NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2017-2018 TERM

HARRY AUSTIN

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED THE DENIAL OF AUSTIN'S PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY BY THE DISTRICT COURT WHERE AUSTIN RAISED SUFFICIENT ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

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   (June 8, 2018)

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TABLE OF AUTHORITIES (CONTINUED)

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**PETITION FOR WRIT OF CERTIORARI
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_____

The Petitioner, HARRY AUSTIN (hereinafter "AUSTIN"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on April 6, 2018.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's denial of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody. *United States of America v. Harry Austin*, on April 6, 2018. *Appendix 1*.

JURISDICTION

The opinion of the Eleventh Circuit Court of Appeals affirming affirming the District Court's denial of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody. was entered on April 6, 2018. The Eleventh Circuit Court of Appeals entered its Order Denying AUSTIN'S Petition for Rehearing and Petition for Rehearing *En Banc* on June 8, 2018. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;

nor shall any person … be deprived of life, liberty, or property, without due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

A jury found AUSTIN guilty of burglary of a dwelling, grand theft, possession of cocaine, possession of drug paraphernalia and resisting an officer without violence. On April 17, 2009, the Seventeenth Judicial Circuit entered its judgment and sentenced AUSTIN to thirty (30) years incarceration. AUSTIN appealed his conviction and the Fourth District Court of Appeal reversed the judgment because it found that the Trial Court forced AUSTIN to defend himself without conducting a proper inquiry under *Faretta v. California*, 422 U.S. 806(1975). Accordingly, the Fourth District Court of Appeal remanded the matter for a new trial. *Austin v. State*, 995 So.2d 1174 (Fla. 4th DCA 2008).

AUSTIN again went to trial and the jury found him again guilty on April 17, 2009, of burglary of a dwelling (Count I); third degree grand theft (Count II);

possession of cocaine (Count III); possession of drug paraphernalia (Count IV); and resisting an officer without violence (Count V). AUSTIN was again sentenced to a concurrent sentence as a habitual felony offender to thirty (30) years incarceration, with a fifteen (15) year minimum mandatory sentence as a prison release offender as to Count I; to ten (10) years as to Count II for being a habitual felony offender; and five (5) years as to Count III. He received time served as to Counts IV and V (DE:10).

AUSTIN appealed the Judgment to the Fourth District Court of Appeals and on June 8, 2011, the Fourth District Court affirmed in part and reversed in part. AUSTIN'S conviction as to Count II was reversed and the matter remanded for judgment and resentencing on the lesser included offense of Petit Theft. *Austin v. State*, 64 So.3d 139 (Fla. 4th DCA 2011).

As a result of the above, AUSTIN filed his timely Motion for Postconviction Relief Rule 3.850, alleging Ineffective Assistance of Counsel. Said Motion was amended on December 20, 2011. The Trial Court for the Seventeenth Judicial Circuit summarily denied AUSTIN'S Motion for Postconviction Relief Rule 3.850, on May 24, 2012. AUSTIN filed his Petition for Rehearing; which was denied on June 12, 2012.

AUSTIN appealed the denial of his Motion for Postconviction Relief Rule 3.850. The Fourth District Court of Appeal, *per curiam*, affirmed the summary

denial of AUSTIN'S Motion for Postconviction Relief Rule 3.850. *Austin v. State*, 145 So.3d 106 (Fla. 4th DCA 2012). The Mandate issued on August 16, 2013.

On August 7, 2013, AUSTIN filed a second Motion for Postconviction Relief Rule 3.850. The Seventeenth Judicial Circuit summarily denied AUSTIN'S Motion for Postconviction Relief Rule 3.850 on May 30, 2014. AUSTIN again appealed said denial. The Fourth District Court of Appeals, *per curiam*, affirmed the denial of AUSTIN'S Second Motion for Postconviction Relief. *Austin v. State*, 158 So.3d 595 (Fla. 4th DCA 2015). The Mandate issued on April 6, 2015.

On or about June 15, 2015, AUSTIN timely filed his Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody. (DE-cv:1).

On May 2, 2016, the Magistrate for the District Court of the Southern District of Florida, summarily denied AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody. (DE-cv:13). AUSTIN filed his Objection to Magistrate Judge's Recommendations on May 20, 2016. (DE-cv:14).

On June 1, 2016, the District Court for the Southern District of Florida adopted the Report and Recommendation of the Magistrate Judge and denied AUSTIN'S Objection, denied AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody, and denied AUSTIN'S Certificate of Appealability. (DE-cv:16).

AUSTIN filed his timely Notice of Appeal on June 10, 2016. (DE-cv:19). The Eleventh Circuit granted AUSTIN a Certificate of Appealability on only one issue, to wit: "Whether the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when it denied [Petitioner's] claim that his trial counsel rendered ineffective assistance by failing to object on Confrontation Clause grounds to Officer McCoy's testimony concerning a deceased witnesses description and identification of the robber."

The Eleventh Circuit affirmed the District Court's denial of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody on April 6, 2018. The Eleventh Circuit, in affirming the denial by the District Court of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody, found that because AUSTIN'S Trial Counsel did not specifically object to Officer McCoy's testimony as being in violation of the Confrontation Clause, that same was deficient performance, but that said deficient performance did not prejudice AUSTIN and therefore "[b]ecause the state court had a reasonable basis to conclude that Petitioner [AUSTIN] had not shown prejudice, the state court's rejection of Petitioner's ineffective assistance of counsel claim was not contrary to, an unreasonable application of *Strickland*". The Eleventh Circuit in reaching said finding also reasoned that because of the other evidence introduced at trial, that the likelihood of a different outcome would not have been substantial.

AUSTIN'S Petition for Rehearing and Rehearing *En Banc* was denied by the Eleventh Circuit on June 8, 2018.

A. The Denial Of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody By The District Court Should Not Have Been Affirmed By The Eleventh Circuit Where AUSTIN Raised Sufficient Allegations Of Ineffective Assistance Of Counsel Which Violated His Fifth And Sixth Amendment Rights.

"A claim of ineffective assistance of counsel requires a showing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. The … standard of review is highly deferential." *Huynh v. King*, 95 F.3d 1052, 1056 (11th Cir. 1996); *see also, Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2064, 2065 (1984). The District Court erred in denying AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody where AUSTIN raised sufficient allegations of ineffective assistance of counsel which violated his Fifth and Sixth Amendment rights.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED THE DENIAL OF AUSTIN'S PETITION UNDER 28 U.S.C. §2254 FOR WRIT OF

HABEAS CORPUS BY A PERSON IN STATE CUSTODY BY THE DISTRICT COURT WHERE AUSTIN RAISED SUFFICIENT ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH VIOLATED HIS FIFTH AND SIXTH AMENDMENT RIGHTS.

In denying AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody, the Eleventh Circuit found that because AUSTIN'S Trial Counsel did not specifically object to Officer McCoy's testimony as being in violation of the Confrontation Clause, that same was deficient performance, but that said deficient performance did not prejudice AUSTIN and therefore "[b]ecause the state court had a reasonable basis to conclude that Petitioner [AUSTIN] had not shown prejudice, the state court's rejection of Petitioner's ineffective assistance of counsel claim was not contrary to, an unreasonable application of *Strickland*". The Eleventh Circuit in reaching said finding also reasoned that because of the other evidence introduced at trial, that the likelihood of a different outcome would not have been substantial. The Eleventh Circuit erred in affirming the denial and in order to assure that AUSTIN'S constitutional right to effective assistance of counsel is protected, this Court must grant his Petition for Writ of Certiorari.

"A state court's decision is contrary to clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the [Supreme] Court on a question of law' or 'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at' an opposite result." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495 (2000). Further, a State Court unreasonably applies federal law when it "'identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular ... case'", or "'unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply". *Williams v. Taylor*, 529 U.S. at 407. Stated differently, to obtain federal habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement". *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786-87 (2011).

A State Court's decision will be found to have been an "unreasonable application" of the Supreme Court's precedent if "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000)

(*quoting Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495 (2000)). In other words, the State Court's decision must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166 (2003). Based on the above, AUSTIN must establish that the state court's application of *Strickland* was unreasonable under 28 U.S.C. §2254(d); basically "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1323 (11th Cir. 2013). AUSTIN clearly established that the state court's application of *Strickland* was unreasonable under 28 U.S.C. §2254(d) and as such, the Eleventh Circuit should not have affirmed the denial of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody by the District Court. Therefore, because the denial by the District Court of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody was affirmed, AUSTIN'S Petition for Writ of Certiorari must be granted.

AUSTIN argues that the Eleventh Circuit failed to take into account that the "overwhelming evidence" that the State Court and the Eleventh Circuit, itself, relies upon, was obtained as a result of the statement given to Officer McCoy by Joshua Saks, who was deceased at the time of the trial and therefore, unable to testify and be cross examined by AUSTIN. Therefore, AUSTIN was denied the ability to question Joshua Saks about the identity he gave to Officer McCoy and the actual

information given to the Officer by Joshua Saks. Joshua Saks, who gave the Officer the information which was included in the BOLO wherein AUSTIN was named as the suspect, died prior to the trial. As a result of his death, AUSTIN was unable to cross examine him. And, without the statement in question, the other evidence would not have been obtained. Accordingly, the basis for the denial by the District Court of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody, i.e., the "overwhelming evidence" and the affirming of said denial by the Eleventh Circuit for the same reason was clearly erroneous. *See Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir. 1996).

It is quite clear that the "overwhelming evidence" against AUSTIN was obtained from a deceased witness, whom AUSTIN never crossed examined. Because Trial Counsel did not object to the fact that all of the evidence introduced at the trial was based upon the statement given my Joshua Saks, her representation of AUSTIN was defective. And because of this, the State was allowed to introduce all the other evidence that led to AUSTIN'S conviction. Therefore, it is quite clear, that had Trial Counsel properly objected, that none of the other evidence could have been introduced and therefore there clearly would have been a totally different outcome. After all, without the BOLO description -given by Joshua Saks to the Officer, Officer McCoy would never had looked for AUSTIN in the first place.

In reviewing the questionable testimony, it is clear that when Officer McCoy asked Mr. Saks to identify a person in custody "[a]s the person that was in his home" and that that was "the person he gave you a description of" and then Officer McCoy identified AUSTIN as the person that Mr. Saks described as the person who was in his home – that Officer McCoy's testimony about what Mr. Saks told him when they had AUSTIN in custody was "testimonial in nature" and not just "identification". *Davis v. Washington,* 547 U.S. 813 (2006). After all, the statement was not from a line up and there was no one else around when the alleged "identification" was made. Therefore, said testimony was hearsay because it was "testimonial in nature" and was admitted in violation of AUSTIN'S right of confrontation. AUSTIN was unable to confront him and confirm his statements to Officer McCoy. AUSTIN was denied an opportunity to cross-examine him in violation of the Sixth Amendment of the United States Constitution. *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *see also, Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006) (for testimonial hearsay to be admissible, two criteria must be satisfied: (1) the declarant must be unavailable to testify at trial and (2) the defendant must have had a prior opportunity to cross-examine the declarant). The District Court in denying AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Court, failed to consider the fact that said out of court statement was the sole basis of the BOLO being issued and was the only actual evidence

supporting the charges against AUSTIN. The Eleventh Circuit in affirming the denial of AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Court also failed to take into account that the "overwhelming evidence" was obtained as a result of the statement made by a deceased person. Again, Mr. Saks statement to Officer McCoy was the only basis that led to the other evidence introduced at the trial and Mr. Saks' statement was the only evidence that positively identified AUSTIN as the perpetrator. Based upon the arguments made by AUSTIN, the Eleventh Circuit affirming the denial by the State Court of AUSTIN'S claim that he was denied his constitutional right of confrontation and that said denial "was neither contrary to nor an unreasonable application of controlling federal constitutional principles" is not supported by the facts or legal argument. Accordingly, AUSTIN has shown that the state courts' denial of his claims, was contrary to, or the product of an unreasonable application of clearly established federal law and therefore the District Court and the Eleventh Circuit should have found that "the state court's determination under the *Strickland* standard "was unreasonable'. . ." *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411 (2009). As such, AUSTIN has met the burden of demonstrating that his Trial Counsel's performance was deficient and that said deficient performance prejudiced AUSTIN. Because AUSTIN was denied the right to cross examine Joshua Saks and Trial Counsel did not pursue that issue by properly objecting, AUSTIN was

prejudiced because he was convicted in violation of his constitutional rights. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974). Based on the above, AUSTIN was entitled to relief from the District Court and the fact that the Eleventh Circuit affirmed the District Court's denial of AUSTIN'S Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Court, clearly denied AUSTIN the relief he was entitled to. Because of the above, AUSTIN'S Petition for Writ of Certiorari must be granted in order to assure that AUSTIN'S constitutional right to effective assistance of counsel is upheld.

CONCLUSION

This Court should explicitly adopt AUSTIN'S position based upon law and equity. The upholding of the denial of by the Eleventh Circuit of AUSTIN'S Petition Under 28 U.S.C. §2254 For Writ Of Habeas Corpus By A Person In State Custody seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally*, *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, HARRY AUSTIN, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17 day of July, 2018, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/David J. Joffe
DAVID J. JOFFE, ESQUIRE