DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

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CHADWICK WILLACY,

Petitioner,

vs.

SECRETARY,
Florida Department of Corrections, et al.,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether a defendant's right to a fair and impartial jury is impacted when a juror failed to answer honestly material questions during the voir dire process?

2. Whether the State's failure to inform the court during trial that a juror is in a pretrial intervention program constitutes prejudicial error requiring a new trial?

3. Whether trial counsel renders ineffective assistance when he fails to inquire into and object to a juror's bias or ineligibility to serve?

4. Whether the petitioner has demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional claims concerning the denial of his right to a fair trial, or that such jurists could conclude the issues presented are adequate to deserve encouragement to proceed further, thereby entitling petitioner to the issuance of a certificate of appealability?

5. Whether the consideration of non-enumerated statutory aggravating circumstances in a *Strickland* prejudice analysis is contrary to and an unreasonable application of clearly established federal law?

6. Whether a court's decision to negate the value of clear mitigating evidence on the basis of perceived negative information that the jury would also have heard is objectively unreasonable?

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
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Petitioner, **CHADWICK WILLACY**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Willacy v. Secretary*, Case No. 14-13797 (11th Cir. 2017), and is Attachment A to this petition. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The district court's order denying relief is Attachment C to this petition. The Florida Supreme Court's opinion affirming the denial of postconviction relief is Attachment D to this petition. The Florida Supreme Court's opinion on direct appeal affirming Willacy's convictions is Attachment E to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on July 12, 2017. Rehearing was denied on September 19, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defence.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

PROCEDURAL HISTORY

On September 25, 1990, Chadwick Willacy was charged by indictment with first degree murder, robbery, burglary and arson. Willacy proceeded to trial and was found guilty as charged. A penalty phase proceeding was held, after which the jury recommended death by a vote of nine to three. On December 10, 1991, the trial court followed the jury's recommendation and imposed a sentence of death. The Florida Supreme Court affirmed Willacy's convictions on direct appeal but reversed the death sentence and remanded for a new penalty phase proceeding. *Willacy v. State*, 640 So. 2d 1079 (Fla. 1994).

Following the remand, the jury again recommended a sentence of death, this time by a vote of eleven to one. The trial court sentenced Willacy to death on November 20, 1995. On direct appeal, the Florida Supreme Court affirmed. *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Certiorari was denied on November 10, 1997. *Willacy v. Florida*, 522 U.S. 970 (1997).

On May 11, 1998, Willacy filed a postconviction motion in the state circuit court (PCR. 2093). Following an amendment and

an evidentiary hearing, the circuit court denied relief on November 19, 2004 (PCR. 2545). On June 28, 2007, the Florida Supreme Court affirmed. *Willacy v. State*, 967 So. 2d 131 (Fla. 2007). Rehearing was denied on October 10, 2007.

On April 22, 2008, Willacy filed a federal habeas petition in the United States District Court, Middle District of Florida (Doc. 1). With the district court's permission, Willacy filed an amended petition on June 16, 2013 (Doc. 69). Thereafter, on July 18, 2014, the district court issued an order denying relief (Doc. 84). At the conclusion of its order, the district court stated that it was declining to issue a certificate of appealability (COA) (Doc. 84 at 70).

On August 14, 2014, Willacy filed a motion to alter or amend judgment and/or for reconsideration of the denial of a COA (Doc. 86).[1] Willacy's motion was denied by the district court on August 22, 2014 (Doc. 89). Subsequently, the Eleventh Circuit granted a COA as to three issues on March 4, 2015.

On March 30, 2017, subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion affirming the denial of Willacy's federal habeas petition. Willacy thereafter moved for rehearing en banc and panel rehearing. On July 12, 2017, the Eleventh Circuit panel granted the motion for rehearing, vacated its prior opinion, and substituted it with a new opinion which again affirmed the denial of Willacy's federal habeas petition. *Willacy v. Secretary*, Case No. 14-13797 (11th Cir. 2017).

[1]On August 18, 2014, Willacy filed a notice of appeal (Doc. 87).

On August 2, 2017, Willacy moved for rehearing en banc and panel rehearing of the new opinion. Willacy's motion was denied by the Eleventh Circuit on September 19, 2017.

Willacy subsequently filed a motion for extension of time with this Court in which to file his petition for writ of certiorari. The motion was granted, and Willacy was afforded until February 16, 2018, in which to file his petition.

FACTS RELEVANT TO QUESTIONS PRESENTED

A. THE REMAND

During the direct appeal proceedings of Willacy's 1991 trial, appellate counsel[2] moved to relinquish jurisdiction based on the contention that Edward Clark, the foreman of the jury, had pending criminal charges in Brevard County at the time of his participation as a juror. The motion was granted by the Florida Supreme Court, and a hearing was conducted by the trial court as to Willacy's allegations. At that hearing, the following facts were elicited:

Initially, both parties stipulated to the fact that Clark was charged with grand theft, that he was accepted into a pretrial intervention (PTI) program, and that he signed a contract on October 29, 1991 (R. 3517).

Clark testified that at the time he received his jury summons, the grand theft case was ongoing (R. 3519). Clark showed up for jury duty on October 7, 1991, but he did not have a

[2]Willacy's appellate counsel was Kurt Erlenbach. Erlenbach had also served as Willacy's lead attorney at the 1991 trial. He was assisted by his wife, Susan Erlenbach.

recollection of hearing a particular question about whether he was under prosecution for any crime in state or federal court (R. 3520-21, 3522-23). Clark stated that during the course of the trial after being selected as a juror, he received information from the PTI program indicating that he had been accepted (R. 3520). Clark called the individual who had sent the information and told him that he was on jury duty and that he might not be able to make the October 18, 1991, signing date that had been set (R. 3520, 3567-68). Clark attended the PTI signing after the trial (R. 3521). Clark maintained that he did not feel he owed the State Attorney's Office anything for accepting him into PTI (R. 3529).

Jury clerk Lucille Rich testified that during the jury qualification process on October 7, 1991, she asked the assembled venirepersons a series of questions under oath, including whether at the present time they were under prosecution for any crime in either state or federal court (R. 3536-38). Rich's minutes indicated that Clark was present during these questions (R. 3538). Rich's minutes further reflected that no one, Clark included, answered affirmatively, despite being given an opportunity to answer privately (R. 3539). Rich also testified that the jury summons that Clark would have received indicated that a person who was under prosecution for a crime must be excused from jury service (R. 3542).

Kurt Erlenbach testified that no one ever told him that Clark was pending prosecution in a case (R. 3557, 3560). Erlenbach learned of Clark's prosecution while conducting

research for the initial brief during Willacy's direct appeal proceeding (R. 3557-58). Erlenbach explained that in order to show the discriminatory nature of the State's challenge to a black prospective juror, Alvin Payne, he researched the criminal records of the white venirepersons by running their names through the records of the clerk of court for Brevard County (R. 3557-58).[3] By doing this, Erlenbach learned that Clark was a criminal defendant and had criminal proceedings pending against him at the time he sat on Willacy's jury (R. 3558). Erlenbach stated that had the defense learned of Clark's prosecution at the time of trial, it would have challenged him for cause and, if that challenge were denied, the defense would have sought to strike him peremptorily (R. 3559).

Joseph Brand, who works for the Department of Corrections and was affiliated with the PTI program in Brevard County in 1991, testified that once a referral for the program got to the Department of Corrections, he would conduct a background investigation and make a recommendation to his supervisor (R. 3562-63). If the recommendation was approved, it would go to Chris White from the State Attorney's Office for final approval (R. 3563). Brand testified that after Clark was submitted for consideration into the PTI program, he completed his investigation on September 29, 1991 (R. 3564). Brand found Clark to be a very suitable candidate for the PTI program, and he sent

[3]Erlenbach was concerned that the State had run a criminal records check only on a black prospective juror, and that this individual had been struck based on minor criminal trouble (R. 3557-58).

his recommendation to the State Attorney's Office on September 27, 1991 (R. 3565-66).

Brand was notified on October 4, 1991, that Clark was approved for PTI (R. 3567). On October 7, the day Clark's jury service began, Brand sent a letter to Clark and his attorney informing them of his acceptance and that the PTI contract signing date was set for October 18 (R. 3567-68). A couple of days later, Brand received a phone call from Clark (R. 3569-70). Upon learning of Clark's service on the jury, Brand testified that he called Chris White's secretary (R. 3568-69). Brand was concerned of the possibility that Clark could be sitting on White's jury (R. 3569). Brand testified that Clark was formally accepted into the PTI program when he signed a contract on October 29, 1991 (R. 3570). Brand acknowledged that the contract signing is the starting date for the PTI program (R. 3578). According to Brand, the PTI program is like probation (R. 3570). Clark was in it for six months and he completed his obligations (R. 3571-72).

Donna Wilmer, Chris White's secretary at the State Attorney's Office, testified that she received a referral for Clark from Brand on September 27, 1991 (R. 3583). White proceeded to review the file and approved the PTI for Clark on October 2, 1991 (R. 3584-85). Wilmer notified Brand on October 4, 1991 (R. 3585). Subsequently, Wilmer received a call from Brand regarding Clark's jury service and inability to make his signing date (R. 3586). Wilmer contacted Chris White (R. 3586).

Chris White testified that he was the lead co-counsel in Willacy's prosecution (R. 3589). His duties at the time also involved being the PTI Coordinator for his office (R. 3589). White approved Clark for pretrial intervention on October 2, 1991 (R. 3591). White testified that he received a call during a break in Willacy's trial from his secretary informing him that there may be a PTI candidate on the jury (R. 3592-93). White discussed this information with Craig Rappel, another prosecutor on the case, and they decided that they needed to advise the defense of this fact (R. 3593). White then approached the defense table "and told either Mrs. Erlenbach, Mr. Erlenbach or both of them that, in fact, there was a juror that I believed might be in the PTI Program." (R. 3593). According to White, "The closest I can come to the exact words a year later now was - - I think I approached one of them or both of them and said something along the lines of, You're not going to believe this, but I think that Mr. Clark on our jury may be in the PTI Program." (R. 3595). Following this revelation, White stated that the defense did nothing, which was surprising to him since the defense had made an issue out of everything that it possibly could (R. 3594-95, 3601-02). White also testified that he took no further action as to this issue (R. 3595-96).

Craig Rappel testified that after White informed him of the possibility that the Clark on the jury might be the same person involved in a PTI program, he suggested that they inform defense counsel (R. 3607-08). Kurt Erlenbach wasn't in the courtroom yet, so White spoke to Susan Erlenbach about this (R. 3608). While

Rappel did not hear the full conversation, he did hear words such as Ed Clark, PTI and alternate juror (R. 3608). Further, according to Rappel, when Kurt Erlenbach came into the courtroom, White went back over to the defense table and told him about his conversation with Susan Erlenbach (R. 3609).

Susan Erlenbach testified that Chris White never approached her during the trial to inform her that there was a possible problem with one of the jurors (R. 3612). Rather, she stated that on October 16, 1991, after the testimony had ended, she had the following conversation with Craig Rappel:

> Mr. Rappel and I had some casual conversation just kind of killing time. This was after the case was all over. During the course of that Craig Rappel said to me, you know, we were sort of worried there for a minute that we might have a juror on the PTI list. And then he laughed, and he said, you know, like it was a big joke or misunderstanding.
>
> * * * *
>
> At no time did Mr. Rappel during the course of that tell me that, in fact, a juror was on PTI. It was sort of like there was some common name. They had checked the list. That was it. You know, it was a big joke, a misunderstanding.

(R. 3614).

B. THE RESENTENCING

The evidence presented during Willacy's resentencing proceeding was summarized by the Florida Supreme Court as follows:

> On retrial, the State presented evidence of the crime and testimony of Sather's son and two daughters. Willacy presented the testimony of relatives and friends. The court followed the jury's eleven-to-one recommendation and sentenced Willacy to death, finding five aggravating circumstances,[1] no statutory mitigating circumstances, and many nonstatutory mitigating circumstances.[2]

> 1 The court found the following aggravating circumstances: 1)The murder was committed in the course of a robbery, arson, and burglary; 2) the murder was committed to avoid lawful arrest; 3) the murder was committed for pecuniary gain; 4) the murder was especially heinous, atrocious, or cruel (HAC); and 5) the murder was committed in a cold, calculated, and premeditated manner (CCP).
>
> 2 Willacy proposed thirty-seven separate mitigating factors. Most of the proposed factors, however, were cumulative to others and were of a general nature (e.g., "1. During his lifetime, the defendant has exhibited kindness for others. 2. During his lifetime, the defendant has exhibited compassion for others. 3. During his lifetime, the defendant has exhibited concern for others."). The court rejected six factors outright, and gave the others little weight.

Willacy, 696 So. 2d at 694-95.

C. THE POSTCONVICTION PROCEEDINGS

During his state postconviction proceedings, Willacy asserted that trial counsel was ineffective for failing to inquire into and object to Clark's ineligibility to serve on Willacy's jury. During Willacy's postconviction evidentiary hearing, trial counsel Kurt Erlenbach testified that had he learned of Clark's pending charges during voir dire, he would have moved to strike him for cause or would have used a peremptory challenge to remove him from the jury panel (PCR. 672, 684). As Erlenbach explained:

> If a juror, any juror had said I am being prosecuted now, I'm about to go into PTI—if I remember this testimony right he had not had time to sit on the jury, he had not received his letter saying that he was going into PTI. But had he said I'm being prosecuted by this State Attorney's Office that would have made a very significant difference and I would have moved to challenge for cause and stricken him peremptorily had the opportunity arisen.

(PCR. 684).

* * * *

A Well, a juror who has pending charges is clearly in a position to be biased in favor of the State, particularly somebody in Mr. Clark's position.

If I remember correctly he was a businessman and it was a business dispute that led to the criminal charges and a person in his position clearly has more to lose than many other folks who are charged with crimes and somebody in his position who is angling to get into a diversion program, a person who has not ever been charged with a felony before, perhaps never even been charged with a crime before. Certainly somebody in his position is very clearly—I wouldn't say clearly but likely very easily have a very strong bias for the State particularly in a case this serious. . . .

* * * *

A A circumstance of a person trying to sway a jury one way or the other for their own reasons rather than the way the evidence would lead them. And the circumstance of somebody being prosecuted by the same prosecutor and looking to get their felony charges diverted has a very strong opportunity.

(PCR. 692-93).

Yet, while Erlenbach indicated that he would not have wanted Clark to serve on Willacy's jury, and he described Clark as probably "the worst possible defense juror" (PCR. 732-33), he did not specifically ask Clark whether he had any charges pending against him (PCR. 673). Indeed, Erlenbach failed to ask anyone on the jury panel whether they had any charges either pending or ever filed against them (PCR. 681, 684). Erlenbach aknowledged that these questions, if answered honestly, would have prompted jurors to relay this type of information (PCR. 681).

Willacy also presented at the postconviction hearing evidence in support of his claim that resentencing counsel rendered ineffective assistance in failing to investigate and present evidence of statutory and non-statutory mitigating

factors. Dr. William Riebsame, a psychologist, testified that he was contacted by Willacy's attorney, James Kontos, on September 7, 1995 (PCR. 1112). Kontos stated that he was conducting a death penalty proceeding within the week and that he wanted Dr. Riebsame to see Willacy at the Brevard County jail (PCR. 1113-14). Kontos requested a competency evaluation of Willacy and he forwarded a two-page arrest affidavit to Dr. Riebsame on September 8, 1995 (PCR. 1114). Dr. Riebsame met with Willacy on the same day for approximately two hours (PCR. 1118, 1120).

Dr. Riebsame testified that based on his examination of Willacy, he found him to be aware of the charges against him and able to communicate with his attorneys (PCR. 1119-20). Dr. Riebsame concluded that Willacy was competent, and he promptly conveyed his findings to Kontos (PCR. 1120). In reviewing the test results with Kontos, Dr. Riebsame also told him that a portion of the testing revealed some indicators of antisocial personality characteristics in Willacy (PCR. 1124-25). Dr. Riebsame estimated that his conversation with Kontos lasted twenty minutes (PCR. 1130).

Dr. Riebsame testified that as a general practice in a penalty phase evaluation, he would conduct a thorough review of all academic, medical and prior mental health treatment records relating to a defendant (PCR. 1112). He would speak to relatives of the defendant and would meet with the defendant on several occasions (PCR. 1112). He would also conduct a battery of psychological and neuropsychological testing to ascertain any existing mental disorders (PCR. 1112). Dr. Riebsame stated that

he would not have been able to complete such an evaluation in the time period provided by Kontos (PCR. 1112-13). He also stated that the two-page arrest affidavit, the sole document faxed to him by Kontos, would have been insufficient for preparation of mitigation evidence (PCR. 1114-15). Dr. Riebsame testified that based on the materials provided, he did not understand that he was to evaluate potential mitigation evidence (PCR. 1116).

In 2000, Dr. Riebsame was contacted by collateral counsel regarding mitigation in this case (PCR. 1130). At that time, Dr. Riebsame was furnished with extensive background information related to Willacy and the crime in question (PCR. 1130-32). Dr. Riebsame was also asked to review prior psychological testing and to perform an evaluation of any potential mitigation (PCR. 1133). Dr. Riebsame reviewed all the material provided, met with Willacy on a number of occasions, and performed a thorough battery of psychological and neuropsychological tests (PCR. 1133). Based on his examination, Dr. Riebsame diagnosed Willacy with the following: cocaine abuse, cannabis abuse, alcohol abuse, Attention Deficit Hyperactivity Disorder (ADHD), antisocial personality disorder, cocaine intoxication and cocaine withdrawal (PCR. 1171-73). In addition, Dr. Riebsame found the presence of a statutory mitigating circumstance, that Willacy was under an extreme mental or emotional disturbance (PCR. 1189-90).

Dr. Riebsame testified that a cocaine abuse diagnosis would include Willacy ingesting crack cocaine in a binge-like manner to the level of intoxication, across a three to four-day period (PCR. 1279). Dr. Riebsame explained that this diagnosis was

confirmed by third-party sources such as Alonzo Love, Carlton Chance and a confidential informant, all of whom confirmed Willacy's drug abuse around the time of the homicide (PCR. 1172-73).

As to his diagnosis of ADHD, Dr. Riebsame explained that this is a mental disorder that reflects impulsivity and poor judgment, rather than reasoned decision-making (PCR. 1173). Individuals with ADHD are easily distracted, get off task, have difficulty completing projects, appear forgetful and have difficulty making effective decisions (PCR. 1219, 1225). Dr. Riebsame testified that evidence of ADHD was found in Willacy's school records, which reflect behavioral problems, attentional problems and a lack of achievement consistent with Willacy's intellectual ability (PCR. 1173). Dr. Riebsame also testified that there was evidence of a conduct disorder in Willacy's childhood history, noting that a child with ADHD often receives an accompanying conduct disorder diagnosis (PCR. 1175, 1177). Additionally, Dr. Riebsame explained that drug addiction intensifies the impulsivity component of ADHD (PCR. 1271).

With regard to his diagnosis of antisocial personality disorder, Dr. Riebsame testified that Willacy meets the criteria for the disorder (PCR. 1177). However, Dr. Riebsame noted that there are aspects of Willacy's personality that are not consistent with the diagnosis, such as Willacy having maintained extended relationships, helping others for no personal gain, attempting to stop abusing drugs, and having adopted the Islamic religion solely for spiritual reasons (PCR. 1177-78). Dr.

Riebsame also explained that there exists a significant correlation between adult males diagnosed with antisocial personality disorder having a history of chronic and severe physical abuse (PCR. 1271). Further, he testified that when one has ADHD combined with cocaine intoxication, the characteristics of antisocial personality disorder are intensified or worsened (PCR. 1277).

As to his diagnosis of cocaine intoxication and cocaine withdrawal, Dr. Riebsame testified that Willacy's appearance on the videotaped statement to police offers markers of cocaine withdrawal (PCR. 1179). He explained that a cocaine-intoxicated individual would show very poor judgment, remain sleepless for several days, be talkative and possibly agitated and disagreeable. Further, such an individual's thinking may be confused and his impression of himself may be grandiose (PCR. 1196). Specifically as to Willacy, Dr. Riebsame noted that based on third-party reports, Willacy had been sleepless for several nights and doing crack cocaine for several days beforehand, including the morning and afternoon of the murder (PCR. 1208).

As to the statutory mitigating circumstance of extreme mental or emotional disturbance, Dr. Riebsame testified:

> Yes, I would suggest that there are very extreme mental or emotional disturbances in this case given the crack cocaine intoxication at the time and symptoms of the other mental disorder.
>
> * * * *
>
> . . . he was amidst of a crack cocaine binge and was very much likely intoxicated on crack cocaine at the time of the offense. Symptoms associated with this particular disorder would surely impair his judgment

> and affect his behavior substantially. I think it's also a diagnosis of Attention Deficit Hyperactivity Disorder in this case that would lay the foundation for someone who is going to act impulsively, show poor judgment and not recognizing the consequences of their behavior anyway. In combination with the cocaine intoxication you have an individual who is extremely mentally disturbed. If you look at the circumstances surrounding Ms. Sather's death, I think the way the offense was carried out reflects extreme mental disturbance simply on the facts of the evidence.

(PCR. 1189-90).

In conclusion, as to the presence of non-statutory mitigating circumstances, Dr. Riebsame testified that Willacy had a history of physical abuse, substance abuse and the diagnosis of a mental disorder (PCR. 1182). He further testified that Willacy's ability to appreciate the criminality of his conduct was impaired, although not substantially, stating:

> . . .There's some impairment, given what occurred and given that he was intoxicated on crack cocaine and associated with this mental disorder but not substantial in nature.

(PCR. 1186).

Heather Willacy, Chadwick Willacy's sister, testified that their father, Colin, began physically abusing Chadwick when he was around eight years old (PCR. 1322). She described the abuse as a constant occurrence in their home, occurring a couple of times a week for six to seven years (PCR. 1324). Heather classified the abuse as severe, such that "where I thought he was really like going to hurt him bad." (PCR. 1322). Heather stated that Colin left bruises and welts on Chadwick and that he would use a leather belt on him (PCR. 1323, 1325). She also described an incident in which Colin broke a chair leg and beat Chadwick

with the leg (PCR. 1323-24). According to Heather, Colin would hit Chadwick "wherever he could get him." (PCR. 1325).

Heather also testified that Colin physically abused her mother by hitting, slapping or pushing her (PCR. 1319-20). During these attacks, Heather and Chadwick would be present in the home, huddled together crying (PCR. 1320). Heather recounted an incident when Chadwick was 14 or 15 years old in which he tried to stop Colin from beating his mother (PCR. 1322). Colin proceeded to turn on Chadwick and beat him (PCR. 1322). Heather indicated that the attorneys representing her brother never asked her about any physical abuse or alcohol abuse by their father (PCR. 1330). Rather, attorney Kontos "wanted to know, he wanted me to tell good things about my brother which is what I did." (PCR. 1343).

Audrey Willacy, Chadwick's mother, testified that she married Colin Willacy in 1966 (PCR. 1368). She stated that Colin began drinking prior to their marriage, and it continued following their marriage (PCR. 1369). When Colin became drunk, he was abusive to both Audrey and Chadwick (PCR. 1370-78). Audrey testified that almost every time Colin was drunk there was a physical attack on Chadwick. Audrey related that the abuse began when Chadwick was approximately 8 years old and ended when he was 15 or 16 years old (PCR. 1378-79). Audrey described these beatings as extreme, with Chadwick being beaten with a belt, fists, furniture, or whatever was available or handy at the moment (PCR. 1379). She stated the abuse usually occurred over trivial things like Chadwick failing to walk the dog or to do his

homework (PCR. 1381). Audrey testified specifically about an incident involving a chair leg:

> He came home and he was as I say drunk. And he was, he was talking to Chad. And there was the chair and he broke the chair, took the foot of the chair and beat Chad with it. I tried to intervene and I got hit, not seriously but I got hit during the time that I was trying to get in-between him and the chair and Chad.

(PCR. 1380). Audrey recounted a second incident when a friend witnessed Colin beating Chadwick, and the friend, concerned over the intensity of the blows, stated, "You're going to kill him." (PCR. 1390).

In the previous penalty phase proceeding, Audrey did not testify about any abuse (PCR. 1384). She explained that she was never asked specifically about abuse, and therefore, she did not volunteer or otherwise detail any abuse witnessed or suffered by Willacy (PCR. 1384-85). She related that the defense attorneys never discussed with her any potential significance of abuse (PCR. 1385). She indicated that she met with Kontos three or four times, but he never pressed her for such information (PCR. 1388). Rather:

> . . . , Mr. Kontos and Mr. Erlenbach told me that I should get people who can tell of Chad's good behavior and good conduct and good things that he had done in the penalty phase.

(PCR. 1385). According to Audrey, Kontos instructed her to focus on the good things about Chadwick (PCR. 1412). She testified that had someone asked about the abuse, she would have told them (PCR. 1384-85).

Colin Willacy, Chadwick's father, testified that drinking half a quart of rum was a daily pastime for him (PCR. 1416). He

described his drinking as steady and excessive, resulting in irrational behavior (PCR. 1416). In addition to beating his wife, Colin testified that he began beating Chadwick when he was about 7 or 8 years old, and that the beatings, while regular, got more brutal as Chadwick got older (PCR. 1416-18, 1421). Colin stated, "I would go frantic . . . I would use anything. If there was a chair there, anything, because I was in a state really that I got very abusive." (PCR. 1420). Colin would "really, really let him have it for disobeying me." (PCR. 1421). He explained that in Jamaica corporal punishment is practiced, but "what I did, I gave that and more . . . what I inflicted as corporal punishment was brutal." (PCR. 1449). He described the blows to Chadwick as "oh, to the full extent of whatever power that I had, very hard." He would strike Chadwick with his belt on "any part of his body, 15 to 20 times." (PCR. 1428, 1429). Colin also recounted the incident where he beat Chadwick with a chair leg (PCR. 1422).

Colin testified that he stopped beating Chadwick when he was in high school (PCR. 1421). He also testified that due to Chadwick's drug use, he and his wife kicked him out of their home. During that time, Chadwick was homeless, living on a rooftop (PCR. 1449).

During the 1995 penalty phase proceeding, Colin testified that he was a disciplinarian who inflicted corporal punishment (PCR. 2836, 2837). Yet, he was never asked by the attorneys about his treatment of Chadwick (PCR. 1425). Thus, he never told the attorneys about the physical abuse or his alcohol abuse (PCR. 1425). Colin indicated that while he was ashamed of his conduct,

he would have told the lawyers if he had been asked (PCR. 1426). In this regard, Colin explained that he was unaware that this information was important in the penalty phase proceeding (PCR. 1426). Colin testified:

> When the penalty phase came up I was not told that I should, I was told that what counted is his good behavior, the good deeds that he had done.

(PCR. 1434-35).

THE COURTS' RULINGS

A. JUROR CLARK

During his state court proceedings, Willacy raised several issues concerning Edward Clark, the individual who served as the jury foreman at Willacy's trial. On direct appeal, Willacy asserted that the court erred in failing to grant a new trial when it was discovered that Clark was found to be ineligible under §40.013 of the Florida Statutes. Moreover, Willacy asserted that the State's failure to inform the court during the trial of Clark's status was prejudicial error that required a new trial. In his postconviction proceedings, Willacy asserted that defense counsel was ineffective for failing to inquire during voir dire into and to object to Clark's ineligibility to serve on Willacy's jury. And in his state habeas petition, Willacy asserted that he was denied his constitutional right to a fair trial by having a juror who was pending prosecution serve as foreman of his jury.[4]

[4]Including in this claim was the argument that appellate counsel was ineffective for failing to adequately raise Clark's misconduct and the State's failure to inform the trial court of Clark's status with regard to the PTI program.

The Florida Supreme Court in its opinions found no issue with Clark's service on Willacy's jury, as it determined that he was not under prosecution during Willacy's trial and was therefore eligible to serve. *Willacy*, 967 So. 2d at 140; *Willacy*, 640 So. 2d at 1083.[5] Similarly, the federal district found that Willacy's claims were either without merit or procedurally barred, and that Clark was not under prosecution at the time of his service on the jury (Doc. 84 at 15-19, 21-22).

On appeal, the Eleventh Circuit granted a COA on the following two issues regarding Clark: 1) Whether the district court erred in denying Willacy's federal constitutional ineffective assistance of counsel claim with respect to trial counsel's failure to inquire during voir dire into juror Edward Clark's eligibility to serve as a juror; and 2) whether the district court erred in denying Willacy's claim that his federal constitutional right to a fair trial was violated when the State failed to inform the trial court of Clark's ineligibility to serve as a juror.

The Eleventh Circuit in its opinion relied on the Florida Supreme Court's finding that Clark was not under prosecution within the meaning of Florida law. *Willacy*, Case No. 14-13797 at 18. Citing to this Court's decision in *Estelle v. McGuire*, 502 U.S. 62 (1991), the Eleventh Circuit stated that it is not the

[5]In its direct appeal opinion, the Florida Supreme Court also found that during Willacy's trial, the State informed his counsel of Clark's status and his counsel voiced no objection. Thus, according to the court, Willacy waived this issue. *Willacy*, 640 So. 2d at 1083.

province of a federal habeas court to reexamine state court determinations on state law questions. *Willacy,* Case No. 14-13797 at 17. Thus, under *Estelle*, the Eleventh Circuit concluded that it could not disturb the Florida Supreme Court's determination. *Id*. at 18.

The Eleventh Circuit further noted in a footnote that while the Florida Supreme Court's determination did not necessarily foreclose any argument that Clark was biased, it foreclosed Willacy's claim for relief because he did not meaningfully argue in state or federal court that Clark was unconstitutionally biased notwithstanding his eligibility to serve. *Willacy,* Case No. 14-13797 at 19, fn 7. According to the Eleventh Circuit, "At best, Willacy made passing references to the notion of actual or implied bias, but even those references were tethered to Clark's alleged inability to serve as a juror as a matter of state law. This was insufficient to put the state courts and the district court on notice of any argument that Clark, despite being eligible, was a biased juror." *Id*. Thus, according to the Eleventh Circuit, "Indeed, for this reason, Willacy lacks a certificate of appealability, on any claim that Clark was biased notwithstanding his eligibility to serve." *Id.*

B. INEFFECTIVE ASSISTANCE OF COUNSEL

In addressing the issue of trial counsel's effectiveness at the resentencing, the Florida Supreme Court found neither deficient performance nor prejudice. According to the court, trial counsel conducted a reasonable investigation into Willacy's mental condition and family history, and he made a reasonable

strategic choice to forego the presentation of negative mitigation evidence. *Willacy*, 967 So. 2d at 143-44. The Florida Supreme Court further determined that prejudice had not been established on the basis that the mitigating evidence "would have been more likely harmful than helpful." *Id.* at 144 (citation omitted).

In addressing this issue during Willacy's federal habeas proceedings, the district court concluded that the Florida Supreme Court's evaluation of the performance and prejudice prongs of the *Strickland* standard was not objectively unreasonable (Doc. 84 at 46). Like the Florida Supreme Court, the district court determined that trial counsel made the case that Willacy's life was worth serving and that trial counsel conducted an extensive investigation (Doc. 84 at 43, 45-46). Moreover, similar to the Florida Supreme Court, the district court dismissed much of the mitigation presented during the postconviction hearing on the basis that a mental health defense would have opened the door to negative acts by Willacy as a child (Doc. 84 at 44). The district court also found that a defendant's drug addiction is often a two-edged sword that might alienate a jury (Doc. 84 at 44).

In its opinion affirming the district court's order, the Eleventh Circuit "assume[d] for present purposes that Willacy's trial counsel rendered deficient performance in failing to investigate and present a sufficient case in mitigation." *Willacy*, Case No. 14-13797 at 20. As to prejudice, the Eleventh Circuit concluded that "the Florida Supreme Court reasonably

determined that Willacy suffered no prejudice from his counsel's failure to present mitigation testimony regarding his history of physical abuse, substance abuse, and other mental health problems." *Id.* at 21. While recognizing that the physical abuse Willacy endured was "indisputably" mitigating, the Eleventh Circuit found that the mental health evidence "presented a double-edged sword that could have harmed Willacy's case for a life sentence as much or more than it would have helped." *Id*. The Eleventh Circuit found that evidence of an antisocial personality disorder as well as behavioral problems at school is damaging and looked disfavorably upon by jurors. *Id*. at 21-22. Moreover, citing to *Suggs v. McNeil*, 609 F.3d 1218 (11th Cir. 2010), the Eleventh Circuit stated that "evidence of drug and alcohol abuse, 'alone and in combination with the evidence that' a defendant was acutely intoxicated at the time of the murder 'could [cause] some jurors to vote in favor of death' by supplying the jury 'an independent basis for moral judgment.'" *Willacy,* Case No. 14-13797 at 22.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF WILLACY'S CLAIMS THAT HE WAS DENIED HIS RIGHT TO A FAIR TRIAL IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Willacy submits that this Court should grant certiorari to consider whether the Eleventh Circuit's determination was based on a flawed legal and factual analysis. In *Estelle v. McGuire*, 502 U.S. 62 (1991), this Court noted that "[i]n ruling that McGuire's due process rights were violated by the admission of

the evidence, the Court of Appeals relied in part on its conclusion that the evidence was 'incorrectly admitted . . . pursuant to California law.'" 502 U.S. at 67. However, while finding that such an inquiry is "no part of a federal court's habeas review of a state conviction", *id.*, this Court's analysis did not end there. Rather, this Court stated that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68 (citations omitted). This Court proceeded to consider whether "the admission of the evidence violated McGuire's federal constitutional rights." *Id.*

Willacy submits that here, as in *Estelle*, the issue also concerns a federal constitutional right, that of a fair and impartial jury. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) (Noting that "[o]ne touchstone of a fair trial is an impartial trier of fact"); *Smith v. Phillips*, 455 U.S. 209 (1982). Willacy was denied that right when Edward Clark, the jury foreman in Willacy's trial, shared the same prosecutor, Chris White, in his own proceedings. Indeed, Joseph Brand, a DOC employee who recommended Clark for the PTI program, was concerned of the possibility that Clark could be sitting on White's jury (R. 3569).[6] And, prosecutors White and Craig Rappel were likewise

[6]Brand found it necessary to alert White as to the issue (R. 3569).

concerned, as they felt it necessary to approach the defense and notify it of the situation (R. 3593).[7]

Morever, Willacy's right to a fair and impartial jury was impeded when Clark failed to answer honestly a material question when asked by jury clerk Lucille Rich whether he was under prosecution for any crime; and when Clark did not respond when asked by the prosecutor during the jury selection process if he had any "prior experience in the courtroom before in any capacity at all." (R. 621, 3539). Such omissions by Clark support a finding of juror bias, which deprived Willacy of his constitutional right to a fair trial. *See United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984) ("Goad's dishonesty, in and of itself, is a strong indication that he was not impartial.").

Contrary to the Eleventh Circuit's determination, Willacy's arguments were not limited to Clark's statutory eligibility pursuant to state law. Rather, they were also based on the notion that he was entitled to a fair jury pursuant to the federal constitution. Indeed, in his direct appeal brief, Willacy cited to and quoted from this Court's decision in *McDonough*. *See Willacy v. State*, Case No. 29, 217, Initial Brief of the Appellant at 33-35. Willacy also cited to the Eleventh Court's decisions in *Perkins*, *United States v. Casamayor,* 837 F.2d 1509

[7]White testified that he "approached one of them or both of them and said something along the lines of, You're not going to believe this, but I think that Mr. Clark on our jury may be in the PTI Program." (R. 3595).

(11th Cir. 1988), and *United States v. Bollinger*, 837 F.2d 436, 439 (11th Cir. 1988). *Id.* at 35-36.[8]

During his federal habeas proceedings, Willacy also relied on several federal cases in support of this issue. For instance, Willacy cited to *McDonough* (juror's failure to answer honestly a material question on voir dire); *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001)(same); and *Skaggs v. Otis Elevator Company*, 164 F.3d 511, 516 (10th Cir. 1998)(implied bias) (Doc. 70 at 2-3). And in his briefing before the Eleventh Circuit, Willacy cited to *McDonough*, *Carpa*, *Perkins*, and *Bollinger*. *Willacy*, Case No. 14-13797, Initial Brief of Petitioner-Appellant at 38, 43; Reply Brief of Petitioner-Appellant at 2.

Moreover, during his federal habeas proceedings and before the Eleventh Circuit, Willacy cited to trial counsel's testimony that he would never have wanted Clark to serve on Willacy's jury; that Clark was possibly the worst possible defense juror; and that somebody in his position, with pending charges, would be very likely to biased in favor of the State (Doc. 69 at 12-13); *Willacy*, Case No. 14-13797, Initial Brief of Petitioner-Appellant at 34-35. And in his summary of argument before the Eleventh Circuit, Willacy stated:

> 1. Trial counsel's failure to inquire during voir dire regarding juror Clark's status deprived Willacy of the effective assistance of counsel. Trial counsel testified during Willacy's postconviction evidentiary hearing that he considered the information he uncovered regarding Clark's pending felony charges to be significant, and that he would have moved to remove him

[8]Willacy noted in his direct appeal brief that these cases applied the *McDonough* standard in criminal contexts. *Id.* at 35.

> from the jury panel had he known of this information. Yet, as the trial court found, while counsel had an affirmative duty to discover any potential disqualification or challenge for cause of a prospective juror, counsel here made no inquiry of the prospective jurors, and particularly of Clark, concerning any pending prosecutions against them.

Willacy, Case No. 14-13797, Initial Brief of Petitioner-Appellant at 31.

Based on the foregoing, Willacy submits that he was denied his right to a fair and impartial jury as guaranteed by the Sixth Amendment to the United States Constitution. Certiorari review is warranted.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER WILLACY WAS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON HIS REMAINING CLAIMS CONCERNING THE DENIAL OF HIS RIGHT TO A FAIR TRIAL.

In the proceedings below, Willacy sought a COA on two additional related claims concerning juror Clark, 1) that the court erred in failing to grant a new trial when it was discovered that Clark was found to be ineligible to serve on the jury; and 2) that trial counsel was ineffective for failing to object and/or in allowing Clark to be seated on the jury.

In denying a COA on each of Willacy's issues, the district court stated that "Petitioner has failed to make a substantial showing of the denial of a constitutional right." (Doc. 84 at 70). Willacy subsequently sought a COA in the Eleventh Circuit as to five issues. While the Court granted a COA as to three of the issues, the extent of its analysis as to the two aforementioned issues was as follows: "The balance of [Willacy's] request for a COA is denied."

In *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000), this Court delineated the proper procedures for the issuance of a COA in federal habeas cases under the AEDPA. Thereafter, in *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003), this Court further elaborated:

> In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel, 529 U.S. 473, 481, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*. Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra, 529 U.S. at 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595*.

This Court then explained the manner in which a federal court should conduct a COA inquiry:

> The COA determination under *§ 2253(c)* **requires an overview of the claims in the habeas petition and a general assessment of their merits**. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean

> very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with *§ 2253* that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra, at 893, n. 4*.

Miller-El, 537 U.S. at 336-37 (emphasis added). Thereafter, this Court found error in the court of appeals' resolution of the COA:

> The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. **As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits**. *Slack, 529 U.S., at 481; Hohn, 524 U.S., at 241*. **The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved.** Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 342 (emphasis added).

The holding in *Miller-El* is pertinent to the circumstances of Willacy's case. Contrary to this Court's precedent, there is no indication that the Eleventh Circuit conducted a "threshold inquiry into the underlying merit[s]" of Willacy's claims. Indeed, it appears as though no "overview of the claims" nor "general assessment of their merits" was conducted. And, no analysis as to "whether the applicant had made a substantial showing of a denial of a constitutional right" was performed by the Eleventh Circuit. Further, the absence of a COA inquiry by

the Eleventh Circuit was compounded by the failure of the district court to provide any explanation or analysis for its denial of a COA as to these issues.[9]

Willacy submits that when a proper analysis is conducted, jurists of reason could find it debatable as to whether the court erred in failing to grant a new trial when it was discovered that juror Clark was found to be ineligible to serve on the jury. Likewise, jurists of reason could find that trial counsel's failure to object to Clark's service as a juror fell outside the range of reasonable professional assistance. If the State truly informed the defense of Clark's criminal status and the defense waived any cause challenge, Willacy's constitutional rights were violated as it clearly cannot be strategy to let the "worst possible defense juror" sit on Willacy's jury.

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S.Ct. 759, 773 (2017)(citation omitted). Under the appropriate standard, Willacy's issues are deserving of a COA. Certiorari review is warranted.

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[9]Rule 22(b), F.R.A.P., provides in pertinent part:

> If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.

III. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF WILLACY'S PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Willacy submits that this Court should grant certiorari to consider whether the Eleventh Circuit's analysis, like that of the Florida Supreme Court, is in direct conflict with this Court's precedent. In *Porter v. McCollum*, 130 S.Ct. 447, 454 (2009), this Court addressed the Florida Supreme Court's failure to properly apply the appropriate standard as to constitutional ineffective assistance of counsel. This Court was particularly critical of the state court's application of the controlling standard used to measure a claim of penalty phase ineffective assistance of counsel. This Court determined that "[t]he Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing." *Porter*, 130 S.Ct. at 454. For example, this Court determined that the state court unreasonably discounted to irrelevance the evidence of Porter's abusive childhood, and it also unreasonably concluded that Porter's military service would be reduced to inconsequential proportions "simply because the jury would also have learned that Porter went AWOL on more than one occasion." *Id.*

Willacy submits that here, as in *Porter*, the Eleventh Circuit (and the Florida Supreme Court) unreasonably applied the controlling standards. They either did not consider or unreasonably discounted much of the mitigation set forth by Willacy at the postconviction evidentiary hearing. Indeed, in its

opinion, the Eleventh Circuit dismissed evidence it recognized as mitigating on the basis of perceived negative information that the jury would also have heard. This supposedly negative evidence, which the Eleventh Circuit deemed to constitute a double edged sword and which could cause some jurors to vote in favor of death, included an antisocial personality disorder, behavioral problems at school, drug and alcohol abuse, and Willacy's intoxication at the time of the offense.

Contrary to the Eleventh Circuit's analysis, both the Florida Supreme Court and this Court have recognized that an antisocial personality disorder constitutes a mitigating factor. *See Morton v. State*, 789 So. 2d 324, 329-330 (Fla. 2001) ("Both the United States Supreme Court and this Court have determined that a defendant's antisocial personality disorder is a valid mitigating circumstance for trial courts to consider and weigh. See *Eddings v. Oklahoma, 455 U.S. 104, 107, 115, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); Robinson v. State, 761 So. 2d 269, 273 (Fla. 1999)*, cert. denied, *529 U.S. 1057, 146 L. Ed. 2d 466, 120 S. Ct. 1563 (2000); Snipes v. State, 733 So. 2d 1000, 1003 (Fla. 1999); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1998); Wuornos v. State, 676 So. 2d 966, 968, 971 (Fla. 1995).*").

Moreover, ignored by the Eleventh Circuit is the fact that the finding of an antisocial personality disorder by the defense expert, Dr. Riebsame, is consistent with Willacy's theory of mitigation and does not impeach or diminish the evidence - indeed it supports it. *See Porter*, 130 S.Ct. at 455. At Willacy's postconviction evidentiary hearing, Dr. Riebsame explained that

there exists a significant correlation between adult males diagnosed with antisocial personality disorder having a history of chronic and severe physical abuse (PCR. 1271). Indeed, even the State's expert, Dr. Danziger, acknowledged the correlation between excessive abuse and antisocial personality: "What I will note while that in and of itself may not be sufficient, one of the things we do see with conduct disorder and antisocial personality is that one of the risk factors is inconsistent, capricious, harsh discipline and abuse." (PCR. 1528).

Similarly, in rejecting the mitigating value of Willacy's drug addiction and intoxication at the time of the crime, the Eleventh Circuit overlooked the fact that Willacy's drug use was entirely consistent with his theory of mitigation. Dr. Riebsame testified that Willacy's crack cocaine intoxication in conjunction with other mental issues formed the basis for not only non-statutory mitigating circumstances, but also the statutory mitigating factor that Willacy suffered from an extreme mental or emotional disturbance at the time of the crime (PCR. 1189).

Further misunderstood by the Eleventh Circuit in its opinion is the fact that under Florida law, only the enumerated statutory aggravating factors may be considered in imposing the death penalty. Fla.Stat. § 921.141. *See also Profitt v. Wainwright,* 685 F.2d 1227, 1266-67 (11th Cir. 1982), *modified on other grounds,* 706 F.2d 311 (11th Cir. 1983). Thus, contrary to the Eleventh Circuit's opinion, had the judge or jury voted for death on the basis of Willacy's drug abuse and intoxication at the time of the

crime, this would have violated the Eighth Amendment and prevented the constitutionally required narrowing of the sentencer's discretion. *See Stringer v. Black*, 112 S.Ct. 1130 (1992); *Maynard v. Cartwright*, 108 S.Ct. 1853, 1858 (1988).

Willacy submits that when a proper analysis of prejudice under *Strickland* is conducted, there is a reasonable probability that he "would have received a different sentence after a constitutionally sufficient mitigation investigation." *Sears v. Upton*, 130 S.Ct. 3529, 3267 (2010). Certiorari review is warranted.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Lisa Marie Lerner, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on this 15th day of February, 2018.

/s/. Linda McDermott
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