No._____

IN THE

SUPREME COURT OF THE UNITED STATES

GARY MALONE-PETITIONER

VS.

STATE OF FLORIDA-RESPONDENT

ON PETITITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS 2254(b) FROM THE ELEVENTH CIRCUIT COUR OF APPEAL

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS 2254(b)

Gary Malone, D.C.#L00035
New River Correctional Institution
P.O. Box 900
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QUESTIONS PRESENTED

For the first time under the extraordinary rare facts of petitioner case where an district court Judge and a United States Circuit Judge both agree with Malone on the end of justice of 2254(b) and Rule 9(b) where the rule require federal court to entertain an successive petition only where the prisoner supplements his constitutional claim with an colorable showing of Factual Innocent can an single District Court and a circuit court Judge entertain and 2nd successive 2254(b) petition when the 2nd application is a continuation of the initial habeas application 2244(b) does not bar a second 2254 once the claim ripens. See *Penetti v. Quartman,* 551 U.S. 930 (2007).

Where in the district Malone is being held it's an conflict on the 1966 and 1976 Amendments of 2244(b) Where the 1966 and 1976 amendment retains "the end of justice" provision from the old statute but the act including the provision now found in 2244(b) became effective in April 1996 under the A-E-D-P-A do not where in *Mcquiggin v. Perkins,* 133 S.Ct. 1924 (2013) as an Pro Se prisoner pointed this out to the District Court and the Appeal court that this court supports petitioner view of the law of this court where by refusing to consider this petition the court thereby would endorse a fundamental miscarriage of justice because it would require that an individual who is actually innocent to remain imprisoned.

LIST OF PARTIES

The following is a list of all parties to the proceeding in the 11th circuit court of appeals who judgment is sought to be reviewed as well as a corporate disclosure statement as required by Rule 29.6

Gary Malone Pro se, petitioner

State of Florida, Respondent

For the First time Under Rule 15. Petitioner will name his Trial Lawyer as and party In his case where Allison Gilman had offer to Assist Petioner Gary Malone And not the State of Florida but the trial courts has did everything in there power to make sure that this will never happen.

TABLE OF CONTENTS

PAGE

The Appendix will be submitted in a separate volumes and the 2006 Magistrate Judge Report can be review from the online docket at *Malone v. Crosby,* No.: 05-CIV 60908-Jem Malone I (E CF No 31) with the rest of Malone Docket of his 2254 Filed June 2, 2005.

TABLE OF AUTHORITIES CITED

Cases **PAGES**

RULE

STATEMENT OF THE REASON OF NOT MAKING THE APPLICATION IN THE DISTRICT COURT WHICH THE APPLICANT IS HELD U.S.C. 2242 AND A DIRECT AND CONCISE ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

As Justice Scalia has illustrated with comprehensive review of *Schlup v. Delo,* 513 U.S. At 346-49. The court assumed that the "end of justice" principle not only but require district court to entertain an otherwise adequated successive petition when a petitioner has satisfied the probable innocence standard See *McCeskley v. Zant,* 499 U.S. 467 (1991). This court has required Federal court to entertain successive petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence *Kuhlmann v. Wilson,* 477 U.S. 436 (1986) where Kuhlman held that the miscarriage of justice excertion would allow successive claims to be heard.

WHERE FOR THE FIRST TIME

In petitioner case district court judge and the Federal Circuit judge both agree with petitioner Malone on United State Supreme Court Law "but". It's the United States Court of Appeals for the 11th Circuit precedent forbids granting habeas relief based upon claims of actual innocence in none capital cases where this court is the only one that can settle this conflict and change the law in part.

UNITED STATES DISTRICT JUDGE CECILIA ALTONAGA 2-22-2016 10 PAGE DECISION PAGE 7 TO 8 APPENDIX A

Malone also raises several cases in his objection which are distinguishable from the present situation First *Kuhlmann v. Wilson,* is in apposite See Objections 2 citing 477 U.S. 436 (1986) *Kuhlmann* simply stands for the proposition court should consider the "end of justice" before dismissing a successive habeas petition 477 U.S. At 451 Kuhlmann did not involve a situation where the petitioner had failed to satisfy his preliminary burden of applying to the relevant appellate court to obtain permission to file a successive petition (See generally Id) The court agree there are situations such as actual innocence where successive petitions should be considerd but the fact does not relieve Malone of his burden of first applying to the Eleventh Circuit for permission Pursuant to 28 U.S.C. Section 2244(b)3 to the extent Petitioner alleges his is entitled to review of his claims through the actual innocence or miscarriage of justice exception he must pass through the 2244(3)(A) gateway before the district court may consider his claim.

Likewise *Mcquiggin v. Perkins,* cited by Malone (See Objection 5) stand for the proposition of plea of actual innocence can overcome the habeas statute of limitations See 133 S.Ct. 1924, 1228 (2013).

We hold that actual innocence if proved serves as a gate way through which petitioner may pass whether the impediment is a procedural bar as it was in Schlup and House again the court agrees.

UNITED STATES CIRCUIT JUDGE STANLEY MARCUS 5-4-2018 DECISION PAGE 2-3 APPENDIX B AND THE MANDAMUS HE GRANTED

- Under 28 U.S.C §2244(b) A state prisoner who wish to file a second or successive 28 U.S.C §2254 Federal habeas Petitions must move the court of appeal for an order authorizing the district court to consider such a petitioner See U.S.C.§ 2244(b)(3)(A) As an initial matter Malone's construed motion to amend is here by granted but only to the extent that this court consider the minor corrections contained therein however Malone has not shown a clear and indisputable right to the mandamus relief he now seek an evidentiary hearing on his 2254 petition—especially in light of the district court dismissal of that petition petition for lack of jurisdiction See *Mallard* 490 U.S. At 309 **Further based on Malone argument's in his mandamus petition that newly discovered evidence that the state court and the state attorney got "rid of" his actual innocence claim he appears to be seeking habeas relief accordingly he has adequate alternative remedy of filing another application in this court for leave to file a successive 2254 petition.**

Under 28 U.S.C. § 2244(d)(1)(A) gives a state prisoner one year to file a federal habeas petition on newly discovered evidence.

I Gary Malone had got the Innocence Project of Florida to assist me getting a copy of my docket sheet when I made the trial court bar me and showed in Judge Bernard Bober June and July 13, 2017 court order that I had did in fact file my May 5th, 2010 Motion to Amend on the claim of Actual Innocent and the circuit Judged Stanley Marcus Granted the mandamus in part and gave Malone the adequate alternative remedy of Filing Another Application to file an successive 2254 Petition.

THE PANEL JULY 14, 2018 ORDER APPENDIX C

The court cite *Jordan v. Secretary of DOC,* 485 F.3d 1351 (11th Cir. 2007)
"11th Cir. Say" AT 1356

> For what it is worth our precedent forbids granting habeas relief based upon a claim of actual innocence anyway at least none capital cases.

First of Rule 10. C of this court "say"
A state court or a United State court of appeals has decided an important question of Federal Law that has not been, but should be settled by this court or has decided an important Federal question in a way that conflicts with relevant decisions of this court.

In *Schlup v. Delo,* 115 S.Ct. 851 (1995) at 875 This court held:

Yet when the new version of §2244(b) was first construed in *Kuhlmann v. Wilson,* 477 U.S. 436 (1986) a plurality of the court announce that it would continue to rely on the reference in Sanders to the end of justice 477 U.S. At 451, 106 S.Ct. A 2626 and concluded that the "end of justice" require federal court to entertain successive petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence Id at 454 106 S.Ct. A 2627 that conclusion contains two complementary propositions. The First is that a habeas court may not reach the merits of a barred claim unless actual innocence is shown The Second is that a habeas court must hear a claim of actual innocence and reach the merits of the petition if the claim is sufficiently persuasive.

Rule 2244(E) say:
The grant or denial of an authorization by a court of appeal to file a second or successive application shall not be appeallable and not be the subject of a petition for rehearing or for writ of certioari.

Until of the fact's In Malone's case See *Schlup v. Delo,* at 878 Justice Scalia wrote the following for the court: By applying traditional abuse of discretion standard:

A judge who dismisses a successive petition because he misconceives some question of the law because he detests the petitioners religion or because he would rather play golf may be reversed a Judge who dismissed a successive petition because it is the petitioner twenty-second rather his second because it's only purpose is to vex, harass or delay's *Sander* 373 U.S. At 18 or because the constitutional claims can be seen to be frivolous on the face of the papers—For any of the numerous consideration that have a rational bearing on the propriety of the discharges sought may not be commanded to reach the merits because the "end of justice" require here as elsewhere in the law to say that a district judge may not abuse his discretion is merely to say that the action is question dismissing a successive petition may not be done without considering relevant factors and giving a justifying reason *Forman v. Davis,* 371 U.S. 1781 (1962) See also *American Dreading Co. v. Miller,* 510 U.S. 493 (1994) It is a failure of logic and an arrogation of guide that discretion by holding that what congress authority the district court to do may not be done at all assumption that the requirement imposed by the Kuhlman plurality should be taken as Law.

For the first time by applying traditional abuse of discretion standard of Justice Scalia The 11th circuit court of appeals has decided an important federal question of Law in a way that conflict with relevant decisions of this court in the July 14,2018 order that can be reversed.

SHOWING WHERE THE CONFLICT AT IN THE LAW AS A PRISONER

Jordan v. D.O.C. At 1359 the 11th Cir. Standard:

says: "Jordan does not really argue that he meet the requirements of 2244 b2B instead he argues that he do not have to meet them because his attempt to file a second or successive petition ought to be judged by the standard set out in *Schlup* 513 U.S. At 325, 115 S.Ct. 866 which is more lenient than the one the statute imposed *Cooper v. Woodford,* 358 F. 3d 1117, 1119 (9th Cir. 2004) (enbanc) The A E D P A requirements for a second or successive application are stricter then the Schlup decision provided the standard for filing a second or successive petition at least in capital cases before the A E D P A took effect that act including the provisions now found in 2244(b) became

effective in April of 1996 which was seven years before Jordan sought permission petition. We have neither the power nor the inclination to turn back the clock an pretend that the A E D P A was not enacted.

Schlup v. Delo at 866 "say"

This provision was construed in *Sander v. United States,* 373 U.S. 1 (1963) and with unimpeachable logic was held to mean that controlling weight may be given to denial of a prior application for Federal Habeas Corpus under 28 U.S.C. §2254 on if (1) The same ground presented in the subsequent application was determined adversely to the application on the prior application (2) the prior determination was on 513 U.S. 346 the merits and (3) The end of justice would not be served by reaching the merits of the subsequent application Thus, there appeared for the first time in our decisions the notion that a habeas court has the duty to reach the merits of a subsequent petition if the end of justice demand S.Ct. at 1079 -And it appeared for the perfectly good reason that the statute as then written imposed such a duty and even as to that duty Sanders court added a final qualification that the court would do well to remember.....

The principles governing...denial of a hearing on a successive application are addressed to the sound discretion of the Federal trial judge.

PLEASE SEE APPENDIX B CIRCUIT JUDGE STANLEY MARCUS 5-4 2018 ORDER AND MALONE MANDAMUS HE GRANTED IN PART SEE PAGE 29 TO 41

Now See *Mcquiggin v. Perkins,* 133 S.Ct. 1924 2013 at II B say

This court but congress did not simply incorporate the miscarriage of justice exception into §§ 2244(b)2 and 2254(e)2 rather congress constrained the application of the exception prior to A E D P A's enactment a court could grant relief on a second or successive petition then known as abusive petition if the petitioner could show that a fundamental miscarriage of justice would result from a failure to entertain the claim *McCleskly* 499 U.S. At 495 section 2244(b)2 B limits the exception to cases in which the factual predicate of the claim could not have been discovered previously through the exercise of due diligence and the petitioner can establish that no reason fact finder would have found her guilty of the underlying offense by clear and convincing evidence congress thus required second or successive habeas petition attempting to benefit from the miscarriage of justice exception to meet a higher level of proof clear and convincing evidence and to satisfy a diligence requirement that did not exist prior to A E D P A's passage.

Likewise a petitioner asserting actual innocence pre- A E D P A could obtain evidentiary hearing in Federal Court even if they fail to develop facts in state court *Keeney* 504 U.S. At 12, 112 S.Ct. 1715 a habeas petitioner failure to develop a claim in state court will be excused and a hearing mandated if he can show a fundamental miscarriage of justice would result from failure to hold a federal evidentiary

hearing under A E D P A a petitioner seeking a evidentiary hearing must show diligence and establish her actual innocence by clear and convincing evidence § 2254(e)(2)(A) ii B

AND BREAK DOWN IN THE CONFLICT IN THE LAW

Going by the abuse of discretion standard of Justice Scalia of The End of Justice

"Page 2" of the panel order say

> In his current pro se application Malone indicates he liberally construed Malone argues that his right to a fair jury trial was violated when his trial counsel declined to present his arrest photo and police report at trial he argues that the state court prosecutors improperly removed a May 5, 2010 motion that he filed to amend a pending state habeas proceeding in order to cover up that he was actually innocent of aggravated battery he argues that June 2017 and July 2017 state court order and a copy of his state docket that he received July 2017 showed that he file the motion to amend second Malone argues had the arrest photo and police report been presented to the jury he would have been found not guilty because the photo would have shown that he did not meet the description of the shooter specifically he argue that a witness at trial identified one of the jurors as the shooter and testified that the shooter wore dreadlocks but the arrest photo showed that Malone did not have dread locks Malone argues that he can raise an actual innocence claim under McQuiggin

"Stanley Marcus order said"

Page 3

> Based on Malone's arguments in his mandamus petition that newly discovered evidence that the state court and the State Attorney got rid of his actual innocence claim he appear to be seeking habeas relief accordingly he was adequate alternative remedy of filing another application in this court for leave to file a successive 2254.

Can the court now See the conflict I knew this court law this the reason that I had file the mandamus to submit newly discovered evidence to the court that show that the state and judge got rid of my motion and Judge Marcus granted in part my motion to the fact I show by newly discovered evidence had the arrest photo would have been presented to the jury I would have been found not guilty. This is what this court law say

Mcquiggin v. Perkins, supra say at II

> The court simply basic legal principles where the pose an obstacle to its policy-driven free form improvisation the court's statutory construction blooper reel do not end there congress express inclusion of innocence based exception in two neighboring provisions

> of the act confirms one would think that there is no Actual Innocence exception 2244(d)(1) section 2244(b)(2)b as already noted lifts the bar on claims presented in second or successive petition where the fact's predicate for the claim could not have been discovered previously through...
> due diligence and the facts underlying the claim...would be sufficient to establish by clear and convincing evidence that for constitutional error no reasonable fact finder would have found the petitioner guilty section 2254(e)(2) permits a district court to hold an evidentiary hearing where a diligent state prisoner's claim relies on new facts that would be sufficient to establish by clear and convincing evidence that but for constitutional error no reasonable fact finder would have found him guilty

This court law clearly support Gary Malone alone with the two Judges that has clearly agree with Malone that this court never see happen often and under the abuse of discretion standard that apply to the "End of Justice" Proviso from the old statute this has the jurisdiction to reversed the 11th Cir. Court of Appeals July 14, 2018 order where the court of appeals misconceives the law of this court on the face of there order and it an shame that the District Court Judge know this court law on the End of Justice and not the appeal court.

BY MALONE VIEW OF THE TWO PROVISIONS OF 2244(b) AND 2254(b)

I think that this court need to make new Rule and Law and put 2254(b) and 2254(e)(2) back in to the sound descriptions of the Federal trial Judge that was stated in *Schlup v. Delo* supra by this court when the prisoner supplements his constitutional claim with a colorable showing of factual innocence cause

> The 11th Circuit Court of Appeals forbids granting habeas relief based upon a claim of actual innocence in the District Malone is held.

Where by refusing to consider this petition the court thereby would endorse a fundamental miscarriage of justice because it would require an individual who is actual innocent to remain imprisoned where all Malone has to do is rewrite the same ground that the appeal court judge granted May 4th, 2018 in his order .

OPINIONS BELOW

Under the facts of Malone case there are only court orders the state attorney office and Judge Martin J Bidwill did an 3rd court order and go rid of Malone May 5th, 2010 motion on the claim of actual innocence to keep his trial lawyer Allison Gilman from coming forward to free Malone from an shooting that he did not do when it was made known at the side bar at Malone 2001 jury trial by the state attorney Carlos Rebello that Allison Gilman was telling him everything that Malone told her as a lawyer Malone set an trap for the court and state attorney by sending his motion's to the 4th DCA and the Attorney General by sending his motions attach his mandamus to the appeal courts and made known that his motions will come up missing Malone case went from the trial court all the way to the Florida Supreme Court that Malone will put these orders forward to the court in his statement of the fact's where these orders will be in a separate volume.

STATEMENT OF JURISDICTION

Under the extraordinary fact's of petitioner case for the past 7 years petitioner has got court order's saying that he never file his May 5th, 2010 motion to amend on the claim of Actual Innocence

See Appendix **D** the 3 court orders

4th District Court of Appeals September 30, 2010 order

"say" Ordered that in so far as petitioner has alleged in his September 13, 2010 emergency notice to this court that the state response filed August 31, 2010 did not address his May 2010 Motion to Amend (which did not appear in the on-line docket for this case having been filed.)

11th Circuit Court of Appeals January 13, 2012 order say

page 3 Malone filed a motion to amend his 3.850 motion in May 2010 which did not appear in the online docket additionally Malone argues that various motions he filed with the trial court in 2003 and 2004 were taken out of the trial court file

UNITED STATE DISTRICT JUDGE CECILIA M. ALTONAYA 2-22-2016 ORDER PAGE 5 SAY:

Malone maintains he is innocent of the charged crime and predominantly reiterates two previously- raised claims in support (1) Malone filed a motion to amend his 3.850 motion in May 2010 which the state court Judge and Prosecutor allegedly got rid of... By doing a third court order (2010 motion claim) and (2) Malone contends he would not have been convicted if his arrest photo and police report had been entered into evidence (arrest photo claim).

Petitioner invokes the Jurisdiction of the court: See *Murray v. Carrier,* 106 S.Ct. 2639 (1986) at 2600 or IV Justice Stevens with whom Justice Blackmun joins in the judment

say: But it is equally clear that the prisoner must always have some opportunity to reopen his case if he can make a sufficient showing that he is the victim of a fundamental miscarriage of justice whether the inquiry channeled by the term, cause and prejudice or by the statutory duty to dispose of the matter as law and justice require 28 U.S.C. 2243 it is clear to me that appellant procedural default should not foreclose Habeas Corpus review of meritorious constitutional claim that may establish the prisoner innocence.

I petitioner Gary Malone come to this court as a clear victim of a fundamental miscarriage of justice of Broward County State Attorney Office and the court system of Evidence that may in fact change law on how Federal Court's review State prisoner cases well under the rare facts of my case deal with the fact that my trial lawyer Allison Gilman that was appointed by the court work as an government

informant for the state attorney that played an key role of putting me in prison after I kept getting turn down by the (3) three courts I seek help from the Innocence Project of Florida and was sent an copy of my docket sheet See Appendix **E.**

page 6 of 18 say

(5-6-2010) File Defense Motion Amend For Newly Discovered Evidence

(5-6-2010) File Order Denying Def. Motion signed 5-5-2010 to request Emergency Hearing

This is the first motion with the sworn statement I got from my wife the victim of the case.

I file an 8th Motion for Post Conviction in March of 2017 when I got an new lab report from the Boward County Crime Lab so Judge Bernard Bober file his June and July 13, 2017 order Entitle See Appendix **F**

ORDER DENYING DEFENDANT MOTIONS FOR POST CONVICTION RELIEF AND ORDER TO SHOW CAUSE

In his June and July 13 order's on page 3 of 4 the Judge show my Gary Malone filing history of Post Conviction Relief file in the state trial court that was helpful to show that I file the May 5th, 2010 Motion the Judge made known in his order

5) Motion for Post Conviction relief base on newly discovered evidence file March 19, 2010 denied May 6, 2010 not appealed

6) Motion for Post Conviction relief base on newly discovered evidence file on May 6, 2010 denied January 21, 2011 not appealed

With these two orders with my docket sheet of newly discovered evidence that clearly show I did in fact file my motion and its on the docket I file and mandamus in the 11th Cir. Court of Appeals on newly discovered evidence and Judge Stanley Marcus file his March 4, 2018 order

Appendix **B** said

"say"

> Further based on Malone's arguments in his mandamus that newly discovered evidence that the state court and the state attorney got rid of his actual innocence claim he appears to be seeking habeas relief accordingly he has the adequate alternative remedy of filing another application in his court for leave to file a successive §2254 Petition See U.S.C. §2244(b)(3)A

Malone file what he was order to file but the 11th Cir. Rule July 14th, 2018 with there standard of *Jordan v. D.O.C.* Supra that the court forbid granted habeas corpus relief on claims of actual innocent so Malone must seek relief in this court order under the end of justice

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kuhlman v. Wilson, 477 U.S. 436 (1986) at 451-452 This court held:

Based on the 1966 amendments and there legislative history. Petitioner argues that federal courts no longer must consider the "end of justice" before dismissing a successive petition. We reject this argument. It is clear that congress intended for district court's. As the general rule to give preclusive effect to a judgment denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petitions but t he permissive language of 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances moveover Rule 9(b) of the governing section 2254 cases in the United States District Court which was amended in 1976 contains similar permissive language providing that the district court may dismiss a second or successive petition that does not allege new or different grounds for relief. Consistent with congress intent in enacting 2244(b). However, the advisory committee note to Rule 9(b) 28 U.S.C. P 358 U.S.C.S. Court rule note following Rule 9 state that federal court should entertained successive petitions only in "rare instances' unless those rare instance are to be identified by whim or caprice district Judges must be given guidance. For determining when to exercise the limited discretion granted them by 2244(b) Accordingly as a means of identifying the rare case in which federal court should exercise their discretion to hear successive petition. We continue to rely on the reference in Sander to the "end of justice" our task is to provide a definition of the "end of justice" that will accommodate congress intent to give finality to federal habeas judgment with the historic function of habeas corpus to provide relief from unjust incarceration.

The face of the record is clear in Malone case on this court law and the law that congress intended for the district court to apply on the end of justice where the Florida Supreme Court and the 11th Cir. Court of Appeals has clearly rejected this court law of the actual innocent standard of *Schlup v. Delo,* 513 U.S. 298, 26,27 (1995) that clearly must be settle by this court.

STATEMENT OF THE CASE

On April 26, 2000 Gary Malone was charged with one count of attempted first degree murder of Beverly Morris and went o jury trial February 9,2001 to February 13,2001 and was found guilty of the lesser included offense of aggravated battery with an firearm on March 9,2001. Malone was sentenced as a habitual felony offender to serve 30 years in prison on June 2,2005 Malone filed a section 2254. See Appendix G with 4 grounds.

"page 15 say"[1]

2nd Part of Ground 3

> Petitioner Gary Malone told his counsel to show the jury his arrest photo to prove that he was not wearing dreadlocks that the two witness say the men say who shoot the victim had counsel clearly told the jury herself that Gary Malone was not Id b4 the two witness in violation of Malone Sixth and Fourteenth Amendment of the United States Constitution

So when magistrate Judge Patric a whit do his report page 9 he said: Page 9

> As to the arrest photo Malone argue that it would have shown that he was not wearing dreadlocks on the day of the shooting based on the report testified to by defense witness officer David Moore would have shown that he did not shoot Beverly however Malone explains that although he urged his lawyer to show the photo to the jury for some reason counsel did not want the jury to see the photo. It is well settle that tactical or strategic choices can not support a collateral claim of ineffective assistance only it was patently unreasonable that no attorney would have chosen. **It or if the Petitioner can demonstrate a reason probability that the verdict otherwise would have been different.**

By the 2006 magistrate Judge report Malone was given an very important clue to the issue to the arrest photo and police report and Malone file this issue in his motion to amend May 5th, 2010 SEE ***Herrera v. Collins,* 506 U.S. 390, 404 (1993).** In a series of cases culminating with ***Sawyer v. Whitley,* 505 U.S. 333 (1992).** This court have held that a petitioner otherwise subject defenses of abusive or successive use of the writ may have his federal constitutional claims considered on the merits if he makes a proper showing of actual innocence ***McClesky v. Zant*, 499 U.S. 467 (1991).** This court has required federal court to entertain successive petition when a petitioner supplements a constitutional claim with a

1 This statement of the facts apply to my 2nd rounds of post conviction relief when I got newly discovered evidence of an sworn statement from my wife dated March 2, 2010 that apply to what I was told to do by Magistrate Judge Report in 2006 of his report Malone v. Crosby No.:05-Civ-60908-JEM (Malone I) E c F No.:31 page 8-9 to keep this court on track

colorable claim of innocence ***Kuhlman v. Wilson,* 477 U.S. 436 at 451-452 (1986)**Plurality opinion
The end of justice require Federal to entertain successive petition where the prisoner supplement his constitutional claim with a colorable showing of factual innocence this what Malone did and the court and state get rid of the motion when it was made known to Allison Gillman the State Attorney rated her out on the side bar at the 2-13-2001 Jury Trial...

First of all under Florida Law Florida Rule of Criminal Procedure 3.850(b)(1) permits a petitioner to bring a motion for new trial at any time base on newly discovered evidence if the fact on which the claim is predicated were unknown to the movantor the movant attorney and could not been found by the exercise of due "due dilligence" See ***Jones v.* State, 709 So. 2nd 512 (1998)**

I all ways kept in mind what the federal judge order me to do in his 2006 report so in 2010 at Henry C.I. I had and way that I had some of my family members to track down my wife and I got her phone number so Beverly Morris Malone did a sworn statement that's dated March 2, 2010 and mail it to me See Appendix **H,** so I draw up a motion for newly discovered evidence 3.850(b)(1) See Appendix **I**

EVENT OF THE TRIAL COURT CASE

The Judge Martin J Bidwill issue and court order "say"

ORDER

> This cause had come before the court upon the defendant motion for newly discovered evidence according having considered the motion and the record it is here by ordered and adjudged that the state is directed to file a response within 90 days of the date of this order
>
> Done and order at Fort Lauderdale Broward County Florida
> this 18th day of March 2010

In my first 3.850 I made known in the motion on February 1 to 9th. It was the weekend of Superbowl Sunday that week defendant wife Beverly Morris the victim came to the North Broward Jail to visit Gary in which Beverly told Malone that she was not coming to court and she wants Mr. Malone home this can be proven by the visitation log of BSO so on Friday 2-9-01 prior to picking the jury. Malone told his lawyer Allison Gilman that his wife was not coming to testify so Allison Gilman go tell the State Attorney Carlos Rebello what Mr. Malone wife had said and talk about.

I CAN PROVE THIS TT PAGE 240 THE SIDE BAR

By Mr. Rebello:

> The victim was supposed to show she did not show up her mom gave me a phone number I call she said she was sick and I said well you need to to come to the court house that was approximately

> 8:30 this morning we had been doing everything we can to track her down and get her in here.
>
> The court: We got her and Gattis?
>
> Mr. Rebello: Only for tonight let me say this too she had a conversation with the defendant **and I have a suspicion that this related to some conversation that the defendant may have had with her.**

See Appendix **J**[2] 2-14-01 Letter from Beverly Morris and the statement made to Malone probation officer the day after the trial.

"It say"

> Hello honey how are you fine I hope well where do we go from here baby I didn't want to come to court but your mother in law showed the the police where I stayed at I swear I didn't want to to court so don't think wanted to come the said and shit you know I am on probation I feel so bad and scared and a little confused about us I wish many of times that time can go back and things are much different I wish you could hold me and tell me it going to be alright I wish we could be together again.

Statement to Malone Probation Officer say:

> On 3-5-01 at 12:50 pm This officer spoke to the victim Beverly Morris Malone via telephone in reference to the case Ms. Malone stated she did not want to testify against her husband however she was forced to do it.

I had mailed Allison Gilman a copy of the 3.850 with an letter dated 3-24-2010. I made know that Carlos Rebello had made it known that she was working as an undercover government agent and let the court know she help him send me to prison by telling him everything I told her as my lawyer. See Appendix **K** the March 24, 2010 Letter Page 1 I said:

> Allison it's me Gary Malone I know it been 10 years since I came to prison but I am sending you a copy of the motion that I just filed in court cause of the fact that I wanted to ask you do you want to fix what you did in 2001 when you help the state attorney send me to prison for something that I did not do when I was arrested for shooting my wife that I love and still married to today so first of all as I put it in my motion that when you came to see me I told you my wife was not coming to court I figured that you was on my side and was working for me but you went back and told Carlos what I said but he let that be known at the sidebar and it's on the face of record so he could have not known that

2 The 2-14-01 Letter and P S I statement was made known at the March 9, 2001 sentence hearing

unless you told him.

I had ask Allison Gilman to come forward and set the record straight when I let it be known Carlos Rebello ratted her on the side bar at my jury trial she response back in letter dated March 29,2010 See Appendix **L**

"She said"

Dear Mr. Malone:

I am sorry to inform you that I cannot be more of assistance with you motion 3.850 as I was the attorney of record at the time that the trial took place once the state has response to said motion and the judge agree that you are entitled to a hearing you will be assigned a Public Defender at **at that time I would be more than happy to assist the public defender in your case.**

With this newly discovered evidence in hand I got my state paid lawyer to come forward and assist me Gary Malone and not the state of Florida where it's made known she violated my right to an fair jury trial and help the state of Florida send me to prison for an shooting that I did not do I had kept in mind of what the Federal Judge had order me to do in his 2006 report so I drew up the May 5,2010 motion to amend my 3.850

"MALONE MOTION TO AMEND APPENDIX M"
THE MOTION ADN THE BODY TITLE

"I raised" Motion to amend motion and newly discovered evidence and motion to request that the court hold a emergency hearing to see if petitioner can pass through the gateway and argue the merits of his underlying claims of actual innocence as set in *Schlup v. Delo.*

I set out the *Murray v. Carrier,* 477 U.S. 478 S.Ct. 2634 (1986) standards of this court then the I Ground Raised:

The face of the record clearly shows that defendant Malone is a victim of miscarriage of justice when his trial counsel Allison Gilman and State Attorney Carlos Rebello "**Excluded**" defendant's arrest photo and police report when he call officer David Moore as his only witness to testify cause the description of the shooter was given as dreadlocks when Malone never had dreadlocks but Moore testified to his police report but the counsels did not submit the photo and police report in to evidence cause they knew the jury would have found Malone not guilty but the jury came back and ask the court 9 questions there #5 questions they ask for the arrest photo and police report that was **excluded** that violated defendant *Sixth, Eighth, and Fourteenth Amendment* of the U. S. Constitutional and right to a fair trial

This motion was mail from the prison May 3rd,2010 by putting it in the prison staff hands the order was issue say