18-8624 ORIGINAL

No. 18-10766-C

In the Supreme Court of the United States

BRUCE E. MILLER, *Pro Se*
PETITIONER,

v.

STATE OF ALABAMA,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

TRIAL COUNSEL FAILURE TO MAKE A TIMELY OBJECTION OR FILE A PRETRIAL MOTION TO DISMISS A FATALLY FLAWED INDICTEMENT CANNOT VALIDATE A "CONSTITUTIONALLY DEFICIENT" INDICTMENT OVER THE FIFTH AMENDMENT'S PERSONAL GUARANTEE THAT "NO PERSON SHALL BE HELD TO ANSWER" FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME.

WHETHER THE COURTS INCORRECTLY DETERMINED THE PETITIONER FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL WAS "CONTRARY TO" OR "INVOLVE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, WHERE HE CLEARLY MEET THE TWO-PRONG STANDARD IN STRICKLAND.

WHETHER THE PETITIONER HAS PRESENTED "A COLORABLE SHOWING OF ACTUAL (FACTUAL) INNOCENCE THAT SERVES AS A GATEWAY THROUGH THE STATUTE-OF-LIMITATION OR PROCEDURAL BAR FOR LATE "FIRST" HABEAS CORPUS PETITION.

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Bruce E. Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Courts of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The United States Court of Appeals Decision
(App. A, infra, 1a-5a) to the Petition

The United States District Courts' Decision
(App. B, infra, 1a-5a) to the Petition

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JURISDICTION

The judgment of the United States Court of Appeals was entered on October 9, 2018. This Court's jurisdiction is invoked under 28 U.S.C §1254 (1)

INTRODUCTION

The basic principle of due process within our criminal justice system requires that evidence is submitted to the jury (i.e., grand or petit jury) that proves a crime has been committed. Words alone should not ever be enough to convict someone of committing prohibited actions. The writ of habeas corpus (The "Great Writ") has been for centuries esteemed the best and only sufficient defense of personal freedom. *Ex parte Yerger*, 75 U.S. 85, 95 (1868). An actual-innocence exception to the AEDPA's statute of limitation or procedural bars would enable the courts to continue to redress the most egregious injustice that can occur under our criminal justice system; that is, the incarceration of an innocent person by an unconstitutional process.

Depriving an individual of life and liberty without just cause so violates the principles underlying American society that we would rather let a guilty man go free than incarcerate an innocent one. *See Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting that concern about the injustice that results from the conviction of an innocent person is reflected in the "fundamental value determination of our society that is far worse to convict an innocent man that to let a guilty man go free"). Absent a congressional revision of the statute, the federal courts should construe the AEDPA's statute of limitations in accordance with the purpose of the Great Writ to allow an actual-innocence exception to the AEDPA's statute of limitations.

STATEMENT OF THE CASE AND FACTS

On January 19, 2010, according to the criminal complaints filed in the District Court of Mobile County, Alabama, first charged that on December 23, 2009 and January 5, 2010, that Defendant-Petitioner Bruce Elliott Miller, an Alabama licensed pharmacist was charged with unlawful distribution of a controlled substance and theft of property in the second degree for allegedly stealing controlled substances from his employer.

Prior to any charges filed in the District Court against the defendant, in a classic case of "putting the carriage before the horse," on January 14, 2010, the Mobile County Street Enforcement Narcotics Taskforce ("MCSENT") officers arrested the petitioner without an arrest warrant in violation of his Fourth Amendment right against unreasonable searches and seizures allegedly on "outstanding charges" for the unlawful distribution of a controlled substance.

After being arrested and taking into custody, the MCSENT transported the petitioner from Citronelle, Alabama to his home located in Mobile approximately 35 miles from the scene of the arrest, where several MSCENT officers entered petitioner's home without probable cause or a search warrant in violation of his Fourth Amendment right and conducted an illegal search. (See App. D, at A1; Search Warrant Inventory Sheet). Moreover, the "Police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.") (quoting *Katz v. U.S.*, 389 U.S. 347, 357(1967). *see also Terry v. Ohio*, 392 U.S. 1, 20 (1968). In *Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948), this Court stated, "the point of the Fourth Amendment is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often-competitive enterprise of ferreting out crime." The search of Miller's home consisted of nothing more than a ruse for them to go on a fishing expedition in attempt to prove their otherwise unfounded assertion or hunch.

Nevertheless, on January 15, 2010, Petitioner made his first initial appearance in Mobile County District Court before George Hardesty, a District Court Judge. As a matter of right, Miller was denied bail without rhyme or reason for a nonviolent bailable offense. **(See App. A, at A1-A4; Case Action Summary).**

However, court record revealed that on January 19, 2010, the state filed complaints charging petitioner with unlawful distribution of a controlled substance/furnish in violation of Section 13A-12-211. After the charges had been filed by the State, on January 20, 2010, defendant was summoned from the Mobile County Metro Jail where he was made to languish without being afforded the opportunity to post bail as a matter of right to appear back in district court only to be denied bail again as a matter of right by District Court Judge Charles McKnight. On behalf of Defendant-Petitioner Miller, Attorney Eric K. Roberts, ultimately, filed a motion for bond to have the district court to afford Mr. Miller to post bail as a matter of right. On January 21, 2010, Judge McKnight ordered defendant to return to District Court, motion was granted, and bond was set, defendant posted bail and was released on bond.

Prior to the indictments, there were preliminary discovery hearings that were recorded and transcribed. **(See App. D; State's Exhibit B).** On February 3, 2010, a preliminary discovery hearing was held before Judge Charles McKnight regarding the two unlawful distributions

offenses. Officer Derrick Dubose, who was assigned to MCSENT who claims he was the primary officer at the scene testified that on December 23, 2009, he was riding along with a confidential informant (CI) regarding picking up some controlled substances during a "controlled-buy operation." Officer Dubose testified that the CI was furnished with $400.00 of pre-recorded "marked" money to purchase the narcotics during a control-buy operation to confirm the sale of illegal narcotics. **(State's Exhibit B at 5).** Dubose also stated that other members of the MSCENT unit was in the area in an attempt to record the transaction with a hand-held video camera as the sale unfold. Officer Dubose further testified that the transaction probably "took about three (3) seconds to complete, if that; maybe not even three seconds." After the CI retrieve a plastic bag they let Mr. Miller be on his way at that point without being arrested, albeit, having allegedly just witness a felony being committed in their presence. How can a plastic bag ever be construed as containing narcotics?

As a matter of fact, or law Ala. Code §15-10-3(a) provides authorization for an arrest without a warrant when the officers have "reasonable cause to believe" that the defendant has just committed a felony. A "reasonable cause to believe" that a person has committed a prohibited offense exists when "evidence or information" which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it.

Next, Dubose further testified that he conducted another controlled-buy operation using the same CI involving Mr. Miller on January 5, 2010. Dubose testified that the CI was furnished with another $400.00 of pre-recorded money. Dubose claim that he witnessed the exchange of the $400.00 of pre-recorded money for another white plastic bag tied in a knot. Dubose stated that once this transaction was completed they let Mr. Miller be on his way again; notwithstanding, having just witness another "sale" of illegal narcotics without closing in and arresting Miller with this pre-recorded "marked" money in his possession. Officer Dubose also testified that he never saw any controlled substance (drugs) at the scene. Nonetheless, at the conclusion of the preliminary discovery hearing, District Court Judge Charles McKnight stated on the record that he finds probable cause and bound the incidents occurring on December 23, 2009 and January 5, 2010, over to the Mobile County Grand Jury. **(See App. D, State's Exhibit B at 19 and 40).**

On the other hand, Officer Pat McKean stated in his investigative narrative that he was contacted by a reliable informant that informed him that he was picking up some bottles of codeine and the codeine was already paid for. **(See App. A, at A5; Investigative Narrative).** Why would the MCSENT provide the CI with $400.00 to purchase codeine that was allegedly already paid for? Reader can draw his own conclusion. Perhaps, this explain why there were no photographs of the pre-recorded serial numbers and why the "marked money was never recovered or Mr. Miller arrested with this money in his possession.

Subsequently, on February 18, 2010, Miller was re-arrested at his home by Officer Pat McKean for theft of property allegedly for stealing controlled substance from his employer stemming from the arrest incident on January 14, 2010. On March 25, 2010, a preliminary discovery hearing was held before Bob Sherling, Mobile County District Judge for the theft of property charge, where McKean was the only witness that testified at the preliminary hearing against the defendant. Officer McKean was never in a position to have witness any thefts on January 14, 2010, therefore, he could not have testified regarding any thefts. For example, by Officer McKean's own testimony, he testified that on January 14, 2010, we [MCSENT] unit waited outside for Mr. Miller to get off work before taking him into custody on the outstanding charges of unlawful distribution of a controlled substance. And when he was taken into custody he was found to be in possession of a controlled substance.

Although, McKean testified under oath that he was able to confirm with "someone" at Miller's place of employment that he had in fact misappropriated the drugs without permission or consent from the owner or his employer. **(See App. D; State's Exhibit A at 4-5).** Miller was not charged with theft on January 14, 2010, even though, McKean testified that he "confirmed" it with someone. That someone was never identified by either McKean or the state.

On May 14, 2010, Miller was charged by indictments with two counts of unlawful distribution of a controlled substance. The first count of the indictment averred that on December 29, 2009; instead of December 23, 2009, that Petitioner unlawfully "sold/distributed" codeine within a three-mile radius of Forrest Hill Elementary School, and the second count charged that on January 5, 2010, again "sold/ distributed" codeine within a three-mile radius of Forrest Hill Elementary School. Some three months later, on August 20, 2010, Petitioner was allegedly charged by indictment by a Mobile County Grand Jury with one count of second-degree theft of property. On November 15, 2010, Petitioner appeared in Court with Attorney Lela V. Cleveland

and pled not guilty to unlawful distribution of a controlled substance in CC10-2319 and CC10-2320 and second-degree theft of property in CC10-3391. Trial was set for February 1, 2011.

REASONS FOR GRANTING THE PETITION

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intelligent. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by the effective assistance of counsel.

The writ of habeas corpus has for centuries served as an indispensable safeguard of an individual's constitutional rights. The writ's purpose of safeguarding an individual's constitutional rights and ensuring the integrity of the criminal justice system ought to prevail over any other equitable concerns. Because the writ of habeas corpus stands as the last safeguard protecting personal liberty, a showing of probable innocence must enable a prisoner or person to overcome the AEDPA's statute of limitations or procedural bars and bring his constitutional claims before a federal court. Under this Court's precedent, to establish actual innocence, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."

SUMMARY OF THE ARGUMENT

A. The Right Not to Be Tried

Our Constitution requires that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury." *U.S. Const. Amend. V.* The Fifth Amendment provides the only means of charging a person with commission of a crime against the government. As a general rule, an indictment passes constitutional muster if it

"contains all the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001). But the Court also stated that this constitutional standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. *Fed.R. Crim.P.7(c)(1)*.

This Court held that federal due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. The Due Process Clause protects a person from conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." However, in petitioner's case for the theft of property, in CC10-3391, the grand jury returned an indictment that was "constitutionally deficient" that was not in compliance with the Fifth Amendment or Alabama law. Unlike most other constitutional errors, the Fifth Amendment provides an explicit remedy, namely, that a person "shall not be held to answer" for a capital, or otherwise infamous crime. Here, the Fifth Amendment applies to the guilty as well as the innocent. Neither may be held to answer if the indictment is constitutionally deficient and does not charge an offense.

This Court has recognized that the Fifth Amendment contains a "right not to be tried" independent of any prejudice in the merits trial, in its decision *in Midland Asphalt v. United States*, 489 U.S. 794 (1989), where an indictment contains a fatal flaw or defect, it ceases to be an indictment. A defect so fundamental that causes... the indictment no longer to be an indictment and gives rise to "the constitutional right not to be tried". (Id.802). (Emphasis supplied).

To define a crime, it is necessary that the indictment include "every fact that is by law a basis for imposing or increasing punishment". *Apprendi v. New Jersey*, 530 U.S. 466, 501 (2000)(Thomas, J. concurring). An indictment invalid on its face due to omission an essential element is no accusation at all. Federal Rule 34(a) which requires an arrest of judgment if "the indictment ... does not charge an offense."

Since the earliest days of this Republic, a long solid line of precedent has established that automatic reversal of a judgment is the required remedy when a reviewing court determines that

the indictment does not charge any offense. The framers of the institution of the grand jury was adopted in this country to be a basic guarantee of individual liberty, notwithstanding, periodic criticism, was designed as a means not only of bringing to trial persons accused of a public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, and to provide a shield against arbitrary or oppressive action, by ensuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and judicial instruction and guidance.

The petitioner further contends that he has the right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away. The indictment in and of itself is fatally flawed because it is completely void of any ownership to the property that was allegedly stolen. The legislative intent is not ambiguous but is explicitly clear that the property must belong to someone other than the defendant. Where the error is material, it should have been amended, and if necessary, the proceedings adjourned to avoid a manifest injustice or prejudice by enabling the defense to prepare to meet the amended charge.

But, to allow the prosecution to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant-petitioner of a basic constitutional protection which the guaranty of the intervention of a grand jury was designed to secure. It gives the prosecution free hand to fill in the gap of proof by surmise or conjecture. This was plain error.

B. Ineffective Assistance of Counsel

This Court has held that the trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, see *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), comprehends the right to effective assistance of counsel. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

Every defendant has a right to counsel because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials or proceedings in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court recognized that the right to counsel guaranteed by

the Sixth Amendment includes "the right to the effective assistance of counsel." 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970).

However, the Court defined this right in terms of the "crucial role" that attorneys play in ensuring that our adversarial system produces "just results." Id. at 685.

Thus, the Court held that an attorney's inadequate representation does not rise to the level of a constitutional violation unless the deficiency so infected the adversarial process as to raise doubts about the reliability of the proceeding's outcome. *Id.* at 687. In Strickland, this Court articulated these principles into a two-prong test. A defendant must prove that his counsel's performance was deficient and that he suffered prejudice as a result. To be deficient, an attorney's conduct must fall below an "objective standard of reasonableness" established by "prevailing professional norms." Id. at 687-88. To demonstrate prejudice, the petitioner need not show that the deficient performance more likely than not altered the outcome of the case, but must demonstrate only a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

LEGAL ARGUMENT

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME WHERE A "CONSTITUTIONALLY DEFICIENT" INDICTMENT FAILS TO CHARGE AN OFFENSE.

The Fifth Amendment states: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb." In the petitioner's case for second-degree theft of property, CC10-3391, trial counsel failure to make a timely objection on the record or file a timely pretrial motion to dismiss the fatally defective indictment cannot validate a "constitutionally deficient" indictment over the Fifth Amendment's personal guarantee that "no person shall be held to answer" for a capital or otherwise infamous crime. In this present case, petitioner was allegedly indicted for theft of property. The indictment that was returned by a Mobile County grand jury reads, in its entirety, as follows:

> "The Grand Jury of said county that before the finding of this indictment, Bruce Elliott Miller, whose name is to the grand jury otherwise unknown, did knowingly

> obtain or exert unauthorized control over a substance controlled by Chapter 2 Title 20 or any amendments thereto, to wit: Codeine Syrup and 10 mg Lortabs (two bottles), with the intent to deprive the owner of said property in violation of Section 13A-8-4 of the Code of Alabama." **(See App. A, at A6-A8; State's Exhibit C, D, E).**

At first glimpse or impression, the indictment appears to have the tracking language of a typical theft case; however, a closer analysis of the indictment reveals that it fails to allege an essential element necessary to charge the offense for theft of property. It doesn't say the "property to wit of anybody," that is, the property of another or property belonging to someone else other that the defendant. The "elements" or "facts necessary" to constitute a crime are determined by state law. The materiality of defects in indictments must be analyzed by looking to the essential elements of the criminal offense charged under the specific indictment or information.

Under Code of Alabama 1975, specifically, Section 13A-8-4, Code of Alabama 1975, defines theft of property as follows:

> "A person commits the crime of theft of property if he or she "knowingly obtains or exerts unauthorized control over the property of another with intent to deprive the owner of his or her property."

Accordingly, the defendant-petitioner must have obtained or exerted unauthorized control over the property of another. The true test of the sufficiency of an indictment then is "whether the indictment contains all the elements of the offense intended to be charged." Thus, this court must turn to the essential elements of the offense of theft of property. To have been properly convicted of theft, a sufficient indictment must allege "facts supporting every element of [the charged] offense" with sufficient precision to appraise the defendant of the conduct which is subject of the accusation, and nothing must be left to inference.

In the State's Motion to Dismiss petitioner's first Rule 32 petition, the State argued that the theft charge is self-explanatory. Petitioner was charged with stealing controlled substances from his employer. The fundamental problem with the State's argument, and one they cannot overcome, is that the charging document is "fatally defective" because it doesn't say the property to wit of anybody. Petitioner argues that the gravamen of theft is in depriving the true owner of the use, benefit, enjoyment or value of his property, without his consent. Owner is defined as a person, other than the defendant, who has possession of or any other interest in the property

involved, even though that interest or possession is unlawful, and without whose consent the defendant has no authority to exert control over the property. The indictment here in this matter cannot be fairly read as charging the petitioner with theft of property because it is completely void of any ownership to the property that was allegedly stolen. Clearly, it doesn't say the property to wit of anybody. A cursory glance will tell you that.

The absence of a material or essential element in the charging document is a matter of substance and is far from "a matter of form only". A cardinal rule is to view the Fifth Amendment clause in question in the context in which it occurs and in its cluster of individual guarantees. *United States v. Balsys*, 524 U.S, 666, 673 (1998). Viewed as a whole, the Fifth Amendment is specifically designed to provide individual guarantees against the government. It is not designed for the convenience of the government. As part of the Bill of Rights, Fifth Amendment Grand Jury Clause was "manifestly intended mainly for the security of personal rights". *Ex Parte Bain*, 121 U.S. 1, 6 (1886).

Ever since *Ex Parte Bain* was decided in 1887 it has been the rule that after an indictment has been returned "its charges may not be broadened through amendment except by the grand jury itself." In that case, the court ordered that some specific and relevant allegations the grand jury charged be stricken from the indictment so that Bain might be convicted without proof of those particular allegations. The *Bain* case stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. see also *United States v. Norris*, 281 U.S. 619, 622. Cf. *Clyatt v. United States*, 197 U.S. 207, 219, 220.

Although the trial court did not permit a "formal amendment of the indictment" the effect of what it did was the same in this case that is before this Court. Its historical development was described in *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968): "Objections to the Constitution because of the absence of a bill of rights were met by immediate submission and adoption of the Bill of Rights". Another familiar rule of interpretation is that no word, phrase, or sub-clause is intended to be without meaning. Since the Grand Jury Clause contains its own particular remedy, namely, that a person shall "not be held to answer", that phrase must have been intended to have some meaning.

This Court has ruled that the phrase "no person shall be held to answer" confers a "right-not-to-be-tried" independent of the merits of a matter in two separate instances. In *Midland Asphalt v. United States*, 489 U.S. 794, 802 (1989) the Court held that: "a defect so fundamental

that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried". (Emphasis supplied). In *Midland*, an isolated breach of grand jury secrecy did not give rise to the "right not to be tried". There, the court contrasted Rule 6 violations with the Fifth Amendment "explicit ... constitutional guarantee that trial will not occur". The Court observed "a crucial distinction between a right not to be tried and a right whose remedy requires dismissal of charges". (Id.801). Similarly, in *United States v. MacDonald*, 435 U.S. 850 (1978) the Court ruled that denial of the right to a speedy trial did not cause the indictment "no longer to be an indictment" but said of the issue in the present case:

> "Dismissal of the indictment is the proper sanction ... when his indictment is defective.... Obviously, however, this has not led the court to conclude that such defendants can pursue interlocutory appeals." (435 U.S. at 860, note 7).

The question of what causes an indictment "no longer to be an indictment" has never been squarely addressed other that the *MacDonald* footnote above. A circuit court decision directly in point is *United States v. Bird*, 342 F.2d 1045 (9th Cir. 2003). It squarely concluded that:

> "the Government's failure to allege an essential element of a charged offense is a fundamental defect in an indictment that gives rise to a right not to be tried" based on Midland and MacDonald. Subsequently, the Bird opinion was withdrawn (357 F.2d 1082) and superseded by a procedural ruling disallowing an interlocutory appeal of the question. (359 F.3d 1185).

Under common law, an indictment lacking a necessary element was "no accusation at all" as reported in 1 J. Bishop, Criminal Procedure § 87, p.55 (2d ed. 1872): any accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason. (Emphasis supplied).

A fair summary of the prior decisions of this Court is contained in *United States v. Calandra*, 414 U.S. 338, 345 (1974): "an indictment valid on its face is not subject to challenge on the ground that the Grand Jury acted on the basis of inadequate or incompetent evidence". Similarly, in *United States v. Costello*, 350 U.S. 359, 364 (1956) the court concluded that: "An indictment ... if valid on its face, is enough to call for trial of the charge on the merits". In this theft case, however, the indictment is not valid on its face because it is fatally flawed or defective. It's undisputed that the indictment in the matter is completely void of any owner to the

property that was allegedly stolen. A cursory glance at the indictment can tell you that. As such, trial counsel should have made the appropriate objection on the record to the fatally flawed indictment. The term owner, as it related to theft, is defined as a person, other than the defendant, who has lawful possession of or any other interest in the property involved ... and without whose consent the defendant has no authority to exert control over the property. See Ala. Code §13A-8-1(8) (1975).

In such situations, the court's precedents have uniformly dismissed the invalid indictment at the appellate level and have automatically vacated the judgment. Once an appellate court dismisses the indictment, the judgment and sentence cannot stand. Although the basis of many decisions is not explicitly stated, petitioner submits that when an indictment has been ruled to be constitutionally deficient, the indictment at that point ceases to be an indictment and the court has retroactively employed the remedy "No person shall be held to answer". This Court's precedents have been uniformly in support of the remedy of automatic reversal and have supported petitioner's position for more than a century.

In early days, the procedure was labeled "arrest of judgment". Although not frequently employed in modern times, the procedural rule is still preserved in Rule 34(a)(1) of the Fed.R.Crim.P.. It mandates that "the court must arrest judgment if ... the indictment ... does not charge an offense". Early cases include *United States v. Cook*, 17 Wall. 174, 175 (1872) (if each and every element is not set out "the indictment will be bad" and judgment may be arrested even after verdict); *United States v. Cruikshank*, 92 U.S. 542, 559 (1875)(if element missing indictment is "so defective that no judgment of conviction should be pronounced and any judgment should be arrested"); and, *United States v. Carroll*, 105 U.S. 611, 613 (1881)(element-omission is matter of substance, not form, and indictment is insufficient even after verdict). In *Ex Parte Bain*, 121 U.S. 1 (1886), overruled in part on other grounds by *Mechanic*, supra, the Court granted a writ of habeas corpus because a trial judge had deleted certain wording from the indictment.

Apart from expansive concepts of jurisdiction, the applied remedy was automatic reversal of the verdict. To do otherwise "would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney" thus forcing the citizen to undergo "the trouble, expense, and anxiety of a public trial before a probable cause is established". (121 U.S. at 12). In *Batchelor v. United States*, 156 U.S.

426 (1895), a district judge had denied a timely pretrial motion to dismiss an indictment for failure to include an element. That indictment contained a general allegation but did not "fully and clearly set forth every element necessary to constitute the offence". (Id.429).
This Court concluded that the omission did not "enable him to defend himself against it, or plead an acquittal or conviction in bar of a future prosecution for the same cause". (Id.429). The remedy was dismissal of the indictment and vacation of the verdict apart from any consideration of the strength of the government's case.

In *Stirone v. United States*, 361 U.S. 212 (1960), the indictment charged interstate movement of sand, but the proof also showed interstate movement of steel. The Court ruled squarely: While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed defendant's substantial right to be charged tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Citation. The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. (361 U.S. at 274). (Emphasis supplied).

The next decision was *United States v. Russell*, 369 U.S. 749 (1962). The indictment provided the generic description of the element but did not provide "essential facts" as to how the generally stated element had been violated. In dismissing the indictment after jury verdict, this Court said that the vice was: "A cryptic form of indictment ... requires the defendant to go to trial with the chief issue undefined ... the indictment left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal". (369 U.S. at 766,768). Also in 1962, in the case of *Silber v. United States*, 370 U.S. 717 (1962) there was a "timely motion to dismiss the indictment, made in accord with F.R.Cr.P. 12(b)(2)" which was erroneously denied by the District Court. Although neither presented on appeal nor briefed nor argued, this Court sua sponte recognized the error as plain under Rule 52(b) without discussion.

The test applied was whether the obvious error "affects the fairness, integrity, or public reputation of judicial proceedings". It was not based on whether the outcome of the jury trial would have been the same. (370 U.S. at 317). Adoption of the District Court's recommendation or argument would necessarily require overruling this long line of precedent which goes back

more than a century. In contrast, the government can produce no authority to support its novel, and self-serving, test based upon a judge's view of what a hypothetically "properly instructed grand jury" would have done had they listened to all evidence at the merits trial. In each of the foregoing precedents, this Court's chosen remedy was to do what the district judge should have ordered in the first instance, namely, to dismiss the indictment. In each of the foregoing decisions, the accused had insisted upon his constitutional rights in a proper way at the proper time.

The government at that point had ample opportunity to return to the grand jury to cure the error or, possibly, to remedy the error by providing notice by other means, or, possibly, by obtaining a waiver from the defendant. But, it did not. By necessary implication, the Court's conclusion was that the accused should not "be held to answer" based on an "indictment that was not an indictment" using the terminology from *Midland*, supra, and *MacDonald*, supra.

There is even more precedent. In 1932, the Court decided *United States v. Hagner*, 285 U.S. 427, 433 (1932) which ruled that a post-verdict challenge to the sufficiency of the indictment by way of motion in arrest of judgment came too late. But, the Court opined "without deciding that the indictment would have been open to some form of challenge at an earlier stage of the case". In *Illinois v. Somerville*, 410 U.S. 458, 475 (1973) there was a mid-trial realization that the indictment did not contain an essential element. The trial judge aborted the trial. This Court ruled that mistrial is necessitated when "an error on the part of the State in the framing of the indictment is committed. Only when the indictment is defective - ... when the State has failed to properly execute its responsibilities to frame a proper indictment – does the State's procedural framework necessitate mistrial".

Prosecutors have argued that indictments were void in *Benton v. Maryland*, 395 U.S. 784 (1969) and in *Ball v. United States*, 163 U.S. 662 (1896). In these cases, a jury trial resulted in acquittal. In an attempt to avoid a Double Jeopardy argument, the prosecutor argued post-trial that the indictment had been defective due to a missing element so as to deprive the district court of jurisdiction. The Court did not rule the missing-element indictment to be void but voidable at the option of the accused. The constitutional rule established in *Benton* and *Ball* should govern: ...the indictment would seem only voidable at the defendant's option, not absolutely void... the indictment was fatally defective ... (but) its judgment is not void, but only voidable. (*Benton*, 395 U.S. at 797).

In addition to the Ninth Circuit, other circuits have likewise routinely ruled that the proper remedy for a fatal indictment was dismissal of that indictment even after guilty verdict by a petit jury. Examples include: *United States v. King*, 587 F.2d 956 (9th Cir. 1978); *United States v. Huff*, 512 F.2d 66 (5th Cir. 1975); *Nelson v. United States*, 406 17 F.2d 1136 (10th Cir. 1969). Neither party has been able to locate any authority to support the government argument that the strength of the government case can validate an invalid indictment which was ruled to be "fatally defective" on appeal, or otherwise, after timely and proper pretrial application for dismissal. *United States v. Mechanik*, 475 U.S. 66 (1986).

Under the familiar rule of *Miranda v. Arizona*, a suspect who is subject to "custodial interrogation" must first be informed of his Fifth Amendment privilege against self-incrimination and his right to an attorney to safeguard that privilege. 384 U.S. 436, 444, 469 (1966); see *Johnston v. Mitchell*, 871 F.3d 52, 57 (1st Cir. 2017). The remedy for a violation of Miranda's "prophylactic rules, in the ordinary case, is the exclusion of evidence impermissibly gathered as a result of the violation." *Johnston*, 871 F.3d at 58. However, the Court did not rule that defendant *Mechanik* had proceeded to trial based on a constitutionally deficient indictment. The Court's reasoning, in part, was that despite the diligence of the defense, the attack on the validity of the indictment was not timely. The Court commented that had "the matter been called to its attention before the commencement of the trial" dismissal would have been justified. (Id.69). Contrary to the present case, this Court noted that the first indictment "was concededly free from any claim of error".

A subsequent indictment "was materially unchanged from the valid initial indictment". (Id.66,69). Had defendant *Mechanik* obtained a ruling that his indictments were fatally flawed, and therefore that the indictment had ceased to be an indictment, then the Court's decision as to the appropriate remedy in that case would also serve as precedent in this case. *Mechanik* is also unavailing because that decision concerns the same question of fact before the petit jury as presented before the grand jury, namely, the issue of factual guilt. The only distinction between successive considerations of the same factual issue was the standard of proof – "probable cause" versus "reasonable doubt".

The determination of whether an indictment is fatally defective is made by a district judge who reviews nothing more than the four corners of the indictment in the light of relevant legal opinions. That determination is a matter of law and not a matter of fact. So, the nature of

the issue here is completely different from *Mechanik*. See, for instance, United States v. Sampson, 371 U.S. 75, 78-79 (1962) (at the pretrial stage the indictment must be tested by its legal sufficiency to charge an offense without consideration of the evidence). Also, in United States v. Cook, 17 Wall. 174 (1872) this Court ruled that the question whether every ingredient is accurately alleged is a question of law to be decided by the court, not the prosecutor. Rule 12 likewise lists determination of the validity of an indictment as an issue "the court can determine without a trial of the general issue".

Categorization of questions regarding the sufficiency of the indictment as matters of law is established in the Federal Rules of Criminal Procedure. F.R.Cr.P. 12(b)(3)(B) specifically authorizes a pretrial motion to the court "alleging a defect in the indictment ... that the indictment ... fails to ... state an offense". If not raised by the deadline for pretrial motions, an allegation that an indictment is defective is waived under Rule 12(e). But, an *exception* is a claim that an indictment "fails to invoke the court's jurisdiction or to state an offense". It can be made "at any time while the case is pending". Here, the State concedes compliance with Rule 12. Rule 34 (a) similarly places the decision regarding the sufficiency of the indictment in the hands of the district judge who must determine "if the indictment does not charge an offense". Mechanic concerned only factual guilt – not a question of law. In *Neder v. United States*, 527 U.S. 1 (1999), as well as its predecessor Johnson v. United States, 520 U.S. 461 (1997), the subject matter concerned jury instructions. There was no issue concerning the indictment. The indictment was unchallenged. At no point did the charging document cease to be an indictment.

Unlike the present case, neither the Bill of Rights, nor any other provision in the Constitution, addresses the subject of jury instructions. The Constitution provides no explicit remedy for incorrect jury instructions. In contrast, the Grand Jury Clause provides the exclusive means of initiating a federal or state prosecution coupled with appropriate remedy that "he shall not be held to answer" if the indictment is constitutionally deficient.

The Grand Jury Clause is interlinked with the "Notice and Cause" Clause in the Sixth Amendment. And, also with the Double Jeopardy Clause in that it provides a means for distinguishing successive prosecutions. United States v. Debrow, 346 U.S. 374 (1953).
In view of its three constitutional functions, the Founders established the grand jury as the sole means of initiating a prosecution by the government. F.R.Cr.P. 7(c)(1) embodies the constitutional requirement that the charge provide "essential facts". Rule 30 governs jury

instructions and just states in a general way "that the court instruct the jury on the law". Hence, the constitutional status of a grand jury indictment, including the remedy provided, is far more significant than mundane jury instructions.

Similarly, in *United States v. Cotton*, 535 U.S. 625 (2002) the merits trial was based on a "valid on its face" indictment. The accused "did not object in the district court" but instead "argued in the Court of Appeals". (Id.627, 628). The Court noted that the result might have been different had "proper objection been made in the district court". (Id.631). But, the claim was forfeited and so was reviewed under the plain error provisions of Rule 52(b). The Court ruled: "a constitutional right may be forfeited ... by the failure to make timely assertion of the right". (Id.631).

Cotton is also distinguished in that it concerned the sentencing element of drug quantity. Absent that element, the indictment nonetheless stated an offense and did not give rise to "the right not to be tried." The Cotton court distinguished *Stirone* and *Russell* by, noting that "in each of these cases proper objection had been made in the district court to the sufficiency of the indictment ... (which is) a settled proposition of law. (Id.631). That ruling in Cotton is compatible with this Court's precedents that a defective indictment is "not void, but only voidable". *Benton, Ball*, supra. Defendant Cotton's objection involved the quantity of illegal drugs being transacted which is a matter of fact. Defendant Cotton, moreover, had no constitutional right to be indicted on any particular quantity of drugs. Petitioner here does have a constitutional right not to be held to answer based on an indictment that is no longer an indictment. (Amendment V).

The discussion in Cotton regarding subject matter jurisdiction ("the court's statutory or constitutional power to adjudicate the case") in no way implies that if a person asserts his constitutional rights in a proper way at the proper time that those rights should be denied to him. The rule of constitutional law to be assembled from the foregoing precedents is that a defective indictment is voidable nunc pro tunc at the timely option of the accused but is not void, as articulated in *Benton* and *Ball*. In each precedent, post-verdict dismissal of the indictment had the effect of vacating the jury verdict of guilt. When a court at any level rules that an indictment should be dismissed, or that it should have been dismissed previously, at that point the indictment "is no longer an indictment" within the meaning of *Midland Asphalt*, supra. When an

indictment is no longer an indictment, the constitution requires that the accused should not be "held to answer".

In a sense, the damage is not remediable since a court cannot turn back the clock. But, neither does imposition of a sentence in a state prison sentence accomplish that objective. The only possible remedy on review after verdict is to do what the district judge should have done in pretrial proceedings. Namely, dismiss the indictment which requires that the judgment be vacated. The alternative would be to uphold the judgment, and corresponding prison sentence, based on an indictment that no longer is an indictment. Petitioner now briefly addresses the underlying question of under what circumstances a defect is "so fundamental that it causes ... the indictment no longer to be an indictment". (*Midland Asphalt*, supra, at 802).

Admittedly, not every defect causes an indictment to be constitutionally deficient. In *United States v. Debrow*, 346 U.S. 374 (1953) the Court ruled: The true test of the sufficiency of an indictment is ... whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, ... whether the record shows with accuracy to what extent he may plead a former conviction or acquittal. (346 U.S. at 376). This Court has never wavered from the requirement that "elements must be charged in the indictment". *Jones v. United States*, 526 U.S. 227, 232 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This Court has stated in *United States v. Hamling*, 418 U.S. 87, 117 (1974) that: "the language of the statute must be accompanied by such statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged". The same in *United States v. Russell*, 369 U.S. 749 (1962) and *United States v. Miller*, 471 U.S. 130, 136 (1985): The Fifth Amendment is satisfied "as long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment". As far back as *Cochran v. United States*, 157 U.S. 286, 290 (1906) this Court declared: "the true test is ... whether it contains every element of the offense to be charged". These parameters are so well established as to be incorporated in 1948 in *F.R.Cr.P. 7(c)(1)* requiring the indictment to contain: "a plain, concise and definite written statement of the essential facts constituting the offense charged". This Court has determined that certain values and remedies have per se importance independent of any possible "prejudice" to the accused.

Recently, in *United States v. Gonzales-Lopez*, 548 U.S., 126 S.Ct. 2557, 2562 (2006), the Court ruled that the constitutional right to counsel of choice is an important value which is not

part of "the vehicle for determination of guilt or innocence". The Court ruled: "the right at stake here is the right to counsel of choice, not the right to a fair trial". The right at stake in the present case is the Fifth Amendment right not to be tried on a fatally defective indictment regardless of the strength of the government's case. Another recent example is *United States v. Zedner*, 548 U.S., 126 S.Ct. 1976 (2006) where the Court held that harmless error analysis was inappropriate due to the "absolute language" and the "categorical terms" of the Speedy Trial Act.

After observing that the harmless error doctrine presumptively applies to "all errors where a proper objection is made", citing *Neder v. United States*, supra, the Court ruled that harmless error review "would undermine the detailed requirements of the provision" of the Act and would be inconsistent with the strategy of Congress. Here, as in *Zedner*, "such an approach would almost always lead to a finding of harmless error because the simple failure to make a record of the sort is unlikely to affect the defendant's rights". (Id.1990). That is so because if acquittal results, the case terminates. If conviction results, the standard at trial is always reasonable doubt while the standard at grand jury is always probable cause. The harmless error doctrine must be capable of being "square with the Act's categorical terms" and must not "undermine the detailed requirements of the (regulating) provisions". (126 S.Ct. at 1990). Here, the subject matter is not an Act of Congress but is the Constitution itself.

Since the Fifth Amendment itself provides the particular remedy that "no person shall be held to answer", a "fatally defective" indictment is no indictment at all. The only possible remedy is dismissal of the faulty indictment. After the indictment is dismissed, the judgment and sentence cannot stand. Automatic reversal is the only viable option. In *Ex parte Bain*, Mr. Justice Miller, speaking for the Court, said: "if it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U.S. 1, 10. The foregoing precedents span 124 years and squarely support petitioner's interpretation. A conviction based on a charging document that fails to state an essential element of the offense must be vacated, when prejudice is shown. Failure to allege element of charged offense is fundamental defect that renders the indictment "constitutionally defective."

THEREFORE, when an indictment is declared to be fatally defective it is no longer an indictment and the Fifth Amendment right-not-to be-tried is activated independent of the merits.

II.

WHETHER THE COURTS INCORRECTLY DETERMINED THAT THE PETITIONER FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE PETITIONER MET THE TWO-PRONG STANDARD IN STRICKLAND WAS "CONTRARY TO" OR "INVOLVE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense. U.S. Const. amend. VI. The Sixth Amendment right to counsel applies to all federal and state criminal prosecutions in which the defendant is accused of a felony. Under some limited circumstances, however, the absence of counsel after the initiation of the adversarial proceedings may be harmless error. If the Sixth Amendment violation "pervades" the entire proceeding," then harmless error analysis is inapplicable, and the violation is enough to overturn a conviction regardless of the severity of the results. (*U.S. v. Cronic,* 466 U.S. 648, 659 n.25 (1984)). The Courts has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical phase of the proceedings.

To a competent criminal defense attorney, the errors and constitutional "red flags" in these cases are glaring. Petitioner avers that his trial attorney Lela V. Cleveland representation fell below an objective standard of reasonableness" (deficient performance prong), under any prevailing professional norms and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (the prejudice prong). In each of these cases, trial counsel completely failed to timely, reasonably, or adequately to conduct a "reasonable" preliminary investigation to familiarize herself with the material and relevant facts and law in relation to the prosecution's case against her client.

Ineffective assistance of counsel or "bad lawyering" constitutes a violation of a criminal defendant's Sixth Amendment right to counsel. In too many cases defendants retain or are appointed attorneys who lack the time, experience, or professional responsibility to zealously represent their clients. The resulting representation may include failures to investigate an alibi defense, investigate prosecution witnesses, challenge the prosecution's evidence, or even

communicate with their client regarding their case. In addition, some attorneys simply accept cases for which they are not qualified and are thus, unable to properly represent a defendant.

"Bad" lawyering results in an unlevel playing field and while a criminal trial or proceeding is not a game in which the participants are expected to enter the courtroom with near match in skills, neither is it a sacrifice of an unarmed person or prisoners to gladiators. But for the defendant ineffective assistance of counsel or bad lawyering, all too often, result in wrongful convictions of the defendants. Therefore, "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052 (1984).

In *Strickland*, this Court set forth the familiar two-prong test for evaluating a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees; Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance' that the deficient performance prejudiced the defense sufficiently to undermine the reliability of the trial or proceedings (*Id.* at 686).

Second, the defendant must demonstrate prejudice in addition to deficient performance. Deficient performance results in prejudice when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." This requires showing that counsel's errors were so serious as to deprive the defendant of a trial, a trial whose result is unreliable. 466 U.S. at 687, 104 S.Ct. at 2047. The prejudice inquiry is focused on "the fundamental fairness of the proceeding. In a companion case, *United States v. chronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), the said:

> "If counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. 466 U.S. 648, 104 S.Ct. at 2047."

In order to show ineffectiveness of counsel a habeas petitioner must demonstrate that his attorney's performance fell below "objective standard of reasonableness," 466 U.S. 648, 104 S.Ct. at 2064 and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." 466 U.S. at 694, 104 S.Ct. at 2068. See also *Morgan v. Zant*, 743 F.2d 781 (11th Cir. 1984); *Chadwick v. Green*, 740 F.2d 897 (11th Cir. 1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* 466 U.S. at 694. In every case, the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

I. Trial Counsel's Failure to Investigate, Interview or Contact Alibi Witnesses

On January 19, 2010, criminal complaints were filed in the Mobile County District Court, charging Defendant Miller with unlawful distribution of a controlled substance /furnish. Specifically, Miller's criminal complaint reads as follows:

> Before me the undersigned Judge/Clerk/Magistrate of the District Court of Mobile County Alabama, personally appeared Cpl Lew Spencer who being duly sworn deposes and says that he/she has probable cause for believing, and does believe that Bruce Elliott Miller defendant, whose name is otherwise unknown to the complainant, did within the above named county and did on or about **1/23/2009**, while at or Moffett Rd at Shelton Beach Rd, Mobile County, Alabama unlawfully sell, furnish, give away, deliver or distribute a controlled substance, to wit: Codeine in violation of 13A-12-211 of the code of Alabama against the peace and dignity of the State of Alabama."

On May 14, 2010, Defendant Miller was indictment for two counts of unlawful distribution of a controlled substance. Contrary to the criminal complaints, the first count of the indictment averred that on December 29, 2009, Petitioner unlawfully "sold/distributed" codeine within a three-mile radius of Forrest Hill Elementary School, and the second count charged that on January 5, 2010, again "sold/ distributed" codeine within a three-mile radius of Forrest Hill Elementary School. Petitioner avers that his Defense Attorney Lela V. Cleveland ("Cleveland") rendered ineffective assistance of counsel, as well as several other claims of error. Trial counsel's deficiencies in these cases are almost too numerous to set forth.

In each case of the distribution offenses, Lela Cleveland completely fail to investigate; failed to interview known witnesses for the prosecution; failed to make proper objections or file

timely pretrial motions; failed to contact and subpoena alibi witnesses who could provide exculpatory information; and failed to object to an illegal sentence. More importantly, Cleveland rendered ineffective assistance of counsel for completely failing to subject prosecution's weak cases to real and meaningful adversarial testing.

This ultimately lead to a complete breakdown in the adversarial testing process causing his guilty plea to be entered unknowing and involuntarily as not being an informed and intelligent choice on the basis of trial counsel's ineffective assistance of counsel, and thus his defense was prejudiced. For example, Petitioner presented clear and convincing evidence to his trial counsel as it relates to the incident occurring on December 23, 2009, of his not even being in the state at the time of the alleged offense, let alone within the confines of Mobile County, that he could not have been at the scene at the date and time of the offense. This clear and convincing evidence was in the form of Southwest Airline Tickets. (See App. D, at D; Southwest Ticket Itinerary).

Petitioner also provided Cleveland at the time with the names, addresses, and telephone numbers of several alibi witnesses. Veronica Bailey, the alibi witness in Texas is where petitioner flew too. Melanie Scott and Josie Rush, the alibi witnesses that was present here in Mobile, and Vicki Pritchard, co-worker. Had Cleveland contacted these witnesses, they were all willing to testify on Miller's behalf as to his whereabouts on December 23 and December 29 at trial.

Had Cleveland conducted a pretrial investigation, she would have timely and reasonably discovered that Miller had a rock-solid and credible alibi witness. Ms. Veronica Bailey, a retired Chief Naval Petty Officer would have testified in court on his behalf to rebut the state's primary witnesses that on December 23, 2009, Defendant-Petitioner Miller was without a doubt in San Antonio, Texas celebrating the Christmas Holidays with family and friends on the relevant date and time of the alleged crime, therefore, rendering it impossible for him to have been in two places simultaneously. Trial counsel's failure to contact Bailey cannot under any theory be deemed a "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. None of that was investigated. None of that was followed up. No reasonably competent criminal defense attorney would have failed to contact Bailey as a credible alibi witness to rebut the prosecution's central witness and any evidence that the prosecution may introduce under any prevailing professional norms. However, none of that was investigated. None of that was followed up. Trial counsel's

failure to interview or call the alibi witnesses constituted ineffective assistance of counsel, as was the failure to attempt to find and interview potential alibi witnesses and failure to use reasonable efforts to procure alibi witnesses. *Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982) (stating "a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation."

The State simply argues that, although, petitioner says that he was not in Mobile on December 23, 2009, on the alleged date one of the incidents took place. Petitioner was not indicted for an incident that occurred on December 23, 2009; instead Miller was indicted for and pled guilty to unlawful distribution of a controlled substance on December 29, 2009. And Miller offers no evidence with respect to his whereabouts on December 29, 2009.

The fundamental problem with the State's argument, however, and one which the State cannot overcome, is that, in the criminal complaint, the defendant was charged with unlawful distribution of a controlled substance on December 23, 2009, and not on December 29, 2009. And the State have the audacity to say, "Petitioner offers no evidence," at no time throughout Petitioner's entire proceeding or even in his motion for Discovery did the State provide a shred of evidence in either of his distributions cases and not a single eyewitness from his so-called employer that he stole controlled substances from. Furthermore, in the middle of the Petitioner's criminal proceedings, the State arbitrarily change the offense date without any notice to the defendant and certainly without any objection from the defendant's trial counsel.

It is well settled in Alabama, "all criminal proceedings shall be commenced either by indictment or by complaint." The usual procedure for commencing a criminal action is by a complaint. The grand jury also may act on matters presented to it without there being a complaint, and thus the charging instrument "commencing" the prosecution is the indictment." Ala.R.Cr.P., Rule 2. In the present cases, the criminal proceedings were commenced by criminal complaints.

Moreover, the state's assertion that the petitioner was indicted (charged and accused) and pled guilty to an incident occurring on December 29, 2009, is absurd. Furthermore, the State's argument is further refuted by the record. Court record irrefutably show that Judge McKnight consistently referred to DC-10-470, that is, the complaint, the incident occurring on December 23, 2009; and not December 29. Had trial counsel been functioning as the effective assistance of counsel envisioned by the Sixth Amendment and subjected the prosecution indictment to an

adversarial testing by challenging the fatal variance in the indictment amounted to ineffective assistance of counsel. There is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted, instead, on proceeding to trial had Cleveland not abandoned him on February 16, 2011.

For instance, on February 3, 2010, during a preliminary discovery hearing before Charles McKnight, a Mobile County District Court Judge, where Assistant District Attorney Matthew Seymour was discombobulated about the date the first distribution allegedly occurred. The record conclusively refutes the state's assertion that the incident did not occur on December 29, 2009; but instead on December 23, 2009, according to the criminal complaint. Specifically, the record reads as follows:

Mr. Seymour: Judge, for the purposes of the record, I'll be proceeding in DC-10-0470: occurred on December 29, 2009.
The Court: Occurred on –let me look and see. This says 12/23; is that right? 470 says 12/23 the Complaint.
Mr. Seymour: The arrest occurred on 12/23?
The Court: The incident. Let me look. Unlawful distribution, second time is January 5, 2010. And that is Case number 469.
Mr. Seymour: Okay. That's fine.
The Court: if everything is properly assigned in these files.
Mr. Seymour: That's fine, Judge.
The Court: Which one are you going on?
Mr. Seymour: I am proceeding in DC-10-470.
The Court: All right. That's the incident of December 23. Go right ahead. Officer Derrick Dubose previously sworn and testified. **(See Exhibit "F" in App. A at A9).** Finally, at the end of the preliminary discovery hearing, Judge McKnight stated explicitly on the record bounding the incident of December 23, 2009, (and not December 29th) over to the Mobile County Grand Jury to bind the defendant for trial. **(See State's Exhibit. B, pg 19 in App. to Pet. for Cert. at A3).**

A lawyer has a duty to investigate what information a potential witness possesses, even if he later decides not to put then on the stand. Id. at 712. See also *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986) (Neglect even to interview available witness to a crime cannot be ascribed to trial strategy and tactics). Essential to effective representation ...is the independent duty to investigate and prepare. Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision. See *Riley v. Payne*,

352 F.3d 1313, 1324 (9th Cir.2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not "be presumed to have made an informed tactical decision" not to call that person as a witness); see also *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir.1995).

Attorney Robert "Bucky" Thomas, who was appointed to represent the petitioner in a Rule 32 evidentiary hearing that was held on April 9, 2015, before Ben Brooks, a Mobile County Circuit Court Judge regarding his illegal sentence and motion for reconsideration of his ineffective assistance of counsel claim stated on the record saying:

> **Mr. Thomas:** Judge. "In viewing petitioner's documents and talking to him and his position, **and I can't blame him for doing this, especially with what I have seen what he tendered to his attorney that was never presented to the state in any form or fashion.** So, I say all that to say this. . . I do think if you did consider his motion to reconsider as it relates to the ineffective assistance of counsel, quite honestly, I believe this Rule 32 if you do consider that, has a lot of merit. I think at some point his position would be, look, I feel that had this been followed through with, at some point I wouldn't have entered that plea or at least been better advised as to what plea I'm entering and why I am entering the plea.

Had Cleveland contacted the witnesses in Mobile, she would have discovered Miller had a witness that would have testified as to his whereabouts on December 29, 2009. Mrs. Melanie Scott-Miller would have testified unequivocally that on December 29, 2009, she met Mr. Miller around 7:00 p.m. at Wintzel's Seafood Restaurant located on Airport Blvd where they had dinner. Furthermore, Scott would have also testified that Defendant was at work at his place of employment until 6:30 p.m. on the date of December 29, 2009. A lawyer's Strickland duty "includes the obligation to investigate what information a potential eye-witness possess concerning his or her client's guilt or innocence," even if he or she later decides not to put them on the stand." See *U.S. v. Gray*, 878 F.2d 702, 711 (3rd Cir. 1989).

Cleveland's failure to interview Ms. Scott was "objectively unreasonable." Moreover, the Courts held that counsel's failure to interview and call alibi witness to testify on defendant's behalf after defendant told counsel of his whereabouts on December 29, 2009, and what their testimony would be, amounted to ineffectiveness that denied Petitioner Miller a fair proceeding. "A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to

undermine confidence in the outcome, renders deficient performance." Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir.1999) (quoting Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir.1999).

A lawyer's Strickland duty set forth a defense counsel's duty to investigate. As this Court and the Court of Appeals have concluded, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that make a particular investigation unnecessary. In any ineffectiveness case, a decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when he or she has not yet obtained the facts on which such a decision could be made. United States v. Gray, 878 F.2d, 711 (3rd Cir. 1989). In *Gray*, the Third Circuit was faced with a claim of ineffectiveness based upon counsel's failure to conduct a pretrial investigation. The defendant had supplied the names of potential witnesses but expressed his reluctance to subpoena these witnesses and compel their attendance at trial. Counsel went no further. The *Gray* Court found ineffectiveness in light of its belief that counsel could have well established a credible defense had he interviewed and subpoenaed these witnesses. The Court further noted that the effect of counsel's inadequate performance must be evaluated in light of the totality of evidence and opined that an outcome which was only weakly supported by the record is more likely to have been affected by errors than one for which the record harbors overwhelming support. *Id* at 711-713.

Finally, the Courts defined this right in terms of the "crucial role" that attorneys play in ensuring that our adversarial system produces "just results. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials or proceedings in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.

II. Trial Counsel's Failure to Object to Fatally Defective Indictment

Defendant-Petitioner was allegedly indicted (charged and accused) for violation of Code 1975, §13A-8-4, theft of property in the second degree, and convicted pursuant thereto in the

Circuit Court of Mobile County. Cleveland's representation continued to fall below an "objective standard of reasonableness" where she fails to make an appropriate objection on the record or file a timely motion to dismiss the "fatally defective or flawed" theft indictment in the case for second-degree theft of property. For instance, the Mobile County Grand Jury indictment reads as follows:

> Bruce Elliott Miller "did knowingly obtain or exert unauthorized control over a substance controlled by Chapter 2 Title 20 or any amendments thereto, to wit: Codeine Syrup and 10 mg Lortabs (two bottles), with the intent to deprive the owner of said property in violation of §13A-8-4 of the Code of Alabama."

Petitioner contends that after a thorough review of the issue and the applicable facts and laws, the trial court was in error and that it judgment is due to be reversed and vacated. The elements of theft of property as defined by the above statute are: (1) the defendant too possession or control of property; (2) the defendant did so with the intent to deprive another of that property; (3) the property belonged to another, or was the possession of, another at the time of the taking; and (4) the defendant took the property without the consent of the owner.

The indictment in the matter for the theft charge cannot be fairly read as charging the petitioner with theft of property. The indictment attempted to have the statutory tracking language of a typical theft case; however, the indictment doesn't say the property to wit of anybody. More Specifically, §13A-8-4 of Ala. Code of 1975, says that:

> "a person commits the crime of theft of property if, he or she knowingly obtains or exerts unauthorized control over the property of another with the intent to deprive the owner of his or her property."

The indictment is nonetheless "fatally defective" because it fails to set forth all the elements of the charged offense. The indictment lacks an essential element, "the property of another" within the meaning of §13A-8-4. The petitioner is not told whose property he is accused of stealing; therefore, the defendant-petitioner does not have sufficient information to prepare his defense and plead his conviction as a bar to later prosecution for the same offense. "The indictment . . . must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed.R.Crim.P.7(c)(1). Contrary to the State's assertion that the charge for theft of property is self-explanatory. The Petitioner was charged with stealing controlled substances from his employer. The charging instrument (i.e., indictment) is completely void of any owner to

the property that was allegedly stolen. The fighting issue here in this case is whether the petitioner actually took possession or control of property allegedly belonging to his employer, within the meaning of Section 13A-8-4.

The property allegedly stolen must be the "property of another" or belong to someone else other than the defendant. The term "owner" as this is defined by Alabama law. Section 13A-8-1(8) defines "owner" as follows: "a person, other than the defendant, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful, and without whose consent the defendant has no authority to exert control over the property. When asked to interpret a statue, this Court first consider the plain meaning of its language. If the statue is unambiguous, then this must apply it as written. A statute is ambiguous "if reasonable minds can disagree on the meaning of particular words or the statute as a whole." For the purpose of this review for ambiguity, this Court should assess the statute and the indictment in its entirety, not just isolated words or phrases.

Petitioner conclude that reasonable minds would all agree that the indictment here fails to allege an essential element necessary to charge the offense, it didn't say the property to wit of anybody or allege that it is the property of another (i.e Joe Taxpayer, Walmart), thereby creating a fatal variance. And where the fatal flaw or error is material, the case should have been adjourned so that the indictment could be amended by the grand jury to avoid a manifest injustice or prejudice by enabling the defense to prepare to meet the amended charge.

Our Constitution requires that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury." U.S. Const. amend. V.). In order to be properly indicted and convicted for the theft of property, the indictment must contain all the constituents or elements of the offense necessary to charge the crime as defined by its statute. An indictment passes constitutional muster if it "contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001).

Had Cleveland adequately researched the basic relevant laws regarding this theft of property case to be prepared to require the prosecution to survive the adversarial process and meet their burden of proof beyond a reasonable doubt, she would have learned and/or

discovered that the indictment failed to pass constitutional muster because it does not contain every element of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

Petitioner contends that he has the right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away. The deprivation of such a right is far too serious to be treated as nothing more than a variance or dismissed as harmless error. No competent criminal defense attorney would have failed to challenge the sufficiency of the State poor drafted "constitutionally deficient" theft indictment that in and of itself had a fatal flaw. In fact, under the prevailing professional norms, the very first thing any competent criminal defense attorney would do on a case is to look at the indictment. As the state has already pointed out, fatal flaws or defects usually can be spotted and brought out at trial.

Counsel cannot be said to be ineffective for not filing a motion for which there is no legal basis. See Patrick v. State, 680 So.2d 959, 963 (Ala.Crim.App.1996); Hope v. State, 521 So.2d 1383, 1386 (Ala.Crim.App.1988). However, the same rationale applies for a conviction under §13A-8-4(g), Ala. Code 1975, where counsel was ineffective for failing to object for failing to make the appropriate objection on the record or filed a timely motion to dismiss the fatally flawed indictment. As such, Petitioner's trial counsel should have made the appropriate objection on the record to the fatally defective theft indictment.

The right to effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of a real and meaningful adversarial testing. When a true adversarial criminal proceeding or trial has been conducted even if the defense counsel may have made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

II. Trial Counsel's Failure to Object to an Illegal Sentence

Trial Counsel's representation continued to further "fall below an objective standard of reasonableness," when Cleveland stood idly by during the sentencing phase, a critical stage of the proceeding and allowed the trial judge [James C. Woods] impose an illegal sentence of 20-years split 5-years to serve for second-degree theft of property, a class "C" felony without any

objection from trial counsel. The record of the sentencing proceedings only further underscores the unreasonableness of Cleveland's lackluster and deficient performance by suggesting that her complete failure to prepare and mount real and meaningful adversarial testing stemmed from her lack of investigation, preparation and inattention to details of her client's case, and not strategic judgment.

The legislature also clearly directed that second-degree theft of property be punished as a Class C felony. Because this petitioner did not have any prior qualifying felonies, his sentence for second degree theft of property should not have been enhance under the Habitual Felony Offender Act. Again, trial counsel failed to make an appropriate objection before the trial court to an illegal sentence for the theft of property charge. Had Cleveland familiarized herself with relevant facts and laws with respect to a theft case, she would have also learned that the maximum statutory punishment for a class C felony is ten years. Petitioner's trial counsel was ineffective for failing to object to the illegal enhancement of his sentence. Moreover, there was nothing in the record to indicate that the Habitual Felony Offender Act applied.

III.

WHETHER THE PETITIONER HAS PRESENTED "A COLORABLE SHOWING OF ACTUAL (FACTUAL) INNOCENCE THAT SERVES AS A GATEWAY THROUGH THE STATUTE-OF-LIMITATION OR PROCEDURAL BAR FOR LATE "FIRST" HABEAS CORPUS PETITION.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") sharply limits the power of Federal courts to grant habeas petitions for prisoners or person convicted by state courts. Generally, AEDPA requires federal courts to deny habeas petitions from prisoners or persons whose claims received an adjudication (that is, a fair judgment or decision) on the merits from the state court. However, there are two possible exceptions: if the state court proceeding resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal Law, as determined by the Supreme Court of the United States," or resulted in a decision that was based on unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the

state court decides a case differently than this court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner or petitioner's case.

In *McQuiggin v. Perkin*, 133 S.Ct 1924, 1928 (2013), the Court held that actual innocence, if proved, serves as a gateway through which the petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or as in this case, expiration of the statute of limitations. "A petitioner meets the threshold requirement if he persuades this Court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup vs. Delo*, 513 U.S., at 329. See *House*, 547 U.S., at 538.

In *Ex Parte Lewis*, 811 So.2d 485 (2001), Lewis challenged the indictment by arguing that it is void for failure to charge an essential element of the offense. Lewis argued that the indictment was void because it did not allege that he "intended to cause physical injury" he claims this was an essential element of the offense charge of assault in the second degree. He contends that this omission was a jurisdictional defect in the indictment and that the defect cannot be waived by failing to raise it at trial. Thus, he argues, his conviction should be reversed. The Alabama Supreme Court agreed.

The petitioner's case for the theft of property in the second degree is indistinguishable from Lewis' case. As with Lewis, his indictment was void because it did not allege that he "intended to cause physical injury" he claims this was an essential element of the offense charge of assault in the second degree. Similarly, Miller's indictment did not allege that he obtained or exert unauthorized control over the "property of another" he claims this was an essential element of the offense charge for theft of property in the second degree.

The State contends that there are "no exceptions" at all to the AEDPA's one-year statute of limitations. In doing so, the State fails to address the holdings of *Williams v. Taylor*, *Hohn v. United States* and the like cases from this Court. The State has made a raw and unsupported assertion that the statute of limitations is "absolute", but has put forth no theory which would permit this Court to overlook traditional federal habeas corpus doctrines, such as the longstanding actual innocence exception to procedural defaults. Nor has the State provided any explanation as to why a Congress concerned enough to heighten the showing of actual innocence

required to excuse a successive petition would not have been concerned enough to address the application of *Schlup v. Delo* to a late-filed "first" petition, had Congress intended to change the law.

Unable to answer these cases and points, the State has taken the extreme position that the one-year statute of limitations contained in §2244(d) was meant to wholly supplant existing doctrine, and that the limitations period admits of no exceptions at all. If, as the State contends, Congress did not contemplate any exceptions to the one-year time bar, then the limitations period may not even be equitably tolled. The AEDPA is silent on whether there should be an actual-innocence exception to the statute of limitation. It is clear, however, that the AEDPA's statute of limitation is not absolute. The federal courts of appeals have consistently held that it is a procedural bar rather than a jurisdictional bar, and as such, it is subject to equitable tolling in extraordinary circumstances. See *Dunlap v. United States*, 250 F.3d 1001, 1004. The question is, then what constitutes an extraordinary circumstance? Under the cause-and-prejudice standard, few circumstances would constitute cause to justify a late filing. Under this Court's precedent, actual innocence excuses the "cause" requirement in overcoming all the other post-conviction procedural barriers. See *Kuhlmann v. Wilson*, 477 U.S. 436,454 (1986) (quoting "this Court created an exception to the stringent application of the cause-and-prejudice standard permitted federal habeas review of a petitioner's otherwise procedural barred constitutional claims in the absence of cause by "a colorable showing of actual innocence."

The actual-innocence doctrine thus became a safety valve that ensures the availability of the writ to those who are probably innocent. However, the Court emphasized that actual innocence "is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. See *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Thus, freestanding claims of actual innocence are insufficient to overcome the procedural bar; they must be accompanied by an independent claim that a pre-conviction constitutional error occurred. *Id.*, at 416.

This Court recognized that in "appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration. *Carrier,* 477 U.S. at 495 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982). In *Murray v. Carrier,* the Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court

may grant the writ even in the absence of a showing of cause for the procedural default" to prevent a "miscarriage of justice. *Carrier,* 477 U.S. at 495-96. Thus, the argument that §2244(d) admits of no exception has already been authoritatively rejected by this Court. Further, the State's twist on this argument, that no exceptions can apply because §2244(d) is a statute, rather than a judicially-created procedural bar, is wholly circular and does not advance the State's cause. The simple observation that §2244(d) is a statute does not help us to determine the reach of that statute.

More specifically, acknowledging that the one-year limit was established by statute does not, in and of itself, assist in assessing whether Congress meant to displace the *Schlup* exception. The question still boils down to simply what Congress intended the statute to do, that is "curtailing frivolous and abusive federal habeas corpus petitions. The *Schlup* Gateway is also a mechanism by which a federal court may grant a habeas petitioner relief by allowing federal courts to review the merits of his claims, even if those claims have already been "defaulted" on a procedural basis. *Schlup* v. *Delo*, 513 U.S. 298 (1995).

That is, if the convicted party can bring new and reliable evidence that undermines the trial verdict to such an extent that no reasonable juror would have voted to convict, then that party can pass through a procedural "gateway." This gateway allows him to bypass all of the technicalities that would otherwise prevent him from making arguments about his innocence. In *Schlup*, the Supreme Court stated that in order to do this, the party must bring evidence that raises sufficient doubt about his guilt to justify the conclusion that his convictions would be a miscarriage of justice. Petitioner argues that the new evidence that was not presented at the merit trial he brings before the Court is sufficient to qualify him for passage through this gateway. Indeed, he argues that his evidence not only meets, but exceeds this standard, and that the lower courts erred in applying *Schlup* to the facts of his case.

Petitioner explains that instead of looking at the new evidence as a whole, the lower courts examined each piece of evidence individually to see if any single piece of evidence would, by itself, unravel the prosecution's case (which was based no eyewitnesses and entirely on the lack thereof physical evidence, direct or otherwise). In contrast, the State responds by arguing that the new evidence petitioner brings fails to both exculpate him of the distributions and theft of property to undermine any of the prosecution's original evidence on which the petitioner's conviction are based.

The prosecution states that the petitioner's new evidence is not new and does nothing to alter the outcome of the proceedings. Further, Bell suggests that a piece of legislation passed in 1996, a year after Schlup was decided, served to overrule Schlup and elevate the burden of proof required to enter a procedural gateway. This legislation, the Antiterrorism and Effective Death Penalty Act of 1996, or AEDPA, allegedly prohibits review of claims based on new evidence unless the new information establishes "by clear and convincing evidence" that no reasonable fact-finder would have found the petitioner guilty. Under this standard, the state argues, Miller's convictions must stand. In further support of his argument for habeas relief, House asserts that not only does his new evidence meet the threshold for relief in Schlup, but it also meets the requirement for habeas relief articulated in *Herrera*, which is a higher standard.

Petitioner's argument here is that under Justice White's concurring opinion in Herrera, the lower courts should have granted him habeas relief on the basis of "a truly persuasive demonstration of 'actual innocence." See *Herrera v. Collins*, 506 U.S. 390. Petitioner asserts that evidence, new or otherwise show that his actual (factual) innocence, coupled with constitutional violations and ineffective assistance of counsel, combine to create a body of evidence that demonstrates his innocence under which "no rational juror could vote to convict." In *Schlup*, the Court made it abundantly clear that "habeas corpus is, at its core, an equitable remedy" (id. at 319), and restrictions on habeas must be subject to a panoply of exceptions designed to protect against fundamental miscarriages of justice. Id. at 319-22. This Court has applied the actual-innocence doctrine as an equitable exception to certain procedural barriers in order to reduce the harsh impact of the AEDA's statute of limitation. The State contends that this Court has thus far only permitted equitable tolling in certain limited extraordinary circumstances.

The petitioner has never claimed that the *Schlup* exception is a sub-category of equitable tolling. That this Court has found equitable tolling to apply in only some circumstances does not mean that other equitable exceptions can never apply. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) does not wholly displace existing habeas corpus doctrines; indeed, the development of habeas corpus jurisprudence is marked by the interplay between statutory language and judicially managed equitable considerations. *Schlup*, 513 U.S. at 319. This Court repeatedly has recognized that principles of fundamental fairness underlie the writ of habeas corpus. See *Engle v. Isaac*, 456 U.S., 126 (1982); *Sanders v. United States* 371 U.S. 1, 17-18 (1963).

The AEDPA dictates that, in reviewing a state court adjudication on the merits of the petitioner's federal claim, federal courts ask whether the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." An actual-innocence exception to the statute of limitations is necessary despite the enumerated tolling provisions under the AEDPA. Subsection 2244(d)(d)(1)(D) of the AEDPA recognizes that a petitioner should be able to challenge the constitutionality of his conviction on the basis of later-discovered evidence.

Actual-innocence can serve as a gateway through a procedural bar or the statute-of-limitation upon showing "a truly persuasive claim" that no reasonable juror would have convicted him in light of the new evidence. This Court and the Appeals Court have emphasized the continued relevance of traditional principles to habeas corpus practice under the AEDPA. See, e.g., *Williams v. Taylor*, 120 S.Ct. 1479, 1490-91 (2000). Both Courts have also construed specific AEDPA provisions narrowly, noting that when Congress has enacted new habeas corpus procedures in some sections of the Act but not in others, we may presume that the legislature did not intend to alter existing doctrine. See, e.g., *Hohn v. United States*, 524 U.S. 236, 250 (1998) (finding no Congressional intent to bar Supreme Court review of denial of certificates of appealability, where Congress expressly barred certiorari review of denials of motions to file successive petitions but was silent regarding certificates of appealability.

Applying these holdings to the statute at issue here, Congress did not alter the application of the *Schlup v. Delo* innocence exception to a late-filed "first" petition when it increased the quantum of proof required to show actual innocence and allow a successive petition to be filed but was silent on the application of *Schlup* to a late-filed first petition.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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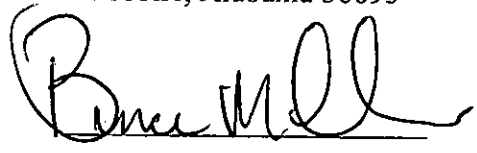

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