

NO.: \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

RICHARD BUTTON—PETITIONER

Vs.

JULIE JONES, Sec'y, Fla. D.O.C.—RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

RICHARD BUTTON, 779155  
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QUESTION(S) PRESENTED

- 1) DO THE PROCEDURAL RULES IN EFFECT AT TIME OF FILING, GOVERN WHETHER AN APPLICATION FOR STATE POSTCONVICTION RELIEF IS PROPERLY FILED?
- 2) WHAT IS THE STANDARD FOR THE CORRECT INTERPRETATION OF A PROPERLY FILED MOTION?
- 3) DOES AN AMENDED POSTCONVICTION MOTION THAT CORRECTS A DEFICIENCY RELATE BACK TO THE ORIGINAL FILING DATE?

## **LIST OF PARTIES**

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

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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

The opinion of the Court of Appeals for the Eleventh Circuit is not reported.

Appendix A. The opinion of the United States District Court for the Southern District is unpublished. Appendix B. The opinion of the state trial court denying the motion to set-aside the conviction is reported at *Button v. State*, 941 So.2d 531 (Fla. 4<sup>th</sup> DCA 2006).

JURISDICTION

The judgment of the court of appeals was entered on November 14<sup>th</sup>, 2017.

A copy of that decision appears at Appendix A.

In *Holm v. United States*, 524 U.S. 236 (1998), this Court held that the United States Supreme Court has jurisdiction on Certiorari to review a denial of a request for certificate of appealability by a circuit judge or a panel of the federal court of appeals.

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

Title 28 United States Code, §2253(c) states:

“A certificate of appealability may issue.... If the applicant has made a substantial showing of the denial of a constitutional right.”

The United States Court of Appeals for the Eleventh Circuit granted Petitioner a Certificate of Appealability reasoning that Petitioner “stated a facially valid claim of a denial of a constitutional right.” Appendix D.

## STATEMENT OF THE CASE

On May 25, 2013, Petitioner filed a Motion for Postconviction Relief, *Fla. R. Crim. P.* 3.850(b)(1), claiming newly discovered evidence, in the form of recantation of alleged witness. Appendix E.

On February 19, 2014, The State responded.

On March 13, 2014, the Court entered an order denying Petitioner's Motion without prejudice, because Petitioner failed to allege that the evidence was discovered within two years of filing the Motion.

On April 9, 2014, Petitioner filed an amended motion claiming the same facts. Appendix F. This time, the State's response argued that Petitioner failed to attach an affidavit by the recanting witness and failed to allege that the witness recanted while under oath and subject to the prospect of perjury. (None of which are filing requirements). The Trial Court adopted this determination and on September 4, 2014, the trial court entered an order dismissing with prejudice Petitioner's motion because Petitioner still failed to demonstrate when he discovered the evidence or why it could not have been discovered sooner. Appendix G.

On October 21, 2014, Petitioner filed a 28 U.S.C. §2254 Petition.

On September 15, 2015, Petitioner filed an amended §2254 Petition.

On June 27, 2016, the District Court dismissed the Petition, denied C.O.A., and closed the case adopting the State Court's determination. Appendix B.

On September 6, 2016, Petitioner filed a notice of appeal.

On December 12, 2016, the Petitioner filed a Request for a Certificate of Appealability to the United States Court of Appeal, Eleventh Circuit. Appendix H.

On March 29, 2017, the Eleventh Circuit Court granted Petitioner's Request for Certificate of Appealability. Appendix D.

On May 22, 2017, Petitioner filed his Initial Brief. Appendix I.

On June 13, 2017, Respondent filed an Answer Brief. Appendix J.

On June 23, 2017, Petitioner filed a Reply Brief. Appendix K.

On November 14, 2017, the Eleventh Circuit Court denied Petitioner's appeal and affirmed the lower court's decision. Appendix A.

Petitioner filed a timely Motion for Rehearing which was denied on February 6, 2018. Appendix C.

#### REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's departure from the accepted and usual course of judicial proceedings, calls for an exercise of this Court's supervisory power.

The District Court and the Circuit Court's determination that Button's Habeas Corpus Petition was untimely is based on an unreasonable and incorrect application of the rules and laws of the United States and Florida.

The decisions are contrary to existing law, and must be addressed to avoid unwarranted decision disparities among litigants with similar issues.

Button filed his *Fla. R. Crim. P.* 3.850(b)(1) newly discovered evidence motion on May 25, 2013. The rules in effect at that time did not require an affidavit to support a witnesses' recantation. The rule states only that a brief statement supporting the claim is needed.

The rule change requiring an affidavit did not become law until July 1, 2013. *In re Amendments to Fla. R. Crim. P.*, 132 So.3d 734 (Fla. 2013). Appendix L. 30 days after Button filed his motion. Therefore, the decisions are in conflict to the law that was in effect at the time Button filed his 3.850 motion on May 25, 2013. Florida Courts support this fact, ruling in the following cases that no affidavit is required to support witnesses' recantation. *Burton v. State*, 23 So.3d 873 (Fla. 2<sup>nd</sup> DCA 2009); *Keen v. State*, 855 So.2d 117 (Fla. 2<sup>nd</sup> DCA 2003); *Butler v. State*, 946 So.2d 30 (Fla. 2<sup>nd</sup> DCA 2006); and *Russell v. State*, 100 So.3d 202 (Fla. 2<sup>nd</sup> DCA 2012).

The Federal Courts have held that motions are governed by the version of the rule that was in effect at the time of filing. The Eleventh Circuit's ruling is in

conflict with the following Federal Courts, and their decision. *Wheeler v. Newell*, 407 Fed.App. 889 (6<sup>th</sup> Cir. 2011); *First Interregional Equity Corp. v. Haughton*, 1994 U.S. Dist.LEXIS 9477 at \*10 (S.D.N.Y. July 12, 1994); *Kramer Export Corp. v. Peg Perego U.S.A.*, 1994 WL 86357, at \*6 (S.D.N.Y. May 17, 1994), which all agree that the rules in effect at the time of filing prevail.

This is the Federal standard. The Eleventh Circuit's ruling conflicts with this standard.

As *Artuz v. Bennet*, 531 U.S. 4, 8 (2000) states that an application is properly filed "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" in effect at time of filing.

The Eleventh Circuit's decision in *Green v. Sec'y, Dept. of Corr.*, 877 F.3 d 1244 (11<sup>th</sup> Cir. 2017), clearly states that under Florida law a Postconviction motion that corrects a deficiency relates back and is deemed filed as of the original filing date.

Therefore, utilizing the rules in effect at time of filing, Button was not required to attach an affidavit to his motion supporting the witnesses' recantation making his motion properly filed by the *Artuz, supra*, standards and *Green, supra*, demonstrates that under Florida law, the relation back principle is the accepted and prevailing standard. Thereby making Button's May 25, 2013 motion properly filed and his §2254 Habeas Corpus Petition timely.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

7-3-18

Date:

/s/

Richard Button

Richard Button, Petitioner, *pro se*