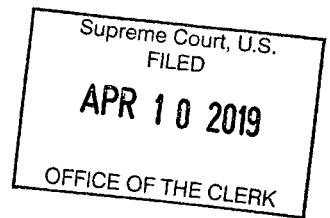


18-8875

ORIGINAL

U.S. Case No. 18A711
Appeal No.: 18-11477-D
District Court No.: 6:17-cv-4-Orl37KRS

IN THE
SUPREME COURT OF THE UNITED STATES



GEORGE E. BROWN,
Petitioner,

PROVIDED TO AVON PARK
CORRECTIONAL INSTITUTION
On 4-9-19 FOR MAILING
BY ly GB

v.

MARK INCH,
SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

George E. Brown #X52380
Avon Park Correctional Institution
8100 Highway 64 East
Avon Park, FL 33825-6801

QUESTION(S) PRESENTED

Question One:

The 'Pipeline' Analysis Should Be Expanded To New Law That Applies To Postconviction Claims Where The Resolution Of The Postconviction Claim Was Still Pending When The New Case Was Decided

Question Two:

Equitable Tolling Should Be Applied When PCR Counsel Fails To Preserve Any Federal AEDPA Time – When Said PCR Counsel Also Represented His Client For Both Direct Appeal And A Motion Alleging Ineffective Assistance Of Trial Counsel Motion

Question Three:

Equitable Tolling Should Be Applied When PCR Counsel Was Reprimanded And Suspended From the Bar By Their State Supreme Court From The Practice Of Law In Relation To A Clients Case

LIST OF PARTIES

All parties **do not** appear in the caption of this case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Barnette, Michael – Esquire

Beasley, Deangelo – the family of the victim

Blankner, Wesley – Esquire

Bleachman, Mark, Hon. – Florida Circuit Court Judge, 9th Judicial Circuit

Brown, George – Petitioner

Coffman, Paula – Esquire

Dalton, Roy B. – United States District Court Judge

Hess, Less – Assistant State Attorney

Inch, Mark – Secretary, Florida Department of Corrections

McCollum, Bill – Florida Attorney General

Moody, Ashley – Florida Attorney General

O’kane, Julie – Florida Circuit Court Judge, 9th Judicial Circuit

Palmer, Orfinger and Lambert, J.J., – Florida District Court Judges, 5th District

Phillips, Ann M. – Florida Assistant Attorney General

Pleus, C.J., Orfinger, and Evander, J.J., – Florida District Court Judges, 5th District

C1 of 2

Sims, Kelly – Esquire

Spaulding, Karla R. – United States District Court Magistrate Judge

Sweet, Leslie – Esquire

Wall, Rebecca R. – Florida Assistant Attorney General

C2 of 2

TABLE OF AUTHORITIES CITED

Federal Cases

Chapalet v. Sec'y Fla. Dep't of Corr., 2016 U.S. Dist. LEXIS 33885 (N.D. Fla., Mar. 16, 2016).....	21
Gordon v. Sec'y Dep't of Corr., 479 F.3d 1299, 1300 (11 th Cir. 2007).....	13
Martinez v. Ryan, 132 S.Ct. 1309 (2012)	25
Miller v. Alabama, 132 S.Ct. 2455 (2012).....	12
Montgomery v. Louisiana	12, 13, 18
Montgomery v. Louisiana, 136 S.Ct. 718 (2016)	12
Rambaran v. Sec'y, Dep't of Corr., 821 F.3d 1325 (11 th Cir. 2016)	14
Slack v. McDaniel, 120 S. Ct. 1595, 1602-03 (2000).....	23
Thomas v. Attorney Gen., Florida, 795 F.3d 1286, 1296 (11th Cir. 2015)	22

Constitutional Provisions

Fifth, Sixth, and Fourteenth Amendments of the United States Constitution	2
---	---

State Cases

Barreto, v. State, 50 So. 3d 738 (Fla. 5 th DCA 2010)	26
Brown v. State, 191 So. 3d 477 (Fla. 5 th DCA 2016)	4
Brown v. State, 25 So.3d 78, 80 (Fla. 2009).....	17
Brown v. State, 954 So. 2d 1173 (Fla. 5 th DCA 2007)	3
Haygood v. State. 109 So. 3d 735, 42 (Fla.2013)	17
Horne v. State, 128 So.3d 953, 956 (Fla. 2 nd DCA 2013).....	17
Montgomery I , 70 So. 3d 603.....	17
Montgomery v. State, 39 So. 3d 252 (Fla. 2010).....	viii, 14, 16
Montijo v. State, 123 So. 3d 133 (Fla. 5 th DCA 2013)	27

Odegaard v. State, 137 So. 3d 505, 512-513 (Fla. 2d DCA 2014)	13
The Florida Bar vs. Francis Wesley Blankner, Jr., 147 So. 3d 528 (Fla.2014)	26
The Florida Bar vs. Francis Wesley Blankner, Jr., 457 So. 2d 476 (Fla.1984)	26
The Florida Bar vs. Francis Wesley Blankner, Jr., Case No.: SC18-1239 (Decided August 16, 2018).....	26
The Florida Bar vs. Francis Wesley Blankner, Jr., LEXIS 570, Case No.: SC16-1971 (Decided February 23, 2017)	26

Federal Code

AEDPA.....	passim
28 U.S.C. § 1257(a).....	1
28 U.S.C. § 2254	vii, 1, 2, 4
28 U.S.C. §§ 1254(1), 1651, and 2253.....	1
Fed.R.Civ.P. 59(e).....	viii, 5

State Rules and Statutes

Amendments to Manslaughter Jury Instr., 911 So. 2d 1220 (Fla.2005); 946 So. 2d 1061 (Fla. 2006); 997 So. 2d 403 (Fla.2008); 41 So. 3d 853 (Fla.2010); 75 So. 3d 210 (Fla.2011); 213 So. 3d 680 (Fla. 2017)	3
Fla.R.Crim.P. Rule 3.850	passim
Fla. Stat. 782.07(1), Fla. Stat. (2005).....	14
Rules Regulating The Florida Bar provide the basis for discipline to be imposed in Blankner's matter: 3-4.3 [Misconduct]; 4-1.1 [Competence]; 4-1.3 [Diligence]; 4-1.4(a) [Communication]; 4-3.2 [Expediting Litigation] and 4-8.4(d) [Misconduct]	24

TABLE OF CONTENTS

QUESTION(S) PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES CITED.....	iv
TABLE OF CONTENTS	vi
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	7
REASONS FOR GRANTING THE PETITION	12
Question One:.....	12
The 'Pipeline' Analysis Should Be Expanded To New Law That Applies To Postconviction Claims Where The Resolution Of The Postconviction Claim Was Still Pending When The New Case Was Decided	12
Question Two:	19
Equitable Tolling Should Be Applied When PCR Counsel Fails To Preserve Any Federal AEDPA Time – When Said PCR Counsel Also Represented His Client For Both Direct Appeal And A Motion Alleging Ineffective Assistance Of Trial Counsel Motion	19
Question Three:	23
Equitable Tolling Should Be Applied When PCR Counsel Was Reprimanded And Suspended From the Bar By Their State Supreme Court From The Practice Of Law In Relation To A Clients Case	23
CONCLUSION	28
CERTIFICATE OF SERVICE.....	29

INDEX TO EXHIBITS

EXHIBIT **DOCUMENT**

1. Opinion of the United States court of appeals
2. Opinion of the United States district court denying petitioner's 28 U.S.C. § 2254 petition
3. Order denying rehearing to the United States Court of Appeals
4. Letter granting extension of time to file the petition for writ of certiorari
5. Charging Information
6. Verdict
7. Scoresheet/Sentence
8. 5TH DCA Decision, direct appeal
9. Mandate, direct appeal
10. Amendments to Manslaughter Jury Instructions (2005-2017)
11. Motion for Postconviction Relief
12. Supplemental Motion for Postconviction Relief
13. Order Denying Amended Supplemental Motion For Postconviction Relief
14. 5th DCA Decision, postconviction appeal
15. Mandate, postconviction appeal
16. Petitioner's 2254 petition

17. Respondent's Response to 2254 petition
18. Petitioner's Reply to the Response
19. Petitioner's Appended Exhibit to his Reply
20. Petitioner's Fed.R.Civ.P. 59(e) Motion To Alter Or Amend
Judgment
21. Order Denying Petitioner's Fed.R.Civ.P. 59(e) Motion To Alter
Or Amend Judgment
22. Federal Notice of Appeal
23. Order Denying Motion For Leave To Proceed *IFP* Of Appeal
24. 11th Circuit Order Granting Extension of Time to File COA
25. Motion for Postconviction Relied Alleging Newly Discovered
Evidence
26. Certificate of Appealability
27. Motion for Reconsideration
28. *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010)
29. Fla. Stat. 782.07(1), (2005)
30. Amended Motion For Postconviction Relief
31. Motion In Leave To File Amended Certificate of Appealability
32. Amended Certificate of Appealability and Appendix

In the
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a *Writ of Certiorari* issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at **Exhibit 1** to the petition and is unpublished. The opinion of the United States District Court denying petitioner's 28 U.S.C. § 2254 petition appears at **Exhibit 2** and is unpublished. The order denying rehearing to the United States Court of Appeals appears at **Exhibit 3** to the petition and is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals entered judgment on November 1, 2018. **Exhibit 1.** Rehearing was denied on December 19, 2018. **Exhibit 3.** An extension of time to file the petition for writ of certiorari was granted to and including May 18, 2019 on January 11, 2019 in Application No. 18A711. **Exhibit 4.** For these reasons explained below, this Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651, and 2253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 28 U.S.C. §§ 1254, 1257(a), 1651, 2244, 2253 and 2254 as well as the *Fifth*, *Sixth*, and *Fourteenth* Amendments of the United States Constitution are involved in this cause of action.

STATEMENT OF THE CASE

On May 28, 2005, the Petitioner was arrested. An amended information was filed on September 26, 2005 where the Petitioner was charged with Second Degree Murder, Attempted Second Degree Murder and Aggravated Battery with a Firearm. **Exhibit 5**

On October 17, 2005, a jury found Petitioner guilty of Second Degree Murder. **Exhibit 6** The state court sentenced Petitioner to a 30-year prison term of imprisonment with a 25-year mandatory minimum. **Exhibit 7** Petitioner appealed, and the Fifth District Court of Appeal of Florida (“Fifth DCA”) affirmed *per curiam* on April 24, 2007. **Exhibit 8** Mandate issued on May 11, 2007. **Exhibit 9** See *Brown v. State*, 954 So. 2d 1173 (Fla. 5th DCA 2007)

On September 8, 2005 the Florida Supreme Court issued its first of many amendments to the standard manslaughter jury instruction; this was a rapidly involving legal precedent in Florida that trial counsel was not staying abreast of. However, this was just the beginning because this same manslaughter jury instruction would go on to be amended a total of six times in a 12-year period. *See 911 So. 2d 1220* (Fla.2005); 946 So. 2d 1061 (Fla. 2006); 997 So. 2d 403 (Fla.2008); 41 So. 3d 853 (Fla.2010); 75 So. 3d 210 (Fla.2011); 213 So. 3d 680 (Fla. 2017) **Exhibit 10**

On May 11, 2009, Petitioner, through counsel, filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which among other things counsel amended twice and filed a supplement alleging that counsel provided ineffective assistance by failing to object to a manslaughter jury instruction at trial. **Exhibit 11.** On July 16, 2013, Brown's counsel Blankner filed a Supplemental 3.850 motion conceded that this ground constituted fundamental error and that appellate counsel rendered ineffective assistance of counsel by failing to include this ground on direct appeal. (It must be noted Blankner was Brown's appellate counsel and has explicitly admitted he should have included this ground in Brown's direct appeal.) **Exhibit 12.** The state court denied the motion without an evidentiary hearing. **Exhibit 13.** Petitioner appealed, and the Fifth DCA affirmed *per curiam*. **Exhibit 14.** Mandate issued on June 3, 2016. **Exhibit 15.** See *Brown v. State*, 191 So. 3d 477 (Fla. 5th DCA 2016)

On December 30, 2016, Petitioner filed his Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254 and accompanying Memorandum Of Law. (Doc.1 and 2) **Exhibit 16.** In it, he raised one constitutional challenge to his conviction and sentence which is the subject of this certiorari petition. On June 27, 2017, the Respondent filed a Response (Doc.12) **Exhibit 17**, and Appendix (Doc.13). Petitioner filed a Reply to the Response **Exhibit 18** and appended

numerous exhibits. (Doc.16) **Exhibit 19.** On March 6, 2018 United States District Judge Roy B. Dalton summarily denied without conducting an evidentiary hearing on Browns' claim. **Exhibit 2.** On March 20, 2018 the Petitioner filed a Fed.R.Civ.P. 59(e) motion to alter or amend judgment. (Doc. 21) **Exhibit 20.** On March 28, the district court denied the motion. (Doc. 22) **Exhibit 21.** On April 9, 2018 Petitioner timely filed his notice of appeal from the Middle District Court's Order and Judgment. (Doc.23) He filed a motion for leave to proceed IFP of appeal (Doc. 24), **Exhibit 22**, which the district court denied. **Exhibit 23.** After successfully being granted an extension of time he then filed motions for a COA and IFP in the Eleventh Circuit Court of Appeal ("Eleventh Circuit"). **Exhibit 24.**

On March 26, 2018, while the Petitioner's 2254 petition was pending, through retained counsel, Paula Coffman, he filed a successive motion for postconviction relief in the Ninth Judicial Circuit, In and For Orange County, Florida. In this motion James Viville provided the Petitioner with an affidavit. Viville was a testifying witness against the Petitioner at trial and now recanted his trial testimony that he was not the aggressor because he initiated this incident by punching the Petitioner in the face when he was a 17-year old juvenile that possessed a firearm that night which also escalated the incident. **Exhibit 25.**

In the Eleventh Circuit Court of Appeal on June 20, 2018 Petitioner filed his initial COA **Exhibit 26**, which was denied on November 1, 2018. **Exhibit 1.** On

November 19, 2018 Petitioner filed his Motion for Reconsideration **Exhibit 27** which was denied on December 19, 2018. **Exhibit 3**. From this last date Petitioner has 90-days (March 19, 2019) to file a application for writ of certiorari in the United States Supreme Court, however an extension of time to file the petition for writ of certiorari was granted to and including May 18, 2019. **Exhibit 4**. This timely certiorari follows:

STATEMENT OF THE FACTS

This case arose from a May 28, 2005 incident at an Orlando nightclub called The Upper Level where D'Angelo Beasley was killed. The Upper Level is a teen club (T125) located in a plaza at Adanson and Lee Rd. (T134).

Witnesses testified that the club closed early on that Friday evening because there had been too much fighting inside; (T529) and that these fights were spilling out into the parking lot. (T135) Deputy Tony Marlow of the Orange County Sheriff's Office described "girls fighting, guys fighting everywhere." (T135)

The police usually have extra units patrolling the parking lot to monitor the closing time crowd. However, because the club closed early, there were fewer than normal police officers present. (T529) It was the responsibility of the security staff – themselves teenagers – to disperse the angry crowd. (T527-529)

The Petitioner was at the club that evening with Christopher Johnson, Marvin White, and Ronald Williams. (T380) They had arrived together in a white Chrysler 300. (T411)

They were inside the club when "everybody was told to leave." (T383) White testified they were told to "get out," and that the staff was "mean" about it. (T414) Outside, security guards were telling the crowd to go home. (T471)

James Viville, who was an 11th grade high school student working security at the club, described how "the customers weren't listening to security." (T531)

Whereas normally the police would disperse the crowd, on this evening the head of security was called as the confrontations escalated. (T533)

The head of security “tried to get everybody moving,” but instead a massive “fight broke out.” (T533) Witnesses described how the fighting between customers and security became concentrated in a ditch by the club. (T407, 491)

When the Petitioner and his friends walked outside, they saw what Christopher Johnson described as “a big riot.” (T384) White stated that there were “a bunch of fights (T415), some involving security guards.” (T417)

The Petitioner testified that he and two of his friends were followed as they left the club by people who were “making threats.” (T702) Marvin White stated that there were “like ten of them walking up to us.” (T417)

Petitioner stated that when he turned around he was punched in the face. (T704) This was witnessed by Williams, who testified that one of the security guards “punched George in the face.” (T488) As the Petitioner fell against a van, the guard’s “brother” joined the fight against him. (T488) White testified that “there were at least six of them beating George up on a car.” (T417) White described the guards beating the Petitioner “like they were trying to kill him.” (T438)

James Viville – standing 6’5” and weighing 290 pounds – admitted being one of the several guards involved in the fight with the Petitioner. (T561-562)

Viville's brother was also fighting the Petitioner and also throwing punches. (T563) Randy Viville, at 6'6" tall (T611) is larger than his brother and "a lot bigger than the Petitioner. Marcus Nieto, who was also fighting, was described as "about [Viville's] size." (T562) James Viville admitted that he and Nieto had punched and pushed the Petitioner up against an SUV (T566) and that Randy Viville had joined in. (T567) Randy Viville testified that he joined the fight against "the little guy." (T597)

There was testimony that at least one of the security guards involved in this fight displayed a firearm. (T491) The gun was seen by Ronald Williams (T492) as well as by the Petitioner. (T717)

James Viville testified that the Petitioner ran to the Chrysler 300. (T569) Although Viville did not admit that he was chasing the Petitioner, he admitted being a couple feet behind the car when the shots were fired. Randy Viville testified that James was yelling at the young men who were getting into the Chrysler. (T638) Randy Viville admitted that he, James and another security guard called "Big Chris" were on either side of the Chrysler (T601, 638) Randy Viville described "Big Chris" as "bigger" than himself with "more muscle." (T636)

Pittman testified that the guards pursued the men and were "three feet from the car." (T107) White stated that the Petitioner was crying as he ran to the car, pursued by a crowd that was "still trying to fight." (T422) Ronald Williams

described a “crowd” coming towards the Chrysler. (T476) Deputy Tony Marlow also saw a “crowd running up to the car” as “four to five males” got inside. Marlow indicated that the driver “tried to leave” but could not because there were “so many people.” (T138)

James Viville agreed that the fight did not end until the shots were fired. (T543)

The Petitioner admitted to firing the gun as he was being chased by the guards. He testified that he shot “upwards” and “in the air” trying to scare off his attackers. (T734) He stated that he was shooting through the partially opened door of the car and that his eyes were closed. (T731) This is consistent with what the Petitioner told the police after the incident. (T195-96) It is also consistent with the physical evidence; the bullet crease on the back passenger side wheel well of the Chrysler. (T143)

The Petitioner’s testimony was corroborated by the State’s witness, Marvin White Jr., who testified that the Petitioner “had his eyes closed, and he was shooting up.” (T423) This testimony was uncontradicted by Nakeem Pittman (T35), Tony Marlow (T137), Christopher Johnson (T406), Ronald Williams (T476), Fred Shinn (T516) and Randy Viville (T603) whom all testified that they did not see the Petitioner fire the gun. Only James Viville testified that the Petitioner’s arm was horizontal (T549); but it should be noted that Viville in the

same breath denied that “the whole reason” he was behind the Chrysler was that he was looking for his brother. (T548) As noted above, he recanted that testimony minutes later, admitting that he had been fighting the Petitioner.

None of the law enforcement personnel called by the state contradicted the Petitioner’s testimony.

All motions for judgment of acquittal were denied. Following the close of evidence and summations by counsel, the jury deliberated and returned a verdict of not guilty as to the count of Attempted Second Degree Murder, and guilty of Second Degree Murder with a Firearm. On December 2, 2005 the Petitioner was adjudicated guilty and sentenced to 30-years in the Department of Corrections with a 25-year minimum mandatory sentence.

REASONS FOR GRANTING THE PETITION

Question One:

The 'Pipeline' Analysis Should Be Expanded To New Law That Applies To Postconviction Claims Where The Resolution Of The Postconviction Claim Was Still Pending When The New Case Was Decided

The certworthiness of this petition is demonstrated by the dictates of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). *Montgomery v. Louisiana* held that *Miller v. Alabama*, 132 S.Ct. 2455 (2012) has a procedural component which can be applied to the elements of crime contained in the Browns' manslaughter jury instructions.

For example, when an element of a criminal offense is deemed unconstitutional, a prisoner convicted under that offense receives a new trial where the government must prove the prisoner's conduct still fits within the modified definition of the crime. In a similar vein, when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class. 136 S.Ct. 718, 735 (2016)

The Respondent claims that, if Brown had raised a claim that he was unconstitutionally sentenced as a juvenile to a mandatory life sentence, his argument would be meritorious. **Exhibit 17** pg. 4, ¶ 2, However, *Montgomery v.*

Louisiana held Miller has a procedural component which includes being properly instructed on the elements of a crime.¹

The issue that must be addressed first and foremost in this cert petition is whether recent cases suggest an expansion of the 'pipeline' analysis to new law that applies to postconviction claims where the resolution of the postconviction claim was still pending when the new case was decided.

Reasonable jurists might find it debatable when an issue is rapidly evolving regarding substantive amendments to a flawed jury instruction; it is hard to justify an approach that allows the first defendant to reach the Supreme Court to receive the benefit of the new rule while other defendants in the legal pipeline do not. See *Odegaard v. State*, 137 So. 3d 505, 512-513 (Fla. 2d DCA 2014) (LaRose, J., concurring) ("However, recent cases suggest an expansion of the 'pipeline' analysis to new law that applies to postconviction claims where the resolution of the postconviction claim was still pending when the new case was decided.")

The Eleventh Circuit's reason for denial stated that, "...reasonable jurists would not debate whether Petitioner's § 2254 motion states a valid claim of the denial of a constitutional right. *Gordon v. Sec'y Dep't of Corr.*, 479 F.3d 1299, 1300 (11th Cir. 2007)(holding that a COA should not issue when the claim is

¹ 136 S. Ct. at 735

foreclosed by binding circuit precedent). The Petitioner's conviction had been affirmed on appeal and was final three years before the Florida Supreme Court issued its decision in *Montgomery v. State*, 39 So. 3d 252. (Fla. 2010) **Exhibit 28** Because of the timing of his direct appeal, his ineffective assistance of counsel claim is controlled by this Court's precedent in *Rambaran v. Sec'y, Dep't of Corr.*, 821 F.3d 1325 (11th Cir. 2016), which held that counsel was not ineffective by failing to anticipate the Florida Supreme Court's decision in *Montgomery*. *Id.* at 1334.

Although Brown's 2254 and COA petition were not a model of clarity in the lower court's because he argued that the 2005 statute for manslaughter was amended instead of arguing, "the crime of manslaughter by act under 782.07(1), Fla. Stat. (2005), **Exhibit 29** did not require that the State prove that defendant intended to kill the victim and trial court's use of the standard jury instruction for manslaughter containing such requirement constituted fundamental error."

Brown primarily based his argument upon *State v. Montgomery*, 39 So. 3d 252 (Fla. 2010) which was decided after trial in this matter, yet while Brown's 3.850 was pending, however reasonable jurists could well debate whether the principles upon which *Montgomery* is based, that the proponent of a fundamentally defective manslaughter jury instruction, were codified through 782.07(1), Fla. Stat. (2005) and were part of Florida evidentiary jurisprudence before his trial and

should have been the basis of a well-taken objection at the time of Browns' trial or direct appeal.

It is hard to believe that Montgomery who was arrested in October 2005 and convicted in Florida in 2007 received the benefit of this amendment when Brown did not, especially considering the fact they are similarly situated. Consider the fact Brown was arrested on May 28, 2005 (5-months before Montgomery) and sentenced December 2, 2005; yet he is not being granted similar relief because Brown's mandate issued on direct appeal in 2007 and Montgomery was issued April 8, 2010 but they were only arrested 5-months apart. To add further insult to injury the same manslaughter statute and jury instruction were used during both *Montgomery and Brown's* trials.

Although counsel is not required to anticipate changes in the law that is not the case with Brown because the 2005 manslaughter jury instruction was a rapidly evolving area of law in Florida, yet the change in law was not applied to Browns' case which did not require an intent to kill.

The 2005 manslaughter jury instructions from Brown's 2005 trial for manslaughter did not change until 2010 when Montgomery was decided. Brown should not be penalized for the court's failure to properly instruct the jury in his case.

The legislative intent behind the changing of this manslaughter instructions can be gleaned from the first amendment to this instruction which occurred in 2005 then was changed again in 2006. Nonetheless, in 2008 the language changed again by stating that, “in order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death, *only an intent to commit an act which caused death.*”

Furthermore, in 2010, the manslaughter instruction was amended again because it resulted in fundamental error in Montgomery's first-degree murder case because the instruction erroneously required the State to prove that the defendant intended to kill the victim.

Lastly in 2011 and 2017 the manslaughter instruction was amended yet again. In conclusion, the fundamentally erroneous manslaughter jury instruction that was used during the Petitioner's 2005 has been amended 6-times since he proceeded to trial.

Reasonable jurists also might find it debatable that Montgomery received relief based off of the same statute that affected Brown yet he is not receiving similar relief. Although this error was identified from the 2005 statute it was not changed until *State v. Montgomery* was issued in 2010.

To determine whether appellate counsel's performed deficiently, Florida Appellate court's apply the law in effect at the time of the appeal; [Florida Court's]

apply current law to determine whether confidence in the fairness and correctness of the appellate result is undermined. *Horne v. State*, 128 So.3d 953, 956 (Fla. 2nd DCA 2013)(citing *Brown v. State*, 25 So.3d 78, 80 (Fla. 2009)).

Clearly the Petitioner would fall into this *postconviction* pipeline analysis were it to be expanded. Counsel filed his initial 3.850 motion in state court on May 11, 2009 (before The Florida Supreme Court accepted jurisdiction of *Montgomery I*, 70 So. 3d 603 **February 12, 2009** Fla. 1st DCA 2009)) The Florida Supreme Court accepted jurisdiction in **May of 2009**. On January 9, 2012 counsel then filed an amended 3.850 motion including the *Montgomery* issue. **Exhibit 30** On July 19, 2013 counsel filed a supplemental 3.850 motion adding the authority of *Haygood v. State*, 109 So. 3d 735, 42 (Fla.2013) **Exhibit 12**. On October 28, 2015 the state trial court denied all claims without an evidentiary hearing. **Exhibit 13**. The state appellate court mandate issued on June 3, 2016 (well within the postconviction pipeline.) **Exhibit 15**.

A jurist of reason would find the issue debatable or wrong that two similarly situated defendants (*Montgomery*² and *Brown*) who were arrested around the same time in 2005, received the same fundamentally flawed jury instruction of manslaughter and the jury was given the same statute, however, because *Brown* is

² 39 So.3d 252 (Fla. 2010)

raising his claim in a 3.850 motion instead of on direct appeal he is being foreclosed relief.

To add to this bizarre turn of events when Attorney Blankner argued this ground in Brown's Supplemental July 16, 2013, 3.850 motion and conceded that this ground constituted fundamental error and that appellate counsel rendered ineffective assistance of appellate counsel by failing to include this ground on direct appeal. **Exhibit 12, pg 5, ¶2** . However, Blankner was Brown's appellate counsel.

Particularly given that absent a cert, a conclusion that Brown suffered no prejudice as a result of counsel's failure to object or raise this claim on appeal will never receive any appellate review, this court should issue a certiorari on this claim of whether *Montgomery v. Louisiana* allows for expansion of the postconviction pipeline analysis

Question Two:

Equitable Tolling Should Be Applied When PCR Counsel Fails To Preserve Any Federal AEDPA Time – When Said PCR Counsel Also Represented His Client For Both Direct Appeal And A Motion Alleging Ineffective Assistance Of Trial Counsel Motion

Reasonable jurists could readily debate whether Attorney Wesley Blankner's actions amounted to the level of abandonment, acting in bad faith, dishonesty or with a divided loyalty. Specifically, the fact that Attorney Wesley Blankner was hired from the very beginning to prepare Browns' direct appeal and collateral appeal motions yet failed to preserve even one day of AEDPA time so he could file a 2254 petition therefore, a jurist of reason would find the issue of equitable tolling debatable.

Without the application of equitable tolling this petition will be procedurally time barred, therefore, Brown asks that this court find that Attorney Wesley Blankner's actions directly prevented Brown from filing a timely 2254 petition. Blankner represented Browns' interests from day one; he hired Blankner with plenty of time left on his federal clock; and to not hold him responsible for his dilatory practices of misrepresentation, abandonment, and gross negligence stood in his way' and prevented timely filing. In essence Blankner abandoned Brown by not communicating with him.

Blankners' actions and inactions is the main reason why Brown did not preserve any federal time or took any steps to assure his limitation period was preserved.

Stated one way, the district court's conclusion that defense counsel was reasonable in his decision to wait until the very last day on a 2-year timeframe to timely a 3.850 motion is debatable. Blankner basically abandoned Brown for years when he failed to communicate with him while his 3.850 appeal was pending.

Conversely, reasonable jurists could also debate whether constitutionally effective counsel would have timely filed Browns' Fla.R.Crim.P. Rule 3.850 motion to preserve time under AEDPA so he could timely file a 28 U.S.C. § 2254 petition after exhausting his state remedies. Brown maintains that defense counsel was objectively unreasonable for all these reasons.

A matter lending great weight to support Browns' argument is that equitable tolling should be applied to the facts of his case because since August 2017 Brown has had a Florida Bar complaint being investigated by the Florida Supreme Court. Were those allegations to be unfounded the Bar would have dismissed Browns' complaint against Blankner.

The record demonstrates that Blankner undertook to represent Brown on his direct appeal then of his Rule 3.850 motion so his representation did not lapse, but carried right over. Yet Browns' 3.850 motion was not filed until all of his federal

AEDPA time expired and almost all of his state time (1-day to spare). It's true that Brown frames his arguments about Blankner in terms of a failure to communicate. The record plainly supports that conclusion. But the facts underlying a failure to communicate may also be facts tending to show abandonment. The record evidence, coupled with Brown's liberally construed pleading, plausibly suggests—that is, one can reasonably infer—that Blankner might have abandoned that representation for a period of time. And if, for example, Blankner "utterly shirked" his professional responsibilities to file a Rule 3.850 motion from, say, May 12, 2007 until May 11, 2009, Brown may be able to establish extraordinary circumstances.

It is important to develop fully the critical findings of fact "the when, the what, the how, and most importantly, the why" of the scope of representation from its inception and the reasons Blankner did not file the Rule 3.850 motion until May 11, 2007 – 2-years to the date his mandate issued from direct appeal on May 12, 2007.

In this case, the magistrate judge failed to conduct an evidentiary hearing and complete a report and recommendation setting out facts relevant to whether Brown's lawyer abandoned him within the meaning of the law. *See Chapalet v. Sec'y Fla. Dep't of Corr.*, 2016 U.S. Dist. LEXIS 33885 (N.D. Fla., Mar. 16, 2016)

The Eleventh Circuit has remanded a habeas petition for an evidentiary hearing to find out exactly why a lawyer delayed in filing a petition. *See Thomas v. Attorney Gen., Florida*, 795 F.3d 1286, 1296 (11th Cir. 2015).

Particularly given that absent a COA, reasonable jurists could easily debate that defense counsels' actions and inactions warrant the application of equitable tolling, this court should issue a certiorari on this claim.

Question Three:

Equitable Tolling Should Be Applied When PCR Counsel Was Reprimanded And Suspended From the Bar By Their State Supreme Court From The Practice Of Law In Relation To A Clients Case

If this court finds the merits of this petition certworthy then a second hurdle that will have to be crossed is whether equitable tolling can be applied. However, a question that may arise later is that; when a lawyer is suspended by the Bar in relation to their dilatory conduct in their representation.

After Brown filed his COA, he sought leave to amend his COA **Exhibit 31** when a decision was rendered which his postconviction counsel was reprimanded and suspended by the Florida Supreme Court from the practice of law for 90-days and placed on probation for 9-months in relation to Brown's case. **Exhibit 31**
Attachments.

The Eleventh Circuit's reason for denial stated that, “[b]ecause the first prong of the Slack³ test is not met, this Court does not address whether the district Court correctly evaluated Mr. Brown's equitable tolling arguments. Mr. Brown's

³ *Slack v. McDaniel*, 120 S. Ct. 1595, 1602-03 (2000)

These new COA requirements provide that a court of appeals should issue a COA when the prisoner shows that (1) reasonable jurists would find it at the very least “debatable” whether his or her petition simply states a “valid” claim of the denial of a constitutional right

motion to file an amended COA motion is also DENIED because it only provides information relevant to his equitable tolling arguments.” **Exhibit 1**, pg. 4

In an abundance of caution, the Petitioner prepared an Amended Certificate of Appealability and accompanying Appendix with the newly acquired facts from Blankner’s suspension and reprimand would the Eleventh Circuit have granted the Petitioner leave to amend. **Exhibit 32**

Brown did not seek to include additional claims but rather include facts that were not previously made at the time of filing Brown’s June 20, 2018 COA.

On August 16, 2018, Defense Counsel Wesley Blankner’s entered into with The Florida Supreme Court a Conditional Guilty Plea For Consent Judgment and found that the following Rules Regulating The Florida Bar provide the basis for discipline to be imposed in Blankner’s matter: 3-4.3 [Misconduct]; 4-1.1 [Competence]; 4-1.3 [Diligence]; 4-1.4(a) [Communication]; 4-3.2 [Expediting Litigation] and 4-8.4(d) [Misconduct]. (**Exhibit 32**, See Exhibit. A; Supreme Court of Florida Order)

The District Court in its order of denial specifically made a finding that, “while Blankner was reprimanded in relation to another case, *this action did not occur in relation to Petitioner’s proceedings*, nor does Blankner’s actions in an unrelated case evidence bad faith or dishonesty toward Petitioner.” **Exhibit 2** pg. 8)

Contrary to this assertion previously made by the district court that Blankner was not reprimanded in the Petitioner's case at the time of the court's order, however, now that has changed because Blankner has been reprimanded and suspended from the practice of law for 90-days and placed on probation for 9-months in relation to Brown's case.

After an investigation from the Florida Bar the Florida Supreme Court found that Blanker failed to provide diligent representation and failed to communicate with Brown in a post-conviction matter, therefore, he asks that were it be possible as an alternative that *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) be applied to his case.

Facts concerning Blankner's unprofessional and dilatory conduct were originally argued in Brown's COA however the Florida Supreme Court's August 16, 2018 order was not available at the time Brown filed his COA in June of 2018.

In Brown's case his post-conviction counsel accepted a plea concerning the allegations set forth against him in the Florida Bar complaint Brown filed in August of 2017 therefore post-conviction counsel has in essence admitted to all the facts set forth against him. (**Exhibit 32**, Exhibit. B; Florida Bar Complaint)

Mr. Brown argued that Blankner "acted in bad faith and dishonestly" as evidence by Blankner's conduct in other cases and warning from the Fifth DCA

concerning his dilatory behavior in one of those case. (**Exhibit 32**, *Compare Exhibit. B; pg. 2-3 and Exh. E*)

Furthermore, this is not the first time Attorney Blankner has been suspended for his action and inactions by the Florida Supreme Court: As far as Brown is now aware, the first time Blankner was suspended was in 1984 for failing to pay his federal income taxes just like he has been suspended for again in 2018 (this year).⁴

Exhibit 32, Exhibit. C; Opinions Rendered Against Blankner)

However, most recently, Blankner has again fallen into conduct unbecoming of the Florida Bar when he was reprimanded in 2014,⁵ suspended for 10-days in 2017,⁶ and yet, suspended again for 90-days followed by a 9-month probationary period in 2018 (this year).⁷ **Exhibit 32, Exhibit. C; Opinions Rendered Against Blankner)**

In *Barreto, v. State*, 50 So. 3d 738 (Fla. 5th DCA 2010), Attorney Blankner was admonished by the State Appellate Court for wasting their time and Barreto's money when Attorney Blankner who was Barreto's trial and appellate counsel (like he was in Brown's case) would participate without comment or objection in what

⁴ The Florida Bar vs. Francis Wesley Blankner, Jr., 457 So. 2d 476 (Fla.1984)

⁵ The Florida Bar vs. Francis Wesley Blankner, Jr., 147 So. 3d 528 (Fla.2014)

⁶ The Florida Bar vs. Francis Wesley Blankner, Jr., LEXIS 570, Case No.: SC16-1971 (Decided February 23, 2017)

⁷The Florida Bar vs. Francis Wesley Blankner, Jr., Case No.: SC18-1239 (Decided August 16, 2018)

he now suggests was a faulty plea process. (**Exhibit 32**, Exhibit. D; Barreto Case Law)

Then yet again Blankner was admonished and called out by name in *Montijo v. State*, 123 So. 3d 133 (Fla. 5th DCA 2013), Brown's attorney Blankner was reprimanded for failing to meet brief deadlines in at least nine cases before the Fifth District Court of Appeal for his violations of the Rules of Professional Conduct. (**Exhibit 32**, Exhibit. E; Montijo Case Law)

As can be seen in the *Barreto and Montijo* case law as well as the decisions handed down from the Florida Supreme Court regarding Blankner's Florida Bar Reprimands and Suspensions. This type of conduct is not new to Blankner, he has a habit of not timely filing briefs on his clients behalf which is detrimental to a petitioner in the federal courts under the AEDPA.

To support Brown's equitable tolling argument these facts are essential for this court to make an evaluated decision, further a reasonable jurists could easily debate that the Florida Supreme Court's decision to suspend Brown's defense counsel from the practice of law "*in relation to Brown's proceedings*" for 90-days followed by 9-months of probation warrant the application of equitable tolling, this court should issue a certiorari on this claim.

CONCLUSION

This Court should grant *certiorari* to review the judgment below.

In the alternative, were this court to agree with the Petitioner's equitable tolling argument he would like this court to consider granting him the opportunity for a type of conditional relief where he may go back to the district court and include grounds that were previously made in his state court proceedings.

Respectfully submitted,

George Brown X52380
George E. Brown #X52380
Avon Park Correctional Institution
8100 Highway 64 East
Avon Park, FL 33826-6801

CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that a true and correct copy of the foregoing has been served by first-class mail on after being placed in the hands of a prison official for mailing at Avon Park Correctional Institution:

**SUPREME COURT OF THE
UNITED STATES**
One First St. N.E.,
Washington, DC 20543

Attorney General's Office
Daytona Beach Office (Fifth DCA)
444 Seabreeze Blvd. Ste. 500,
Daytona Beach 32118, Fl. 32118

On this 9th day of April 2019


George E. Brown #X52380
Avon Park Correctional Institution
8100 HWY Road 64 East
Avon Park, FL 33825