966 (Fla. 1981)

As a corollary to this constitutional prohibition, it has been an established rule for quite some time that, where an offense may be committed in various ways, the evidence, the evidence must establish it to have been committed in the manner charged. *Long v. State*, 92 So.2d 259, 260 (Fla.1957) Florida Courts have consistently applied this rule since its inception *Deleon v. State*, 66 So.3d 391, 393 (Fla. 2d DCA 2011) even courts in this District Trahan v. State, 913 So.2d 729, 730 (Fla. 5th DCA 2005).

A criminal Defendant is entitled to a trial on the charges contained in the Information and many not be prosecuted for uncharged offenses, even if they are of the same general character or constitute alternative ways of committing the charged offense. Citation to the correct statute in an information that specifically alleges the ways the statute was violated to the exclusion of others does not cure the fundamental defect inherent in a verdict that finds the Defendant guilty of violating the statute in the ways that were not charged

Despite the fact the State had the correct statute for armed burglary, Defendant was only charged with simple burglary because the body of the Information did not allege that Defendant was armed with any weapon whatsoever, therefore, information did not allege that Defendant violated statute for armed burglary.

Every other district confirms that where use of a firearm or deadly weapon is not charged as an element of the offense, then the offense is limited to the terms charged. Sanders v. state, 386 so.2d 256 (Fla. 5th DCA 1988)

Although the facts presented showed that Defendant and / or co-defendants carried and / or used a firearm or deadly weapon, it was not charged that way in the Information.

Therefore, Defendant was charged with simple burglary but convicted of armed burglary which is a violation of due process.

Defendant argues that he was prejudiced by trial counsel's deficiency, because had counsel properly objected to Defendant being tried for a charged he was not properly charged with Defendant's due process would not have been violated and would have received a fair trial.

GROUND II

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO DISMISS ON COUNTS 1 & 2 ON THE GROUNDS THAT DEFENDANT'S DUE PROCESS OF LAW WAS VIOLATED BY THE AFFIANT AND STATEWIDE PROSECUTION OBTAINING THE JUDGES SIGNATURE FOR SEARCH AND ARREST WARRANTS THROUGH DELIBERATE FALSE STATEMENTS IN WRECKLESS DISREGARD FOR THE TRUTH.

STATEMENT OF FACTS

On October 24, 2008 judge Raul Zambrano signed search & arrest warrants that was presented by assistant statewide prosecutor Jason Lewis and statewide prosecutor William Shepard of the office of statewide prosecution through affiant Jason Jolicover a agent for the Florida department of law enforcement pertaining to the RICO and conspiracy to RICO count 1 & 2.

In a case report by Sgt. Cole of the Flagler County Sherriff department on 11/25/08 ORI number fl 0180000 page 35 of 38 pertaining to case # 2008-00059991 he claims that on January 17, 2008 a meeting between Flagler County

Sherriff Office and the FDLE took place in reference to open a joint investigation on the BLOODS in Flagler County.

In the FDLE investigative report written by Jason Jolicover serial # 1 pertaining to case number ST-56-0003 approved by Noel Edward Griffin. It is stated that the initial investigation opened in Feb. 15, 2008. It was determined through reviewed incident reports from F.C.S.O. that the crimes effected more than one jurisdiction, therefore warranting FDLE involvement and the office of statewide prosecution.

The joint investigation lasted from Feb. 15, 2008 until Oct. 28, 2008.

The F.C.S.O. had been investigating since 2004.

ARGUMENT

Defendant argues that trial counsel was ineffective for failing to file a motion to dismiss on the grounds that the statewide prosecution through the affiant Jason Jolicover obtained the judge signature by falsifying statements in the affidavits with wreckless disregard for the truth. This was shown on the face of the record through the search and arrest warrants, the information and the actual evidence presented at trial. This is also clear by pro se motion to dismiss that defendant filed on the record. Requesting trial counsel to file on Sept. 15, 2011. there is no way trial counsel could not see that arrest & search warrants was obtained through false pretenses.

Statewide prosecution can only prosecute crimes that effect more than one judicial circuit, and this jurisdiction element must appear on the face of the information or the information is void. 48 Fla. Jur. 2d state of Florida 66.

Absent some clear proof of an actual impact of criminal activity in more than one judicial circuit the requirements for granting the office of statewide prosecution the authority to prosecute a crime allegedly effecting two or more circuit is not satisfied (F.S.A. 16 56c) State v. Tacher (Fla. 3d DCA 2012)

The O.S.P. derives it's authority to prosecute cases from article IV of the Florida Constitution and section 16 56 Florida statutes. Upon the statute the State has the burden of presenting evidence to establish that the crime qualifies for prosecution by the O.S.P. 1) the charging document alleged multiple county criminal activity 2) there is evidence to support the exercise of the O.S.P. authority under section 16.56(1)(A).

The defendant argues that the affiant and statewide prosecution falsified the information on the search and arrest warrants' affidavits with wreckless disregard for the truth in order to meet the necessary criteria in article IV of the Florida Constitution giving the O.S.P. authority to prosecute and to obtain the judges signature. Trial counsel was ineffective for not attacking this.

The information in the affidavits states that the defendant and said co-defendants had been documented since 2004 by the Flagler County Sheriffs Office

and by F.D.L.E. since Jan. 2008 the affidavit said that which was said to be documented the defendant and co-defendants had been racketeering through a criminal street gang, the bloods since 2004 in the couties of St. Johns, Flagler, Volusia and Orange counties. Orange county is the only one that is not apart of the 7th Judicial Circuit, which would make the crime multi-jurisdictional. This was alleged on the face of the affidavit but the affidavit had over 40 predicate incidents for the probable cause but none of the predicates where alleged to have occurred in Orange County, not one.

So the probable cause affidavit itself did not allege any crimes that occurred in more than one jurisdiction. Even though affidavit alleging that the crime effected more than one judicial circuit, the truth is it did not.

If the office of statewide prosecution files an information but lacks jurisdiction to prosecute a case, then the trial courts jurisdiction is not properly invoked.

There is no way affiant could have made a mistake being defendant had been investigated for over 4 years and with ample amounts of documentations affiant would know what counties the crimes were committed in furthermore if affiant claims that having Orange County in the information was a scrivener's error and the remaining counties which are all in the same judicial circuit would not be

enough to warrant F.D.L.E. or the O.S.P. involvement and the trial courts jurisdiction would still be improperly invoked and the information void.

Trial counsel was ineffective for not attacking the fact that defendant was charged with a void information, and trial courts jurisdiction was not properly invoked. Together with the fact that affiant made false statements knowingly with wreckless disregard for the truth to obtain the judges signature, defendant was prejudiced and denied due process by the trial counsel's ineffectiveness by not filing a motion to dismiss on the grounds above. Had counsel filed said motion information would have been dismissed.

SUB GROUND (A)

Trial counsel was ineffective assistance for failing to file a motion to suppress all evidence/testimony that was fruit of a poisonous tree, in that, the evidence/testimony was received only after an illegal arrest and falsified probable cause affidavits.

ARGUMENT

Upon the same facts in the lateral ground, defendant argues that he was prejudiced by counsel's ineffectiveness in not filing a motion to suppress evidence that was a result of the affiant making false allegations deliberately with wreckless disregard for the truth, and obtaining the judges signature for search and arrest warrants presented by the office of statewide prosecution. The statewide

prosecution along with the F.D.L.E. had a substantial amount of time in investigating the crime of R.I.C.O. there is no way that the affiant could have made a mistake and added Orange County another necessary judicial circuit needed to warrant F.D.L.E. and O.S.P. in the case and properly invoke the courts jurisdiction to sign the search and arrest warrants.

Apart from affiant making false allegations the affidavit was insufficient on its face and judge never should have signed it where there was a list of crimes that was documented but none of them was in another jurisdiction. Therefore he should never signed and the courts jurisdiction was never properly invoked.

The affidavits contain assertions relating to the validity of the charges and the jurisdiction of the statewide prosecution. The allegations are false.

A search warrant may be found invalid if the statements contained in an affidavit upon which the warrant was based are found to be errounious. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 / State v. Jacobs, 320 So.2d 45.

Defendant argues trial counsel was ineffective for not filing a motion to suppress because the false statements was not a mistake or negligence. Falsifying the fact that defendant and co-defendants was racketeering in Orange County was necessary to obtain jurisdiction and invoke courts jurisdiction and invoke courts jurisdiction. Without the false statements, the warrants would be insufficient. Even

more, the affidavits would still be insufficient on its face because it did not assert any clear proof that a crime effected more than one judicial circuit.

The Supreme Court finds that where the defendant makes a substantial showing that a false statement knowingly and intentionally or with wreckless disregard for the truth, was included for the truth, was included by the allegedly false statement is necessary to the findings of probable cause, the 4th amendment requires that a hearing be held at the defendants request.

The affidavit was misleading and the assertions that defendant and the assertions that defendant said co-defendants had been racketeering in multiple judicial circuits was a deliberate falsehood, and the misrepresentation violated the arrest and search warrants. U.S. v. Ventresca, 380 U.S. 102, 105, 85 S.Ct. 741, 746 13 L.Ed 684, 689 (1965).

Trial counsel was ineffective for not filing a motion to suppress evidence and testimony obtain only after the invalid search & arrest warrants. The statewide prosecution and which was detrimental to defendant, had multiple co-defendants sign plea agreements, in which was used to convict the defendant.

Trial counsel can not say he was not aware of this because defendant sent a motion to suppress to counsel and requested him to file it. This was filed through the clerk of courts.

Evidence/testimony obtained through unlawful arrest the evidence is inadmissible. Wrong Sun v. U.S., 83 S.Ct. 407/State v. Rheiner, 297 So.2d 130. evidence seized during unlawful search can not constitute proof against victim of search and exclusionary prohibition extends to indirect as well as to direct products of such invasions.

Test of excludability is not whether evidence would not have come to light but for illegal actions of police but whether evidence was come at by exploitation of illegality rather than by means sufficiently distinguishable to be purged of primary taint.

By trial counsel failing to suppress evidence/testimony obtained after the illegal arrest prejudiced defendant tremendously had trial counsel filed a motion to suppress. State would not have had sufficient evidence to convict defendant. Trial counsel's failure prejudiced defendant by denying him a right to a fair trial and violation of due process.

SUB GROUND B

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A PRE-TRIAL MOTION TO DISMISS ON THE GROUNDS THAT THE COURTS JURISDICTION WAS NOT PROPERLY INVOKED BECAUSE THE STATEWIDE PROSECUTION LACKED THE AUTHORITY TO FILE SEARCH AND ARREST WARRANTS WITHOUT THE FALSE AFFIDAVITS WHICH CONSTITUTES FUNDAMENTAL ERROR.

ARGUMENT

Upon the same facts above Defendant argues that counsel was ineffective by failing to file a proper pre-trial motion attacking the fact that trail court jurisdiction was not properly invoked because of false affidavits and the search/arrest warrants insufficient on there face.

A challenge to the Authority of Office of Statewide Prosecution to prosecute a case is a matter for the judge to determine if challenged and not an element of the offense that the state must prove to a jury beyond a reasonable doubt F.S.A. Const. Art 4 (4) (b).

The O.S.P. never had the authority to prosecute the R.I.C.O. because they did not satisfy the necessary criteria. There was no evidence whatsoever to establish any crimes effecting more than one judicial circuit.

A defendant should not be forced to file a motion to request the state to prove that which it must prove in the first instance (opinion in *Scott v. State*, 102 So.3d 676). The court in *State v. Tacher*, 84 So.2d 1131, which is a decision cited by the majority in support of its new rule, did not say that the defendant was "required" to file a pre-trial motion to dismiss, rather, the court stated "we suggest" that such a motion be filed as sworn motion to dismiss. Similar to those filed under Rule 3.190 (c) (4), Florida Rules of Criminal Procedure. Tacher 84 So.3d at 1136,

notably absent from that suggestion is any mention or provision that makes the filing of such motion mandatory.

Regardless, Defendant never plead to the merits of the charges, which record will show on arraignment therefore not giving up the right to attack the validity of said charges.

Defendant argues that trial counsel was ineffective for not raising through pre-trial motion that it was fundamental error and against Defendant's due process of the law, where statewide prosecution presented search and arrest warrants without the authority to do so and therefore did not properly invoke the trial court's jurisdiction. This prejudiced Defendant by denying him a fair trial and his due process of law. Had counsel raised proper pre-trial motions, Defendant would have received a fair trial and the outcome would have been different.

SUB GROUND C

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION FOR A PRELIMINARY ADVERSARY HEARING

ARGUMENT

Upon the same facts above, trial counsel was ineffective for failing to file a motion requesting a preliminary adversary hearing attacking the validity of the charges brought against defendant.

Defendant requested on multiple occasions through letter motions, orally, Nelson inquires and motion to discharge attorney for trial counsel to file such motion trial counsel failed to do so.

Thus prejudiced defendant because it allowed defendant to be tried and convicted of charges in a manner that violated his due process and denied him a fair trial.

Had trial counsel asked for such hearing the outcome would have been different, in that charges would have been dismissed for lacking validity and O.S.P. lacking such authority to bring said charges against defendant.

GROUND THREE

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO STATES INAPPROPRIATE REMARKS IN OPENING STATEMENTS

STATEMENT OF FACTS

*In opening statements the State told the jury that they had evidence to back the following statements:

1. The evidence will show that Brandon Washington was the leader, the O.G. or original gangster of the bloods organization on Flagler county. He was the O.G. from a time period of approximately 2004 to 2008. he was the leader of a set known as 9-Tek Grenades or the Brick Mafia (v4-445)

2. When referring to the armed burglary in count 4 state states "it resulted in the death of a Blood member" (v4-452)
3. Stated again "Rashawn Pugh a Blood member"
4. "Mr. Washington supplied the gun to Reshawn Pugh." (4-463)

ARGUMENT

Defendant argues that trial counsel was ineffective for not objecting to these remarks because they are false and state had no evidence whatsoever to establish these statements as facts. In fact state's own evidence and star witnesses refute theses claims and counsel was aware of this through discovery and depositions.

Pertaining to the first statement that defendant was the leader from 2004 to 2008. This is not true and the State refutes this claim through their own star witnesses Christopher Kee and Michael Gilbert who are co-defendants and fellow members whom claim that 9-Tek Grenades is in fact two different gangs and defendant was the leader of Brick Mafia and Gilbert was the leader of 9-Tek Grenade. It was also established through their testimony that Brick Mafia did not start until late 2006 after Gilbert incarceration and 9-Tek did not start until his release in 2007. Therefore refuting the claim of defendant being the leader since 2004 and that they are two separate gangs.

Pertaining to statements 2 through 4. Once again trough testimony of the states own witnesses, all of them testified that Reshawn Pugh was NOT member of

the bloods. Therefore making this statement false and prejudicial because the State was trying to show the armed burglary was forced because of defendants position in the gun defense argued that these individuals done it on their own accord and was not forced. Therefore, trial counsel should have objected to theses remarks. Also in the statement that defendant supplied Reshawn Pugh with the gun. Where evidence and testimony showed it was Pat Hantzos that supplied him with the gun. Theses facts were known to state before hand therefore making these statements deliberate falsehoods and was detrimental to defendant.

Defendant argues that trial counsel was ineffective for not objecting to these remarks and it prejudiced defendant by allowing the jury to see theses statements as facts. Had counsel objected there lies a strong probability that the outcome of the armed burglary would have been different (Ellingsworth v. Reynolds, 843 F.2d 712)

GROUND IV

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE A PROPER JUDGMENT OF ACQUITTAL, INSTEAD, DOING A BOILER PLATE MOTION.

STATEMENT OF FACTS

1. Defendant went to trial on R.I.C.O. conspiracy to R.I.C.O. second degree felony murder, armed burglary, and attempted home invasion robbery.

2. Upon state resting defense counsel put in for a judgment of acquittal. Courts denied it and defense counsel put in for a judgment of acquittal. Courts denied it and defense renewed it for appeal purposes.

ARGUMENT

Defense counsel was ineffective for not arguing a proper judgment of acquittal attacking specific arguments instead of a general argument in a boilerplate motion. Defense counsel alleged that state simply had not presented a prima Facie case as to several of the predicate offenses particularly for the cases before 2007. in respect to counts III through V he generally argued that the State has not met its burden and not made a prima facie case. Trial counsel's boiler plate J.O.A. argument was not sufficient to preserve any specific J.O.A. arguments for Appellant review (Victorino v. State, 23 So.3d 87, 103 (Fla. 2009)

The information charged defendant of racketeering through a criminal street gang called the 9-tek grenades which is the enterprise. State alleged that this pattern of racketeering activity continued from 2004 to 2008.

Before you can find defendant guilty of unlawfully participating in an enterprise, the State must prove the following three elements beyond a reasonable doubt 1) defendant was associated with an enterprise 2) defendant participated directly or indirectly in such enterprises by engaging in at least two or more predicates 3) in those incidents in which defendant was engaged at least two of

them had the same or similar intents, results, accomplishes, victims, or method of commission, or were interrelated by distinguishing characteristics and were not isolated incidents pursuant to Fla. R. Crim. P. 943.462(3).

An essential element to sustain a conviction an a R.I.C.O. offense, the state must show that defendant continued in a pattern of racketeering activity through an enterprise pursuant to F.S.A. 895.01.

The state uses the criminal street gang as the enterprise, and as used to define "criminal gang" "Ongoing" means that the organization was in existence during the time period charged in a petition, information, indictment, or action for civil injunction relief pursuant to 874.03(1)(A)

In opening statements Ms. Dunton, for the state, stated "the evidence will show that defendant was the leader, the O.G. or original gangster of the bloods organization in Flagler County. He was the O.G. from a time period of approximately 2004 to 2008. He was the leader of a sect known as 9-Tek Grenades or the Brick Mafia. (v4-445)

She also stated "the blood gang is the organization and enterprise that will be the center piece of this trial. (4-446)

The State offered evidence that the gang did exist through the testimony of co-defendants, fellow gang members and law enforcement.

Defense counsel was ineffective in his boiler plate J.O.A. by only arguing that state failed too make prima facie case. What counsel should have argued was that the state offered no evidence whatsoever to show that the criminal street gang 9-Tek Grenade or Brick Mafia was in existence prior to Dec. 2006 to satisfy the "ongoing" element defined in criminal street gang pursuant to 874.03(1)(A)

The State must show the gang was in existence during the time of the alleged crime to satisfy the ongoing element and to also establish the pattern or racketeering activity being promoting the benefits of a criminal street gang. Without the street gang there is no enterprise and without an enterprise there is no R.I.C.O.

Counsel should have argued that through the States own star witnesses, whom where co-defendants and fellow gang members by the names of Christopher Kee and Michael Gilbert, it was established that Brick Mafia did not start until Dec. 2006 when Gilbert was incarcerated and 9-Tek Grenades did not come into play until Gilberts release from prison in 2007. in fact it was also established through there testimony that 9-Tek Grenades and Brick Mafia are two different organizations and were ran/operated by two different people and had different members nevertheless, neither existed before Dec. 2006.

Counsel did not argue that the State did not present any evidence to show that Brick Mafia was in fact a criminal street gang pursuant to 874.03. The State

did not show that Brick Mafia had 3 or more criminal street gang members one of the criteria to be considered a criminal street gang.

The State presented testimony that defendant was a blood since at least 2004, but also through state's witness Sgt. Cole of the Flagler County Sherriff Office a gang specialist, testified that there are different sects that call themselves "bloods" but do not necessarily run together or share any proceeds. Counsel did not argue the fact that "blood" is a generalization and at best it state successfully showed that defendant met the criteria to be a gang member, there was no evidence to show what criminal gang he belonged to prior to Dec. 2006.

Where state fails to show a defendant is apart of a criminal street gang pursuant to 874.03(1)(1) state can not charge defendant as being apart of a criminal street gang (A.K. v. State, 724 So.2d 660) if states fails to show criminal street gang they fail to show an enterprise and pattern of racketeering activity,

Counsel was ineffective for not arguing these issues in his J.O.A. which prejudiced defendant drastically.

In respect to counts III through V to sustain a conviction in R.I.C.O. the State must show that the enterprise works as a continuous unit. The State failed to show this element and if the same enterprise or pattern of racketeering activity was the same as when counts III through V was committed as the pattern they claim exist prior. By the States own evidence showing Brick Mafia & 9-Tek are two

different sects with different leaders and members and failing to show Brick Mafia was an actual criminal street gang, they failed to show Brick Mafia was an actual criminal street gang, they failed to make a prima facie case.

This is what counsel failed to argue in his J.O.A. which made him ineffective, and prejudiced defendant by not giving him a right to a fair trial.

Had counsel argued the J.O.A. sufficiently with theses issues there lies a strong probability that defendant would have gotten acquitted.

SUB GROUND (A)

TRIAL COUNSEL WAS ALSO INEFFECTIVE UPON THE SAME ISSUE ABOVE FOR FAILING TO FILE FOR A NEW TRIAL ON THE GROUND THAT THE WEIGHT OF THE EVIDENCE DID NOT SUPPORT THE GUILTY VERDICT.

ARGUMENT

Upon the same facts as above, trial counsel was ineffective for failing to file for a new trial. ny the State failing to show the existence of an "ongoing" criminal street gang from 2004 to 2008, they failed to show the enterprise therefore, no R.I.C.O.

Dismissal of a R.I.C.O. charge is warranted when the State fails to make a prima facie showing of the exsitance of a criminal enterprise (Boyd v. State, 578 So.2d 718 (Fla. 3d DCA)

As essential element to sustain a conviction on a R.I.C.O. offense the State must show that defendant continued in a pattern of racketeering activity through an enterprise pursuant to F.S.A. 895.01. State failed to do so.

Trial counsel was ineffective for failing to ask trial court to sit as a "Seventh juror" to the re-weight the evidence and to "veto" the jury's verdict.

There is a distinction between the sufficiency of the evidence standard used in determining whether a judgment of acquittal is appropriate and the "weight of the evidence" standard used to evaluate a motion for new trial Moore v. State, 800 So.2d 747 (Fla. 5th DCA 2001).

The sufficiency of the evidence is a test of whether the evidence presented is legally adequate to permit a verdict.

Although, the court can find the evidence of the states case sufficient to require the denial of a motion of J.O.A. the evidence as court to grant a motion for new trial based upon the manifest weight of the evidence.

Trial counsel was therefore ineffective for not asking for a new trial. this prejudiced the defendant by allowing the verdict to stand, had trial counsel filed a motion for new trial there lies a strong probability that the trial courts would have vetoed the jury's verdict.

SUB GROUND (B)

UNDER THE SAME FACTS IN THE LATERAL GROUNDS, TRIAL COUNSEL WAS INEFFECTIVE

FOR FAILING TO OBJECT TO DEFENDANT BEING CHARGED WITH THE CRIMINAL STREET GANG ENHANCEMENT ON COUNT I & II WHEN CRIMINAL STREET GANG WAS NOT IN EXISTENCE.

ARGUMENT

Defendant argues that trial counsel was ineffective for not objecting to the street gang enhancement on counts I & II when criminal street gang was not in existence during the time frame of alleged crime.

States own evidence showed that criminal street gang was not in existence prior ro Dec. 2006 in which state claims said gang was in existence from 2004 to 2008 state also failed to show that Brick Mafia, the alleged street gang had 3 or more members that meet 2 of the 8 criteria's necessary to be a gang member to establish Brick Mafia as a actual criminal street gang.

Defendant was prejudiced by trial counsels ineffective by not objecting to the enhancement in that defendant received a life sentence instead of the max of what R.I.C.O. carries.

Had counsel objected, there lies a strong probability that defendant would not have been eligible for a life sentence.

GROUND V

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE STANDARD JURY INSTRUCTIONS ON PRINCIPLE TO BE GIVEN IN CONNECTION WITH CONSPIRACY ON COUNT II

STATEMENT OF FACTS

* Concerning counts 1 & 2 the R.I.C.O. & conspiracy to R.I.C.O. defendant was charged with 23 predicates with the conspiracy count having one more.
* Within the 23 counts 10 of them where charges of principle.
* After the predicates were read to the jury on count 1 a definition was given.
* Defendant was also charged as a principal on counts 3, 4, & 5.
* Pertaining to count 2 the conspiracy, the judge told the jury that all predicates indicants in count I of the information have been previously defined in the instructions.
* After counts 2, 3, 4, & 5 was charged to the jury another principle instruction was given.

ARGUMENT

Trial counsel was ineffective for not objecting to a principle jury instruction being given in connection with conspiracy count.

Evidence that a person aided and abetted another in the commission of an offense would be sufficient to convict the person as a principle but would be insufficient to convict the person of conspiracy U.S.C.A. Const. Amend. 6 F.S.A. 777.011

Principle instruction should not be given in connection with conspiracy charges (Pisegna v. State, 488 So.2d 624. 625 (Fla. 4th DCA 1986).

Because of the predicates that was charged in count I, a principle instruction was given being that a lot of the predicates were principle offenses. These same offenses was predicates in count II the conspiracy. In count I & II after every predicate that was read as a principle count it read in caption (if you decide that the principle law applies) because counts III, IV, & V were principle counts another principle instruction was read but only after including count II with counts III, IV, & V. Therefore, making the principle instruction apply with the conspiracy.

The court was aware of this and asked for it to be removed. (v16-2157)

The judge asked trial counsel did he object and counsel responded "No" (v 16-2158).

Trial counsel was ineffective for not objecting because the giving of the principle instruction is that it allows the jury to find the defendant to be a member of the conspiracy if the jury concludes that he had done anything to aid or abet the underlying crime.

Trial counsel's ineffectiveness prejudiced defendant because it was misleading to the jury. Instead of trial counsel agreeing with the jury instructions, he should have asked for a clearer jury instruction in that the principle instruction only apply to the predicates themselves and not the actual conspiracy to R.I.C.O.

Also that the second principle instruction only applied to counts III, IV, & V. the first instruction included the principle jury instruction and then for count II the judge stated "all predicate incidents have been previously defined for you in these instructions" this included the principle instruction. There was nothing to assure the jury that the principle instruction did not apply to count II. Than the principle instruction being given again after counts II, III, IV, & V, it made it apply with the conspiracy.

Had counsel objected to this jury instruction and asked for a clearer one this fundamental error would not have occurred and defendant would have received a fair trial and different outcome.

GROUND VI

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ASK FOR THE ACCOMPLICE INSTRUCTION IN CONNECTION TO COUNTS I, II, III, & IV

ARGUMENT

In counts III & IV the only evidence the State presented at trial outside of their testimony. there was no physical evidence or testimony from victims or eye witnesses.

Accomplice jury instructions 2.04(b) states: you should use great caution in relying on the testimony if a witness who claims to have helped the defendant

commit a crime. This particularly true when there is no other evidence tending to agree with what the witness says about defendant...

When there is sufficient evidence to base the instruction a failure in giving it to the jury warrants reversal. Taylor v. State, 429 So.2d 1258 / Woodyard v. State, 823 So.2d 853.

In closing arguments trial counsel's whole defense was that co-defendants were testifying falsely to save themselves.

Trial counsel made the following remarks in closing "...and no evidence other than the testimony of individuals whose interest and self-preservation in pointing the finger at Mr. Washington. Shows that second degree murder against Mr. Washington, the only one who didn't go into the house, by the way, and the only one charged/" (v 16-2130)

Therefore from the counsel's own mouth requires accomplice instructions. On several occasions counsel claimed defendant was being lied on by his accomplices and there was no evidence apart from there testimony to corroborate their testimonies.

Without the putative accomplice's testimonies. The evidence would have been insufficient to convict. In fact, there would be none.

The defense theory was that the putative accomplices instruction counsel's ineffectiveness constitutes fundamental error. (Goodwin v. State, 412 So.2d 347)

Without the testimony of co-defendants. Defendant would never even have become a suspect.

Where there is any evidence introduced at trial which supports the theory of the defense a defendant is entitled to have the jury instructions on the law applicable to his theory of defense.

The accomplice instruction was applicable and trial counsels failure prejudice defendant and denied him a fair trial. had trial counsel asked for accomplice instruction there lies a strong probability that the outcome of the trial would have been different.

The accomplice instruction was also applicable in counts I & II. The only physical evidence that the State had against defendant as far as being a criminal street gang or enterprise was documentation of defendant and co-defendants wearing color coordinating clothing, bandanas, and throwing up hand signs. Even in the footage from the confidential informant, it shows co-defendants at a house discussing certain matters. No where is a certain decision making or hierarchy is discussed, no where does it talk about how proceeds would be divided amongst members, and in fact, the C.I. is the one saying it's a blood meeting. There is nothing spoken in the footage to corroborate what the C.I. claims. The only evidence they have to the actual existence of the criminal gang or enterprise as far as the structure, decision making and hierarchy all comes from his accomplices

that where charged with him. State would not have evidence of this enterprise without the testimony of his accomplices.

When it comes to the predicates (2A) was a possession, a constructive possession, nothing was found on defendant (6) was a robbery of a sub base, there was no physical evidence to corroborate the testimonies of accomplices. The only other testimony was from a young lady who worked there and said defendant was present earlier that day but could not identify defendant in court. No evidence but accomplices testimony. (7) was possession of firearms, were accomplices claim to have seen guns in defendants possession, no other evidence to corroborate only accomplice testimonies. No finger prints, no nothing. (8A)(8B)(8C) all stem from a Armed Robbery once again, no physical evidence of defendants presence, no fingerprints no footprints, no eye witnesses, nothing, only the testimony of defendant's accomplice, nothing corroborating with their story. (9A)(9B)(9C) all stem from the same Armed Burglary. No physical evidence, no eye witnesses, only the testimony of accomplices, noting to corroborate their stories (11A)(11B)(11C) stem from a Home Invasion. Same thing, no physical evidence, no eye witnesses outside of accomplice, the sole evidence is from accomplices.

Out of 23 predicates incidents over half of them state offered no physical evidence or testimony of outside of the testimony of defendants accomplices.

Trial counsels failure to ask for an accomplice jury instruction was extremely prejudicial because the majority of the predicates and the more serious predicates, one involving death, the evidence was based solely on the testimony of defendants accomplices.

This failure constituted fundamental error and denied defendant a fair trial.

Had the accomplice instruction been read to the jury, they would have known to take the testimony of defendant's accomplice with a grain of salt being there was no other evidence to corroborate their story. Had counsel done so there lies a strong possibility that the outcome of defendants trial would have been different.

GROUND VII

TRAIL COUNSEL WAS INEFFECTIVE FOR FAILING TO ASK FOR THE STANDARD JURY INSTRUCTIONS TO BE READ ON THE INDEPENDENT ACT PERTAINING TO COUNTS III & IV

STATEMENT OF FACTS

- Defendant was charged with 2nd Degree Murder along with Armed Burglary arising from the same incident.
- Defendant was charged as a principle.

- State alleged that Defendant gang's leader and ordered the co-defendants Pat Hantzos, Christopher Kee, Hector Echaverria, and Reshaun Pugh to home invade victim's home.
- Upon entering home the home owner opened fire, in the result killing Reshaun Pugh, therefore charging Defendant with 2nd Degree Murder.
- Defendant went to trial and was found guilty on said charges.

ARGUMENT

Defendant argues that trial counsel was ineffective for failing to ask for independent act to be read to jury.

Where there is any evidence introduced at trial which supports the theory of the defense a Defendant is entitled to have the jury instructions on the law applicable to that theory.

It was introduced into evidence by State's own witness that, in respect to counts III & IV that co-defendant acted on their own.

The State's witness Christopher Kee, when asked did Defendant make him go on the Armed Burglary, he answered, "Brandon asked me, not "Oh you going" he asked me , just simple friend like "Yo you going to do that" (v-10-1359) "Yeah, he asked me, not telling me" (v-10-1360-1).

The State then asked was Defendant leader, Kee answers "Yeah, but, all really, I really didn't have to go. Yeah, I went on my own accord (10-1361).

He also states "Everybody who was involved with that really, they went on their own accord; they acted on their own (10-1361).

It was also entered into evidence through Kee's testimony that co-defendant Pat Hantzos whom set the robbery up, also warned the homeowner that co-conspirators were about to enter house.

Kee states ".... It's not reasonably foreseeable when Pat going to tell the guy, okay, we coming to rob you and come on if somebody was telling me, oh, these people coming to rob me, and I'm putting you upp on game, well, of course, I'm going to have a gun".

It was also entered into evidence through Kee's testimony that Rashawn did not follow the original plan that he "Just bursted through the door like superman" in which got him killed instead of following the plan and walk in with Hantzos, committing a burglary instead of a home invasion by forced entry.

Trial counsel may not say he was unaware being this was his defense in closing.

"Regardless of the motivation it was Mr. Hantzos who wanted to rob these individuals" (2125-23)

"Patrick Hantzos through his own testimony drove there, went inside the house, facilitated as much as anyone, if not more than anyone, the commission of this robbery and ultimately what led to the death of Reshaun Pugh (2127-8).

"Same goes for Mr. Kee, an individual who is brandishing a gun, whom entered the home as involved as anybody else, if not more, his testimony, he went in there voluntarily no one was ordered to do anything (2127-8).

"Reshaun Pugh was shot and killed by a gun sold to the home owner by Pat Hantzos"(2127-9).

"Reshaun Pugh entered the home with a weapon that was given to him by Patrick Hantzos. Megan Smith provided the gun to Hector." (2127-24)

"This was all Patrick Hantzos again for the second time, the second time Mr. Hantzos executed a robbery. This time it led to a death". (2128-12)

"Second degree murder against Mr. Washington the only one who didn't go into the house by the way, and the only one charged with that. (2130-9)

"The burglary and the home invasion that ultimately led to the death and I submit to you Mr. Washington did not participate in that. (2130-13)

These statements show that trial counsel was ineffective for not asking for the jury instructions on the Independent Act.

It was also entered into evidence through testimony that Pat Hantzos warned the homeowner that he was getting robbed and the home owner shot Reshaun Pugh with a gun that was given to him by Pat Hantzos. This, even if the Defendant was a part of the scheme to commit said burglary, this falls way out of a common scheme or design of the crime of burglary to warn the victim that burglary is about to

occur. This was an Independent Act by Pat Hantzos which caused the death of Reshaun Pugh for not paying him his cut in a previous home invasion.

In more than one way evidence was introduced at trial to support the theory of the independent act and counsel's failure to ask for it was prejudicial constituting fundamental error and depriving Defendant of a fair trial.

Had trial counsel asked for standard jury instructions on the Independent Act, there is a reasonable probability that Defendant's outcome would have been different, because it prejudiced Defendant by allowing the jury to hear the instructions on the Independent Act and be able to see the result of the crime was not from Defendant's actions and finding him not guilty.

GROUND VIII

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ASK FOR STANDARD JURY INSTRUCTION FOR CONSPIRACY, THAT IF YOU PERSUADE A PERSON NOT TO DO THE CRIME, OR DO SOMETHING TO PREVENT IT FROM OCCURRING IT IS A DEFENSE TO CONSPIRACY, PERTAINING TO COUNT II.

ARGUMENT

It was introduce into evidence by co-defendants and law enforcement that Defendant was trying to tell co-defendants to "fall back" which means to stop committing the crime, which was R.I.C.O..

Also through recorded phone calls of defendant, defendant was trying to tell co- defendants to "fall back because it's hot F.D.L.E. is out" meaning for co-defendants to stop committing crimes or they would be charged with the R.I.C.O..

On the same recorded phone calls Defendant was heard telling co-defendants Mercedes Owens that he told them no to do the robbery at a sub base restaurant. Kim also a co-defendant testified that Defendant called her phone to tell her to tell co-defendants Rhonda Duggins and Mercedes not to commit the robbery.

Defendant argues that trial counsel's failure was ineffective and therefore prejudiced Defendant in denying him a fair trail. Had trial counsel had the defense for conspiracy read where evidence was introduced on more than one occasion to support the theory, there lies a strong probability that Defendant's outcome would have been different, allowing the jury to find Defendant not guilty.

GROUND IX

Trial counsel was ineffective for failing to suppress DVD where officers improperly extended search to Defendant's trunk.

STATEMENT OF FACT

- On March 15, 2008 Defendant along with co-defendant Megan Smith and Manuel Cabral, where they were being sought by Flagler County Sheriff's Office for Robbery With a Firearm and Armed Kidnapping.

- Megan Smith and Manuel Cabral were apprehended the same day. They were arrested in a 2006 Ford Fusion that was owned by Smith and Defendant whom was a girlfriend of Defendant. Police officers searched vehicle and extended search to the trunk of the vehicle finding a camcorder. Officers examined the footage recorded on camcorder finding Defendant and others in footage.
- This DVD was later used in Defendant's R.I.C.O. case as evidence to show Defendant was a gang leader of the bloods.

ARGUMENT

Defendant argues that trial counsel was ineffective for not suppressing the damaging DVD where law enforcement extended search to the trunk of Defendant's car.

Co-defendants Meghan Smith and Manuel Cabral were being sought for committing a robbery with a firearm and armed kidnapping. The items of the said robbery were a cell phone and a pair of car keys. After Smith and Cabral were arrested law enforcement conducted a search of the vehicle. Officers' extending the search without a warrant was inappropriate. Furthermore, a camcorder had nothing to do with the commission of the said crime, officers should not have viewed the footage on DVD, and upon looking at DVD the footage did not show any crime being committed.

Even though the police may have been authorized to search the interior of the vehicle for alleged weapon used in crime but it was improper to extend search to trunk of vehicle, in which case a motion to suppress could have been successful. *Betz v. State*, 793 So.2d 976 (Fla. 2nd DCA), search of passenger compartment is legal; search of trunk is not because it is not in arrestee's immediate control. *Bryant v. State*, 765 So.2d 903 (Fla. 5th DCA 2000); *Pugh v. State*, 804 So.2d 1278 (Fla. App. 2nd Dist. 2002).

Also, at the time Defendant was not charged with R.I.C.O. but later on said robbery was used as a predicate in Defendant's R.I.C.O. case. The video was not used in the case against the crime which it was found but saved and used as evidence in another crime. This falls measurably outside the acceptability of the evidence code.

This video was damaging to Defendant in R.I.C.O. case where state was alleging that Defendant is and co-Defendant of R.I.C.O. were a gang and Defendant was the leader. In said video Defendant was seen with the adopted colors of the alleged gang throwing up gangs signs that belong to that gang. Defendant was seen pledging allegiance to said gang and claiming to be the leader. This was detrimental to Defendant's case and by trial counsel not suppressing it was prejudicial to Defendant by allowing jury to hear from Defendant's mouth that he belongs to said gang at least that is how the State interpreted it. This video was

played a number of times for the jury and was used as the "nail in the coffin" in closing argument.

Had counsel suppressed said video, there lays a strong possibility that the outcome of Defendant's trial would have been different.

GROUND X

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SUPPRESS EVIDENCE WHERE DEFENDANT WAS INCARCERATED AND NOT A PART OF SAID ENTERPRISE

- Rhonda Duggins a co-Defendant of Defendant was arrested on March 15, 2008 for a robbery of a sub base restaurant which later was charged as a predicate under the R.I.C.O.

- Defendant was later arrested on March 17, 2008 for armed robbery with a firearm and armed kidnapping with a firearm.

- Upon Duggins release she began working as a confidential informant for the F.D.L.E. to obtain information on the R.I.C.O. case. Duggins provided the F.D.L.E. with information from approximately June of 2008 up until the arrest warrants were issued from Judge Zambrano in October of 2008.

- Defendant has remained incarcerated since his arrest in 2008.

ARGUMENT

Defendant argues that when members of allege enterprise are incarcerated they are not a part of the same pattern of racketeering activity. *Weinacht v. State*, 744 So.2d 1197 (Fla. 1999).

In racketeering cases that involve new predicates the State must prove that each predicate act corresponds to same pattern of racketeering activity, F.S.A 895.03.

Separate offense may not be joined where basis for joiner is similarity of circumstances for charged offense.

Apart from the testimonies of the Defendant's accomplices, the other evidence that they use to corroborate the working of the gang which was used to satisfy the enterprise element was the information gathered through the documentation received through the C.I. wearing audio and listening devices. All this evidence was received only after Defendant's arrest.

Defendant argues that State must show that Defendant was still involved in enterprise and that it was the same pattern of racketeering activity. The State failed to do so.

State showed where Defendant was still making phone calls to alleged members but no where was Defendant encouraging or ordering them to commit any crimes. In fact, Defendant was telling them to stop committing crimes before they get charged with the R.I.C.O.. There were also letters from the Defendant

introduced in trial; again, Defendant mentioned nothing pertaining to criminal activity.

It was also introduced into trial that once Defendant was incarcerated co-Defendant Michael Gilbert took over gang, this was introduced through the C.I. and co-Defendant's testimony.

Defendant argues that trial counsel was ineffective for not suppressing the all evidence received through the C.I. Rhonda Duggins where Defendant was incarcerated and State did not show Defendant was a part of the same pattern of racketeering activity.

Counsel's failure to suppress the evidence of the information that came from the C.I. only after Defendant's incarceration, there would be no evidence to corroborate the testimony of Defendant's accomplices to establish the inside operations of the alleged enterprise.

SUB GROUND A

TRIAL COUNSEL WAS INEFFECTIVE FOR NOT SUPPRESSING ALL EVIDENCE THAT PERTAINS TO PREDICATES PRIOR TO DECEMBER OF 2006

STATEMENT OF FACTS

- On August 4, 2004 Defendant was arrested for possession of a firearm by a convicted felon and was incarcerated for about 13 months.

- On about November 7, 2005 Defendant was arrested and incarcerated until February of 2006.

- On December 26, 2006 Defendant was arrested for home invasion and was incarcerated until June of 2007.

- March 17, 2008 Defendant was arrested for a robbery and has been incarcerated ever since.

ARGUMENT

Trial counsel was ineffective for not suppressing all evidence prior to December 2006 because from 2004 to 2008 Defendant spent a substantial amount of time incarcerated; therefore, not being a part of the same pattern of racketeering of those on the streets. *Weinacht v. State,* 744 So.2d 1197 (2nd Dist. Fla. 1999).

Also State claims that Defendant engaged in a pattern of racketeering activity through a criminal street gang called 9-TEK Grenades or Brick Mafia based on the same argument in Ground 4, 4 (A) & 4(B) State's own evidence through testimony established that 9- TEK Grenade and Brick Mafia were two different organizations ran by two different people with different members. State also established that Brick Mafia did not exist until December of 2006 when co-Defendant Michael Gilbert was incarcerated and Gilbert did not start 9-Tek until his release in 2007. Therefore, predicates prior to December 2006 could not be a

part of the same pattern of racketeering activity because it was not the same enterprise.

Furthermore, State did not enter into evidence that any of the crimes prior to December 2006 benefited or promoted said gang in any form or fashion; therefore, making those crimes irrelevant to those of the enterprise Brick Mafia or 9-Tek.

Counsel's failure to suppress prejudiced Defendant because it allowed damaging testimony and evidence to be displayed to the jury.

Had defense counsel suppressed it would have left evidence only from the remaining predicates and in which lies a strong possibility that Defendant's trial would have been different.

SUB GROUND (B)

ARGUMENT

Upon the same argument above, trial counsel was ineffective for failing to dismiss all predicates prior to December 2006 where State failed to show that those predicates were a part of the same pattern of racketeering activity and failing to show that they benefited or promoted the gang 9-Tek or Brick Mafia.

Counsel's failure to do so prejudiced Defendant by allowing those predicates to be brought before the jury.

Had counsel dismissed there lies a strong possibility that Defendant's trial outcome would have been different.

GROUND XI

COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL CERTAIN WITNESSES THAT WERE WILLING TO TESTIFY AND AVAILABLE TO TESTIFY TO EXCULPATORY EVIDENCE FOR DEFENDANT.

ARGUMENT

Defendant was charged with R.I.C.O., conspiracy to R.I.C.O. and a armed burglary that was the same incident as count 3 a second degree murder. The State alleged that the defendant was the leader or "O.G." of a Blood set called the 9-TEK Grenades or Brick Mafia and that the Defendant and co-defendants participated in a pattern of racketeering activity through this criminal street gang from 2004 to 2008.

When pertaining to the 2nd degree murder and armed burglary the State alleged that Defendant co-conspired with co-Defendant's to commit the armed burglary and because of Defendants position in the gang. Defendant ordered the armed burglary to take place. Upon co-defendants entering the house the homeowner shot Reshawn Pugh and killed him; therefore, charging the Defendant with 2nd degree murder.

Defendant argues that trial counsel was ineffective for failing to call a number of witnesses. On multiple occasions Defendant wrote trial counsel requesting for him to depose certain witnesses, but this request came to no avail.

Through a letter to the judge , on September 13, 2011 and in a motion to discharge on September 3, 2011 which led to a Nelson inquiry Defendant made it known that there were certain witnesses that needed to be called as defense witnesses and Defendant wanted co-defendants to testify his behalf. Trial counsel was ineffective for failing to do so.

In concerns to Defendant's R.I.C.O. and conspiracy to R.I.C.O., trial counsel failed to call Tommy Banks, Roberto Bravo, Terrance Leeks, Bianca Dorismond, Joel Ortiz, Alex Decosta, Gerrel Smith, Ancil Oliver, and Andre McCarthy whom are co-defendants of the Defendant.

All these witnesses can and would have collectively been able to testify that Defendant was not a part of the gang 9-Tek Grenades. That 9-Tek and Brick Mafia are not one and the same gang and they do not share any proceeds with each other or make decisions together. They also can testify that neither gang existed before December of 2006. Moreover, that Michael Gilbert, a co-Defendant was the one that started 9-Tek upon his release from prison in 2007.

This information was detrimental and needed to be exposed to the jury to refute the fact that Defendant had been racketeering from 2004 to 2008 in 9-TEK and Brick Mafia. This would also refute that Defendant was the leader of 9-TEK and that 9-TEK and Brick Mafia was the same gang.

The State uses 9-TEK as the enterprise in which Defendant was racketeering through a claim that he was promoting or benefiting this criminal street gang, these witnesses who are a part of 9-TEK who took pleas for their guilt in racketeering would have testified to the fact that , even though "we hung out together" Defendant was not a part of 9-TEK Grenades. Defendant never partook in any meetings or decisions or never benefited from any crime committed by 9-TEK, therefore separating Defendant from the racketeering activity. In trial, the State used testimony from co-defendants and other alleged members of the gang, outside of this testimony there is no physical evidence to link Defendant to 9-TEK Grenades. Furthermore, the members that did testify against Defendant, Kim Burgos, Rhonda Duggins, Mercedes Owens, Hector Echaverria, and Pat Hantzos testified that they had just joined the gang. At the time of arrest none of them had been in the gang for more than a year. These members claim that Brandon Washington, the Defendant that was the leader of 9-TEK, but this could have been refuted by co-Defendant Joel Ortiz where he gave an interview on October 28, 2008 to an F.D.L.E. agent by the name of Richard Brendel that he had just joined the gang in January of 2008 and that initially he was under the impression the Defendant was the leader of the gang but later found out that it was Michael Gilbert and he had made defendant a de facto leader to draw attention away from him. He also said that he never saw Defendant give any orders. On the same day

co-Defendant Bianca Dorismond gave an interview for a Gary Nehrbass from the F.D.L.E.. She also stated that Michael Gilbert was the leader of 9-Tek Grenades and he decided who gets beat in. Ancil Oliver also in a report to Richard Brendel on the same day stated that he never saw Defendant give any orders. These are actual members who dispute the State's allegations. Defense counsel was ineffective for failing to call these witnesses to refute State's claims, this prejudiced Defendant because the State's version was not refuted concerning the pattern of racketeering activity and Defendant being the leader. These witnesses were available to testify for trial being they were incarcerated and counsel was aware of their testimony through discovery and Defendant. Had counsel called these witnesses on stand it would have refuted the State's claims of Defendant being the leader of 9-TEK, Defendant racketeering through this street gang from 2004 to 2008 and this would have also been in corroboration with the testimonies of the State's own star witness Christopher Kee and Michael Gilbert, co-defendants of Defendant and alleged fellow gang members whom both testified that Brick Mafia started in late December of 2006 when Gilbert was incarcerated and 9-TEK Gilbert started upon his release from prison in 2007. They both testified that Gilbert was the leader of Brick Mafia and they did not have the same members. There is no doubt that if these witnesses were introduced in trial the outcome would have been different.

SUBSECTION (A)

COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO CALL ROBERTO BRAVO, MIKE MILLER, AND DETECTIVE KOENING. ALSO SANDY HSU AND WENDY DURAN

ARGUMENT

Through testimony in trial it was introduced into evidence that before the Armed Burglary in which Defendant was charged, there was another home invasion that took place which was also a predicate in the R.I.C.O.. It was said the Pat Hantzos a co-defendant and main conspirator in both cases is the one who planned the home invasion because he knew the individuals and he knew of them having a safe that contained a lot of money. After the home invasion was committed by Tommy Gibson and Rashaun Pugh which Pugh was the co-Defendant that was shot and killed in the following armed burglary, they both told Pat Hantzos that they received no money out of the house, Hantzos knew otherwise. The following home invasion was also set-up by Hantzos and another individual that only Hantzos knew. It came out in trial that the same gun the home owner used was sold to him by Hantzos himself with Roberto Bravo days before the home invasion. The home owner claims that after he shot Rashaun that he fired shots at him, fell to the floor, continued shooting and then got up and walked out the house and collapsed on the front step. Through the testimony of Predray Bulic,

a medical examiner, he explained the direction of the bullet and says that it went through his heart. When asked by defense attorney if he believed Reshaun could have been shot the way he had, could he fire back, fall to the ground, continue firing and then get back up and walk outside, he said that he would have been immediately incapacitated and the wound rapidly fatal, he would not have been able to continue firing.

Had defense counsel called Roberto Bravo a co-Defendant and alleged fellow gang member he would have testified that he was present when he sold the gun to the homeowner but did not receive any money in the transaction and that Hantzos told him he and the home owner had some business to take care of because he had to teach someone a lesson for robbing him.

In trial counsel tried to show that Hantzos and home owner was in it together and Hantzos motivation was because Reshaun robbed him on his cut from the previous home invasion that he planned. The State's witness Christopher Kee, a co-Defendant and alleged fellow gang member, testified that Pat Hantzos gave the homeowner the heads up. This testimony alone would have been what was needed to prove this defense angle. Counsel was aware of this information because Bravo told him himself and was willing to testify and he was available because he was incarcerated.

By defense counsel failing to call Sandy Hsu and Wendy Duran he rendered ineffective. These two women were the ones that gave Hantzos a ride to the house and witnessed the whole thing.

Hantzos testified that the two girls gave him a ride to the Kangaroo gas station where he met defendant and co-Defendants Meghan Smith, Christopher Kee, and Rashaun Pugh. He claims this is where Defendant initially decided to rob the home owner in said armed burglary. They then drove to another residence in the P-Section of Palm Coast where they further discussed the plans with Michael Gilbert and Hector Echaverria, all co-defendants. This is where Defendant allegedly gave the gun to Hector Echaverria and ordered the home invasion to happen. Hantzos claims that he was crying the whole way because he knew "somebody was gonna get hurt" and he didn't want it to take place. It was also said that after it happened that Defendant instructed them on what to say.

Had defense counsel called these witnesses it would have contradicted the testimonies of Hantzos, Echaverria, and Smith.

In an interview by Det. Koening the day after the incident took place Sandy Hsu said they did not meet anybody at the Kangaroo gas station but saw Hantzos talking to a white male, none of the co-defendants are white males, only the home owner. Sandy Hsu knows Defendant and says she did not see Defendant at gas station. She says they did not go to any other house but the residence of the

incident. She claims that Hantzos was normal the whole way. The way that they were parked in front of the house they could see inside the house. She says that she just saw men run in behind Hantzos. She heard gun fire about 4 shots maybe less. She saw someone hit the wall then walk out and collapse. Wendy Duran had the same story.

This was and would have been major in Defendant's case refuting the fact that Reshaun fired back and corroborating with the medical examiner that he did not believe Pugh was able to fire back. This would lead the jury to think if Reshaun did not fire back, who did? Law enforcement was not called immediately because Hantzos testified that he left to go drop of Kee and Echaverria at another residence, then returned and helped the home owner clean all the drugs and guns out of his house. One of the officers that was the first to arrive on the scene testified that Reshaun was cold to the touch so there is no telling how long he was killed before the law enforcement was called. He had time to leave the scene, drive back and then clean the house out and be gone before police arrived, another officer testified that he was in the general area so it took him no longer than 5 minutes to get to the scene from the time dispatchers radioed him.

Had defense counsel called these women it would have cast doubt in the jury's mind and supported defense theory that Hantzos set Reshaun up to get killed because of him robbing him on his cut of the money from the previous robbery.

This prejudiced the Defendant, failing to call these witnesses because the State's version went non-contradicted. Counsel was aware of this through discovery and these witnesses were available to testify, by counsel failing to call them he rendered ineffective.

Counsel was also ineffective for not calling Detective Koening to corroborate the statements of the two witnesses above and to elicit why did he feel through his investigation that the home owner Sean Adams and Hantzos were in cahoots with each other. Koening could testify to the fact that Sean Adams was trying to lie and say Hantzos was never there. Koening could also testify that through his investigation that Hantzos invited a friend, Mike Miller, to do a home invasion prior to the incident therefore refuting the claim that it was Defendant's idea. Counsel was also ineffective for not calling Mike Miller to testify to this fact.

Had counsel brought these witnesses forward, their testimony would have contradicted the State's allegations and cast doubt in the jury's mind. These witnesses were available to testify and counsel did not call them which rendered him ineffective. These statements were available through discovery and Defendant requested them as defense witnesses and they were available to testify but counsel did not call them. This prejudiced the Defendant by allowing the State's version not to be refuted.

Had counsel done so the outcome of the trial would have been different.

GROUND XII

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST FOR THE PHONE RECORDS OF MEGHAN SMITH THROUGH A SUBPOENA DEUCE TECUM THAT WOULD HAVE PRESENTED AN ALIBI FOR DEFENDANT

ARGUMENT

When it comes to the 2nd Degree Murder and Armed Burglary, the State presented evidence through testimony that Defendant was present in Palm Coast for the planning of the Armed Burglary. Also, that Defendant was present at the seen of the crime.

To refute this claim, Defendant requested for trial counsel to request phone records of Meghan Smith, a co-Defendant of Defendant and a live –in girlfriend. Had counsel requested phone records it would have shown that Defendant made a phone call from a landline at their shared residence in St. Augustine, another city, to Reshaun's cell phone, the co-Defendant that was shot and killed during the time the armed burglary was taking place. Defendant also left a message on Reshaun's phone looking for him. This was detrimental to Defendant because it would have placed him in another city from the crime, and show he could not have participated and was not aware of the crime taking place.

This prejudiced Defendant because the jury not hearing this evidence there was nothing to refute Defendant's presence and involvement. Therefore counsel's failure was ineffective.

Had counsel presented this evidence there lies a great possibility that the outcome of the trial would have been different.

Trial counsel may not say he was unaware of this because Defendant requested this in letter motions filed on the record and made it known in a motion to dismiss and a Nelson inquiry. Therefore, trial counsel's failure was reckless and ineffective.

SUBSECTION (A)

Trial counsel was also ineffective for failing to check the voicemails of Rashaun Pugh's cell phone that would have revealed that Defendant did call Reshaun during the time of the crime and left a message that he had been looking for Reshaun all day. By the jury not hearing this it prejudiced Defendant tremendously. Counsel was aware of this evidence through Defendant and failed to do so. Had he one so it would have been proof of Defendant's innocence. By failing to do this investigation it rendered counsel ineffective.

GROUND XIII

TRIAL COUNSEL WAS INEFFECTIVE IN DOING NOTHING AS A TRIAL STRATEGY, THEREFORE ALLOWING THE STATE'S VERSION TO GO UNCONTESTED

ARGUMENT

Trial counsel was ineffective for failing to do anything. In respect to the ineffectiveness in the grounds above, counsel did absolutely nothing to defend Defendant. Counsel did not file any pre-trial motions, did not investigate any alibis given to him by Defendant. He presented no defense witnesses and advised Defendant not to testify.

Defendant wrote the judge a letter that was filed through the clerk informing him of counsel's ineffectiveness. Defendant had been writing letters to counsel requesting to speak with him and requesting for him to do certain pre-trial investigations, counsel failed to respond. Within a years time counsel spoke with Defendant one time and made no effort to respond to Defendant's letters.

In grounds 2, 2(A), 2(B), 2(C), 4(A), 9, 10, 10(A), 11, 12 and 12(A) comes from trial counsel doing nothing. Furthermore, it can be seen on record that Defendant requested trial counsel to file such motions.

Counsel was ineffective by not presenting any evidence to refute State's claims. Counsel advised Defendant not to testify. This advice was a poor strategy being defense offered no alibi witnesses, Defendant would be the only person that could refute State's claims, especially when it comes to Defendant's alleged involvement with the 2nd Degree Murder.

Trial counsel's lack of communication with Defendant, engaging in virtually no pre-trial investigation, presenting no witnesses at trial, advising Defendant not to testify, and refusing to file any pre-trial motions fell outside a wide range of professionally competent and acceptable assistance.

A trial strategy to do nothing contrary to the dissent is not an acceptable one. *Williams v. State,* 507 so.2d 1122 (Fla. App. 5th Dist. 1987).

This prejudiced Defendant because it allowed the State's version to go without rebuttal and there was nothing or no one to refute State's claims.

Had counsel presented alibi witnesses that would have refuted the State's claims of Defendant being a member of 9-TEK Grenades, the said enterprise of the pattern of racketeering activity and filed pre-trial motions, also advising Defendant to testify to refute State's claim there lies a strong possibility that the results would be different in Defendant's verdict.

GROUND XIV

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ELICIT CERTAIN EXCULPATORY INFORMATION FROM THE BALLISTICS EXPERT AND WITNESS KIM BURGOS

ARGUMENT

Pertaining to the 2nd Degree Murder it was alleged in trial that Defendant ordered the armed burglary to take place upon burglary occurring, co-Defendant Rashaun Pugh entered the home and was shot immediately. The home owner

whom Shot Pugh, claims that other he shot Pugh, that Pugh returned fired and home owner fled to the garage. Homeowner Sean Adams claims that when he looked back Pugh was on the ground smiling and continued to shoot at him. Upon, law enforcement arriving Reshawn was found on the outside of the house on the steps, meaning after he fired he got up and walked out the house. The fact of Pugh walking out was also corroborated by state witness Michael Gilbert, a co-Defendant, who was sitting outside in a vehicle with two females but he says he heard the shots that hit Pugh then seen Pugh walk out slumped over. He mentions nothing about seeing him return fire. Christopher Kee, also a co-Defendant and one of the individuals that was entering the home and let off shots into the home, testified that as soon as Rashown entered the house first, the home owner already had his gun out and shot Pugh immediately therefore Kee along with another co-Defendant Hecter Echaverria never made it all the way into the home. Kee testified that he saw Pugh get hit and slammed against the wall, because Kee rode to the home in Pugh's vehicle and Pugh had been shot. He ran out to the SUV where Gilbert and the two women were parked in front of the home. Kee also testified to seeing Pugh laying on the steps face down presuming he was dead. Mentioning nothing about Pugh falling down or firing back at the homeowner. Medical examiner Predrag Bulic, when asked do he think that Pugh could have fallen down, return fire, get up, then walk back outside and collapse. He said no and testified to

the fact that the bullet went through his heart and the wound was rapidly fatal therefore immediately incapacitating him, according to the evidence there was fire shots from his gun.

Defense counsel was ineffective for failing to ask officer John Bray who was explaining the crime scene to explain the angles of bullets found position. Had he asked him, he would have elicited the information that the first shots where the projectiles that was found in the freezer and in a microwave that was positioned above the stove, had to be fired from a standing position, and the remaining shots that was in the garage door and the walls in the hallway, the gun had to be shot form the ground because of the upward angle the bullets traveled. This was detrimental because state's witness Kee and Gilbert both saw Reshawn get hit slam against the wall, then walk out and collapse on the steps, which contradicts the homeowner's story of Pugh returning fire and falling down continuing to shoot. The medical examiner expert opinion also contradicts this chain of events being that the wound was fatal piercing his heart. This prejudiced the Defendant because the jury was not able to know the extent of the shoot out, had this information been elicited from officer John Bray, the jury would have seen the impossibility of the chain of events through the expert opinion of the medical examiner. Had counsel done so there lies a strong possibility that the outcome of the trial would have been different.

SUBSECTION (A)

Trial counsel was also ineffective for not eliciting the information from state witness Kim Burgos that on the day of the armed burglary that Defendant was at his apartment that he share with co-Defendant, state witness and, then girlfriend, Meghan Smith. It was made known through Burgos' testimony that she was Defendant's mistress. Had counsel asked Defendant's whereabouts during the crime Burgos would have testified that her and Defendant been together all that day and she was present when Defendant made a phone call to Pugh's cell phone from a land line at his apartment, therefore making it impossible to be at the scene and creating an alibi.

This prejudiced the Defendant greatly because the jury was not able to hear this information and weight the credibility and determine that Defendant was not present therefore not guilty.

Counsel was aware of this info through Defendant and Burgos herself but counsel chose not to introduce this evidence because he believed that the jury would not believe it because Burgos was a gang member, had a relationship with Defendant and other co-Defendant's testified that Defendant was present. This is not an acceptable reason for not eliciting this information deeming counsel ineffective. Had counsel elicited this information there is no doubt it would have put doubt in the minds of the jury therefore changing the outcome of the trial.

GROUND XV

COUNSEL WAS INEFFECTIVE FOR MULTIPLE DEFICIENCIES THAT HAS MADE HIS REPRESENTATION DEPRIVE DEFENDANT OF A FAIR TRIAL.

SUPPORTING FACTS

(SEE PREVIOUS GROUNDS)

ARGUMENTS

Defendant claims that counsel's representation rendered him ineffective by multiple deficiencies that when taken together, the deprived him of a fair trial.

Defendant argues that prejudice may result form cumulative impact of multiple deficiencies. This is even so where no single error or omission of counsel standing alone significantly impairs the defense, see Edwing v. Williams 596 F.2d 391 (9th Cir. 1979). Harris by and through Ramsoyer v. Wood, 64 F.3d 1432 (11th Cir. 1995).

There are multiple deficiencies by and through counsel's representation and which they where so erroneous that they were fundamental errors and were on the face of the record.

Therefore, counsel's representations fell way below the effectiveness guaranteed by the sixth Amendment. In respect to the previous grounds raised in this motion,

counsel's representation prejudiced Defendant and denied him a fair trial, and due process.

Had it not been for counsel's cumulative errors which resulted in his ineffectiveness, there lies a strong probability that Defendant would have been found not guilty.

NATURE OF RELIEF SOUGHT

The nature of relief sought in this 3.850., is that, based upon the foregoing, Petitioner respectfully prays this court will grant this motion primised upon ineffective assistance of trial counsel, vacate the sentence and conviction, or any other just and fair relief deemed proper by the court.

CERTIFICATION AND OATH

UNDER THE PENALTIES OF PERJURY I CERTIFY, pursuant to 3.850 (n) Fla. R. Crim. P.; that I: a.) have read the foregoing motion or that it has been read to me and the facts stated in it are true and correct; b.) understand English and the motions contents; the motion is filed in good faith and 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; or if I do not understand English the contents were read to me by_____ _____whose address is listed below and the certification of an accurate and complete translation is shown below.

EXECUTED on this 25 day of Nov, 2015 by the undersigned.

PROVIDED TO FRANKLIN CI
FOR MAILING ON
11/25/15
INMATE INITIALS BW

/s/ Brandon Washington
DC# V-23361

CERTIFICATION OF AN ACCURATE AND COMPLETE TRANSLATION

I certify that a complete and accurate translation of this motion was provided to the Defendant in this cause on this 25 day of November 2015.

/s/_____
Translator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this document in the hands of the Mailroom Personnel, at Franklin Correctional Institution for mailing to: Clerk of Courts, Bunnell, FL. 32110

on this 25 day of November 2015.

Name Brandon Wright pro se
DC# V-23361 Dorm _____
Franklin Correctional Institution
1760 Highway 67 North
Carrabelle, Florida 32322