No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DEREK W. PELTO,
Petitioner,

v.

JULIE L. JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his counsel rendered ineffective assistance of counsel by misapprehending a change of law as to the burden of proof for an insanity defense, which resulted in defense counsel interfering with the Petitioner's right to testify.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, DEREK W. PELTO, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on January 5, 2018 (A-3) [1] (reconsideration/rehearing denied on March 12, 2018). (A-4).

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

G. STATEMENT OF THE CASE

In 2003, the Petitioner was charged in Florida with first-degree murder. The

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

case proceeded to trial in 2005. The Petitioner's defense at trial was insanity. However, the record is clear that the Petitioner's defense counsel thought (incorrectly) – up until the point of the charge conference (which was after the defense had rested) – that the state trial court would instruct the jury, consistent with the standard jury instruction, that *the prosecution* had the burden of proving sanity beyond a reasonable doubt.[2] Defense counsel failed to realize that before the incident in this case, the Florida Legislature changed the insanity law to place the burden of proving insanity on *the defendant* by clear and convincing evidence, and defense counsel failed to comprehend that the state trial court was required to give an instruction consistent with the current law (regardless of whether it was contrary to the standard jury instruction). The claim in this case focuses on defense counsel's misunderstanding regarding the insanity burden in the Petitioner's case – a misunderstanding that resulted in a violation of the Petitioner's constitutional right to testify on his own behalf at trial.

At the conclusion of the trial, the jury found the Petitioner guilty of the lesser offense of second-degree murder. The state trial court sentenced the Petitioner to life imprisonment. On direct appeal, the Florida Fifth District Court of Appeal affirmed the Petitioner's conviction and sentence. *See Pelto v. State*, 949 So. 2d 241 (Fla. 5th DCA 2007).

The Petitioner subsequently filed a state postconviction motion pursuant to

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[2] The instant case was the first case where defense counsel had presented an insanity defense.

Florida Rule of Criminal Procedure 3.850. Following an evidentiary hearing, the state postconviction court denied the Petitioner's rule 3.850 motion. The Petitioner appealed the state postconviction court's denial of his rule 3.850 motion and the Florida Fifth District Court of Appeal affirmed the denial of the Petitioner's rule 3.850 motion without any explanation. *See Pelto v. State*, 155 So. 3d 364 (Fla. 5th DCA 2014).

Thereafter, the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. The Petitioner raised several claims in the petition – one of which is the focus of the instant petition: defense counsel misapprehended a change of law as to the burden of proof for an insanity defense (and, as a result, defense counsel interfered with the Petitioner's right to testify because he misadvised the Petitioner as to the burden of proof for the insanity defense).[3] The district court subsequently denied the Petitioner's § 2254 petition. (A-6).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit. On January 5, 2018, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim. (A-3).

[3] This claim was previously raised in the Petitioner's state postconviction motion.

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claim. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In his § 2254 petition, the Petitioner alleged that in preparing for trial, defense counsel misapprehended a change in the law relating to the insanity defense, and specifically – which party has the burden of proof regarding this affirmative defense. As a result of defense counsel's ineffectiveness/misunderstanding of the law, the Petitioner was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the Constitution (and but for counsel's ineffectiveness, the result of the proceeding would have been different). The Petitioner explained that prior to the trial in this case, defense counsel repeatedly told him and his parents that the only viable defense in this case was insanity. Defense counsel also told the Petitioner and his parents that all the defense had to do was to raise a reasonable doubt about insanity, and then *the prosecution* would have the burden to prove beyond a reasonable doubt that the Petitioner was sane.

The Petitioner's claim is supported by the record in this case. At the conclusion of the trial, during the charge conference, defense counsel requested the state trial court to give the standard jury instruction on insanity, which stated that the prosecution had the burden to prove beyond a reasonable doubt that the defendant was

sane. The prosecutor responded and explained that prior to the alleged offense in this case, the Florida Legislature had changed the burden of proof and, pursuant to the change, the defendant was required to prove insanity by clear and convincing evidence. Defense counsel replied that even though the Florida Legislature may have changed the law regarding insanity, the state trial court should nevertheless give the standard jury instruction, arguing that the standard jury instruction controlled until the Florida Supreme Court adopted a new instruction. The state trial court agreed with the prosecutor and ultimately gave an instruction consistent with the legislative change (i.e., the state trial court instructed the jury that the Petitioner had the burden of proving insanity by clear and convincing evidence). On direct appeal, the Florida appellate court *per curiam* affirmed the Petitioner's conviction, thereby rejecting defense counsel's claim that the clear and convincing instruction was improper because the Florida Supreme Court had not adopted the instruction at the time of the Petitioner's trial.

The Petitioner's claim is further supported by the transcript of the state court postconviction evidentiary hearing. Despite the Florida appellate court's ruling on direct appeal, during the state court postconviction evidentiary hearing, defense counsel testified that "I think the judge was completely wrong in the jury instructions that she gave in the case." (A-19). Defense counsel added:

> The jury instruction that was in place at the time was the jury instruction that I anticipated the court would give. Why? Because the Florida Supreme Court says so. When we got towards the end of the trial, the ju[dge] said no, she's going to give a special jury instruction that she understood was being considered by the court. I did not know until

> immediately later that she was on the committee dealing with that but the fact of the matter is, the Florida Supreme Court did not approve that new and different jury instruction for about a year and a half after this case was over. So I was supposed to anticipate what the Supreme Court was going to do with a ruling a year and a half in the future, which they did.

(A-20). Defense counsel admitted that his "defense strategy was to create a reasonable doubt – in the mind of the jurors . . . ." (A-21).

The incident in this case occurred on March 29, 2003. In 2000, the Florida Legislature enacted section 775.027, Florida Statutes, which became law on June 19, 2000. Section 775.027 provides that the "defendant has the burden of proving the defense of insanity by clear and convincing evidence." § 775.027(2), Fla. Stat. Florida law is clear that a trial court is required to instruct the jury consistent with current law – even if such an instruction would be contrary to the standard jury instruction. *See Dowling v. State*, 723 So. 2d 307, 309 (Fla. 4th DCA 1998) ("No such error occurred here, despite the court's deviation from the standard jury instruction. Our supreme court has often emphasized that their approval of standard jury instructions does not relieve the trial judge of his or her responsibility to properly and correctly charge the jury in each case.") (citations omitted).

Clearly defense counsel should have been aware of section 775.027 and its impact on the presentation of the insanity defense – a change that took place nearly *three years* prior to the incident in the Petitioner's case and nearly *five years* before the trial. Additionally, defense counsel should have been aware that when there is a conflict between current law and a standard jury instruction, the court is required to

give an instruction that reflects current law. Based on the record in this case – both the trial transcripts and defense counsel's testimony during the state court postconviction evidentiary hearing – it is clear that defense counsel was *not aware* that the state trial court in this case was required to instruct the jury that the Petitioner would have the burden of proof for the insanity defense.

In *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008), the federal appellate court explained that "[t]actical or strategic decisions based on a misunderstanding of the law are unreasonable." (Citation omitted). Pursuant to *Lawhorn*, counsel was ineffective for misunderstanding the state of the law at the time of the Petitioner's trial and for failing to properly advise the Petitioner regarding the law.[4]

The Petitioner was prejudiced by defense counsel's misunderstanding of the law because defense counsel's misunderstanding resulted in defense counsel interfering with the Petitioner's right to testify (i.e., defense counsel told the Petitioner that *the*

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[4] During the state court postconviction evidentiary hearing, defense counsel claimed that the change in burden did not affect the way he tried the case. The Petitioner submits that defense counsel's statement was nothing more than a *post hoc* justification for his actions. Notably, during the state court postconviction evidentiary hearing, defense counsel admitted that his "defense strategy was to create a reasonable doubt – in the mind of the jurors . . . ." – a strategy that *fell short* of *proving* insanity by "clear and convincing" evidence. (A-21). Moreover, during the state court postconviction evidentiary hearing, defense counsel acknowledged that at trial, when asserting that the standard jury instruction should be given, defense counsel told the state trial court that "we prepared in this fashion and it *would be prejudicial to the Defense*" to not give the standard jury instruction. (A-22) (emphasis added). Finally, as explained in this petition, the question of whether defense counsel's strategy would have changed had he possessed a correct understanding of the burden of proof pales in comparison to the question of whether *the Petitioner's decision* to forego or exercise his constitutional right to testify would have changed had he been properly advised regarding which party had the burden of proof.

prosecution would have the burden to prove beyond a reasonable doubt that the Petitioner was sane, when, in fact, a correct statement of the law was that the Petitioner had the burden to prove insanity by clear and convincing evidence).

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court recognized that a criminal defendant has a constitutional right to testify on his own behalf at trial. The Court declared that the right "is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The Court held that the right is derived from several constitutional provisions, including the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, the Sixth Amendment right to self-representation, and as a corollary to the Fifth Amendment privilege against self-incrimination. The Court acknowledged that "[o]n numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental right." *Rock*, 483 U.S. at 51 n.10.

In *Harris v. New York*, 401 U.S. 222, 225 (1971), this Court explained that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson*

v. Zerbst, 304 U.S. 458, 464 (1938).

Thus, a criminal defendant cannot properly weigh the option of foregoing this "fundamental" constitutional right unless the defendant is properly advised as to the burden of proof (and without understanding the burden of proof regarding the insanity defense, there was no way that defense counsel could properly advise the Petitioner as to whether he should testify during the trial). During the state court postconviction evidentiary hearing, the Petitioner explained that defense counsel specifically told him that the burden was on the prosecution to prove sanity beyond a reasonable doubt. In fact, the Petitioner explained that the question of the burden of proof came up during the trial and defense counsel advised the Petitioner that the state trial court could *not* give the "clear and convincing evidence" insanity instruction. The Petitioner explained that he told defense counsel that he wanted to testify as the Petitioner felt the only chance there was to meet the clear and convincing burden of proof was for him to get up there and tell the jury what happened, but defense counsel was adamant that the Petitioner refrain from testifying. Defense counsel told the Petitioner he does not need to testify because the defense need only raise a reasonable doubt and that the prosecution could not prove the Petitioner was sane beyond a reasonable doubt. Pursuant to these facts, it is clear that defense counsel interfered with the Petitioner's fundamental constitutional right to testify. In light of defense counsel's actions, the Petitioner's waiver of his fundamental right to testify was *not* knowing, voluntary, and intelligent. Had the Petitioner been properly informed that the defense carried the burden of proof regarding the insanity defense, the Petitioner would have exercised his

constitutional right to testify.[5] In support of his argument, the Petitioner relies on *Everhart v. State*, 773 So. 2d 78 (Fla. 2d DCA 2000). In *Everhart*, the Florida appellate court explained that misadvice relating to the defendant's right to testify at trial results in prejudice if the defendant's testimony would have been relevant to resolve a disputed issue at trial:

> Everhart alleges that counsel interfered with his right to testify by erroneously informing him that if he testified, the jury would automatically be told of the specific nature of his prior convictions. If counsel told him this, it would be an incorrect statement of the law, *see Britton v. State*, 604 So. 2d 1288 (Fla. 2d DCA 1992), and would constitute deficient performance by counsel sufficient to require relief, *provided that Everhart can show that he was prejudiced. See Jackson v. State*, 700 So. 2d 14 (Fla. 2d DCA 1997).
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> *Everhart goes on to allege that, but for this incorrect advice, he would have testified. He asserts that he would have told the jury that he did have permission to enter the apartment, that the officer mischaracterized his statement, and that he told the officer that Ford had asked him not to come back to the apartment until the following day, which was when the burglary occurred. Based on the record before us, it appears that the issue of whether Everhart had consent to enter the apartment was disputed and that the resolution of it turned on a credibility determination. Under these circumstances, we believe that Everhart has adequately shown prejudice.*

Everhart, 773 So. 2d at 79 (emphasis added). *See also Hicks v. State*, 666 So. 2d 1021

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[5] Had the Petitioner testified, the jury would have been able to assess his credibility and veracity first hand. The facts of this case caused the Petitioner's testimony to be paramount. Giving the jury the opportunity to assess the Petitioner's credibility and veracity first hand was extremely important because if the jury did not believe the Petitioner and his version of the events, then all of the expert testimony defense counsel presented at trial was totally irrelevant. The missed opportunity for the jury to assess the Petitioner's credibility and veracity first hand is the prejudice the Petitioner suffered when defense counsel misadvised the Petitioner regarding the burden of proof for the insanity defense.

(Fla. 4th DCA 1996).[6] Pursuant to *Everhart* and *Hicks*, in the instant case, defense counsel was ineffective by depriving the Petitioner of his right to testify on his own behalf.[7]

In the district court's order,[8] the district court concluded that the Petitioner was not prejudiced as a result of defense counsel's ineffectiveness because "Dr. Gutman and Dr. Danziger testified about what Petitioner told them occurred during the incident." (A-12). Contrary to the district court's conclusion, the doctors' testimony of the Petitioner's version of events was very short – amounting to only a couple of pages – *and the doctors did not discuss the Petitioner's state of mind (i.e., that he was in fear of being killed).*[9] The Petitioner's's full version of events was *not* introduced in the trial.

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[6] Although the Florida appellate court did not decide the issue in *Hicks*, the court "recognize[d] that some cases have held that no prejudice need be shown when the defendant's right to testify has been abridged in any way." *Hicks*, 666 So. 2d at 1023.

[7] *See also Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (explaining that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" which would cause a waiver to be involuntary).

[8] In its order, the district repeatedly noted that the Petitioner's defense counsel was an "experienced criminal defense lawyer." (A-6). In *Chandler v. United States*, 218 F.3d 1305, 1316 n.18 (11th Cir. 2000) (*en banc*), the federal appellate court put "experience" in its proper place:

> We accept that even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, *United States v. Cronic*, 466 U.S. 648 (1984) (inexperienced does not mean ineffective), so we recognize that an experienced lawyer may, on occasion, act incompetently. . . .

[9] Notably, during the state court postconviction evidentiary hearing, defense counsel stated that Dr. Gutman conducted a videotape interview of the Petitioner and

At the state court postconviction evidentiary hearing, the Petitioner testified as to what he would have testified at trial. Had he testified at trial, the Petitioner would have explained the sequence of events and he would have described how the alleged victim attacked him (thereby refuting the State's theory in this case that the Petitioner killed the alleged victim and then self-inflicted his two head wounds and all of the cuts/lacerations on his body).[10] The Petitioner's testimony also would have refuted the trial testimony of Sharon Ballou – the prosecution's blood spatter expert. Thus, the Petitioner's testimony not only would have supported the insanity defense, but his testimony would have disproved the State's murder allegation.[11]

In essence, the district court concluded that had the Petitioner testified at trial,

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that the Petitioner's version of events would be introduced at trial pursuant to the videotape – which defense counsel stated was a "couple hours long." However, contrary to defense counsel's testimony, the videotape of Dr. Gutman's interview of the Petitioner was *not* introduced during the trial.

[10] Although the alleged victim was hit with a hammer, the Petitioner was hit in the head – *twice* – with the hammer, and he was attacked with two knives and suffered cuts on his whole body, including his hands, arms, legs, and chest. The long laceration on his arm was so deep and bloody that the hospital was required to use staples to close it.

[11] The district court's order references the blood at the scene and the number of blows that were allegedly inflicted in this case. (A-14). Regardless of the blood and number of blows, the Petitioner's testimony at trial would have established a reasonable probability that his state of mind at the time of the incident was *not one of a depraved mind* (required to support a conviction for second-degree murder) but rather was one of *fear*, and therefore would have resulted in either not guilty by reason of insanity verdict or, at worst, a guilty verdict for the lesser offense of manslaughter (i.e., the Petitioner was charged with first-degree murder, but the jury acquitted him of this charge and found him guilty of the lesser offense of second-degree murder, and but for counsel's ineffectiveness in this case, it is likely that the jury would have returned a verdict of either not guilty or manslaughter).

his testimony would have been cumulative to the testimony that was presented by defense counsel. As explained above, this assertion is incorrect because the Petitioner's testimony would have (1) explained the sequence of events (i.e., he would have described how the alleged victim attacked him[12]); (2) rebutted the prosecution's theory that he killed the alleged victim and then self-inflicted his head wounds; and (3) refuted the trial testimony of Ms. Ballou. Moreover, courts have rejected the assertion that a criminal defendant's testimony can be cumulative to other testimony. In *Riggins v. State*, 168 So. 3d 322 (Fla. 2d DCA 2015), the Florida appellate court explained that a criminal defendant's trial testimony has a different "impact" on the jury than the testimony of other witnesses:

> Turning to the postconviction court's alternate basis for denial – that Riggins was not prejudiced because his testimony would have been cumulative – we must disagree for two reasons. First, regardless of whether a defendant has presented other evidence in support of his theory of defense, the defendant has the absolute right to testify in his own defense. The trial court simply cannot preclude the defendant from exercising his right to testify on the grounds that any such testimony would be cumulative. Therefore, this rationale cannot support the postconviction court's ruling.
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> *Second, a defendant's testimony cannot be "cumulative" because the impact of a defendant's own testimony is qualitatively different from the testimony of any other witness* – even a witness as aligned with the defendant as his girlfriend. *In the minds of the jurors, the defendant's testimony would not be "cumulative" of that of any other witness. Cf. Solorzano v. State*, 25 So. 3d 19, 25 (Fla. 2d DCA 2009) (noting that it may be error to exclude otherwise cumulative evidence when the evidence is offered from a source that "'differ[s] in quality and substance' from that of the other witnesses" (quoting *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987))). While the trial court may have discretion to limit the number of

[12] The Petitioner's testimony would have established that he was in fear of losing his life after being cut with a knife and hit in the head with a hammer (twice).

> other witnesses a defendant may call to present cumulative evidence, the defendant's own testimony simply is not "cumulative" to that of any other witness *because of its different effect on the jury*. Therefore, this rationale cannot be the basis for denying postconviction relief.

Riggins, 168 So. 3d at 325 (emphasis added). Pursuant to *Riggins*, the "impact" of the Petitioner's own testimony "would have been qualitatively different" from the testimony of these other witnesses and his testimony would have had a "different effect on the jury." The Petitioner's testimony was necessary to establish the insanity defense in this case because it was necessary for the jury to believe the Petitioner's version of events in order to establish the insanity defense. And because – contrary to defense counsel's understanding – the *defense* carried the burden of proof regarding the insanity defense, there was, in essence, no defense at all in this case without the Petitioner's testimony.[13]

For all of these reasons, the Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The

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[13] In its order, the district court questioned whether the Petitioner would have been a good witness at trial. (A-13) ("Had Petitioner testified and provided additional detail regarding the incident and explanation for his actions, he risked being vigorously cross-examined about his ability to remember such details despite his purported memory lapse. Therefore, the potential benefit to be gained from Petitioner testifying was minimal when weighed against the potential harm to his insanity defense through cross-examination."). Contrary to the district court's assertion, there is *nothing* in the record that supports the contention that the Petitioner would not have been a good witness – especially in light of the fact that the Petitioner had *no criminal history*. *Cf. Simon v. State*, 47 So. 3d 883, 886 (Fla. 3d DCA 2010) ("This Court determined that counsel's advice to Garcia not to testify was reasonable in that on cross-examination, the prosecutor would have introduced defendant's prior criminal history . . . ."). Moreover, the record demonstrates that the Petitioner would have been an excellent witness at trial – *just as he was during the state court postconviction evidentiary hearing* (where he successfully withstood "vigorous" cross-examination).

Petitioner's claim is a matter debatable among jurists of reason. Therefore, the Eleventh Circuit should have granted a certificate of appealability for this claim (i.e., whether a defendant can demonstrate prejudice when the decision to waive the constitutional right to testify is based on an attorney's misadvice/misunderstanding of the law regarding the burden of proof for the defendant's sole theory of defense).

To be entitled to a certificate of appealability, the Petitioner needed to show only "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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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