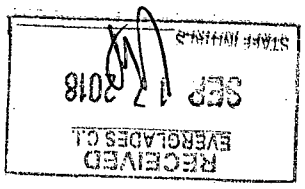

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

CURTIS NAIRN – PETITIONER
(Your Name)

vs.

JULIE JONES, et. al. – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEAL
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Curtis Nairn
(Your Name)

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000
(Phone Number)

QUESTION(S) PRESENTED

Whether the Eleventh Circuit Court of Appeal err when it denied Petitioner's §2254 petition as procedurally barred by AEDPA, unexhausted and meritless, which violated Petitioner's 5th, 6th and 14th Amendment to the United States Constitution.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Julie Jones, Secretary Florida Department of Corrections

Attorney General, State of Florida

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix C & D to the petition and is

[ ] reported at _____; or,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix E,F,G,H,I to the petition and is

[X] reported at 978 So. 2d 268 (Fla. 4th DCA 2008); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the trial Court appears at Appendix J to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was May 11th, 2018.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition rehearing was denied by the United States Court of Appeals on the following date: June 26th, 2018, and a copy of the order denying rehearing appears at Appendix B.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was April 9th, 2008. A copy of that decision appears at Appendix E,F,G,H,I.

[X] A timely petition rehearing was thereafter denied on the following date: June 2nd, 2008, and a copy of the order denying rehearing appears at Appendix E,F,G,H,I.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment V [1791] to the United States Constitution which, provides in relevant part: Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

This case involves Amendment VI [1791] to the United States Constitution which provides in relevant part; to have the assistance of counsel for his defense.

This case involves Amendment XIV [1868] to the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244(d)(2) The time during which a properly filed application for State post conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period to limitation under this subsection.

28 U.S.C. §2254(c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this

section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. §2254 (e)(1) In proceeding instituted by application for a writ of habeas corpus by a person in custody pursuant to the judgment of State Court a determination of a factual issue made by a State Court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

In the early morning hours of May 10th 2006, Nairn went to Venice Cove Apartment parking lot where he met Ms. Hobson and an unknown black male.

A physical altercation between Nairn and the unknown male engaged briefly. Nairn then left the unknown male and Ms. Hobson in the parking lot. Before Nairn left, Nairn retrieved his cellular phone from Ms. Hobson which was registered in Ms. Hobson's name. Ms. Hobson was bleeding when Nairn left.

Approximately 12:58 a.m. Nairn began to receive and place phone calls on his cellular phone. Those calls placed Nairn a few blocks away from the Venice Cove Apartment parking lot and never again in that area.

Approximately 1:27 a.m. Nairn called Crystal Mackey to have her check on Ms. Hobson. At 1:33 a.m. the police received a police call about a female screaming and yelling.

Two days later Nairn was arrested and charged with the murder of Ja'Vaughn Hobson based on a statement from Crystal Mackey and her mother

Pauline Mackey that Nairn called Crystal at 1:27 a.m. May 10th, 2006, and told her he just killed the victim. Nairn repeatedly denied telling anyone he killed Ms. Hobson.

Petitioner requested counsel twice during interrogation. Those requests were not honored. At trial the State used Petitioner's recorded statement and sent it to the jury room to be reviewed during deliberation.

During trial the State did not present any evidence that Ms. Hobson was not bleeding when Petitioner arrived in the parking lot. The State presented evidence of someone's bloody hands which had the victim's blood on it and left bloody prints on a 2003 Honda Accord parked at the crime scene. The victim was excluded from one impression of the source. This was unknown to the jury. Petitioner was excluded as the source of the blood prints.

Petitioner Nairn was convicted of second degree murder after a jury trial and sentenced to life in prison. After direct appeal, Nairn filed several post-conviction motions including the Miranda violation in the State Appellate Court twice beginning from June of 2008 challenging the constitutionality of the judgment and sentence.

Nairn also alleged that trial counsel was ineffective when counsel failed to independently investigate the timeline he believes to be relevant and material for the defense alibi theory.

An evidentiary hearing was heard April 23rd, 2013. During the evidentiary hearing Nairn investigated the timeline through an independent forensic

pathologist. New evidence of the timeline was discovered based on medical facts and evidence by the forensic pathologist.

The Courts, i.e., State and Federal never address counsel's beliefs. i.e., counsel believes that developing a timeline with cellular site towers was relevant, material and important for the defense's alibi theory.

On January 14, 2014, Nairn timely filed a State Habeas Corpus pursuant to Rule 3.850(b)(3) Fla. R. Crim. P. The trial Court on January 17th, 2014, issued a show cause order to the State to respond within 90 days. The State responded and requested that the petition be stayed until after the then pending appeal of the first 3.850 Motion. On January 29th, 2014, or thereabout the trial Court issued an order that the petition shall be stayed until the issuance of a mandate from the then pending appeal.

On May 1st, 2015, the State Appellate Court issued a mandate.

April 18th, 2016, Nairn timely filed a § 2254 Petition. The Magistrate Judge denied the Petition and ordered that it be refiled by May 25th, 2016, due to 36 page non-compliance with federal and local rules governing such filing. On May 5th, 2016, Nairn, in compliance with the Court order, refiled the § 2254 Petition with five grounds.

On May 30th, 2017, the Magistrate issued a Report and Recommendation denying the § 2254 Petition as procedurally barred pursuant to AEDPA, one year statute of limitation and alternatively on the merits on four of the five grounds

raised. The fifth ground was denied as procedurally barred by AEDPA one year statute of limitation and unexhausted in the State forum.

The Magistrate acknowledges that the State Habeas Corpus filed in 2014 is still pending in the trial Court. [1] The pending Habeas Corpus filed in 2014, was raised as ground five in the § 2254 Petition.

The District Judge adopted the Magistrate's Report and Recommendation.

Nairn appealed. The appeal and request for Certificate of Appealability was denied by the Eleventh Circuit Court of Appeal May 11th, 2018. Nairn filed a Rehearing En Banc that was denied on June 26th, 2018.

On July 31st , 2018, Nairn filed a Rule 60 Motion requesting to be allowed to return to the State trial Court to exhaust the petition filed in 2014, pursuant to this Court decision in *Rose v. Lundy*, 455 U.S. at 510 (1982); *Pliler v. Ford*, 542 U.S 225, 230 (2004). That request was denied August 17, 2018. Nairn filed a Rehearing En Banc August 27th, 2018. That request was denied September 4th, and 5th, 2018. Nairn filed an appeal September 10th, 2018. That appeal is pending.

REASONS FOR GRANTING THE PETITION

A. CONFLICTS WITH THE DECISIONS OF OTHER COURTS

PETITIONER'S §2254 PETITION IS NOT PROCEDURALLY BARRED BY AEDPA STATUTORY LIMITATIONS

[1] See document number 26 at 66. It is worth noting that this makes the §§2254 timely filed and not procedurally barred by AEDPA one year statute of limitation.

STANDARD OF REVIEW: A District Court's determination that §2254 Petition was time barred is review de novo. *Thomas v. Sec'y Dept. Corr.*, 644 Fed. Appx. 887 (11th Cir. 2016); *Kearse v. Sec'y Dept. Corr.*, 736 F. 3d at 1362 (11th Cir. 2013).

Factually this case is straightforward. It is undisputed that the Eleventh Circuit Court of Appeal found that Petitioner's State Habeas Petition filed in the trial Court January 14th, 2014, is pending a ruling from the State trial Court. See document number 26 at 66.

It is well settled, AEDPA clock is stopped while Petitioner's State post conviction proceeding is pending. 28 U.S.C. § 2244(d)(2). Under AEDPA statutory tolling provision, "Pending" includes the time between a lower Court's decision... See *Carey v. Saffold*, 536 U.S. at 219-20, 122 S. Ct. 2134, 2138, 153 L. Ed. 2d 260 (2002). The lower Court has not made a final decision on the State Habeas Petition filed 2014. See document # 25-1 lower Court's docket. At the time when Petitioner filed the State Habeas Petition January 14th, 2014, 308 days remain of the 365 days allowed by AEDPA. See document number 26 at 7 and 8.

Nairn has rebutted the presumption of correctness by clear and convincing evidence that his §2254 Petition is procedurally barred by AEDPA. 28 U.S.C. §2254(e)(1). See *Kearse v. Sec'y Dept. of Corr;* 736 F. 3d 1359 (11th Cir. 2013). Rebutted the presumption of correctness with clear and convincing evidence. Nairn's constitutional rights to due process of law were violated for reasons above. That is, the Eleventh Circuit finding that the §2254 is untimely was objectively unreasonable in light of the facts and evidence which rebutted their finding as procedurally barred by AEDPA statutory limitations.

PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN NEITHER UNEXHAUSTED OR MERITLESS

Its undisputed that Petitioner filed the ineffective assistance of counsel claim for failure to have Petitioner recorded statement suppressed due to Miranda Violation in State Courts three times. First, in 2008, case number 4D08-

2653, then 2014, the trial Court and finally 2015, 4D15-1058. The Appellate Court without analysis found Nairn's claims to be without merits.

Petitioner raised the same issue in the Federal Courts. The Federal Court did the same, and claimed that claim 5 is unexhausted without full and proper consideration.

For reasons below the Eleventh Circuit should have reviewed this claim de novo. See *Cone v. Bell*, 556 U.S. 449, 472 (2002); unexhausted claims are reviewed de novo.

It is well settled, in Florida and the Federal system for the purpose of "exhausting" a litigant's claim Petitioner need only to raise the claim in the State Appellate Court. See *Clinkscale v. Carter*, 375 F. 3d at 438 (6th Cir. 2003); *Smith v. White*, 719 F. 2d at 392 (11th Cir. 1983). In addition, 28 U.S.C. §2254(c) "requires only that State prisoners give State Courts a fair opportunity to act on their claims." See *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). The State Courts had three opportunities to give full consideration to this claim on the merits and declined to do so. Claim 5 is therefore exhausted because it was sufficiently presented to the State Appellate Court twice. For reasons above, as a matter of law the Eleventh Circuit denial of this claim as unexhausted was objectively unreasonable that violated Petitioner's constitutional due process right. As to the merits of Claim 5, counsel's failure to have Petitioner's recorded statement suppressed due to Miranda violation, violated Petitioner's constitutional rights to effective counsel and due process of law. See *Collins v. State*, 4 So. 3d 1249 (Fla.

4th DCA 2009) violated *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S.C. Amendment 6 and 14; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1601, 16 L. Ed. 2d 694 (1966); thus, Nairn's Claim 5 is not meritless. For example, materially indistinguishable facts, unequivocal request for counsel, incriminating, based on the Court's determination that Nairn's recorded statement is overwhelming evidence of guilt. Counsel's testimony at the evidentiary hearing, i.e., he was hoping that the recorded statement would be suppressed, overcame trial strategy.

Turning to the merits of Petitioner's other claim of ineffectiveness of counsel, as to the timeline of the inflicted fatal wound.

Unlike Claim 5 the Eleventh Circuit, via District Court's gave consideration to this claim. For reasons below it was "objectively unreasonable" application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 80 L. Ed. 2d 624 (1984). And, therefore, violated Petitioner's constitutional rights to due process of law and effective counsel.

The general principles which applies to Petitioner's claim that he received constitutionally inadequate representation are well settled. A Defendant claiming ineffective representation bears the burden of proving by a preponderance of the evidence both: (1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to

Defendant – in other words, a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). At the same time, a Defendant has the right to the effective assistance of counsel at trial, and thus is "entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate." Id.

In *Strickland* the Supreme Court emphasized that "tactical" decisions, although entitled to a heavy measure of deference if undertaken following a reasonable investigation, are only as reasonable as the investigation on which they are based:

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances applying a heavy measure of deference to counsel's judgments.

Strickland, supra, 466 U.S. at pgs. 690-91.

The duty to investigate is part of a Defendant's right to reasonably competent counsel. Indeed, "the principle is so fundamental that the failure to conduct a reasonable pretrial investigation may in itself amount to ineffective assistance of counsel." *United States v. Tucker*, 716 F. 2d 576, 583 n.16(9th Cir. 1983). The American Bar Association states the duty as follows:

> "It is the duty of the lawyer to conduct a prompt investigation of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."

A.B.A. Standards 4-4-1. Moreover, "the investigatory process should begin immediately on appearance as counsel for a Defendant." (Id. standard 4-4-1)

As summarized in the commentary to standard 4-3 (emphasis added):

> "An adequate defense cannot be framed if the lawyer does not know what is likely to develop at trial...In criminal litigation, as in other matters, the information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively.

Furthermore, the duty to investigate does not depend upon the lawyer's ability or experience: "The most able and Competent lawyer in the world cannot render effective assistance in the defense of his client if his lack of preparation for trial results in his failure to learn of readily available facts which might have afforded his client a legitimate justifiable defense." *Harris v. Blodgett*, 853 F. Supp. 1239, 1255 (W.D. Wash. 1994). (Citing *Tucker*, supra and *McQueen v. Swenson*, 498 F. 2d 207, 217 (8th Cir. 1994).

In sum, the *Strickland* test does not afford any slavish deference of decisions by trial counsel that are based – not on informed "tactical" choices, but rather on a failure to conduct reasonable investigation in the first place. Similarly, in the case at bar, it is trial counsel's failure to investigate that is

assailed, rather than informed tactical decision made in the wake of a reasonably thorough investigation. Id.

Counsel decision to not independently investigate the case based on his post-trial testimony was an objectively unreasonable one. Counsel testified that it was important for him to keep the last word because "he had no one else to call that could have provided any substance." This provides a strong basis for counsel's deficiency, because had counsel independently investigated the case he would have had a "forensic pathologist" who would have provided "favorable substance" for the defense alibi. Equally is counsel's pre-trial belief, that is, "he believed that developing a timeline with the cell site towers are relevant and material which might prove beneficial for the defense alibi theory." The trial Court found the independent forensic pathologist testimonial evidence during the evidentiary hearing to be "favorable" for the defense alibi. Thus, Nairn was prejudiced due to counsel's action.

The forensic pathologist testimony would have given the jury a clear understanding with the State cellular site tower evidence that it was physically impossible for the Petitioner to have committed the murder.

The jury was deprived of such "favorable" information by a forensic pathologist and had they learnt of such there was no reason for them not to believe the medical expert and acquitted the Petitioner.

The Eleventh Circuit Court of Appeal unreasonably disregarded such favorable evidence. See 28 U.S.C. §§2254 (e)(1). Rebutted the presumption of

correctness by clear and convincing evidence; *Wiggins* v. Smith, 539 U.S. at 521-22, 528 (2003). Additionally, the Court based its conclusion, in part, on clear factual and legal error – that the recorded statement is "overwhelming evidence of guilt... and witnesses testimony..." However, the recorded statement is in violation of Miranda, therefore inadmissible. And the new reliable evidence by Dr. Shuman, along with the cell site tower evidence rebutted witnesses testimony that implicated Nairn as the perpetrator. For reasons set forth Petitioner constitutional rights to due process of law and effective counsel was violated. U.S.C. Amendment 6 and 14.

CONCLUSION

For the following reasons certiorari should be granted in this case.

Date: 17th September

Respectfully submitted,

Curtis Nairn

DC# L67295
Everglades Correctional Institution
1599 SW 187th Ave.
Miami, Fl. 33194-2801