No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT LEE SWINTON JR

Petitioner,

V

STATE OF FLORIDA, SECRETARY FOR THE DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL

Respondents.

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

PETITION FOR CERTIORARI

Robert L. Swinton Jr., PRO SE
F.C.I. Loretto
P.O. Box 1000
Loretto, PA 15940

QUESTIONS PRESENTED FOR REVIEW.

1. If the merits of an appeal exist and are not evaluated by a State or Federal Court of review, should a Federal court address Inaffective Assistance of Trial Counsel claims on the merits to assess whether the claims are arguable before denying In Forma Pauperis status and Extraordinary Writ relief of a U.S. Sixth Amendment claim that the petitioner was completely denied counsel on appeal for that State ?

2. If a defendant's appellate counsel filed an **Anders** brief to withdraw as counsel, without briefing the facially clear merits of the case and notifying the defendant, what avenue of redress would the defendant have if state procedures bar IAC redress and the sentence completely expired; and would federal habeas corpus be unavailable for a State Ineffective Assistance of Trial Counsel and oversentencing claims that were defaulted by state appellate counsel that provided no advice that a collateral attack was available at that time ?

3. Can Florida Rule of Criminal Procedure § 3.850, statute of collateral attack that bars relief of an ineffective assistance of trial counsel claim or Coram Nobis relief thereof after two years, be squared with the rulings in **Martinez v. Ryan,** 566 U.S. 1, and **Trevino v. Thaler,** 569 U.S. 413, when state appellate counsel caused the default of an Ineffective Assistance of Trial Counsel claim and unknowingly left the defendant pro se ?

LIST OF PARTIES

United States court of Appeals for The Eleventh Circuit,
Honorable Kevin C. Newsom
56 Forsyth Street
Atlanta, GA 30303

United States District Court for The Middle District of Florida,
Honorable District Judge Charlene Edwards Honeywell
Honorable Magistrate Judge Mark A. Pizzo
801 N. Florida Avenue, 2nd Floor
Tampa, FL 33602

State of Florida, Secretary of Department of Corrections and State Attorney General - In Captioned Parties.
1996 Appeal Counsel, Ass. Att. Gen. Dale E. Tarpley
Criminal Division, Suite 200
3507 E. Frontage Road
Tampa, FL 33607

Patrick Michael Megaro, Esquire - 2014 Collateral Review Counsel
33 East Robinson Street, Suite 210
Orlando, FL 32801

State of Florida, Court of Appeals for The Second District,
Honorable Judges Northcutt, Casanueva and Wallace, 2015 Panel.
Honorable Judges Quince, Threadgill C.J., and Schoonover, 1996 Panel.
P.O. Box 327
Lakeland, FL 33801
(Honorable Judges Khouzam, Morris and Black, 2015 Per Curiam Affirmed from 2014 appeal.)

State of Florida, Tenth Judicial Court of Polk County,
Honorable Michael E. Raiden, 2014 decision.
Honorable Joseph Strickland, 2001/2002 revocation hearing
Honorable Daniel True Andrews, 1994 sentencing
Tenth Judicial Circuit of Polk County
Bartow, FL 33830

Office of The State Attorney, Polk County, Florida
James Wagner, Esquire, 2001/2002 probation revocation
William Dunn, Esquire for State Attorney Jerry Hill, 1994 case.
255 N. Broadway Avenue
Bartow, FL 33830

Polk County Public Defender's Office
Spencer Patorin, Esquire, 2001/2002 revocation
John C. Fisher, Esquire, 1996 Second District Appeal
Bartow, FL 33830

Thomas D. Wilson, Esquire, appointed counsel, 1994 sentencing.
Bartow, FL 33830

United States District Court, Western District of New York
Honorable District Judge Elizabeth A. Wolford
Honorable Magistrate Judge Marion W. Payson
100 State Street
Rochester, NY 14614

United States Court of Appeals for The Second Circuit
United States v. Swinton, No.: 18-101cr, on appeal from The Western District of New York
40 Foley Square
New York, NY 10007

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Swinton v. State, 2D14-3492 (Second District Court of Appeals, State of Florida.)

Swinton v. State, 2D15-1600 (Second District Court of Appeals, State of Florida.)

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BASIS FOR JURISDICTION.

The petitioner alleges that this court has jurisdiction to hear this case, pursuant to 28 USC §§ 1251(b)(2), 1254(1) and 1257.

The first address of jurisdiction will be the direct appeal from a plenary order of a United States Circuit Court of Appeals. See Appendix ("Appx.") p. 0-3, rendered by The Eleventh Circuit Court of Appeal, pursuant to 28 USC § 1254(1).

The second address will be of original jurisdiction. The petitioner is alleging that there is a direct conflict between Florida's Criminal Procedure statute § 3.850 that bars a collateral attack on IATC, and this court's rulings, pursuant to 28 USC § 1251(b)(2) and U.S. Supreme Court Rule 10(c).

The third basis for jurisdiction is 28 USC § 1257, yet is untimely due to the State court's failure to notify the petitioner of a disposition of a validly filed Coram Nobis petition in the State court in 2015, and the disposition on June 8, 2015, until December 5, 2017. The petitioner requests permission to appeal this decision as well, as this is the court of last resort for this petition. See Appx. p. 96 - 107 (Dist. Dk. 3-1, p. 14-25.) Also see Appx. p. 85-94 (Court Correspondences.) The petitioner alleges that appeal directly to the U.S. Supreme Court would have been available, pursuant to U.S. SCt Rule 10(b) if collateral estoppel had not taken place.

CONSTITUTIONAL PROVISIONS.

The petitioner alleges that the respondents have violated his U.S. Sixth Amendment right to counsel, and the right to have effective counsel, and enforced upon The States pursuant to the U.S. Fourteenth Amendment due process of law and equal protection of law. 1994 trial counsel was ineffective and appellate counsel assigned by the respondent state withdrew as counsel on appeal. The respondent state violated due process of law by deciding a meritous appeal without counsel and review of the record. 2014 collateral counsel was also ineffective.

The petitioner's U.S. Fourteenth Amendment due process of law was violated when the State of Florida Court of Appeal denied the petitioner's Coram Nobis petition without an adjudication of the merits, or stating the grounds for dismissal. No assessment of procedural bars were made, and Fla.R.Crim.P § 3.850 may have been grounds, barring collateral attack of IATC ("Ineffective Assistance of Trial Counsel") after two years of final conviction. The courts gave no explaination.

The petitioner was denied due process of law, pursuant to the U.S. Fifth Amendment as well. The United States Court of Appeals for The Eleventh Circuit and Middle District of Florida. No court assessed the procedural bar for defaulted claims, if addressed in an original 28 USC § 2254 proceeding, would have mandated a remand or reversal, as proven by a prior ruling in The U.S. District Court for The Middle District of Florida, and other United States Circuit and District Courts.

CONCISE STATEMENT OF THE CASE.

The petitioner was arrested for Armed Robbery on June 3, 1994, In The Tenth Judicial Circuit Court, For The County Of Polk, State Of Florida. The petitioner (from hereon "Swinton"), pled guilty to one count of armed robbery and sentenced on November 3, 1994. Swinton's codefendant in this case, Richard C. Toney (from hereon "Toney"), proceeded to trial and was found guilty on November 3, 1994, before the sentencing of Swinton on the same day. Counsel for Swinton did not file a notice of appeal, nor argue the application of the sentence by the court. Swinton accepted a plea agreement for 5 years of incarceration and a term of probation "up to the court". The court imposed 10 years of probation.

On November 17, 1994, Swinton filed a notice of appeal and application to appeal as a poor person pro se. The court appointed appeal counsel on November 30, 1994. On March 2, 1995, appeal counsel filed a 'Statement of Judicial Acts to be Reviewed'. Swinton filed a 'Motion To Correct Sentence' on March 13, 1996. On April 19, 1996, the Second District Court of Appeals for The State of Florida struck various fines and fees yet affirmed the conviction. Aside from the Statement of Judicial Acts to be reviewed, no briefs were filed. WESTLAW citation, Swinton v. State, 670 So.2d 1128 (2DCA 1996), reflects that an Anders brief was filed and the court did not allege that it had reviewed the record in this citation. Two issues were alleged to have been brought to the court's attention, and the

chose to only address one. No records exist of the other issue presented by appeal counsel. Swinton was not provided a copy of the Statement of Judicial Acts to be Reviewed.

Swinton violated probation and left to New York in 1998, in which he was returned by extradition on December 10, 2001. On January 24, 2002, Swinton was sentenced to 72 months of incarceration. Swinton had served a 60 month sentence. The 1994 sentence totaled 180 points, and the 2002 sentence totaled 132 points. The maximum points in this case was 115.5 points. Probation time was included in maximum point calculation in Florida at that time. Swinton was immediately released upon being turned over to The Florida Department of Corrections, February 2, 2002 for oversentencing.

In the case of United States v. Swinton, 15-cr-6055-EAW-MWP, Western District of New York, Magistrate Judge Payson appointed Patrick Michael Megaro, Esq., to represent Swinton in The State of Florida's proceedings. Mr. Megaro made no IATC or AC ("Appeal Counsel") challenges, nor any challenges to the procedural bar implemented by Fla.R.Crim.P. § 3.850. Swinton claimed that he was ineffective and reported this to Magistrate Judge Payson. See U.S. v. Swinton, Dk. # 265-1, 265-2, 265-3, in The Western District of New York (Docketed Letters to Magistrate Payson.) Swinton was incarcerated on October 16, 2012, and remained incarcerated through trial on July 10, 2017 and until this date. Swinton received a 270 month career offender sentence, instead of a 81-87 month guideline sentence. The 1994

Armed Robbery and The New York State 1999 Attempted Sale of a Controlled Substance were the only adult felonies of Swinton, and formed the minimum basis for career offender enhancement.

Patrick M. Megaro, Esq., filed a Motion for Correction of Sentence, In The Tenth Judicial Circuit of Florida, on June 20, 2014. The motion was denied by Judge Michael E. Raiden on July 1, 2014. Megaro filed a notice of appeal on July 14, 2014 in The Second District Court of Appeals for The State of Florida. Megaro proceeded in appeal as a summary appeal and did not brief. The appeal of case no. 2D14-3492 was affirmed per curiam on March 27, 2015. Swinton filed a pro se Coram Nobis petition on April 1, 2015. This petition was dismissed on June 8, 2015, 'Quo Warranto'. Swinton was not notified of this decision until December 5, 2017. Swinton petitioned the State of Florida Supreme Court for a Writ of Prohibition to compel The Second District to allow a amendment to the petition, unknowing that the petition had been decided. Florida Supreme Court Clerk held that the court had no jurisdiction to entertain the writ in the appeal case of 2D15-1600, which is Swinton's pro se Coram Nobis petition.

An affidavit was file by Swinton on November 30, 2015. The Second District Court of Appeals for The State of Florida did not respond. The affidavit alleged the ineffectiveness of Megaro in 2D14-3492. The affidavit clearly shows that Swinton believed that 2D15-1600 was still open in the Second District Court of Appeals for The State of Florida.

After being informed of the coram nobis denial on December 5, 2017, Swinton believed that he could not request a certiorari on the grounds that the 90 day span had elapsed, and began the procedure anew in The United States District Court for The Middle District of Florida, after the current sentencing on December 20, 2017 and tranfer to current facility of incarceration. Swinton initiated the federal Coram Nobis petition, and requested that it be construed to any statute to obtain jurisdiction to hear the merits of the case. The petitioner paid the $5.00 habeas fee to the District court, and the petition was denied. Swinton then motioned for In Forma Pauperis status to appeal to The Eleventh Circuit Court of Appeals. This was also denied. The District court denied relief on the grounds that 28 USC § 2254 was available. Swinton was not incarcerated pursuant to this 1994 charge. This petition was initiated on February 22, 2018.

Swinton then petitioned for permission to appeal to The Eleventh Circuit Court of Appeals, and for In Forma Pauperis status. In Forma Pauperis status was denied, and Swinton was granted an appeal pursuant to 28 USC § 1915, and submitted the required forms for withdrawl of 20% of incoming funds. Swinton was given an appeal number and initiated the appeal. Swinton filed his appeal brief, 1 original and 3 copies, on August 27, 2018. On October 4, 2018, Honorable Kevin C. Newsome held that Swinton was ineligible for Coram Nobis relief, and denied IFP, and ordered that any funds should be returned to Swinton. This is the order appealed from, and request from Swinton to fashion

a remedy for redress of countless ineffective assistance of counsel claims and one deprivation of counsel claim that has defaulted valid IATC claims that have had no chance for redress at all. At the core of all of this litigation is the unchallenged ineffective assistance of trial counsel.

In light of the constant denial of avenues to pursue meritous claims of ineffective assistance, and deprivation of counsel, the petitioner alleges that these actions constitute a complete miscarriage of justice that I pray the United States Supreme Court may remedy.

The petitoner's appeal to the U.S. Eleventh Circuit was dismissed by the clerk on October 30, 2018, for failure to pay the $505 dollar filing fee in which Swinton filed an In Forma Pauperis motion that showed he could not pay this fee in order to receive review. No IATC merits were addressed by The Circuit or District courts of the United States.

ARGUMENT OF ISSUES.

I. The 1996 appeal of this case, and procedural default thereafter, was due to constitutionally ineffective counsel pursuant to Strickland v. Washington, 466 US 668 (1984) and deprivation of counsel pursuant to Penson v. Ohio, 488 US 75 (1988), on the grounds that appealable issues were present on the record for appeal. See Halbert v. Michigan, 545 US 605, 125 SCt 2582, 162 LEd2d 552 (2005); Lafler v. Cooper, 566 US 156, 165 (2012); Douglas v. California, 373 US 353, 357-58, 83 SCt 814, 9 LEd2d 11 (1963). Due to no Federal or State courts evaluating any ineffective assistance of counsel claims presented to them in prior Coram Nobis petitions, the petitioner prays that this will warrant complete review by this court.

II. A reasonable jurist would not have convicted Swinton of armed robbery, after the only person alleged to have had a gun was found not to have a gun by trial testimony and the verdict of the jury. ? Swinton's trial counsel was constitutionally ineffective on the grounds that he had knowledge of there being no weapon in the case and allowed Swinton to be sentenced to Armed Robbery with a firearm when Swinton possessed no weapon at all. Even in the abscence of lower tribunal records from 1994, the records available show that trial counsel, at a minimum, failed to investigate mitigating circumstances. Actual innocence of armed robbery should apply, as well as proceeding pro se, to excuse the

procedural bar and grant federal review of a constitutional claim. See Dretke v. Haley, 541 US 386, 394 (2004); House v. Bell, 547 US 518, 126 SCt 2064, 165 LEd2d 1 (2006); Schlup v. Delo, 513 US 298, 115 SCt 851, 130 LEd2d 808 (1995); Herrera v. Collins, 506 US 390, 404, 113 SCt 853, 122 LEd2d 203 (1993).

III. The unlawful upward departure in the 1994 sentencing for armed robbery was an issue for direct appeal, and was allowed to be challenged on direct appeal. An Anders brief (Anders v. California, 386 US 738 (1963).) was filed, in which The Second District Court of Appeals for The State of Florida decided the appeal without appropriate briefing from appellate counsel and deemed meritless without addressing the initial issue forwarded by Swinton- oversentencing. A motion to correct sentence was also filed, in which was denied. The court did find merit in the erroneous application of fines and court costs, and struck them, which is an unreasonable application of Penson v. Ohio and United States v. Frady, 456 US 152, 170 (1982). This court has also held that these types of violations are structual errors. See Weaver v. Massachusetts, 137 SCt 1899, 1908 (2017). This type of violation of appellate rights by the respondent State should be remanded for the appeal of right as granted by that State.

IV. The procedurally barred claims of ineffective assistance of counsel and denial of due process of law cannot rest on 'state law' if no procedural bar was advanced by the

respondents, nor were the merits address by a properly filed petition in the respondent State's court. The Florida Second District Court of Appeal denied Swinton due process of law and equal protection of law, under the U.S. Fourteenth Amendment, by refusing to rule on the merits of ineffectiveness of trial counsel, appellate counsel and its own error that deprived Swinton of appellate counsel and state appeal of right as alleged in the filed Coram Nobis petition to the State. See Morgan v. United States, 346 US 502, 512, 74 SCt 247, 253, 98 LEd 248 (1954)("[T]rial without competent and intelligent waiver of counsel bars conviction of the accused"); Johnson v. Zerbst, 304 US 458, 468, 82 LEd 1461 (1938).

V. The State of Florida Criminal Procedure Rule § 3.850 conflicts with the U.S. Supreme Court's rulings in Martinez v. Ryan, 566 US 1, 132 SCt 1309 (2012) and Trevino v. Thaler, 569 US 413, 133 SCt 1911 (2013). Rule 3.850 prevents an ineffective assistance of **trial counsel** claim in the state, that could possibly be used to bar Coram Nobis relief, in which a habeas corpus could not grant if the sentence had expired while challenges to the conviction were being made, after two years. This has caused Swinton to seek relief in the federal courts, and could possibly be the unexplained grounds in which the State Coram Nobis petition was dismiss quo warranto. § 3.850 could prohibit a valid IATC from being challenged. See 28 USC § 2403.

ARGUMENT IN DEPTH.

I. In United States v. Aviles, 380 Fed.Appx. 830, 831 (11th Cir. 2010), the court stated that,

> ""The bar for Coram Nobis relief is high," and the writ may only issue when (1)"there is and was no other available avenue of relief" and (2)"the error involves a matter of fact of the most fundemental character which has not been put in issue or passed upon and renders the proceeding itself irregular and invalid." Alikhani v. United States, 200 F.3d 732, 734 (11th Cir. 2000)."

The petitioner has not located any court that has identified a Penson issue, (Penson v. Ohio, 488 US 75) and did not remand for appeal until this present case. A Penson issue is unique and requires no Strickland analisis on the grounds of counsel withdrawl from the case. Swinton was denied his 1996 appeal in the state of Florida on these grounds. No Anders brief was filed, only a 'Statement of Judicial Acts to be Reviewed', and no party to this case advised Swinton that counsel had withdrew, until the 2014 collateral attack by Megaro. See Amadeo v. Zant, 486 US 214, 222-24 (1988); United States v. Olano, 507 US 725, 733-34 (1993). Swinton had assumed that he had an appeal of right as granted by Florida until the collateral attack in 2014.

The record is silent as to whether the Second District Court of Appeals in Florida reviewed the record. See Appx. 172-73 (Dk. 3-2, p.5-6). All docket reference numbers will be corresponding to The Middle District of Florida's docket.

According to WESTLAW citation, an Anders brief was filed. The respondent state docket sheet only shows a "Statement of Judicial Acts to be Reviewed". Appx. 150 (Dk. 3-1, p.68, 03/02/1995). The citation alleged that there was two issues and the court would only address one of the issues. The record is silent on the other issue, and the Second District alleges no record exists after Swinton requested **all records** the appeal court had on this case. It was construed as a request for only the pending coram nobis petition. Appx. 88 (Dk. 3-1, p.6). All lower Polk County Tenth Judicial Court of Florida records were submitted to the U.S. Middle District of Florida, and apart of the docket. These records were submitted by Patrick M. Megaro, Esq., with his 2014 collateral attack.

Swinton has shown by clear and convincing evidence that there were issues to be appealed in 1996, yet no brief was filed by appellate counsel on behalf of Swinton. See Appx. 61-69 (Dk. 1, p.21-29), Appx. 128 (Dk. 3-1, p.46), Appx. 155 (State PSR score sheet, Dk. 3-1, p. 73) and Appx. 161-167 (relevant state citations, Dk. 3-1, p.79-85).

There was no ruling on the merits of the state coram nobis being appealed. Appx. 87 (Dk. 3-1, p.5). All issues herein this federal extraordinary writ being appealed, were presented to the State of Florida by coram nobis petition. Appx. 96-107 (Dk. 3-1, p.14-25). A ruling cannot rest on state law when the state did not rule on a validly filed petition with state law.

> "[T]his court [has] repeated[ly] recongni[zed] that federal court must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights"

Walker v. Martin, 562 US 307, 321 (2011).

No opinion of the state coram nobis petition was forwarded to Swinton of the pro se petition, and the state dismissed the petition "quo warranto" and did not address the merits of the petition. Swinton's right to due process of law, and equal protection of laws, has been violated pursuant to the U.S. 14th Amendment. In the state petition, Swinton addressed the unconstitutional ineffective assistance of trial counsel, 1996 appellate counsel, 2002 revocation counsel and 2014 collateral attack counsel. These allegations also serve as adequate grounds for "cause and prejudice" to excuse procedural default, that no federal or state court has addressed.

The U.S. District court two page decision (Appx. 35-36) does not reflect any consideration of a procedural default, pursuant to Martinez v. Ryan, 566 US 1, and Trevino v. Thaler, 569 US 413, "Martinez/Trevino" doctrine pertaining to ineffective assistance of trial counsel, Coleman v. Goodwin, 833 F.3d 537 (5th Cir. 2016), miscarriage of justice or actual innocence in regards to excusing the procedural bar. For a collection of cases, see Murray v. Carrier, 477 US 478, 488, 497 (1986); Coleman v. Thompson, 501 US 722, 747, 749-50 (1990); Miller-El v. Cockrell, 537 US 322, 123 SCt 1209, 154 LEd2d 931

(2003); Holland v. Florida, 560 US 631 (2010); Evitts v. Lucey, 469 US 387, 396 (1985); Dretke v. Haley, 541 US 386, 393 (2004); Maples v. Thomas, 565 US 266, 181 LEd2d 807, 821 (2012); Sawyer v. Whitley, 505 US 333, 339 (1992); Anders v. California, 386 US 738 (1967); Douglas v. California, 372 US 353 (1963); and **Gideon v. Wainwright, 372 US 335, 343-45 (1963).**

As this case stands, it has eroded the principles of Gideon v. Wainwright, and The U.S. Sixth Amendment, as it applies to the states through the U.S. 14th Amendment.

Some courts have suggested that a petitioner's pro se status at the time of a procedural default is itself sufficient to make out "cause" for the default. See e.g., McCoy v. Newsome, 953 F.2d 1252 (11th Cir.), cert. denied, 504 US 944 (1992)(pro se petitioner can satisfy "cause" requirement by showing "either that an objective factor external to himself caused him to default his claim, or that the defaulted claim raises an issue that was 'intrinsically beyond [a] pro se petitioner's ability to present'" (quoting Harmon v. Barton, 894 F.2d 1268, 1275 (11th Cir. 1990))(emphasis added). Also see Wilkinson v. Cowan, 231 F.3d 347, 350-51 (7th Cir.), cert. denied, 533 US 928 (2001).

> "The bar to federal review may be lifted, however, if the petitioner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as the result of the alleged violation of federal law." Id., at 750, 111 SC 2546, 115 LEd2d 640; see Wainwright v. Sykes, 433 US 72, 84-85, 97 SCt 2497, 53 LEd2d 594 (1977)."

Maples, 181 LEd2d at 821.

The petitioner alleges and believes that a hearing should be held to address the unanswered state coram nobis petition in the interests of justice. See 28 USC § 2254(e). See Dickerson v. Alabama, 667 F.2d 1364, 1367 (11th Cir.), cert. denied, 459 US 878 (1982); Westley v. Alabama, 488 F.2d 30, 31-32 (5th Cir. 1974); Jackson v. Herring, 42 F.3d 1350, 1366 (11th Cir.), cert. denied, 515 US 1189 (1995)(district court properly held evidentiary hearing because "crucial findinds of state coram nobis court was not fairly supported by the record.")

> "[C]areful consideration of his claim, including opportunity to present relevant facts, since, since (1) the prisoner's claims were not vague or conclusory, but instead contained factual allegations to the terms of the promise, and when, where and by whom it was made and witnessed, (2) the plea had been made at a time when plea bargaining was generally characterized by an atmoshpere of secrecy, and (3) there was no transcript of the pleading proceeding or subsequent sentencing hearing, there thus being no indication as to whether the judge had deviated from the printed form or as to any statements concerning the promised sentencing concessions had been made by the defendant, his lawyer or the prosecutor."

Id. in Blackledge v. Allison, 431 US 63, 52 LEd2d 136, 97 SCt 1621 (1977).

One of the undisputed claims of ineffectiveness of 1994 trial counsel is that he allowed Swinton to be oversentenced on November 3, 1994. PRS report of Probation Officer Sheffield shows a maximum score of 115.5, a sentence of 5 years with 10 years probation was an impermissable upward departure, and citations from that timeframe prove that. Appx. 161-167. This erroneous sentence brought Swinton within the 15 year range

for use as a prior for 2012 career offender purposes. Swinton only has two adult felonies, and no felony after 1999.

Tolling of time is appropriate due to the State failing to inform Swinton, in which was pro se at the time, of coram nobis disposition in the State. The respondent state has effectively removed the ability for Swinton to appeal its decision as a matter of coarse, and deprived the U.S. Supreme Court appeal in 2015 pursuant to 28 USC § 1257. See Bracy v. Gramley, 520 US 899, 117 SCt 1793 (1997). Respectfully, Swinton alleges that the State, U.S. Middle District and U.S. Eleventh Circuit applies procedural bars to Swinton in error. See Edwards v. Carpenter, 529 US 446, 451-52 (2000).

The petitioner in this case definately wanted his appeal of right from Florida, and not afforded an appeal of issues facially present, in which reliability of the proceeding cannot be presumed.

> "The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any "'presumption of reliability,'" Robins, [528 US] at 286, to judicial proceedings that never took place. Roe v. Flores-Ortega, 528 US 470, 483, 120 SCt 1029, 145 LEd2d 985 (2000)."

Id. In re Aranda, 789 F.3d 48, 55 (2d Cir. 2015. Swinton was oversentenced twice, in 1994 and 2002, and emergency released in 2002 from The Department of Corrections, Florida, the day of receipt due the sentencing on February 24, 2002.

Swinton hereby alleges that he did not knowingly bypass the state appeal or collateral review in this case. See Fay v. Noia, 372 US 391, 439 (1963). Swinton did not intentionally relinquish or abandon a known right, such as collateral review, in this case. See Francis v. Henderson, 425 US 536 (1976) and Tollet v. Henderson, 411 US 258 (1973). The State of Florida has not defended any claims in the **State or Federal Coram Nobis petitions**, and cannot assert any procedural arguments that are hereby waived. See Lee v. Kemma, 534 US 362, 376 n.8 (2002); Adkins v. Holman, 710 F.3d 1241, 1246-47 (11th Cir.), cert. denied, 134 SCt 268 (2013). This court will not imply any disrespect for The State of Florida courts by entertaining the merits of this case. Humbly, Swinton is requesting de novo review of this entire appeal, due to the fact that it completely rests on questions of law. As it seemed by the circuit and district court rulings, they could not hear any part of cases like this when a complete deprivation of counsel has occurred on appeal after a state sentence has expired.

II. The petitioner, Swinton, alleges that no rational juror would convict him of the crime of Armed Robbery in 1994. The indictment, Appx. 117-119, or any testimony ever alleged that Swinton possessed a firearm. Swinton's codefendant, Richard C. Toney, was found guilty of a lesser included offense of Robbery with a Weapon after trial. Toney was sentenced to 5 years of incarceration and 4 years of probation as a second time

violent felon. Appx. 191 and 193. Toney was not elible for a five year sentence , and a five year sentence was only available to Toney under Fla. Stat. § 812.13(2)(c), in which does not involve a firearm or weapon. See Appx. 199 (Dk. 3-2, p. 32). Guidelines were mandatory in Florida after trial.

Swinton brought this issue to the state in coram nobis, that he told his counsel Thomas D. Wilson that there was no weapon involved before his sentencing, and Wilson coersed Swinton into pleading guilty or face the court's wrath by an increased sentence, which led to pleading to Armed Robbery that could not be sustained after Toney's verdict. Swinton was sentenced on November 3, 1994, Appx. 150 (Dk. 3-1, p. 68), and Toney's verdict was returned before Swinton's sentencing on November 3, 1994. See Appx. 180 (Dk. 3-2, p.13). 1996 appellate counel also failed to investigate this as well and withdrew from the case.

A state prisoner may raise such claims of insufficient evidence on a federal collateral proceeding. See Jackson v. Virginia, 443 US 307, 99 SCt 2781, 61 LEd2d 560 (1979). Clear and convincing evidence has been provided to the District court, as if it were a §2254 proceeding, in order to evaluate the sufficiency of the evidence at face value. Again, the state has been silent since the very first state presentation.

The Rule of Consistency should apply when a jury did not decide Swinton's fate and all facts of Armed Robbery rests on the possession of a firearm by Toney. The State's evidence was

insufficient to support a conviction for Armed Robbery of Swinton. See United States v. Twigg, 588 F.2d 373, 383 n.11 (3rd Cir. 1978).

There were no other extrinsic facts or evidence for either party, to warrant the charge of armed robbery to just one defendant, as in United States v. Powell, 469 US 57, 105 SCt 471, 83 LEd2d 461 (1984), outside of the possession of a firearm that was alleged to Toney. The petitioner understands the 'Rule of Consistency' may no longer be a viable doctrine, Standefer v. United States, 447 US 10, 100 SCt 1999, 64 LED2d 689 (1980), yet Swinton presents this as argument that trial counsel should have moved to withdraw the plea agreement after the verdict of Toney and it was known that his client was not alleged to have had a firearm. The firearm element was the element imposed on Swinton to coerse the 1994 plea agreement for armed robbery. See Lafler v. Cooper, 566 US 156, 165 (2012).

In re Warren, 537 Fed.Appx. 457, 459 (5th Cir. 2013) the court stated:

> "Further, in Bousley v. United States, 523 US 614, 623, 118 SCt 1604, 140 LEd2d 828 (1998), the Supreme Court held that the defaulted claim of a petitioner who pleaded guilty may still be reviewed in a collateral proceeding if he can establish that the constitutional error in his plea colloquy has probably resulted in the conviction of one who is actually innocent in accord with Schlup, 513 US at 327-28, and Murray v. Carrier, 477 US 478, 496, 106 SCt 2639, 91 LEd2d 397 (1986)."

In Jones v. GDCP Warden, 815 F.3d 689, 697 (11th Cir. the Eleventh Circuit held that:

"[T]he "miscarriage of justice" exception requires him to show that he is "actually innocent of the death penalty to which he has been sentence" Sawyer v. Whitley, 505 US 333, 339, 112 Sct 2514, 120 LEd2d 269 (1992); see Gonzales v. Sec'y for Dep't of Corr., 366 F.3d 1253, 1275 (11th Cir. 2004)(en banc)("if... a court of appeals is considering recalling the mandate on its own motion, the literal terms of § 2244(b) do not apply, but the mandate cannot be recalled unless to prevent a miscarriage of justice; that means that the petitioner must be factually innocent of the crime, or sentence, as defined in the pre-AEDPA federal habeas jurisprudence."

AND

"In deciding whether he has made that showing, we "must focus on those elements that render a defendant eligible for the death penalty [[Armed Robbery]] [under the relevant state law], and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error."

In Sawyer v. Whitley, 505 US 333 (1992)(Summary), the Supreme Court held:

"(1) for the purposes of the "actual innocence" exception, a federal habeas corpus petitioner, in order to show "actual innocence" of the state death sentence, must show by clear and convincing evidence that but for a federal constitutional error, no reasonable juror would have found the petitioner eligible for the death [armed robbery] penalty under applicable state law - a standard which (a) allows a petitioner to show, in addition to innocence of the capitol crime itself, that there was no aggravating circumstances or some other eligibility was not met."

To this point, Swinton has produced clear and convincing evidence that, (1) 1994 trial counsel should have challenged the

illegal sentencing and plea agreement to armed robbery instead of a lesser included offense, and (2) appeal counsel in 1996 filed no brief and withdrew as counsel whithout advising of any other form of review available, and (3) Second District of Florida Appeal Courts made no record of an issue presented, decided the appeal without the briefing of counsel and corrected errors on appeal, and most of all, (4) Swinton had no firearm in this case to support a conviction for armed robbery and given a sentencing calculation and catagory placement due to this erroneous placement.

Swinton does understand the reluctance and unresolved rulings on "actual innocence" in Dretke v. Haley, 541 US 386, 394 (2004). Eleventh Circuit cases allege that this has not been ruled upon as to this rule applying outside of the death penalty context. See McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011) and Spencer v. United States, 773 F.3d 1132, 1176 (11th Cir. 2014). If this court finds no other issue to remand this case, the petitioner humbly requests that this court remand to the state court on the grounds of actual innocence.

III. As alleged, and shown by the case citations at Dk. 3-1, the has clear argument for oversentencing that 1996 appeal counsel should have made, and the ineffectiveness of trial counsel was established. This was an unlawful upward departure and the court gave no explaination for this departure, seemingly believing it to be legal. The record shows no participation by 1996 appeal counsel, no copy of the 'Statement of Judicial acts

to be Reviewed' remains. Florida appeal court struck costs and assessments, without the presence of counsel. This is an unreasonable application of Penson v. Ohio, 488 US 75 (1988), and prejudice is assumed. Penson at 88. The Florida appeal court did not disclose the second issue alleged by counsel in 1995 statement, and sentencing error could have been challenged at any time. See Appx. 162 (Dk. 3-1, p. 80, Davis v. State, 661 So2d 1193 (Fla. 1995)). The failure to advise Swinton of appeal counsel withdrawl is an unreasonable application of Anders v. California, 386 US 738 (1967), and has deprived Swinton of a state appeal of right as granted by that state, pursuant to Douglas v. California, 372 US 353 (1963). This case has not survived direct review in order to envike the State's interests in the finality of convictions due to the State's denial of counsel on direct review. See Wright v. West, 505 US 277, 293 (1992).

IV. The issues presented herein were presented to the respondent state. Appx. 97-107. The claim to the respondent state was (1) never answered on the merits of the claims presented, and (2) addressed IATC and problems in the appellate court for The Second District of Florida, that the Tenth Judicial Circuit lacked jurisdiction to hear, concerning its superior court. The Coram Nobis petition was directed at the Second District Appeals court for that reason, and a coram nobis petition could be filed in either court. The decision to render the 1996 appeal meritless could only be corrected by the

superior court instead of the subordinate court. To reiterate, all Penson issues identified by any court has been consistently remanded, all across the country. Please see Appx. 74-82 (Dk. 3, p.1-9).

IV. The coram nobis in this case cannot rest on state law when the state never ruled on the merits of the claims presented and have not asserted any procedural defenses to these claims, that are now waived. The appellant believes that the state court was required by U.S. Supreme Court judicial law, to construe a pro se litigant's petition to reach the merits of the claim. Castro v. United States, 540 US 375, 381-82 (2003). The petitioner is not aware of any law abolishing the acient writ of coram nobis in the State of Florida, and he is not aware of any law that allows for correction of an expired state conviction outside of this writ. Swinton's coram nobis was filed on the belief that this was the only way to challenge the ineffectiveness of trial counsel, that was defaulted by appellate counsel and 2014 collateral counsel failed to address the state courts of these ineffectiveness of prior counsel, in which he could have arged that The Martinez/Trevino doctrine applied to allow review in the state, to counter Florida's Rules of Criminal procedure § 3.850, after the expiration of the challenged sentence.

Swinton was not afforded an equal opportunity to be heard in state court, nor process of law to address newly

discoverd abandonment of 1996 appeal counsel. The State of Florida does not have a remedy for a constitutional violation of this sort, or declines to correct this error, denying Swinton a U.S. First Amendment right to redress the government of grievances. See Tennessee v. Lane, 541 US 509, 532 (2004). As alleged, this amendment is applicable to the states by the U.S. Fourteenth Amendment.

> "All these problems are common to state and federal prisoners, and the interests in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded."

Id. in Kaufman v. United States, 394 US 217, 231, 89 SCt 1068, 22 LEd2d 227 (1969).

Swinton was not afforded a full and fair litigation of ineffective assistance of trial counsel, appeal counsel, 2002 revocation counsel or 2014 collateral counsel in accordance with Townsend v. Sain, 372 US 293, 9 LED2d 770, 83 SCt 745 (1963), by the State of Florida, United States District Court for The Middle District of Florida or The United States Court of Appeals for The Eleventh Circuit. Submitted brief that was dismissed in The Eleventh Circuit is at Appx. 4-40.

The prejudice to Swinton is that he was overcharged and oversentenced in the initial 1994 proceedings. He was also given an enhanced predicate sentence in The State of New York on the basis of this conviction, and last, this challenged offense was one of the two required priors to subject Swinton to a career offender enhancement under the present federal sentence,

pursuant to the United States Sentencing Guidelines § 4B1.1, that justified the 270 month sentence of incarceration instead of an 81 to 87 month sentence that would have been served as of this petition. This enhancement would not have applied if this present case was not applied and appropriately adjudicated, in which a lesser sentence on the 1994 charge would remove this conviction from the 15 year period in which a prior could be used to enhance a sentence under the guidelines. Swinton has also challenged, and faced with the issues in Stokeling v. United States, 138 SCt 1438, 200 LEd2d 716 (2018), in The U.S. Court of Appeals for The Second Circuit. Unlike Stokeling, Swinton was sentenced when McCloud v. State, 335 So2d 257 (Fla. 1976) was controlling, and any degree of force would support a robbery, therefor a crime of violence. See United States v. Stokeling, 684 Fed.Appx. 870, 872-76 (11th Cir. 2017).

The U.S. District Court for The Middle District of Florida has given relief under the provisions of 28 USC § 2254, of the same type of error that Swinton presents at this time. See Grubbs v. Singletary, 892 FSupp 1484, 1491 (M.D.Fla. 1995). The discretion in this case was exercised differently for two similarly situated defendants, Buck v. Davis, 137 SCt 759, 766, 773-74 (2017). The only difference was the custody and lack thereof to exercise jurisdiction.

CONCLUSION AND RELIEF SOUGHT.

The petitioner, Robert L. Swinton Jr., humbly and respectfully request that this court review this case de novo and remand to The State of Florida for the 1996 appeal of right, or that this 1994 conviction be expunged or vacated, or in the alternative, vacate the conviction if the appeal of right is not granted in 90 days or any other relief that this honorable court deems righteous and just.

The petitioner, Robert L. Swinton Jr., believes all herein to be true, under penalty of perjury pursuant to 28 USC § 1746.

Date: November 6, 2018

Respectfully Signed,

Robert L. Swinton Jr.

Robert L. Swinton Jr. #22008-055

CERTIFICATE OF COMPLIANCE.

I, Robert L. Swinton Jr., petitioner, have prepaired this petition in accordance with U.S. Supreme Court Rule 33.2, and this document is double spaced, typewriter generated, and less than 40 pages.