

18-6592

8-H

CASE NO.:  
L.T. CASE NO. : 18-11928-H

IN THE  
SUPREME COURT  
OF  
THE UNITED STATES

Supreme Court, U.S.  
FILED  
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**ANDRES PAVON, - PETITIONER**

Vs

**JULIE JONES, SECRETARY  
DEPARTMENT OF CORRECTIONS, - RESPONDENT**

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES SUPREME COURT**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**Andres Pavon DC# 948292  
Columbia Correctional Annex  
216 SE Corrections Way  
Lake City, FL 32025**

## **QUESTION(S) PRESENTED**

1. Were this Petitioner's Fifth Amendment rights according to the United States Constitution violated by the United States Court of Appeal for the Eleventh Circuit Judge?
2. Does Petitioner's conviction and sentence violate the principles as cited in Padilla V. Kentucky, 130 S. Ct. 1473 (2010) and Lee V. U.S., 137 S. Ct. 1958 (2017).
3. The ruling in Castro V. United States, 540 U.S. 375, 381 (2003) allowed for this Petitioner to certify this question of law to the Honorable Supreme Court of the United States, despite the Lower Tribunal Court's actions.
4. Should this Petitioner have been granted permission to have filed a Second or Successive Petition for Writ of Habeas Corpus

## **LIST OF PARTIES**

All Parties appear in the caption of the case on the cover page.

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## **U.S. CODE**

2244(b)(2) 28 U.S.C.S.	2
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**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 \_\_\_\_\_  
[ ] 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[X] is unpublished.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 \_\_\_\_\_ to the petition and is

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[ ] is unpublished.

[ ] For cases from State Courts:

The opinion of the highest States Court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

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[ ] is unpublished.

The opinion of the \_\_\_\_\_ Court appears at Appendix \_\_\_\_\_ to the petition and is

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[ ] is unpublished.

## JURISDICTION

[ ] For cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 6-29-18, and a copy of the order denying rehearing appears at Appendix "C".

[ ] 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 Court:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

[ ] A 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 PROVISION INVOLVED**

Fourth Amendment of the United States Constitution

Fifth Amendment of the United States Constitution

Sixth Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

## **STATEMENT OF THE CASE**

This Petitioner prepared and submitted a Petition for Writ of Habeas Corpus within the Honorable United States District Court for filing and this Petitioner sought permission to hold his Petition in abeyance while this Petitioner returned back down to the Lower Tribunal Court so that this Petitioner could exhaust a State Claim. Petitioner's Petition for Writ of Habeas Corpus was dismissed without prejudice for this Petitioner to re-file his petition, once the claim was exhausted in the State Court.

This Petitioner did resubmit the Petition for Writ of Habeas Corpus with all claims and the Respondent argued that Petitioner's petition should be dismissed as successive. This Petitioner argued that his petition was not successive and should not have been dismissed. This Petitioner did appeal the denial to the Honorable United States Court of Appeals for the Eleventh Circuit, seeking to have the United States District Court Judge order of denial reversed because the ruling was incorrect.

The Petitioner did attack the successive ruling on a Certificate of Appealability and the Honorable United States Court of Appeals for the Eleventh Circuit denied Petitioner's Certificate of Appealability. This Petitioner submitted a timely Motion for Reconsideration addressed facts and case laws that were on point

on this issue and had to have been overlooked and/or misapprehended when the Honorable United States Court of Appeals for the Eleventh Circuit entered the order of denial.

As this Petitioner did argue that the pro se Petitioner did not need to seek permission to file a Second and/or Successive Petition for Writ of Habeas Corpus because it was not a Second or Successive petition, and it as well involved an actual innocence claim. This Petitioner clearly did not and could not have argued on Petitioner's First Petition or the Second re-filed Petition, when this Petitioner was granted permission to return back down to the Lower State Court to exhaust a claim which was still being litigated.

This Petitioner correctly argued that his claim was being addressed under controlling authorities/applicable law in Padilla V. Kentucky, 130 S. Ct. 1473 (2010) and Lee V. U.S., 137 S. Ct. 1958 (2017), which was made under 28 U.S.C.S. 2244(b).

## **REASONS FOR GRANTING THE WRIT**

**ACTUAL INNOCENCE CLAIMS AND CASE LAWS  
OVERCOME THE ONE YEAR TIME LIMITATION  
AND THIS PETITIONER'S SHOULD HAVE BEEN  
FILE HIS PETITION FOR WRIT OF HABEAS  
CORPUS. THIS PRO SE PETITIONER'S FEDERAL  
CONSTITUTIONAL RIGHTS HAVE BEEN STRIPPED  
FROM THIS PETITIONER BY THE HONORABLE  
UNITED STATES COURT OF APPEALS ORDER OF  
DENIAL...**

This Petitioner argues that the Honorable United States Court of Appeal for the Eleventh Circuit Justices should have allowed for this Petitioner's Petition for Writ of Habeas Corpus under the controlling authorities of Padilla V. Kentucky, 130 S. Ct. 1473 (2010) and Lee V. U.S., 137 S. Ct. 1958 (2017). Because the claim being made under 28 U.S.C.S. 2244(b) does not require for a Petitioner to demonstrate actual innocence of the crimes, as no reasonable fact finder would have found [him] guilty of the underlining offense[s].

Also, in Scott V U. S., Florida L. Weekly Fed. C907 (2018), the honorable Supreme Court of the United States Justices specifically addressed this issue by stating in part the following:

the Court concluded that it enjoyed jurisdiction over Panetti's case, because Panetti's Second-in-time §2254 petition was not second or successive as that phase is used in §2244(b)(2)'s gated keeping

mechanism. Id. at 947.

The above cases clearly reflect how this Petitioner's claims is similar to those made by others in the United States Supreme Court's cases: Johnson V. United States, 135 S. Ct. 2551 (2015) and Welch V. United States, 136 S. Ct. 1257 (2016); where no requirement to demonstrate actual innocence of crimes of convictions was required and/or no reasonable fact finders would have found [him] guilty. This issue was properly argued and exhausted throughout the State Court under the new controlling authority of law in Long V. State, 183 So. 3d 342 (Fla. 2016). And was never raised or filed in a Federal Court but the Honorable United States Court of Appeals for the Eleventh Circuit and has not allow this Petitioner to develop or to properly address this critical issue, the Honorable Court's order of denial allowed for a "manifest of injustice" to occur and the ruling is clearly erroneous.

As this Petitioner argued on his Motion for Reconsideration how the record reflects that this Petitioner did exhaust all State remedies before invoking the Honorable United States Supreme Court jurisdiction.

**(See Appendix "D", Petitioner's Motion for Reconsideration, dated 5/18/18)**

On July 9, 2018 Honorable United States Court of Appeals for the Eleventh

Circuit entered an order of denial and this pro se Petitioner prepared and submitted a timely Motion for Reconsideration for filing within the Honorable United States Court of Appeals. The Honorable United States Court of Appeals denied the Motion for Reconsideration.

**(See Appendix “ E”, United States Court of Appeals Order Returned unfiled, dated 7/9/18)**

This pro se Petitioner on his 3.850 Motion filed within the Lower Tribunal Court did argue a new controlling point of law which was established by the Honorable Florida Supreme Court in Long V. State, 183 So. 3d 342 (Fla. 2016). As in Long, the Honorable Florida Supreme Court Justices established a two prong test that determined post conviction claims by adopting the first prong of the Jones test and the second prong from Grosvenor in which the following was stated in part:

“First, the evidence must not have been known by the trial court, the party, or counsel at the time of the plea, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence. Second, the defendant must demonstrate a reasonable probability that, but for the Newly Discovered Evidence, the defendant would not have pleaded guilty and would have insisted on going to trial. “[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and trial court at the time of the plea, and the difference

between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial. (See Grosvenor, 874 So. 2d at 1181-82)" The Petitioner argues that this issue was not known until after Mrs. Claudia Del Castillo through his relative informed this Petitioner on October 13, 2017 after reviewing

This Petitioner has asserted that the honorable Supreme Court of Florida Justice's ruling in Spera V. State, 971 So. 2d 754 (Fla. 2007); the Honorable Ssecond District Court of Appeal Justice's ruling in Blake V. State, 152 So. 3d 66 (Fla. App. 2nd DCA 2014); and lastly the honorable Fourth District Court of Appeal Justice's ruling in Fletcher V. State, 53 So. 3d 1249, 1252 (Fla. App. 4th DCA 2011) was applicable to the insufficient pleading of Petitioner's claim. Also in Davis V. State, 26 So. 3d 519 ( Fla. 2009 ) ( extending Spera to successive post conviction motions ), this Petitioner should have been given an opportunity to amend his claims if it was denied as being facially insufficient.

This Petitioner argues that the Honorable Supreme Court of the United States Justice's should utilize their jurisdiction to review these major State and Federal Constitutional violation, which Petitioner's claim raises/attacked because the Federal Courts have been notified by the Respondent that this pro se Petitioner's Petition for Writ of Habeas Corpus was successive and should have been denied, a ruling that this Petitioner has argued is incorrect and should have been reversed because as this Petitioner has stated Petitioner's petition was voluntarily withdrawn so that claims could

be exhausted before commencing the Federal Procedure.

**(See Appendix " A", Petitioner's Habeas Corpus, dated 7/9/18)**

This pro se Petitioner is being asked to pay the price for errors that alleged trained certified law clerks have committed in the past in his case, because this Petitioner was being assisted by law clerks that lacked proper knowledge of the law and this Petitioner understands that it is no excuse but this Petitioner does argue that denying this Petitioner access to the honorable United States Court of Appeal for the Eleventh Circuit Court is too harsh of a sanction to implement against this Petitioner because in reality the three grounds which this Petitioner raised on his alleged Second Petition for Writ of Habeas Corpus, does in fact raise several major State and Federal Constitutional Right violation which properly address on its legal basis that this Petitioner sought and legally requests the Honorable Supreme Court of the United States Justice's to invoke their legal jurisdiction and allow for Petitioner's grounds to be addressed and the merits ruled on. As this Petitioner directs the Honorable Supreme Court of the United States Justice's attention in which the inmate law clerk argued on Petitioner's **Ground One:**

**TRIAL COUNSEL INEFFECTIVE FOR NOT OBJECTING TO  
THE ERRONEOUS JURY INSTRUCTION VIOLATED  
PETITIONER'S FOURTH; FIFTH AND FOURTEENTH  
AMENDMENT OF THE UNITED STATES CONSTITUTION...**

The pro se Petitioner argued on his First Claim how his Trial Counsel was ineffective for failing to object to the charging information as being duplicitous and the jury instructions as being duplicitous thereon. This Petitioner argued that his Trial Counsel failure to perform that critical duty to object and preserve the violation for Appellate Review or for a proper ruling at the Trial Court level was ineffective. Counsel's Failure to object allowed for this critical violation, which rose to the Fundamental Error level, to go uncorrected. As this Petitioner argues that every Defendant has a right to know the charge that they remain accused of and the fact that the Charging Information and the jury instructions that the Petitioner was accused that by the State that he had by force, violence, assault or putting in fear, taken certain property of Metro PCS store and/or the store person or custody of Ms. Yadira Basulto. The Petitioner argues that his Trial Counsel should have contemporaneously objected to that error because it was clearly duplicity as undertaking to charge two separate crimes in alternative in one count. Furthermore, Petitioner's counsel failure to object to the information as being duplicity when it clearly joined two separate offenses, or alternative means of committing the same offense, into a single count. Therefore, Petitioner alleges

that the same rule on duplicity does apply to jury instructions when they are worded from the information as exact.

This Petitioner asserted throughout the State Court how his trial counsel allowed for the fundamental error to occur when the Counsel failed to contemporaneously object, when the record reflects that the Trial Court provided his impaneled jurors the duplicity jury instructions. This Petitioner understands that the while the jury instructions are subject to the contemporaneously object rule, unless the error constitutes a fundamental error, as in said case. The Petitioner asserts the fact that the Timeliness of the specific contemporaneously objection is of such importance, that if a criminal defendant's counsel fails to make a timely one, can very well fail to preserve this constitutional error for Direct Appellate Review as in the instant case. Prejudice can be safely assumed by counsel's failure in this case. Had Petitioner's counsel made a timely specific contemporaneously objection and moved for a dismissal or Motion to Quash or Motion to Dismiss Indictment based upon this evident constitutional error, this pro se Petitioner asserted that the outcome would have been different and a New Trial would have had to have been granted because the fundamental error complained about violated Petitioner's Fourth'; Fifth and Fourteenth Amendment of the United States Constitution and the Honorable Supreme Court of the United States Justices have the legal jurisdiction to correct the improper ruling that denied this pro se Petitioner access to the Federal Courts,

when Petitioner's Petition for Writ of Habeas Corpus was in fact not successive.

**(See Appendix "B", United States District Court Order of Denial,  
dated 4/10/18)**

**GROUND TWO:**

**TRIAL COURT ERRED BY NOT ATTACHING  
PORTION OF THE RECORDS THAT  
CONCLUSIVELY REFUTED THE MERITS OF  
PETITIONER'S CLAIM VIOLATED  
PETITIONER'S FOURTH; FIFTH AND  
FOURTEENTH AMENDMENT OF THE UNITED  
STATES CONSTITUTION...**

This Petitioner argued throughout the Honorable United States District Court and the Honorable United States Court for the Eleventh Circuit how the State Lower Court's and the Florida State Laws, which governs the procedures to be followed by the Honorable Trial Court, when a criminal defendant in the State of Florida has been convicted and sentenced, the defendant may file a Motion seeking to set aside the verdict and sentence based upon the violation of laws or rules not normally cognizable on a Direct Appeal.

In the State of Florida this is codify in Florida Rules of Criminal Procedure, Section 3.850. After filing the motion, the court determines if the motion is legally sufficient and, if so, then either summarily deny the grounds raised or direct the State to

respond to the grounds. If the Court decides to summarily deny the grounds portions of the records which conclusively refute those grounds must be attached to the Courts denied. After filing his Rule 3.850 motion in the Circuit Court, the Honorable Lower Tribunal Court Judge summarily denied Petitioner's ground raised but failed to attach any portion of the records that conclusively refuted the grounds. In fact, no record was attached at all, to the Lower's Court's order of denial.

The District Court of Appeal Justice's entered an order per curiam of affirm Petitioner's appeal and that critical question of law never was addressed in open Court. This Petitioner argued that due to the seriousness of this violation which Petitioner's constitutional rights that guaranteed this Petitioner a fair and impartial jury trial. This Petitioner argues that the threshold necessary to invoke the jurisdiction of the Honorable Supreme Court of the United States should have been met and allowed for Petitioner claim to have been litigated within the Honorable Federal Court's, once the claims had been exhausted. As a reasonable tier of facts should interpret the Trial Court's failure to attach any portion of the records that conclusively refuted the merits, as rule 3.850 prescribed, when denying a Petitioner's motion. A manifest of injustice and a miscarriage of justices was allowed to occur. Based upon this claim the Honorable United States Court of Appeal for the Eleventh Circuit should have utilized its authority to have granted this Petitioner permission to proceed back to the United States District Court because this

claim was never addressed in a thorough manner, as Petitioner's petition has been incorrectly denied as being successive. The outcome would have been different had the Honorable United State Court of Appeals understood that this Petitioner could have been re-filed a Second Petition for Writ of Habeas Corpus which complied with the Rules and Procedure set forth. As Petitioner's petition should have been reversed and remanded back down to the Lower United State District Court for compliance with the Courts rules and procedures because the Honorable United State District Court Magistrate Judge Written Recommendation clearly corroborate Petitioner's claim.

**(See Appendix " C", United States District Court Magistrate Judge Recommendation Written Order, dated 9/14/11)**

### **GROUND THREE:**

**THAT THE STATE OF FLORIDA LAW DOES NOT RECOGNIZED A B.B.-GUN AS A WEAPON AS DEFINED BY SECTION § 790.001, FLORIDA STATUTE (2005) AND SUCH SENTENCE VIOLATED PETITIONER'S FOURTH; FIFTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION...**

Once again this Petitioner argued on his Motion for Reconsideration how the claim which involved the jury instruction which the Honorable Trial Court Judge read to his

impaneled jury was erroneous and violated Petitioner's State and Federal constitutional rights because the record of appeal clearly reflect that the judge stated in part the following:

**"If you find that [Petitioner] carried a weapon that was not a firearm, in the course of committing the robbery, you should find him guilty of robbery with firearm."**

As Section 90.106, Florida Statute (2017) prohibited such illegal misconduct because it states in part the following:

**"Summing up and comment by judge-A judge may not sum up or comment to the jury upon the weight of the evidence, the credibility of the witness, or the guilt of the accused."**

This Petitioner correctly argued on his Motion for Reconsideration that the Honorable Trial Court judge violated Petitioner's Fourth; Fifth and Fourteenth Amendment of the United States Constitution by reading his impaneled jury the illegal jury instructions which Section 90.106, Florida Statute (2017) the jury was prejudiced and misled into bringing back a guilty verdict. The Honorable Trial Court erred by not attaching portion of the record that conclusively refuted Petitioner's Claim. As the Law of the State of Florida does not Label a B-B gun a firearm as defined by F.S. 790.001 and this Petitioner argues that his trial counsel was ineffective for not preventing the trial court judge from reading his jury the erroneous jury instruction as argued on Petitioner's ground one.

The record of the Honorable United States Court of Appeals clearly reflects how this claim has not been addressed per its merits because the violation which this Petitioner has appealed throughout the State Court's and the Federal Court's have shown how this Petitioner is in fact innocent of the conviction for all of the robberies with a firearm, which the impaneled juries convicted this Petitioner of, because the weapon that was alleged to have been utilized was in fact shown to be a BB-gun that was not operational and could not harm any physically. Petitioner's Fourth; Fifth; Sixth and Fourteenth Amendment of the United States Constitution was violated by his Trial Counsel and this Petitioner does in fact seeks to have the Honorable Supreme Court of the United States to grant this pro se Petitioner to proceed with the Federal Litigation because this Petitioner is being held illegally under a charge that a jury was unable to find this Petitioner legally guilty of under the State law.

This Petitioner understands the Respondent argues that Petitioner's instant petition should be dismissed because the Petitioner had filed a prior petition on January 2011 Case No: 11-CV-20349-CMA which this Petitioner voluntarily dismissed because this Petitioner wanted to exhaust State remedies before pursuing and/or continuing on to the Federal Level. The Petitioner disputes that a Second and Successive Petition for Writ of Habeas Corpus was pursued because that petition did raise seven grounds that were raised in his initial petition, so in reality does not make Petitioner's petition a second

and/or Successive, as the Respondent incorrectly asserts.

This Petitioner argues that his instant petition can be considered a second petition for writ of habeas corpus, which this pro se Petitioner argues three completely different grounds that this Petitioner had never been notified by the inmate law clerk who was assisting this Petitioner preparing his second petition that the Petitioner had to first seek permission from the Honorable United States Court of Appeals for the Eleventh Circuit to be able to proceed within the Federal Courts. Only now that this Petitioner is at Columbia Correctional Institution Annex has this Petitioner learned through a bilingual inmate law clerk that this Petitioner can communicate in his Spanish language how the prior law clerk had not complied with the Federal Rules of Civil Procedures. This Petitioner understands that he does not have a legal leg to stand on because the law is clear how being ignorance of the law is no excuse but this Petitioner does seek for the Honorable Supreme Court of the United States to grant this pro se Petitioner leniency and to not hold this Petitioner to the same standard as the Court does a Bar Certified Attorney.

This Petitioner argues that the grounds which this Petitioner raised on his Motion for Reconsideration are meritorious and so the honorable United States Supreme Court Justices should accept jurisdiction and address the merits of these violations

## **CONCLUSION**

**WHEREFORE**, this pro se Petitioner argues that the Honorable United States Supreme Court Justices should accept jurisdiction of Petitioner's Writ of Certiorari because this Petitioner has shown on his Petition for Writ of Habeas Corpus as well as the Motion for Reconsideration how his constitutional right to access to the court was and continues to be violated because the ruling of successiveness is incorrect and must be reversed because the order supersedes numerous case laws properly addressed throughout the Federal Courts.

  
**Andres Pavon DC# 948292**  
**Columbia Correctional Annex**  
**216 SE Corrections Way**  
**Lake City, FL 32025**