IN THE SUPREME COURT OF FLORIDA

**JORGE E. GONZALEZ,**
*Petitioner,*

**v.**

**HARRY K. SINGLETARY, Sec.,**
*Florida Department of Corrections,*
*Respondent.*
_____/

**CASE NO: 93-547**
**DCA CASE NO: 98-444**
**L.T. CASE NO: 92-31611**

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**ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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# PETITIONER'S ANSWER TO RESPONDENT'S INITIAL BRIEF ON THE MERITS

**Jorge E. Gonzalez,** *Petitioner,* **Pro se**
**Hamilton Correctional Institution**
**10650 S. W. 46th Street**
**Jasper, Florida 32052-1360**

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## ARGUMENT

**THE DISTRICT COURT ERRED IN ITS DENIAL OF PETITIONER'S MOTION FOR BELATED APPEAL FROM HIS PLEA OF GUILTY.**

**MAY IT PLEASE THE COURT**

To preclude a defendant from obtaining a belated appeal from his judgment of conviction, who is indigent and inexperienced and unskillful in the complexities of the legal issues involved in his cause to establish his guilt or innocence, and who stands before a trial judge charged with a serious crime for the first time in his life. When such a defendant has affirmatively relied on the erroneous legal advice of his court appointed advocate in entering his plea of guilty to a crime, the facts of which, are implicitly established at a previous trial to be a clear indication contrary to the legislature's intent of the statute under which the defendant is formally charged. Furthermore, that court appointed advocate fails to file a notice of appeal, or a motion to withdraw his plea within the time limitations, after specifically being instructed to do so by the defendant. These actions strike a devastating blow to the foundation of American Jurisprudence, and unveils constitutional due process implications which should not be deemed waived by the passage of time. And, which this Honorable Court should *sua sponte* amend in exercising its responsibility to apply the law, and to see that justice is served.

At bar petitioner specifically contends that based on this Honorable Court's recent decision in Trowell v. State, 706 So.2d 332 (Fla. 1st DCA 1998) (State v. Trowell) Supreme Court Case NO: 93, 393 Order dated July 22, 1998 he is entitled to belated appeal from his plea of guilty. In Trowell; this Court certified conflict that defendant need not state meritorious issues as a

precondition to right to belated appeal from a criminal conviction. Receding from prior decision in Thomas v. State, to the extent that decision required defendant to state what issues he or she would have raised on appeal, whether or how those issues would have been dispositive, or how defendant was otherwise prejudiced by counsel's failure to file notice of appeal-The only relevant inquiry once request for belated appeal is made is whether defendant was informed of right to appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person-If appeal proceeds from entry of unconditional guilty or nolo contendere plea, that may ultimately be basis for dismissal by an appellate court, but issues of merit are not required as precondition to appeal. Moreover, petitioner further contends that he is entitled to belated appeal from his plea of guilty because it is constitutionally invalid by misrepresentation, and his conviction under the kidnapping statute as a result thereof constitutes fundamental error. *See* Otero v. State, 696 So.2d 442 (Fla. 4th DCA 1997); Nelson v. State, 543 So.2d 1308 (Fla. 2nd DCA 1989) which stand for the proposition that error in admitting the defendant's confession without independent proof of the *corpus delecti* was fundamental. In each case, fundamental error occurred because *prima facie* evidence of the crime charged was not presented. *See* J.B. v. State, 705 So.2d 1376 (Fla. 1998) *id. at* 1378-79, which can be considered on appeal without objection in lower court.[1] This Honorable Court has jurisdiction to allow petitioner to plead to the lesser included offense of false imprisonment and his claim is affirmatively fortified by the record.[2] *Cf.* Akins v. State, 462 So.2d 1161 (Fla. 5 DCA 1984); Mizell v. State, 23 Fla. L. Weekly D1978 (Fla. 3rd DCA *Case No; 97-3638 Opinion filed August 26, 1998).*

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[1] *See* Clark v. State, 363 So.2d 331 (Fla. 1978).

[2] *See* (Appendix "A"; "F"; and "O"); Art. V Section 3(b)3 Fla. Const.; State v Pitts, 520 So.2d 254 (Fla. 1988)(*Quoting* Combs v. State, 436 So.2d 93 (Fla. 1983); *See also* (Appendix to Respondent's Brief on the Merits Exhibit "A")

It is necessary to consider here the question of whether the battery, a misdemeanor, can act as predicate crime to support the primary charge of kidnapping. *See* Smith v. State, 687 So.2d 308 (Fla. 1st DCA 1997) which right for appellate review was formally presented to the district court via petitioner's 3.850 motion for post conviction relief.[3] Although untimely as the district court opined, it falls within the fundamental error exception whether or not the claimed inadequacy of the district court, the state, and defense counsel "appear[s] in the record" for it is clear, in any event, that the interest of justice requires it because the trial court was without jurisdiction to tinker with the elements of the kidnapping statute that are implicitly delineated by the legislature. Thereby, constituting prejudice in this case. The prejudice is also a consequence of petitioner's counsel critically erroneous legal advice, coupled by his subsequent abandonment of the petitioner by not filing a motion to withdraw the plea or, to file a notice of appeal during the time limitations after specifically being instructed to do so, constituting ineffective assistance of counsel. *See* Valle. v. State, 705 So.2d 1331 (Fla. 2nd DCA (Fla. 1997); Akins; Mizell; supra. Therefore, the real issue before us is what due process rights a convicted defendant has in post conviction matters when petitioner relies on his attorney's advice to pursue remedies designed to prove his innocence and to obtain his freedom. And the attorney fails to file with in the limitations period. If petitioner can prove that he was improperly convicted, he should be set free, if he is denied the opportunity to offer such proof because of the malpractice of his lawyer, fundamental due process requires that he have a remedy that will address his future incarceration and not merely compensate him for staying in prison. If petitioner is denied the opportunity to challenge his conviction under an appropriate rule because of the negligence of his attorney, then due process requires a belated filing procedure similar to that allowed in belated appeals. *See* Steele v. Kehoe, 23 Fla. L Weekly D771 (Fla. 5th DCA 1998) *Id at* 772; Trowell; *supra;*

It is a well established rule in Florida that the law presumes that a person charged with a

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[3] *See* (Appendix " O ").

crime is innocent and the presumption of innocence follows such a defendant charged with crime through every step in the trial until the presumption is overcome by establishing the guilt of the accused beyond a reasonable doubt. Likewise, it is a fundamental and widely recognized principle of criminal law that the burden of proof is on the state to establish every essential element or material allegation in the information beyond a reasonable doubt before a verdict of guilt may be allowed. *See* Pinder v. State, 53 So.2d 639 (Fla. 1951); Broadnax v. State, 57 So.2d 651 (Fla. 1952); Griffin v. State, 705 So.2d 572 574-75 (Fla. 4th DCA 1998)(Conviction is fundamentally erroneous when the facts affirmatively proven by the state do not constitute charged offense as a matter of law); Waites v. State, 702 So.2d 1373 (Fla. 4th DCA 1997)(Statute making it an offense to operate motor vehicle, without having driver's license, in careless and negligent manner resulting in death of another human being, prohibits only knowingly driving with invalid license); Dubose v. State, 704 So.2d 143 (Fla. 1st DCA 1997)(Conviction for burglary of a dwelling reversed because a necessary element of that offense as charged in this case was the intent to resist the officer without violence); Donaldson v. State, 682 So.2d 197 (Fla. 4th DCA 1996)(Defendant did not "kidnap" automobile driver, although he threatened driver with weapon, where driver never obeyed defendant's commands to proceed in certain directions or to stop car); Blanchard v. State, 634 So.2d 1118 (Fla. 2nd DCA 1994).

The statute[4] which makes kidnapping with intent to commit *any felony* a crime, the intent with which the felony was made is the gravamen of the offense. Although questions may arise as to whether it was distinctly alleged in the original charging document[5]. On remand, it is uncertain

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[4] *See* §787.01.

[5] *See* (Appendix "A").

what the charging document reflects because petitioner was never provided with one. A charge of kidnapping with intent to commit *any felony e.,g., aggravated battery, and/or aggravated assault, and/or to inflict bodily harm upon or to terrorize the victim, and/or retaliating against a witness* must alleged with certainty the intent with which those felonies were made. *Compare* Black v. State, 173 So.2d 166 (Fla. 2nd DCA 1965)(Under statute which makes assault with intent to commit a felony a crime, the intent with which the assault was made is the gravamen of the offense). Construing it *citing* Williams v. State, 41 Fla. 295, 26 So. 184, the court stated that "this section designs to punish assaults with intent to commit any felony. The intent is the gist of the offense, and no one can be punished under the statute for assault unless it be accompanied with the requisite intent". The intent being the gist of the offense must be distinctly alleged with that certainty which is required as to other material allegations. It must not be left to uncertain inference, nor is a mere statement of such intent, in the conclusion of the information, by way of legal deduction or inference from the facts previously alleged, a sufficient allegation as to the intent. Black v. State, 173 So.2d *at* 168; Akins; supra.

As argued previously in this case[6], it is axiomatic the state failed to meet its burden since it cannot use the original information to formally charge petitioner on remand, because the aggravator in the kidnapping charge is dependent in the battery to support a conviction under §787.01, and is contrary to the legislature's intent of the kidnapping statute. Thus, here the facts are contrary to the plain meaning of the statute and fail to meet the legislature's intent.

After striking the *any felony* aggravator in this kidnapping case petitioner is left with only one statutory aggravator, battery. This sole aggravator when pitted against significant mitigation,

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[6] *See* Initial Brief on the Merits.

rendered the conviction under the kidnapping statute disproportionate. Illustrating the distinction the legislature has drawn between a felony and a misdemeanor this Honorable Court should agree that the legislature's use of the term *any felony* in the kidnapping statute to be a clear indication of legislative intent that misdemeanants are not to be imprisoned under the auspices of *any felony*. Based on the legislature's intent and upon review of the record and a comparison of the relevant case law, this Honorable Court must also conclude that because the *gist* of the alleged crime is missing, and because petitioner entered his guilty plea based upon critically incorrect legal advice from his court appointed lawyer, his plea of guilty is involuntary by representation[7] and falls under the Robinson exceptions, because had petitioner been correctly advised, he would not have entered his plea of guilty and instead would have proceeded to trial.

In Fayson v. State, 694 So.2d 272 (Fla. 1st DCA 1996), *Approved* 698 So.2d 825 (Fla. 1997), *disapproving* Sgroi v. State, 634 So.2d 280 (Fla. 4th DCA 1994), the district court further explained that the "aggravated battery conviction is not dependent on a finding of battery as an aggravator in a burglary with a battery charge, i.,e., the conviction on the lesser included offense did not negate a necessary element of the aggravated battery conviction." Fayson; 698 So.2d at 826. This Court further explained. There is a reasonable explanation for the verdicts in that the jury could have factually distinguished the charges in this case by concluding that when Fayson first entered the premises he had only committed a burglary and at that time he had no intent to commit a battery. As the facts of this case unfolded, the jury could have logically concluded that the aggravated battery came after and separate from the burglary. Fayson So.2d *Id. at* 827. By contrast, the conviction and sentence imposed in this case is disproportionate because the kidnapping

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[7] Explained in Initial Brief on the Merits.

conviction is dependent on a finding of battery as an aggravator in the kidnapping charge i.,e., the conviction on the lesser included offense of *any felony* negates a necessary element of the kidnapping conviction. Fayson; *Id. at* 826. The fact that petitioner did not raise this issue on his motion for belated appeal does not waive this claim. Since the issue was already before the district court by way of petitioner's rule 3.850 motion for post conviction relief it was unnecessary to re-argue it on petitioner's motion for belated appeal. Moreover, the issue in this appeal is very straight forward and not novel because the district court was familiar with petitioner's case due to petitioner's four visits to the court contesting different matters in a dramitic attempt to give birth to his meritorious legal claim.

In making the determination of proportionality, this Court should be guided by the decision reported as Daniels v. State, 23 Fla. L. Weekly D 1994, D1995 (Fla. 4th DCA Opinion filed August 26, 1998)("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.") *Id. at* D1995 *(citation omitted (emphasis added)*; *See also* State, v. Leroux, 689 So.2d 235 (Fla. 1996)(This Court and all the district courts have long recognized that a defendant may be entitled to withdraw a plea entered in reliance upon his attorney's mistaken advice about sentencing), *Id. at* 237. Here, the state was afforded *(two bites at the same apple)* the opportunity to twice depart from the Florida Sentencing Guidelines under the misrepresentation of defense counsel and without the acquiescence of petitioner after the state conceded error on appeal, and before the defendant could have his first. *See also e.,g.*, Sosa v. State, 641 So.2d 935 (Fla. 3rd DCA 1994). In Sosa all statutory elements of kidnapping with the exception of the use of the weapon were inherent in the facts. The crime of kidnapping should be reserved for only instances where the *any felony* intent of § 787.01 is found

to have been committed beyond a reasonable doubt. *See e.,g.,* Puentes v. State, 658 So.2d 171 (Fla. 3rd DCA 1995). Had the district court properly reviewed the record in this case as enumerated in the cited cases in its order denying petitioner's motion for belated appeal, Harriel; *at* 106. It would have recognized the injustice, and would have granted petitioner's motion without further delay. The record in the instant case is clear that petitioner's defense was that although he and the alleged victim argued, he lacked the intent to commit bodily harm on Ms. Gonzalez. Smith; 687 So.2d at 309; *See also* State v. Delva, 575 So. 2d 643 (Fla. 1991); Platt v State, 697 So.2d 989 (Fla. 4th DCA 1997);

In *Delva*; this Court answered the certified question in the affirmative with the qualification that fundamental error does not occur when the defendant's knowledge of the nature of the substance was not at issue in the case. *Id. at* 645. By contrast, in this case the issue of intent has been a feature from the start and has remained such throughout these proceedings. Defense counsel argued to the jury that petitioner's defensive move when attacked by Ms. Gonzalez was the end product of fear and was grounded on a claim of self-defense. As in Smith; and Platt; supra, defense counsel's stipulation at the plea colloquy as to the facts herein constituting the crime charged, and waiver of P.S.I. report without petitioner's acquiescence after being completely familiarized with this case, clearly constitutes conduct which fell measurably below the standard of competent counsel. Platt; *id. at* 990-991, and the conviction for the charged crime constitutes fundamental error. Otero; Nelson; Akins; J.B.; supra.

Generally, reviewing court will not consider question not presented in lower court. *See* State, Shea, 167 So.2d 767 (Fla. App. 1964) Where fundamental error appears on the record, it is reviewable despite failure of appellant to raise the issue below. *See* Robbins v. State, 413 So.2d 840 (Fla. 3rd DCA 1982); U.S. Const. Amend. 14. The erroneous legal advice received by petitioner

form his court appointed attorney was not inadvertent, but was a deliberate tactic calculated to put before the trial judge, by stipulation, and waiver of P.S.I. report inconsistent facts which were legally erroneous, and contrary to the legislature's intent of the kidnapping statute thereby divesting the trial court of jurisdiction to impose sentence in this case, and constituting prejudice. *See* Valle; supra; With respect to prejudice prong of claim of ineffective assistance of counsel, reviewing court must determine whether there is reasonable probability that but for deficiency, result of proceeding would have been different. *Id. at* 1333.

In this case there was available to the state from the onset a simple prosecution for battery against petitioner. Based upon the statutory criteria of Section 787.01, Florida Statutes (1992), the charge of kidnapping was not available. Although the alleged victim testified[8] that she intended to enter the home willingly, her testimony reveals that when she reached the front door to the home petitioner grabbed her by the arm and pulled inside the house. This is insufficient to constitute a kidnapping. Moreover, as the facts of this case unfolded once inside the home, Ms. Gonzalez further testified that petitioner ordered her into another room, a distance of approximately ten (10) feet, wherein petitioner allegedly ordered Ms. Gonzalez to write a suicide note which she refused. While in the home Ms. Gonzalez movements were never restricted. She was not tied up. Although she sustained no physical injuries or facial discoloration during the incident. Ms. Gonzalez further testified that petitioner began to beat her about the face very hard with his fists. She was not pregnant. Ms. Gonzalez was not left in any precarious or vulnerable position to facilitate an escape. Indeed, there is no evidence that petitioner attempted to escape. There was no deadly weapon involved. In fact, Ms. Gonzalez testimony reveals that she left the home on her own free will after

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[8] (*See* Appendix " Q" Trial Transcript).

she stabbed the petitioner in the neck near the juggler vain causing petitioner a collapsed lung. The record here is absolutely devoid of the statutory factors within the parameters of §787.01 to constitute the crime of kidnapping. But by ignoring these *objective* facts relating to the kidnapping, which are contemplated by the statutory law, and, instead, concentrating on the *subjective* intent of the offender, the state has succeeded in elevating this apparent misdemeanor into a first-degree felony kidnapping with battery as predicate crime and obtaining a conviction therefor. By charging kidnapping the state has shifted the focus of the inquiry away from the statutory factors and directed it to petitioner's intent which can only be induced from circumstantial evidence. This gives rise to much complex and enigmatic considerations. *See* State, v. Law, 559 So.2d 187 (Fla. 1989).

Here, there was a reasonable hypothesis of the innocence of petitioner in respect to the felony offense of kidnapping. i.e., in a moment of anger in response to an offensive action by the victim he sat on her without intending to inflict bodily harm, permanent disability or permanent disfigurement, and indeed, none of these consequences ensued. Given the reasonableness of that hypothesis, it became the burden of the state at trial to produce competent, substantial evidence to contradict it, or suffer a judgment of acquittal. Law: *at* 189. The state, though honorable in its intentions, struggled with that burden in this case. Although it introduced testimony of prior threats by petitioner. It did not introduce any admission by petitioner that he would ever harm Ms. Gonzalez. The mere fact of sitting on the victim while she had a weapon when petitioner had the opportunity to inflict great bodily harm or injury itself is no more proof of intent to inflict *great* bodily harm or to terrorize the alleged victim than it is proof of intent to commit *some* bodily harm. Indeed, the words of the petitioner during his in court testimony which are part of the record[9] in this

[9] (*See* Appendix "R" Trial Transcript).

case seem more indicative of the latter intent than the former. There was only one witness to this incident (the couple's son) who did not testify at trial. Neither was the petitioner convicted of any wrong doing in regards to his son. Therefore, this is not an issue here.

At issue here is that petitioner was having difficulties visiting with his son. But defense counsel did not explore this claim. The state introduced various witnesses who's testimony was highly prejudicial because it indiscriminately related the alleged victim's version of the facts after she had related them to several people, at different intervals and with ample time for reflective thought, thereby vitiating the spontaneity and reliability of the statement and destroying its admissibility under the spontaneous statement exception to the hearsay rule. *See* Fratcher v. State, 621 So.2d 525 (Fla. 4th DCA 1993). Because they were not actual eye witnesses to the incident, their testimony should not have been allowed because it was introduced by the state solely for the purpose of eliciting the jury's sympathy. The State's primary theory was that petitioner had kidnapped the victim because he could not let go of the relationship. That the victim had suffered from domestic violence abuse at the hands of the petitioner, and that because the victim refused to make amends, he committed the crime. Petitioner was never contacted or asked by anyone whether he wished to file formal charges against Ms. Gonzalez. In other words, based on the popular belief that it is the husband who always abuses the female spouse, the state focused its investigation on the petitioner and made domestic violence an issue throughout trial. The admission of this testimony is a clear indication of abuse of discretion by trial judge constituting prejudice, because allowing such critical hearsay testimony invaded the jury's providence. The defense on the other hand presented no witnesses on its behalf and did not refute the state's theory. By not presenting any evidence to contradict this eminent fact, the possibility exists that the testimony resulted in prejudice and affected the outcome of this case. *See* *State v. Diguilio*, 491 So.2d 1129 (Fla.1986). Throughout the trial it was petitioner's defense that he never pulled Ms. Gonzalez into the house. Petitioner testified that she entered the home on her own free will as in the previous instances when she had brought the son for visits. Petitioner further testified that once inside the home an argument ensued due to Ms. Gonzalez deliberate disregard for petitioner's visitation rights. Petitioner's testimony further evinces that he was attacked by the alleged victim who stabbed him on the neck causing a

collapsed lung on the petitioner. Most important, petitioner's's testimony further reveals that he never intended to harm Ms. Gonzalez in any way. In fact, in closing argument, defense counsel argued that had the petitioner called the police to file formal charges against Ms. Gonzalez after she left the scene. Ms. Gonzalez would be the one charged with attempted murder. Based upon these material facts already established at a trial in this cause. It was specifically petitioner's defense that he did not have the intent of the kidnapping statute. §787.01. On remand, defense counsel was well aware of the legal issues involved. He should have known that the facts herein did not constitute the crime charged in the information document. Considering petitioner's unveiled inexperience and unskillfulness in the complexities of the legal issues involved prior to entering his guilty plea and the danger of conviction because he did not know how to establish his innocence[10] Trowell; 706 So.2d *at* 334, counsel's performance amounts to nothing less than improper conduct and if this court determines that it was calculated to, and did create a prejudicial misrepresentation on the part of the petitioner, this Court should not hesitate to set such verdict aside in fulfilling its purpose of securing a fair determination of the controversies. *See* Abertson v. State, 294 So. 2d 698 (Fla. 4th DCA 1974); Valle; supra.

Florida Statutes § 924.34 (1997) states: When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish

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[10] It is ironic that because of counsel's abandonment, and petitioner's inability to find competent legal assistance through other law clerks to marshall his *prima facie* claims. As part of petitioner's rehabilitation during his incarceration after he entered his plea of guilty in 1994 has been to become a law clerk himself in 1996 at Hamilton Correctional Institution assisting other inmates in the preparation of meaningful papers. But by the time he was allowed the opportunity to research this case and to learn how to marshall the complexities of the legal issues involved herein to file his motion for post conviction relief, the time limitations under rule 3.850 had expired. Due to petitioner's counsel legal misrepresentations, this Honorable Court should agree that the granting of this belated appeal from his plea of guilty is crucial, because it is the only vehicle petitioner currently has to obtain collateral relief from his judgment of conviction, and it is precisely the issue this Honorable Court's decision in Trowell; supra; seeks to safeguard. Nevertheless, because the facts herein do not legally constitute the crime charge in the information document, and because the ineffective assistance of counsel claim is not a viable issue on appeal. Mizel; supra; *Id. at* D1979, this Honorable Court should correct the injustice by allowing petitioner to plea to the lesser included offense of false imprisonment, because the issue is properly before the Court.

guilt of a lesser statutory degree offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

Here, as in Black; supra; it should be noted that the record in this case does not show that the court below had an opportunity to rule on this question. It does not offer in the record that said question was raised, though it may have been argued under appellant's motion for new trial which assigned no grounds. Although we do not condone such practice, we consider that the question is too serious to regard as having been waived by appellant. Had it not been raised in this appeal, it is of such a nature that this court could consider it on its own motion. Black v. State, 173 So 2d *at* 168; Akins; supra. Thus, at bar, the district court had jurisdiction to follow the intent of § 924. 34, and to properly review the record but refused to do so. Instead, it opted to certify direct conflict with the First and Fourth districts due to a *pro se* litigant's failure to follow a previous decision of the court in the district wherein he allegedly committed his crime. Of course, this matter has already been resolve. *See* Trowell; supra. This claim is not frivolous, and was not presented in the original appeal in this cause. Nevertheless, it is an issue of merit which has already been established at a trial by jury, but has not been properly reviewed by this Court which cannot be deemed waived by the passage of time, and which falls under the Robinson; exceptions because it leads to the presumption that petitioner's plea was involuntarily entered due to the legal misrepresentation of his court appointed attorney.

The argument that petitioner could have inflicted sufficient bodily harm upon the victim could be judicially noticed without any medical testimony at all. But this argument that that the possibility alone establishes a *prima facie* case of kidnapping leads down a slippery slope. It would logically follow that a thief who steals less than $300 (ostensibly petit theft) may be prosecuted for attempted grand theft in the first-degree (a second-degree felony) on the theory that had more than $10,000 been available for the taking he obviously would have taken it. A late punch to the head by a boxer after the bell can become the basis for a charge of attempted homicide since medical testimony is readily available that death can result from a blow to the head. Once upon that slide, there is very little to restrain an imaginative prosecutor in the filing of charges based upon the

concept of *any felony*. It is interesting to note the case of Velasques v. State, 654 So.2d 1227 (Fla. 2nd DCA 1995), wherein the state elevated counts of aggravated assault into counts of attempted first-degree murder, ultimately resulting in the defendant's acquittal. The recorded testimony already established herein reveals that petitioner merely wanted to exercise his visitation rights with his only son. The fact that an argument ensued where the alleged victim stabbed the petitioner causing him a collapsed lung is evidence of mitigation. The fact that petitioner was much larger than the alleged victim and had sat on her for two or three minutes and caused her no serious injury is further consistent with his theory of the case. The popular belief that it is usually the male spouse who batters the female spouse is contrary to the facts in this case. And, it should be taken seriously.

In Graig v. State, 685 So.2d 1224 (Fla. 1997) This Honorable Court stated: The [government] attorney is the representative not an ordinary party to a controversy, but a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold arm of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful [result] as it is to use every legitimate means to bring about a just one. Craig; *Id. at* 1229. *(citations omitted), (emphasis added)* The record herein unambiguously demonstrates the state's earnestness and vigor-indeed to win the case, rather than to do justice.

Since practically every battery has the potential of causing serious injury and even possibly death, then if the state's position is accepted and the intent to cause a greater injury than that inflicted can be inferred from the commission of the lesser offense, almost every battery can be charged as an aggravated battery or aggravated assault and/or inflict bodily harm upon or to terrorize the victim. And even a simple assault can be charged as an aggravated battery. Surely, this was not the intent of the legislature in enacting the offense of "kidnapping". Thus, in essence, and with all due respect, what the district court implies by denying petitioner's motion for belated appeal in this case is that because petitioner is indigent, and did not know how to marshall his meritorious,

and legally dispositive issue within the time limitations, and because of his inexperience and unskillfulness in the law. After he affirmatively relied on the erroneous legal advice of his court appointed advocate in entering his plea of guilty, which advocate, later abandoned petitioner by not filing a motion to withdraw his plea or, to file a timely notice of appeal, after specifically being instructed to do so when petitioner realized counsel's misrepresentations. He is precluded from obtaining belated appeal. *But see* Daniels; supra.. This ruling strikes a devastating blow to the foundation of American Jurisprudence and unveils constitutional due process implications which should not be deemed waived by the passage of time, and which this Honorable Court should *sua sponte* amend in exercising it responsibility to apply the law, and to see that justice is served. Therefore, under the circumstances surrounding this case, there is a reasonable probability that the result would have been different had petitioner been financially able to acquire a competent private attorney to represent him in these proceedings.

## CONCLUSION

**WHEREFORE** based on the foregoing argument, in conjunction with petitioner's Initial Brief on the Merits Argument, and because fundamental error resulting from the violation of constitutional due process rights have been unambiguously demonstrated, **JORGE E. GONZALEZ** urges this Honorable Court to formally discharge petitioner from his incarcerative commitment as to his kidnapping conviction, and/or vacate his judgment of conviction and sentence imposed as to the kidnapping charge and to allow him to plead to the lesser included offense of false imprisonment. And in the alternative, to grant belated appeal of his judgment of conviction and belated appeal of the denial of his motion for post conviction relief as the interests of justice mandate it.

Respectfully submitted,

Jorge E. Gonzalez, *Petitioner*, **Pro se**
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Hamilton Correctional Institution
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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true copy of the foregoing Petitioner's Answer to State's Response in this cause has been furnished to Douglas Gurnic, Assistant Attorney General, Attorney General's Office, Department of Legal Affairs at The 110 Tower 201 S.E. 6th Street, Fort Lauderdale, Florida 33301, and to the Honorable Katherine Fernandez Rundle, State Attorney for the Eleventh Judicial Circuit, in and for Dade County, Whose address is E.R. Graham Building, 1350 N.W. 12th Avenue, Miami, Florida, 33136-2111. Sent by U.S. Mail on this day 25th of September, 1998.

Jorge E. Gonzalez, *Petitioner*, **Pro se**.