IN THE COUNTY COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

JERRAD RYAN RIVERS,
Petitioner,

vs. **Case Number2003 MM 055959**

STATE OF FLORIDA,
Respondent.
_____/

RIVERS'S MOTION PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE, TO VACATE JUDGEMENT AND SENTENCE, IN THE FORM REQUIRED BY RULE 3.987, FLORIDA RULES OF CRIMINAL PROCEDURE, AND PETITION FOR CONSTITUTIONAL HABEAS CORPUS RELIEF, PURSUANT TO ARTICLE V, § 5(b), OF THE FLORIDA CONSTITUTION, AND INCORPORATED MEMORANDUM OF LAW

Comes Now JERRAD RYAN RIVERS ("Rivers"), by his undersigned post-conviction counsel, WILLIAM MALLORY KENT, pursuant to Rule 3.850(a)(1), (5) and (6), Rule 3.850(b)(1) and Rule 3.850(h), Florida Rules of Criminal Procedure, in the form required by Rule 3.987, Florida Rules of Criminal Procedure, and Article V, § 5(b), of the Florida Constitution, and moves this Honorable Court to vacate the judgement and sentence in this case.

1. Name and location of the court that entered the judgment of conviction under attack.

County Court in and for Duval County, Florida, Fourth Judicial Circuit of Florida, Jacksonville, Florida.

2. Date of judgment and conviction.

Judgment and sentence was imposed and judgment rendered January 8, 2004.

3. Length of sentence.

Three days jail with credit for three days, followed by 01-12 months probation subject to early termination upon completion of special conditions of probation. Probation was terminated July 9, 2004.

4. Nature of offense(s) involved (all counts).

Rivers was charged in a single count information with misdemeanor domestic battery in violation of Florida Statutes, § 784.03.

5. What was your plea?

Rivers was never asked how he pled to the charge. His attorney at the change of plea simply stated, while he was outside the courtroom, "Mr. Rivers is going to plead to a domestic battery . . . " The Court never established whether Mr. Rivers was pleading no contest or guilty.

6. Kind of trial:

There was no trial.

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

No.

8. Did you appeal from the judgment of conviction?

No.

9. If you did appeal, answer the following:

(a) Name of court:

Not applicable.

(b) Result:

Not applicable.

(c) Date of result:

Not applicable.

(d) Citation (if known):

Not applicable.

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

Not applicable.

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

(a)(1) Nature of proceeding: Not applicable.

(2) Grounds raised: Not applicable.

(3) Did you receive an evidentiary hearing: Not applicable.

(4) Result: Not applicable.

(5) Date of result: Not applicable.

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

No.

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

(a)(1) Name of court: Not applicable.

(2) Nature of the proceedings: Not applicable.

(3) Grounds raised: Not applicable.

(4) Did you receive an evidentiary hearing: Not applicable.

(5) Result: Not applicable.

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

A. Grounds for Relief

1. Actual Innocence - Manifest Injustice and Fundamental Miscarriage of Justice.

2. Newly Discovered Evidence - That Plea to Misdemeanor Domestic Battery Resulted in Loss of Second Amendment Right to Keep and Bear Arms.

3. Failure of Trial Court and Counsel to Advise Defendant on Direct Consequence of Plea - Loss of Second Amendment Right to Keep and Bear Arms.

4. Failure of Trial Court to Insure That Plea Was Knowingly and Intelligently, Freely and Voluntarily Entered, as a Result of an Inadequate Plea Dialogue and Resulting Prejudice, That an Actually Innocent Person Pled and Lost His Right to Keep and Bear Arms.

B. Supporting Facts

Rivers alleges that he is actually innocent of the misdemeanor domestic battery charged in this case. His then wife, *******, simply fabricated the accusation against him. She has a history of similar false police reports in which she has made false criminal accusations.

In support of his allegation of actual innocence, Rivers is filing an Appendix hereto, which contains the following documentation which supports this claim:

1. Affidavit of "victim," *******, recanting criminal complaint.

2. Police reports where ******* made other false accusations.

3. Attestations from persons who know the defendant.

Rivers alleges that neither the Court, nor his counsel, Oscar Rafuse, advised him that his plea to a misdemeanor domestic battery would result in his loss of his right to keep and possess firearms. In support of this allegation Rivers has included in the Appendix:

4. A transcript of the plea colloquy

5. An affidavit of counsel.

Rivers alleges that he did not learn he could not possess a firearm as a result of this misdemeanor conviction until he was told by military recruiters that he could not reenlist in the United States Armed Forces because his misdemeanor domestic battery conviction deprives him of his right to keep and bear firearms. He first learned this within two years of filing this motion. See supporting document in the attached Appendix:

6. Letter from military recruiter.

C. Supporting Memorandum of Law.

Timeliness of Motion

This motion is timely because it is being filed within two years of Rivers

discovering the basis for the claim and under the circumstances Rivers exercised reasonable due diligence in discovering the claim when he did so. Within two years of learning that he had lost his right to possess a firearm as a result of his misdemeanor criminal conviction, Rivers initiated this action, therefore this motion is timely under Rule 3.850(b)(1).[1] Rule 3.850(b)(1) provides for an exception to the two-year limitations period for a motion to vacate, set aside, or correct a sentence which alleges that "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." That is what Rivers alleges.

The two-year period for filing a motion for postconviction relief based upon the exception for unknown facts commences at the time the newly discovered facts are discovered or could have been reasonably discovered. *Graddy v. State*, 685 So.

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[1] The United States criminalized possession of firearms by persons convicted of misdemeanor domestic violence offenses in 1996. Public Law 104-208, which added § (g)(9) to 18 U.S.C. § 922:

> (g) It shall be unlawful for any person--
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2d 1313 (Fla. 2nd DCA 1996). A comparable example of the application of this rule is found in *Hall v. State*, 891 So.2d 1066 (Fla. 2nd DCA 2004). In *Hall* the defendant's claim was that he had been misadvised about the loss of gain time credits, but the motion was filed more than two years after the guilty plea. The Court of Appeals held that the motion was timely, because it was filed within two years of Hall's discovery of the gain time forfeiture.

> [Hall's] judgment and sentence became final on November 8, 1995. Under rule 3.850, Hall had until November 8, 1997, to file a motion for postconviction relief. He filed this motion on October 14, 2002.
>
> In his motion, Hall alleged that it was not until he received an incentive gain time credit report [from the Department of Corrections] on October 8, 2002, that he discovered that he had not received any basic gain time credits. He maintains that counsel assured him that he would receive these credits if he accepted the State's plea offer.

Hall v. State, 891 So.2d 1066, 1067 (Fla. 2nd DCA 2004).

Although Hall's motion was seven years after his guilty plea, the Court of Appeal found it timely, because it was filed within two years of Hall's being informed by the DOC that he would not receive the gain time credits his counsel had led him to believe he would receive. This is exactly like the situation for Rivers. Rivers was not informed by counsel or the Court that he would lose his right to possess a firearm as a result of his misdemeanor domestic battery plea. He did not learn that possession of a firearm was prohibited by federal law until he sought to reapply to join the

United States Armed Forces and was told by his military recruiter that his misdemeanor domestic violence conviction prohibited him from possessing a firearm and hence prohibited his serving in the United States Armed Forces. Although he learned this more than two years after his sentence was final, he thereafter promptly moved to vacate the plea within two years of learning of this direct consequence of his plea.

In ruling in Hall's favor, the Court of Appeals cited *Spradley v. State,* 868 So.2d 632 (Fla. 2md DCA 2004). In *Spradley* the court confronted another similar situation. Spradley alleged that his counsel misadvised him that he would receive credit for previously earned gain time upon sentencing for a violation of probation. Spradley sought to withdraw his plea, claiming that had he known that he would not receive the previously earned gain time, he would not have pleaded guilty to violating his probation. The trial court, though, denied Spradley's motion as untimely because it was filed outside of the two-year period for filing a motion for postconviction relief. The Court of Appeals concluded that Spradley could not have known about the Department of Corrections' (DOC) forfeiture of gain time at the sentencing if he had not been advised of the possibility of forfeiture by counsel or the trial court. Like Hall, Spradley did not discover that his gain time had been forfeited until he filed administrative grievances with the DOC. Once the DOC responded and

informed him of the forfeiture, the couurt held that Spradley had two years to file a rule 3.850 motion based on this newly discovered information. *See Spradley,* 868 So.2d at 633; *Anderson v. State,* 862 So.2d 924 (Fla. 2nd DCA 2003); *Graddy v. State,* 685 So.2d 1313, 1314 (Fla. 2nd DCA 1996).

Under the holdings of *Hall* and *Spradley*, Rivers's 3.850 motion is timely, because it has been filed within two years of Rivers being informed by an Armed Forces recruiter that he has lost his right to keep and bear firearms.

Actual Innocence

The United States Supreme Court has found that a habeas petitioner may obtain review of constitutional claims raised in his petition which are otherwise procedurally barred "if he falls within the 'narrow class of cases... implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 314-315 (1995)(quoting *McCleskey v. Zant*, 499 U.S. 467, 494 (1991)). A claim of actual innocence –though not a constitutional claim in and of itself– brings the petition within this narrow class of cases, and provides "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id*. at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). Specifically, where a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial

was free of non-harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id*. at 316.

A belated 3.850 motion filed under a "miscarriage of justice" actual innocence gateway claim should be reviewed under the standard set in *Calderon v. Thompson*, which requires that the petitioner make only a *prima facie* showing that it is "more likely than not" that no reasonable juror, considering all available evidence including that which was excluded at trial (even if not newly-discovered), would have found the petitioner guilty beyond a reasonable doubt. *See Calderon v. Thompson*, 523 U.S. 538 (1998).

In the present case, Rivers asserts actual innocence of the crime of which he has been convicted, and alleges that, absent the constitutional claims of error in his case, it is more likely than not that no reasonable court would have accepted his plea and found him guilty beyond a reasonable doubt. Because Rivers asserts a claim of actual innocence in addition to his separate constitutional claims for habeas relief, he requests that this Court review and adjudicate the merits of his underlying constitutional claims of error despite the belatedness of the instant petition or the time bar. *See Mize v. Hall*, 532 F. 3d 1184, 1195 (11th Cir. 2008) ("A claim of actual innocence is normally used not as a freestanding basis for habeas relief, but rather as a reason to excuse the procedural default of an independent constitutional claim");

see also Slack v. McDaniel, 529 U.S. 473, 478 (2000) (explaining that the *prima facie* showing of actual innocence operates to overcome the time bar).

Alternatively, this Court may grant a constitutional writ of habeas corpus irrespective of the 3.850 limitations. Authority for this procedure is found in the decision of the United States Supreme Court in its last term to grant the petition for constitutional habeas corpus presented by Troy Davis, a petition otherwise procedurally barred. *In re Davis*, 130 S.Ct. 1 (2009). In so doing Justices Stevens, Ginsburg and Breyer's concurring opinion stated:

> Justice SCALIA's dissent [to the granting of the habeas petition] is wrong in two respects. First, he assumes as a matter of fact that petitioner Davis is guilty of the murder of Officer MacPhail. He does this even though seven of the State's key witnesses have recanted their trial testimony; several individuals have implicated the State's principal witness as the shooter; and " no court," state or federal, "has ever conducted a hearing to assess the reliability of the score of [postconviction] affidavits that, if reliable, would satisfy the threshold showing for a truly persuasive demonstration of actual innocence," 565 F.3d 810, 827 (C.A.11 2009) (Barkett, J., dissenting) (internal quotation marks omitted). The substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently "exceptional" to warrant utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and our original habeas jurisdiction. See *Byrnes v. Walker*, 371 U.S. 937, 83 S.Ct. 322, 9 L.Ed.2d 277 (1962); *Chaapel v. Cochran*, 369 U.S. 869, 82 S.Ct. 1143, 8 L.Ed.2d 284 (1962).

> Second, Justice SCALIA assumes as a matter of law that, "[e]ven if the District Court were to be persuaded by Davis's affidavits, it would have no power to grant relief" in light of 28 U.S.C. § 2254(d)(1). Post, at ----. For several reasons, however, this transfer is by no means "a fool's errand." Post, at ----. The District Court may conclude that § 2254(d)(1) does not apply, or does not apply with the same rigidity, to an original habeas petition such as this. See *Felker v. Turpin*, 518 U.S. 651, 663, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) (expressly leaving open the question whether and to what extent the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applies to original petitions). The court may also find it relevant to the AEDPA analysis that Davis is bringing an "actual innocence" claim. See, e.g., *Triestman v. United States*, 124 F.3d 361, 377-380 (C.A.2 1997) (discussing "serious" constitutional concerns that would arise if AEDPA were interpreted to bar judicial review of certain actual innocence claims); Pet. for Writ of Habeas Corpus 20-22 (arguing that Congress intended actual innocence claims to have special status under AEDPA). Even if the court finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute's text is satisfied, because decisions of this Court clearly support the proposition that it "would be an atrocious violation of our Constitution and the principles upon which it is based" to execute an innocent person. 565 F.3d, at 830 (Barkett, J., dissenting); cf. *Teague v. Lane*, 489 U.S. 288, 311-313, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

Justice SCALIA would pretermit all of these unresolved legal questions on the theory that we must treat even the most robust showing of actual innocence identically on habeas review to an accusation of minor procedural error. Without briefing or argument, he concludes that

> Congress chose to foreclose relief and that the Constitution permits this. But imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

Rivers case, of course, is not a death penalty case, but there is no justifiable basis to distinguish the right to justice for one defendant over another merely because of the *penalty* that attaches. One can understand that death penalty cases would be subject to stricter scrutiny when it comes to deciding whether error is sufficient to undermine confidence in the outcome - death is different - but the same logic does not apply to distinguishing death from non-death cases when actual innocence is the deciding factor. Would it not be as much a due process concern to imprison for life a man actually innocent as to sentence him to death? As the special concurrence stated:

> . . . imagine a petitioner in Davis's situation who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man. The dissent's reasoning would allow such a petitioner to be put to death nonetheless. The Court correctly refuses to endorse such reasoning.

Assume the hypothetical that Rivers can show that he is "beyond any scintila of doubt" an innocent man, then does not Due Process require his conviction be vacated? Florida courts have long recognized similar miscarriage of justice

exceptions to the procedural limitations of Rule 3.850, either permitting belated petitions or granting relief under Florida's constitutional writ of habeas corpus. *See Baker v. State*, 878 So.2d 1236, 1246 (Fla. 2004)(Anstead, C.J., specially concurring)(the writ of habeas corpus "is enshrined in our Constitution to be used as a means to correct manifest injustices and its availability for use when all other remedies have been exhausted has served our society well over many centuries. This Court will, of course, remain alert to claims of manifest injustice, as will all Florida courts."). See also *Jamason v. State*, 447 So.2d 892, 895 (Fla. 4th DCA 1983)("If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do just justice.") (quoting *Anglin v. Mayo*, 88 So.2d 918, 919 (Fla.1956)).

As explained above, a claim of actual innocence, if not a constitutional claim for habeas relief in and of itself, and we suggest that it is,[2] is a gateway claim to habeas review of independent constitutional claims. With claims of actual innocence, the petitioner must make only a *prima facie* showing that it is more likely than not that no reasonable juror, considering all available evidence including that which was

[2] Florida, however, does not yet recognize a "free standing" actual innocence claim as a constitutional claim entitling a defendant to relief under 3.850. *Thompkins v. State*, 994 So.2d 1072 (Fla. 2008).

excluded at trial even if not newly-discovered, would have found the petitioner guilty beyond a reasonable doubt. *See Calderon v. Thompson*, 523 U.S. 538 (1998). A *prima facie* showing is not a difficult standard to meet, but rather requires nothing more than a sufficient showing of possible merit to warrant fuller exploration by the district court. *See Cooper v. Woodford*, 358 F. 3d 1117, 1119 (9th Cir. 2004); *Bennett v. U.S.*, 119 F. 3d 468, 469 (7th Cir. 1997); *In re Lott*, 366 F. 3d 431, 432-433 (6th Cir. 2004); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). In the present case, Rivers' claim of actual innocence satisfies the necessary *prima facie* showing.

Given *******'s recantation, which is supported by all of the evidence in the case, particularly the evidence establishing *******'s history of false police reports and false accusations, as shown in the attached Appendix, there is no evidence remaining whatsoever to establish River's guilt. As such, Rivers has raised a sufficient gateway claim through which the Court may now address on the merits the following constitutional claims.

Failure of Court or Counsel to to Inform Rivers of Direct Consequence of His Plea - The Loss of His Second Amendment Right to Keep and Bear Arms

When accepting a plea of guilty or no contest in a criminal case under Rule 3.172, Florida Rules of Criminal Procedure, a court is required to advise the Defendant of the direct consequences of the plea and conviction. The question is

whether the loss of his constitutional right to keep and bear arms is a direct consequence of his plea as to which he had to have been informed for the plea to have been knowingly and intelligently made. If loss of his right to possess a firearm was a direct consequence of his plea, and he was not informed of that consequence by the Court or counsel, then his plea was not knowingly and intelligently made, and the resulting conviction violated due process under the Fifth Amendment to the United States Constitution applicable to this Court under the Fourteenth Amendment. See *Brady v. United States*, 397 U.S. 742 (1970).

Deprivation of the Second Amendment right to keep and possess firearms is an important and onerous consequence of a guilty plea on a misdemeanor domestic violence case and not a merely a collateral consequence. The Second Amendment to the United States Constitution, "protects the rights of individuals, including those not then actually a member of any militia or engaged in an active military service or training, to privately possess their own firearms…" *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001). Under *Emerson*, a guilty plea on a misdemeanor domestic violence offense has a direct and immediate impact on a defendant's Second Amendment right to possess a firearm. This is not a mere triviality. When a plea of guilty on a misdemeanor domestic violence case has the result of automatically extinguishing the valuable and historic right of a person to possess a firearm, the

failure to inform the defendant of the loss of this right should not be condoned.

Under Florida law the test for determining whether a consequence of a plea is a direct or a collateral consequence is expressed as follows:

> "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a *definite, immediate and largely automatic effect on the range of the defendant's punishment.*" *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364, 1366 (4th Cir.) cert. denied, 414 U.S. 1005[, 94 S.Ct. 362, 38 L.Ed.2d 241] (1973).

Daniels v. State, 716 So.2d 827, 828 (Fla. 4th DCA 1998), cited in *Major v. State,* 814 So.2d 424, 429 (Fla. 2002) (emphasis supplied).

No Court, state or federal, has ever held that the loss of a federal constitutional right as an automatic consequence of a guilty plea in a criminal case can be classified as a collateral consequence of the plea. A guilty plea to a domestic violence offense results in the immediate deprivation of the valuable constitutional right to possess a firearm under the Second Amendment. The loss of the right to possess a firearm after a domestic violence conviction is not dependent on the further action of any other governmental agency. Once the state court enters judgment on the domestic violence conviction, the prohibition on possession of a firearm is immediate and automatic. If,

at that very moment, the defendant was in possession of a firearm, he could be arrested and prosecuted in federal court for a violation of 18 U.S.C. §922(g)(9).

A collateral consequence, by contrast, is something that requires further action. See *Moore v. Hinton*, 513 F.2d 781, 782-83 (5th Cir. 1975) ("Alabama Department of Public Safety, not the court, deprives defendant of his drivers license. The Court accepts the plea and sentences the defendant. The Department of Public Safety then institutes a separate proceeding for suspension of the driver's license"). The same is true of deportation, loss of voting privileges or the use of a conviction to enhance a future sentence. All require further action by some agency other than the sentencing court, such as the Immigration and Naturalization Service, local election authorities, or prosecuting attorneys. Likewise, in all of these situations, requiring advice to a defendant of these "collateral consequences" would require a judge to predict what another governmental agency will do. By contrast, the loss of firearm privileges following a domestic violence conviction is automatic and requires no guess work or predictions by the presiding judge and directly and immediately results in the loss of a fundamental constitutional right.

Just as the Court must explain the loss of the Sixth and Fifth Amendment rights upon entry of a guilty plea, so too must the Court explain to the Defendant the loss of his Second Amendment right at time of entry of the plea, else the plea is not

knowing and intelligent. Because the loss of the right to keep and bear firearms was a direct consequence of the plea, and because neither the Court nor Rivers' counsel informed him of this direct consequence and he did not otherwise know of this consequence, his plea was not knowingly and intelligently made.

Had Rivers known that he would lose his Second Amendment right to keep and bear firearms, he would not have pled guilty to this offense therefore he should be permitted to withdraw his plea on this ground.

Other Constitutional Defects in Plea Colloquy

Core Concern of a Plea Dialogue - Coercion

The Court failed to satisfy itself of the core concern of any guilty plea, that it not have been the result of threat or coercion. At no point in the plea colloquy did the Court inquire whether the Defendant had been threatened or coerced to enter his plea. The failure to make this core concern inquiry is fundamental error, affects the Defendant's substantial rights, and entitles the Defendant to vacate his plea. *McCarthy v. United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969), as discussed in *United States v. Martinez-Molina*, 64 F.3d 719 (1st Cir. 1995).

Although Florida courts often speak of a requirement of "prejudice" as a condition precedent for withdrawing a plea for a violation of Rule 3.172, prejudice is presumed when one of the three "core concerns" of any guilty plea colloquy is

missing or inadequately addressed by the trial court. *See e.g. United States v. Siegel*, 102 F.3d 477 (11th Cir., 1996) (Black, J.).[3] The three "core concerns" are rooted in the Due Process clause of the Constitution, and any failure to address a core concern in a plea colloquy results in per se substantial prejudice to the defendant's fundamental rights. In *Siegel* Judge Black held as follows:

> Rule 11(c)(1) [the federal equivalent of Rule 3.172] imposes upon a district court the obligation and responsibility to conduct a searching inquiry into the voluntariness of a defendant's guilty plea. *United States v. Stitzer*, 785 F.2d 1506, 1513 (11th Cir.), cert. denied, 479 U.S. 823, 107 S. Ct. 93, 93 L. Ed. 2d 44 (1986). Three core concerns underlie this rule: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea. *United States v. Hourihan*, 936 F.2d 508, 511 n. 4 (11th Cir.1991); *United States v. Bell*, 776 F.2d 965, 968 (11th Cir.1985), cert. denied, 477 U.S. 904, 106 S. Ct. 3272, 91 L. Ed. 2d 563 (1986); *United States v. Dayton*, 604 F.2d 931, 935 (5th Cir.1979), cert. denied, 445 U.S. 904, 100 S. Ct. 1080, 63 L. Ed. 2d 320 (1980). If one of the core concerns is not satisfied, then the plea of guilty is invalid. *Stitzer*, 785 F.2d at 1513. Thus, "A court's failure to address any one of these three core concerns requires automatic reversal." Id.; *Bell*, 776 F.2d at 968 (citing *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)); see also *Buckles*, 843 F.2d at 473 [*United States v. Buckles*, 843 F.2d 469 (11th Cir. 1988)].

Whether a plea is threatened or coerced is a core concern. In *United States v. Martinez-Molina*, 64 F.3d 719 (1st Cir. 1995), the court set aside a plea due to the

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[3] This is our "own" Judge Susan Black of Jacksonville, who started her judicial career in this very Court many years ago.

failure to make an *adequate* inquiry into the possibility of threats or coercion, stating:

> Rule 11(d) [upon which Florida Rule 3.172 is based] states: "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. Proc. 11(d) (emphasis added). Here, the district court conducted only a partial inquiry into the voluntariness of Travieso's and Velez' guilty pleas. Specifically, it asked them whether they had "entered into [the] plea agreement without compulsion or any threats or promises by the -- from the U.S. Attorney or any of its agents." It did not, however, ask whether the defendants were pleading guilty voluntarily or whether they had been threatened or pressured by their codefendants into accepting the package plea agreement. Under these circumstances, the district court's inquiry was incomplete because, regardless of whether Travieso's and Velez' guilty pleas were actually coerced by their codefendants, the literal answer to the court's question could still have been "yes."

The Court in the Defendant's case failed to address in any fashion this core concern, and accordingly the Defendant is presumed to have been prejudiced in his fundamental rights and he must be allowed to withdraw his plea.

> **Inadequate Plea Colloquy Concerning Nature of the Charge - Prejudice Because Defendant is Actually Innocent of Domestic Battery - Defendant Had Legal Defense: the Facts Did not Support Probable Cause for the Charge**

There was no plea colloquy in this case. The Court's minimalist inquiry failed to advise the Defendant of the nature or elements of the charge.

Rivers contends and it cannot be disputed that the *record* does not show that his plea was an intelligent and voluntary waiver of his constitutional rights. Due

process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea, so that the record contains an affirmative showing that the plea was intelligent and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969); see also *Porter v. State*, 564 So. 2d 1060, 1063 (Fla. 1990), cert. denied, 112 L. Ed. 2d 1106, 111 S. Ct. 1024 (1991); *Lopez v. State*, 536 So. 2d 226, 228 (Fla. 1988); *Mikenas v. State*, 460 So. 2d 359, 361 (Fla. 1984). Here, the transcript of the plea hearing does not affirmatively show that Rivers knowingly and intelligently entered his guilty plea. Because a guilty plea has serious consequences for the accused, the taking of a plea "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 243-44. The detailed inquiry necessary when accepting a plea is absent in this case.

Florida Rule of Criminal Procedure 3.172 governs the taking of pleas in criminal cases. This rule provides basic procedures designed to ensure that a defendant's rights are fully protected when she enters a plea to a criminal charge. *Hall v. State*, 316 So. 2d 279, 280 (Fla. 1975). The rule specifically provides that a trial judge should, in determining the voluntariness of a plea, inquire into the defendant's understanding of the fact that she is giving up the right to plead not

guilty, the right to a trial by jury with the assistance of counsel, the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine adverse witnesses, and the right to avoid compelled self-incrimination. Fla. R. Crim. P. 3.172(c).

The elements of a prima facie case of domestic battery require proof that the defendant touched or struck a domestic partner against that person's will. There was nothing about the conduct of the Defendant that satisfied the elements of domestic battery in this case. He was actually innocent of the charge, and had the Court engaged in a proper plea colloquy in which he were informed of the nature and elements of the charge, he would have known that he was not guilty, and would have pled not guilty. On these facts the Defendant was actually prejudiced by the inadequate plea colloquy and his plea was not knowing and intelligently made.

Accordingly, this Court must either summarily grant this motion or conduct an evidentiary hearing and unless the claims are then disproved, grant the motion.

Although a petitioner under Rule 3.850 is not required to file supporting affidavits or documents in order to make a prima facie showing to entitle him to relief or an evidentiary hearing (*Roundtree*, 884 So.2d at 323), in this case Rivers has filed supporting documents in the attached Appendix, which if not conclusively refuted, will entitle him to summary relief.

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

Actual innocence claims are an exception to the procedural bar rules. Newly discovered evidence does not require prior appellate exhaustion.

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

No.

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

Not applicable.

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

(a) At preliminary hearing:

Not applicable.

(b) At arraignment and plea on violation of probation:

Not applicable.

(c) At trial or plea:

*****, Esq.

(d) At sentencing:

Same.

(e) On appeal:

Not applicable.

(f) In any postconviction proceeding:

William Mallory Kent, 1932 Perry Place, Jacksonville, Florida 32207, 904-398-8000, kent@williamkent.com.

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

Not applicable.

CONCLUSION

Accordingly, Rivers respectfully requests this Honorable Court vacate his judgment and sentence.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

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OATH OF PETITIONER

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

_____
JERRAD RYAN RIVERS

MARCH _____, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail, first class, postage prepaid, on the office of the State Attorney, Duval County Court House, 340 East Bay Street, Jacksonville, Florida, this March _____, 2010.

_____
William Mallory Kent