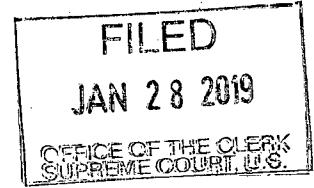


18-7760

No. 18A644

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES



Geoffrey A. Gish,

petitioner,

vs.

United States of America,

respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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Geoffrey A. Gish  
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P.O. Box 1031 (Low custody)  
Coleman, Florida 33521-1031

## QUESTIONS PRESENTED

### Question 1

This Court held that a court of appeals exceeds its subject-matter jurisdiction when the appellate court bypasses the certificate of appealability process, and without granting a COA, denies a § 2255 appeal on the merits. **Buck v. Davis**, 137 S.Ct. 759 (2017).

The Eleventh Circuit denied Mr. Gish a certificate of appealability on whether the district court should have conducted an evidentiary hearing, because in the appellate court's view, Mr. Gish still would have rejected the plea bargain even if counsel's advice had been correct.

Did the Eleventh Circuit exceed its subject-matter jurisdiction by denying a certificate of appealability based on its assessment of the underlying claim's merits?

### Question 2

Section 2255(b) and controlling decision authority require the district court to conduct an evidentiary hearing when a § 2255 movant's allegations—if proven—would entitle the movant to relief. Mr. Gish alleged his attorney misadvised him about the nature of the crime and the trial strategy. Further, Mr. Gish stated if he had been correctly informed about the nature of the crime or the strategy to be employed, then he would have accepted the offered plea bargain, and pleaded guilty. Nonetheless, the district refused to conduct an evidentiary hearing. Despite the district court's departure from governing authority, the Eleventh Circuit did not grant a certificate of appealability.

Would jurists of reason have found debatable the district court's refusal to conduct an evidentiary hearing?

### Question 3

This Court holds that a constitutional challenge to the validity of a statute cannot be waived by a knowing and voluntary guilty plea. **Class v. United States**, 138 S.Ct. 798 (2018). Mr. Gish went to trial, he never waived the right to challenge the statute's constitutionality. But his attorney failed to raise the claim on direct appeal. The district court denied the claim as procedurally defaulted. The Eleventh Circuit refused a certificate of appealability.

Can a facial challenge to the constitutionality of a statute can be procedurally defaulted?

### Question 4

The constitution guarantees every person due process of law, which entails both fair notice and a meaningful opportunity to be heard. The Eleventh Circuit's staff attorneys and clerks, in applying the local rules on certificate-of-appealability applications, foreclosed any opportunity for Mr. Gish to be heard. When a federal court's staff denies a party an opportunity to be heard, due process of law is violated and its judgment is void.

Should the Eleventh Circuit reopen the certificate-of-appealability proceedings and allow Mr. Gish to be heard?

**LIST OF PARTIES INVOLVED**

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

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#### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Eleventh denying the motion for reconsideration appears at Appendix "1".

The opinion by the United States Court of Appeals for the Eleventh Circuit denying the (construed from the notice of appeal) application for a certificate of appealability appears at Appendix "2".

The denial of the 28 U.S.C. § 2255 motion by the District Court for the Northern District of Georgia appears at Appendix "3".

The grant for an extension of time by this Court requesting a petition for a writ of certiorari appears at Appendix "4".

#### **JURISDICTION**

The date on which the Eleventh Circuit Court of Appeals decided Mr. Gish's motion for reconsideration was August 31, 2018. (Appendix "1").

The date on which the Eleventh decided Mr. Gish's application for a certificate of appealability was July 9, 2017. (Appendix "2").

This Court extended the time to file a petition for a writ of certiorari up to and including January 28, 2019. (Appendix "4").

This Court's jurisdiction otherwise arises under 28 U.S.C. §§ 1291, 2253.

#### **STATEMENT OF THE CASE** (Procedural History)

In September 2017, the United States District Court denied Mr. Gish's 28 U.S.C. § 2255 motion along with an application for a certificate of appealability.

In December 2017, Mr. Gish filed a notice of appeal. On January 9, 2018, the Eleventh Circuit Court of Appeals dismissed the case for failure to pay the filing and docketing fees. On January 29, 2018, the Court of Appeals denied Mr. Gish's motion to proceed In Forma Pauperis.

On February 1, 2018, Mr. Gish filed a motion to reinstate the appeal because the appeal was erroneously dismissed according to the mailbox rule and that Mr. Gish filed a timely motion to proceed in forma pauperis.

The Eleventh Circuit reinstated the appeal but did not rule on the renewed application to proceed in forma pauperis. After reinstating the appeal without informing Mr. Gish the Eleventh Circuit construed Mr. Gish's notice of appeal as an application for a certificate of appealability.

On July 9, 2018, the Eleventh Circuit Court of Appeals denied Mr. Gish's application for a certificate of appealability. (Appendix "2").

On August 30, 2018, Mr. Gish filed a motion for reconsideration, and on August 31, 2018, without ever receiving, let alone considering, Mr. Gish's motion for reconsideration, the court of appeals denied the motion for reconsideration. (Appendix "1"). On August 30, 2018, via the prison mailbox rule, Mr. Gish filed the reconsideration motion; the appeals court did not receive Mr. Gish's motion until September 4, 2018. (Appendix "5") (Date stamped copy of the motion). On August 31, 2018, the appellate court ruled on the motion although it had not received it. When the appellate court did receive it (4 days later), however, the appeals court chose not to read or consider Mr. Gish's timely motion.

Thereafter, this Court extended Mr. Gish's time to file a petition for a writ of certiorari up to and including January 28, 2019. And this petition followed.

#### **STATEMENT OF THE FACTS**

In 2010, Mr. Gish and his co-defendant, Myra Ettenborough, were indicted by a federal grand jury of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371 (Count One). Four counts of mail fraud in violation of 18 U.S.C.

§§ 1341 and 2 (Counts Two through Five). Six counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2 (Counts Six through Eleven).

From September 7, 2011 through September 23, 2011, the district court conducted the trial. On September 23, 2011, the jury convicted Mr. Gish of counts one through ten and acquitted him on count eleven. The United States District Court sentenced Mr. Gish to 240 months imprisonment and order him to pay over seventeen million in restitution.

On May 16, 2013, the Eleventh Circuit Court of Appeals affirmed Mr. Gish's conviction and sentence.

#### **Constitutional Error**

Prior to trial, Mr. Gish's counsel failed to advise him that misrepresentations about how a person handled money constituted illegal conduct, even if Mr. Gish misunderstood the law and did not steal the money. If Mr. Gish had known that his statements to investors that misrepresented historic facts constituted a crime, even if Mr. Gish believed the investors' monies were safe, then he would have pleaded guilty. In other words, Mr. Gish relied on his attorney's advice that he had a valid defense. Instead, even if the jury believed Mr. Gish's testimony, the criminal intent element of the charges against Mr. Gish would not have been negated.

There are no Eleventh Circuit decisions, which suggest that an accused may rely upon the advice of non-professionals when deciding whether to act or not.

After direct appeal, Mr. Gish learned of trial counsel's errors and filed a § 2255 motion. During the § 2255 proceedings, the district court authorized the government to inspect trial counsel's file. It turns out the files were empty of substantive research. The district, however, ignored the facts and presumed counsel's performance adequate. Then, without a hearing denied the § 2255 motion

through a combination of procedural default and the presumption counsel was adequate.

Mr. Gish filed a notice of appeal, and without notice (lost mail apparently) to Mr. Gish, the appellate court dismissed the notice of appeal. Eventually, the court reinstated the appeal. But then, once again, without notice, construed Mr. Gish's reinstatement as an application for COA and denied it without allowing Mr. Gish to be heard.

Mr. Gish sought and received permission to file for reconsideration. And although Mr. Gish timely filed the motion, the Eleventh Circuit ruled on the reconsideration motion before receiving it.

Mr. Gish asked the court to reconsider its premature denial and read his motion before denying it. The appeals court refused. This petition ensued.

## REASONS FOR GRANTING THE WRIT

1. Should the Eleventh Circuit have issued a Certificate of Appealability based on whether an evidentiary hearing was required rather than deciding the appeal by analyzing the underlying merits?

In rejecting a COA on claims 1 and 2, the Eleventh Circuit made the same mistake the Fifth Circuit did in **Buck v. Davis**, 137 S.Ct. 759 (2017). The Eleventh Circuit looked past Mr. Gish's presumptively true allegations and decided the merits without granting a certificate of appealability. In claim 1, Mr. Gish alleged that he only rejected a plea bargain because of trial counsel's mistaken advice on the nature of the crime. In looking past the § 2255 pleadings and concluding that Mr. Gish would have pleaded guilty even if he had been more accurately advised by trial counsel, the Eleventh Circuit denied the COA based on its assessment of the merits.

In rejecting a COA on claim 2, the Eleventh Circuit made the same error. In claim 2, Mr. Gish alleged counsel unilaterally changed the trial strategy without informing Mr. Gish. Mr. Gish then stated, under penalty of perjury, if he had known counsel was going to present a different case, then Mr. Gish would have pleaded guilty. On the existing record, the only evidence of what course of action Mr. Gish would have followed is his verified pleadings. Instead of following the record, the Eleventh Circuit decided the merits based on speculation; an outcome the appeals court reached by adopting a premise expressly rejected by this court: "Moreover, the record indicates that Gish continued to assert his innocence throughout trial, and at sentencing, which does not support a conclusion that he would have pleaded guilty "if counsel had pursued the promised strategy."" (Appendix "2" at 3). This Court expressly held that an assertion of innocence does not preclude a claim that, but for counsel's error, a defendant would have accepted a guilty plea. See **Missouri v. Frye**, 132 S.Ct. 1399 (2012); **Lafler v. Cooper**, 132 S.Ct. 1376 (2012).

The appellate court's premises are flawed. Initially, the very tone of its opinion reveals jurists of reason could debate the district court's summary resolution of the claim. Stated otherwise, jurists of reason would have found it possible that an accused would plead guilty when he or she learned that his or her attorney unilaterally chose a different trial strategy and did not tell him in advance. Implicitly, these actions by the trial attorney indicates that the original strategy was not likely to be successful. A rational client, like Mr. Gish, could then decide that it is better to negotiate a plea than go to trial with a counsel who does not believe in the defense. Moreso, if trial counsel unilaterally concludes that the planned witnesses will not help the case, counsel should inform the client. When counsel does not inform the client, the client may assume that the changed plan represents a downgrade in the attorney's confidence, which supports the conclusion that counsel thinks you are guilty. A situation that would make even the most recalcitrant accused consider entering a guilty plea.

Significantly, the merits of Mr. Gish's claims are not at issue in this action, nor should they have been at issue in the appeals court.

In 2017, this Court instructed the circuit courts of appeals that they lacked jurisdiction over the merits of habeas appeal unless a certificate of appealability had been granted. **Buck**, 137 S.Ct. 765 (citing **Miller-El v. Cockrell**, 537 U.S. 322, 336 (2003)). The Eleventh sidestepped the COA "process by first deciding the merits of an appeal and then justifying its denial of a COA based on its adjudication of the actual merits" essentially "deciding an appeal without jurisdiction." **Id.**

The only question before this court is whether jurists of reason would find debatable the district court's decision to resolve the § 2255 motion without an evidentiary hearing.

This court should grant the writ of certiorari, vacate the Eleventh Circuit's ruling, and remand the cause to the appeals court with instructions that it comply with the COA process.

2. **This Court and most circuits conclude that an evidentiary hearing must be conducted when a habeas claim results from events outside the courtroom and off the record. The Eleventh Circuit implicitly rejects that rule in denying Mr. Gish's § 2255 motion without a certificate of appealability, that is, without argument and briefing.**

This Court's decisional authority and Congress's statutory mandate entitles a 28 U.S.C. § 2255 movant to an evidentiary hearing whenever the § 2255 movant's well-pleaded factual allegations would—if proven—warrant habeas relief. **28 U.S.C. § 2255(b); *Fontaine v. United States*, 411 U.S. 213, 215 (1973); *Townsend v. Sain*, 372 U.S. 293 (1963).**

In the courts below, and in the paragraphs that follow, Mr. Gish identifies his trial attorney's specific misadvice that caused him to reject the plea agreement. This advice occurred outside the courtroom, yet neither the district or appeals court conducted an evidentiary hearing.

This Court explicitly identified that when a claim depends on "factual allegations outside the courtroom and upon which the record could, therefore, cast no real light[,] then, generally, the issues raised by the § 2255 motion cannot be conclusively resolved by the motion and "files and records;" thereby requiring the habeas court to conduct an evidentiary proceeding. ***Machibroda v. United States*, 368 U.S. 487, 494-95 (1962).**

In the proceedings below Mr. Gish alleged that his attorney gave him inaccurate advice that was directly material to his decision to reject a plea bargain and proceed to trial.

In the habeas context, a petitioner's allegations are presumed true until an attorney is appointed and an evidentiary hearing conducted. ***Id.*** The offspring

rule is that an evidentiary must be conducted unless the record conclusively refutes the allegations or the allegation are scientifically impossible. 28 U.S.C. § 2255(b).

Mr. Gish's allegations involved advise provided by counsel outside the courtroom, thus involved events, which were outside the record. And as such the law requires the district court to either conduct an evidentiary hearing or presume the allegations true. The district court did neither, and the appellate court's refusal to issue COA sanctions the district court's departure from the law. See **Machibroda v. United States**, 368 U.S. at 494.

#### Allegations

Mr. Gish alleged:

- A. On several occasions, at counsel's office, defense counsel instructed Mr. Gish that he had a valid defense of good faith reliance. Counsel advised that Mr. Gish had a defense that Mr. Gish's relied on Mr. Gish's nonlawyer partner's advice that because money is fungible, Mr. Gish did not have to segregate the particular investor funds, despite his promises and representations, that the funds were segregated.
- B. Counsel assured Mr. Gish that he had researched the law and investigated the facts. And that the actions of Zahra Ghods could arise to good faith reliance. (But a review of counsel's files reveal no legal research on the matter.)
- C. When Mr. Gish rejected the government's five year plea bargain offer. Mr. Gish believed that counsel's advice on the good faith defense was reasonably founded on case-specific facts and law.
- D. The government's review of trial counsel's files reveals a dearth of legal research and no investigation notes or reports. In other words, based on available evidence, counsel misrepresented the foundation of his advice.
- E. If Mr. Gish had known that counsel had neither researched the law nor investigated the facts, then Mr. Gish would not have gone to trial and would have pleaded guilty.
- F. Moreover, if Mr. Gish had known that no Eleventh Circuit decisions stand for the proposition that good faith reliance on a **non-attorney** (or expert) is a valid defense, then Mr. Gish would have pleaded guilty.

If these allegations are proven, then Mr. Gish is entitled to have his conviction and sentence vacated, this fulfills the statutory (and decisional authority) requirements for an evidentiary hearing. By refusing to conduct an evidentiary hearing, the district court denied Mr. Gish not only his statutory right to prove his claims, but also his statutory right to be heard.

On this record, Mr. Gish's allegations are not only presumptively true, but corroborated by counsel's empty files and Mr. Gish's own inculpatory testimony concerning the firm's business practices. In essence, Mr. Gish's only defense was that he relied upon Zhara Ghods's (essentially legal) advice that it was proper to simply make bookkeeping entries when handling investor money, rather than setting up distinct accounts with specific controls—as they had promised the investors.

Ms. Ghods's advice was wrong and likely meant to (as it did) deceive Mr. Gish. But—as the jury found, and counsel should have known—Mr. Gish had no right to rely upon that advice. Succinctly, in this circumstances ignorance of the law is not a defense, **United States v. Lebowitz**, 676 F.3d 1000 (11th Cir. 2012), and reliance on a non-professional does not negate intent.

Summarily, Mr. Gish alleges that defense counsel's inadequate investigation and lack of research resulted in mistaken advice that caused Mr. Gish to reject a favorable plea bargain. If that is proven, then governing Eleventh Circuit law declares defense counsel to have been constitutionally ineffective. See **Sullivan v. Sec'y, Fla. Dept. of Corr.**, 837 F.3d 1195 (11th Cir. 2016).

Virtually, every circuit would find the district court's resolution of the motion debatable. See, e.g. **Lafuente v. United States**, 617 F.3d 944, 946-97 (7th Cir. 2010)(per curiam)(district court abused discretion by denying § 2255 motion "without discovery or a hearing"; "The petitioner's pro se motion, sworn

statement, and corroborating evidence show that his allegations are plausible, and are sufficient to warrant further inquiry by the district court."); **United States v. Jackson**, 209 F.3d 1103, 1110 (9th Cir. 2000)(district court abused discretion in denying evidentiary hearing, given that "the motion, files and record in this case could not have shown conclusively that Jackson is not entitled to relief"); **Arredondo v. United States**, 178 F.3d 778, 788-89 (6th Cir. 1999)(district court abused its discretion in refusing to hold evidentiary hearing on ineffective assistance claim, given that petitioner's allegation were not "contradicted by the record, inherently incredible, or conclusions rather than statements of fact").

Jurists of reason would find the district court's failure to conduct an evidentiary hearing wrong. Governing law entitles Mr. Gish to either § 2255 relief or an evidentiary hearing.

The Eleventh Circuit should have granted a certificate of appealability on whether the district court should have conducted an evidentiary hearing before adjudicating the § 2255 motion's merits. This Court should either grant certiorari, then vacate, and remand the matter to the Court of Appeals, or grant the certificate of appealability itself.

**3. When the Court of Appeals denies a certificate of appealability, it effectively sanctions a district court's ruling. In denying a COA in this case, the Eleventh Circuit approved the district court's departure from the usual application of the procedural default doctrine.**

The appeals court applies the wrong rule of law when it finds Mr. Gish's facial and applied challenges to the constitutionality of the fraud laws (Appendix "2" at 2) to be procedurally defaulted and untimely. (Appendix "2" at 7)(referencing claim 11).

Mr. Gish challenges the federal fraud laws based on Congress having failed to define a scheme to defraud. **United States v. Bradley**, 644 F.3d 1213, 1240 (11th Cir. 2011). Congress's delegating to the courts the duty to define the crime's elements violates the separation of powers principle and is a deregulation of Congress's constitutional duty. Furthermore, as a practical matter, the courts delegated the duty to the jury. This kicking-the-can-down-the-road practice reveals that the fraud statutes are too vague to put an ordinary citizen on notice of what conduct is prohibited; plus, creates a high risk that in practice the fraud laws could impose an ex post facto punishment or transform into the equivalent of a bill of attainder. Simply, under the current text, in order to understand the prohibited conduct, a person must not only comprehend the statutory text, but also must predict how twelve unknown people will feel at some future date. The Constitution cannot tolerate multiple levels of uncertainty. See generally **Sessions v. Dimaya**, 138 S.Ct. 1204 (2018). It cannot conceive of fortune telling and mind reading serving as a basis for understanding prohibited conduct.

The district court never addressed the merits of these claims, since it found that Mr. Gish had procedurally defaulted the claims by failing to raise it on direct appeal. (Appendix "2" at 6-7). By failing to issue a certificate of appealability the Eleventh Circuit sanctioned that ruling.

This Court, however, indicates that a challenge to the validity of a statute cannot be waived, even by a knowing, intelligent, and voluntary waiver. See **Class v. United States**, 138 S. Ct. 298 (2018) ("In our view, a guilty plea [and a plea agreement waiver] by itself does not bar" a "ground that the statute of conviction violates the Constitution[.]"). Mr. Gish's challenge sounds both in subject-matter jurisdiction and actual innocence, thus "cannot-be-waived"

rule aligns this scenario with the general rule that certain challenge cannot be waived. This Court's settled law establishes that subject-matter jurisdiction cannot be forfeited or waived. **Cotton v. United States**, 535 U.S. 625, 630 (2002). Equally settled law provides that actual innocence creates an equitable exception to forfeiture or waiver, and to the statute of limitations. **McQuiggin v. Perkins**, 133 S. Ct. 1924 (2013); **Kuhlman v. Wilson**, 477 U.S. 436 (1986).

In the light of this precedent, jurists of reason should find the district court application of the procedural default doctrine to the facial challenge of the fraud statute debatable.

Once more, Mr. Gish emphasizes at this stage the merits are not in controversy; the only relevant question is whether Claim 11 was subject to procedural default.

This Court should grant the writ of certiorari and reverse the Eleventh Circuit's order denying a certificate of appealability.

4. The Constitution delegates to lifetime judges the authority to determine whether the state may take an individual's property or liberty. Eleventh Circuit procedures, as a practical matter, deprived Mr. Gish and similarly situated litigants of the constitutional guarantee of judicial independence.

The Constitution provides special protections (lifetime tenure, irreducible salary, etc.) to ensure judicial independence. Those protections are meant to minimize the risk that political or social pressure affect a judge's ruling. The Eleventh Circuit has adopted a practice that vitiates those protections: The Eleventh Circuit permits non-Article III employee (thus unprotected by constitutional safeguard) persons to review the record and as a practical matter, determine appeals.

The court of appeals periodically complains of an excessive workload—and to the extent that Mr. Gish's opinion matters, he agrees that the courts are

under-resourced for the volume of cases—this burden, however, does not justify a nearly complete abdication by the appellate judges of their constitutional and statutory duties to learn the facts and apply the law. Cf. generally, **United States v. Flores**, 632 F.3d 229 (5th Cir. 2011); **Bolin v. Story**, 225 F.3d 1234 (11th Cir. 2000).

In order to appeal the district court's denial of Mr. Gish's § 2255 motion, the court of appeals had to grant a certificate of appealability. Yet, the Eleventh Circuit of Appeals steadfastly refused to allow Mr. Gish to be heard concerning his application for a certificate of appealability.

Initially, without ever giving Mr. Gish notice, the Eleventh Circuit construed Mr. Gish's notice of appeal as an application for a COA. (Appendix "5"). When the Eleventh Circuit recognized its indiscretion and allowed Mr. Gish an extended time to file for reconsideration. Under the mailbox rule, Mr. Gish timely applied for reconsideration. (Appendix "5"). The Eleventh Circuit ignored the mailbox rule, and, once more, ruled on the COA (reconsideration) without considering Mr. Gish's input. (Appendix "5", "6", "7").

Mr. Gish notified the Eleventh Circuit of what had occurred and provided documentary support. The Eleventh Circuit turned a blind eye and deaf ear. Its clerk, however, was not mute, and returned the motion and explanation unfiled. This petition ensued. (Appendix "6" and "7").

It is unconscionable and unconstitutional to have Mr. Gish's right to habeas corpus, and his liberty, dependent on comparatively inexperienced staff attorneys instead of Article III judges. If the United States government cannot, or is unwilling to, comply with the Constitution, then it must reduce its criminal (or civil) prosecutions in order to meet the Constitution prerequisites for state jurisdiction over an individual's person and property.

What this Court must not allow is for lower courts to lessen the Constitution's protection by creating practices that glaze over the lack of resources. By covering up the problem, the courts are complicit in deceiving the public generally as well as the individual. Especially when the problem essentially deprives litigants of due process. This Court should exercise its supervisory powers to end the Eleventh Circuit's practice of allowing non-judges to decide cases.

#### CONCLUSION

Mr. Gish presented a valid claim that his attorney's out-of-court, off-record misadvice caused Mr. Gish to reject a favorable plea bargain. The Eleventh Circuit in diametric opposition to this Court's precedent then conducted a merits analysis (without either briefing or a reasoned district court opinion on that claim) (Appendix "2", "3"). Thereby, not only denying Mr. Gish his statutory right to be heard, but also usurping jurisdiction the appeals court did not have. Constitutionally intolerable actions by the court of appeals, which are magnified since it appears that no judge ever examined the record, and instead the Eleventh Circuit's opinion came from an employee, not a judge, and certainly not an Article III judge.

This Court should grant the writ of certiorari to bring the Eleventh Circuit into compliance with 28 U.S.C. § 2255(b), this Court's decisions, and this Court's controlling precedent.

Prepared with the assistance of Frank L. Amodeo and respectfully submitted on this 26<sup>th</sup> day of January, 2019, by:



Geoffrey C. Gish