

No. 18-9416

ORIGINAL

Supreme Court, U.S.
FILED

MAY 15 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN D. WILLIAMS — PETITIONER
(Your Name)

vs.

MARK S. INCH / DDC — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN D. WILLIAMS
(Your Name)

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(Address)

CRAWFORDVILLE, FLA. 32327
(City, State, Zip Code)

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1) IN THE DISTRICT COURT Judge's order of denial, denying PETITIONER'S 2254 HABEAS PETITION AND COA, THE HONORABLE ROBERT L. HINKLE DETERMINED THAT THE PETITIONER HAD THE EVIDENTIARY FOUNDATION FOR THE LESSER INCLUDED OFFENSE AND THAT THE PETITIONER WAS ENTITLED TO RELIEF ON THE LESSER OFFENSE CLAIM, ONLY IF THE STATE COURT'S RULING WAS "CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES, BUT PETITIONER WOULD LOSE HIS LESSER INCLUDED OFFENSE CLAIM BECAUSE BECK V. ALABAMA, 447 U.S. 625 (1980) HAS NOT BEEN EXTENDED TO NON-CAPITAL CASES BY THE SUPREME COURT OF THE UNITED STATES, AND CAUSE HIS CASE IS BEING LITIGATED IN THE ELEVENTH CIRCUIT WHERE PERRY, AND EASTON ESTABLISH THE GOVERNING LAW OF THE CIRCUIT. SEE APPENDIX (B)

IF THE DISTRICT COURT Judge DETERMINED THAT THE PETITIONER WAS ENTITLED TO RELIEF UNDER THE ADEPA, THEN THAT CLEARLY DEMONSTRATES THAT THE TRIAL COURT DENIED THE PETITIONER HIS DUE PROCESS RIGHTS TO A STANDARD JURY INSTRUCTION THAT WAS SUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL. (SEE TRIAL TRANSCRIPTS PAGES 81-89).

THEREFORE, SINCE THE THIRD (3RD) AND SIXTH (6TH) CIRCUITS HAS EXTENDED THEIR REASONING IN BECK TO NON-CAPITAL CASES, HOLDING THAT IT IS CONSTITUTIONAL ERROR NOT TO GIVE A REQUESTED "LESSER - INCLUDED - OFFENSE" WHENEVER THE EVIDENCE WOULD SUPPORT A CONVICTION EITHER ON THE CHARGED OFFENSE OR ALL UNCHARGED "LESSER - INCLUDED - OFFENSE" OR BOTH, WOULDN'T IT BE A DENIAL OF DUE PROCESS AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE NOT TO GRANT THE PETITIONER RELIEF ON THE LESSER OFFENSE CLAIMS?

"ESPECIALLY" SINCE THE NINTH (9TH) CIRCUIT HAS ALSO RECOGNIZED THAT "THE REFUSAL BY A COURT TO INSTRUCT A JURY ON LESSER - INCLUDED OFFENSES, WHEN THOSE OFFENSES ARE CONSISTENT WITH DEFENDANT'S THEORY OF THE CASE, MAY CONSTITUTE A COGNIZABLE HABEAS CLAIM" UNDER CLEARLY ESTABLISHED FEDERAL (2018 U.S. DIST. LEXIS) LAW SOLIS, 219 F.3d AT 929; SEE ALSO BRADLEY V. DUNCAN 315 F.3d 1091, 1099 (9TH CIR. 2002). AND SEE DUKETTE V. PERRIN, 564 F. SUPP. 1530, 1537 (D.N.H.) (1ST CIR. 1983).

2) SINCE THE FAILURE OF A STATE COURT TO INSTRUCT THE JURY ON lesser included offenses RAISES A QUESTION THAT IS COGNIZABLE ON HABEAS CORPUS REVIEW, AND IN SOME CIRCUMSTANCES, THE FAILURE TO GIVE THE REQUESTED INSTRUCTION COULD DEPRIVE THE DEFENDANT OF THE FUNDAMENTAL RIGHT TO A FAIR TRIAL AS SECURED BY THE U.S.C. CONSTITUTION 14TH AMEND.

DID THE TRIAL COURT'S ACTIONS OF REMOVING THE REQUESTED lesser included offense OF BATTERY FROM THE STANDARD JURY INSTRUCTIONS AFTER DETERMINING THAT THE EVIDENCE ADDED AT TRIAL SUPPORTED THE lesser-included offense. ABUSE ITS DISCRETION DENYING PETITIONER HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE? (SEE T.T. PGS. 81-89).

3) IF THE FEDERAL RULES OF CRIMINAL PROCEDURE DEAL WITH lesser-included offenses, SEE Rule 31 (c), AND THE DEFENDANT'S RIGHT TO SUCH AN INSTRUCTION HAS BEEN RECOGNIZED IN NUMEROUS DECISIONS OF THIS COURT, SEE E.G. SANSONE V. UNITED STATES, 380 U.S. 343, 349, 85 S.Ct. 1004, 1009, 13 L.Ed. 2d 882 (1965); BERRA V. UNITED STATES, 351 U.S. 131, 134, 76 S.Ct. 685, 687, 100 L.Ed. 1013 (1956); STEVENSON V. UNITED STATES, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896). AND SEE ALSO KEEBLE V. UNITED STATES 93 S.Ct. 1993 (1973) ALL HOLDINGS BY THIS COURT STATES THAT IF THE INSTRUCTION IS SUPPORTED BY THE EVIDENCE AND WOULD ALLOW OR PERMIT A JURY TO RATIONALLY FIND HIM GUILTY OF THE lesser offense AND ACQUIT HIM OF THE GREATER IT IS BEYOND DISPUTE THAT THE DEFENDANT IS ENTITLED TO AN INSTRUCTION ON THE lesser offense.

THEREFORE, BASED ON THE DISTRICT COURT JUDGE'S RULING IN THE INSTANT CAUSE, DID THE PETITIONER MEET THE EVIDENTIARY FOUNDATION WHERE THE HELD HE'S ENTITLED TO RELIEF ON THE lesser offense CLAIM. (SEE APP. B)

4) IF PETITIONER'S lesser-included offense AND JUDGMENT OF ACQUITTAL CLAIMS ARE HELD TO BE TECHNICALLY EXHAUSTED, THEN THEY ARE NOT PROCEDURALLY BARRED AND THE lesser-included offense CLAIM ARE CONSIDERED TO CONSTITUTE A COGNIZABLE HABEAS CLAIM UNDER CLEARLY ESTABLISHED FEDERAL LAW. WAS THE PETITIONER DENIED DUE PROCESS AND THE RIGHT TO A FAIR TRIAL TO THE THEORY OF HIS DEFENSE BY THE STATE COURTS? (SEE SUPPLEMENTAL REPORT AND RECOMMENDATION).

LIST OF PARTIES

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

☐ All parties **do not** appear in the caption of the 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:

- 1) A. B.
- 2) S. O.
- 3) BEEN, STEVEN A, ASSISTANT Public Defender
- 4) BENTON, THE HON. ROBERT, APPELLATE Judge
- 5) CLARK, THE HON. NIKKI, A APPELLATE Judge
- 6) CONLEY, ANNE, ASSISTANT ATTORNEY GENERAL
- 7) COPEK, Alice, APPELLATE ATTORNEY
- 8) DEKKER, KATHLEEN, TRIAL Judge
- 9) DERRINA HURT, TRIAL Counsel
- 10) DEL SOLLE, Adrienne, ASSISTANT Public Defender
- 11) DUFF, THOMAS H, ASSISTANT ATTORNEY GENERAL
- 12) EVANS, Eddie, ASSISTANT STATE ATTORNEY

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STATUTE AND RULES

800.04 (4) FLA. STAT.
 800.04 (5) FLA. STAT.
 800.04 (5) (b) FLA. STAT.
 775.082 (3) (A) 4, A II, FLA. STAT.
 794.011 (5) FLA. STAT.

OTHER

UNITED STATES CONSTITUTION'S 5TH 6TH AND 14TH AMEND.
 FLORIDA CONSTITUTIONS, 5TH 6TH AND 14TH AMEND.

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix C to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at N/A; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was OCTOBER 12TH 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: JANUARY 02, 2019, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including NONE (date) on _____ (date) in Application No. A.

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

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

SEE THE FOLLOWING:

TAYLOR V. WORKMAN, 554 F.3d 879 (10TH CIR. 2009) DENIAL OF JURY INSTRUCTION ON LESSER INCLUDED NON-CAPITAL OFFENSE VIOLATED DUE PROCESS.

HARRIS V. ALEXANDER, 548 F.3d 200 (2^D CIR. 2008) TRIAL COURT VIOLATED DUE PROCESS BY REFUSING TO INSTRUCT ON ACCUSED'S THEORY OF CASE.

SEE ALSO ALLEN V. MORRIS, 845 F.2d 610, 617 (6TH CIR. 1988) CERT. DENIED, 488 U.S. 1011 (1989) (FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES WHEN EVIDENCE WARRANTS INSTRUCTION RAISES QUESTION COGNIZABLE ON HABEAS CORPUS REVIEW EVEN IN NON-CAPITAL CASES). VUJOSEVIC V. RAFFERTY, 844 F.2d 1023, 1027 (3^D CIR. 1980) FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE SUPPORTED BY EVIDENCE CONSTITUTES VIOLATION OF DUE PROCESS EVEN IN NON-CAPITAL CASES (CITING BECK V. ALABAMA, 447 U.S. 625 (1980) AND BISHOP V. MAZURKIEWICZ, 634 F.2d 724 (3^D CIR. 1980) MCKENZIE V. RISLEY, 842 F.2d 1525, 1530 (9TH CIR. CERT. DENIED, 488 U.S. 901 (1988)) (PRESUMPTION INSTRUCTIONS UNDERMINING REASONABLE DOUBT STANDARD IS COGNIZABLE IN HABEAS CORPUS PROCEEDINGS). SEE ALSO SULLIVAN V. LOUISIANA, 508 U.S. 275 (1993) (DIRECT APPEAL CASE) (SIMILAR TO CASE, IN INFRA); CAGE V. LOUISIANA, 498 U.S. 39, 40-41 (1990) (PER CURIAM) (DIRECT REVIEW CASE) (DUE PROCESS REVIEW, OR DIRECT APPEAL, OF STATE JURY INSTRUCTION ON REASONABLE DOUBT). BUT, CF. VICTOR V. NEBRASKA 511 U.S. 1 (1994) (DIRECT REVIEW CASE) (LIMITING REACH OF CAGE RULE); AUTHORITY CITED SUPRA NOTE 18 (REACHING CONCLUSION DIFFERENT FROM, OR RESERVING QUESTION ADDRESSED IN WIGGERSALL V. JONES, ALLEN V. MORRIS, AND VUJOSEVIC V. RAFFERTY).

CITING KEEBLE V. UNITED STATES, 412 U.S. 205, 212-213, 93 S.Ct. 1193, 1197-98, 36 L.Ed. 2d 844 (1973). DUE PROCESS CLAUSE OF THE 5TH AMENDMENT GUARANTEES THE RIGHT OF A DEFENDANT TO HAVE THE JURY INSTRUCTED ON A LESSER INCLUDED OFFENSE. LESSER-INCLUDED OFFENSE INSTRUCTION WARRANTED WHEN REASONABLE VIEW OF EVIDENCE WOULD PERMIT JURY TO FIND DEFENDANT COMMITTED THE LESSER, BUT NOT THE GREATER, OFFENSE. ALSO SEE BRADLEY V. DUNCAN, 315 F.3d 1091 (9TH CIR. 2002); DUKETTE V. PERRIN, 564 F.Supp. 1530, 1537 (D.N.H. 1ST CIR. 1983).

STATEMENT OF THE CASE

PETITIONER WAS CHARGED IN THE CIRCUIT COURT IN AND FOR LEON COUNTY, FLORIDA, CASE NO: 2004-CF-3046, WITH ONE (1) COUNT OF LEWD OR LASCIVIOUS MOLESTATION OF A PERSON LESS THAN 12 YEARS OF AGE (COUNT I), AND ONE COUNT OF LEWD OR LASCIVIOUS MOLESTATION OF A PERSON 12 YEARS OF AGE OR OLDER BUT LESS THAN 16 YEARS OF AGE (COUNT II). FOLLOWING A JURY TRIAL, PETITIONER WAS FOUND GUILTY AS CHARGED AS TO COUNT I, AND GUILTY OF THE LESSER INCLUDED OFFENSE OF ATTEMPTED LEWD OR LASCIVIOUS MOLESTATION AS TO COUNT II.

ON MARCH 20, 2009, THE COURT ADJUDICATED PETITIONER GUILTY AND SENTENCED HIM TO LIFE IMPRISONMENT ON COUNT I. THE TERM OF IMPRISONMENT TO BE SUSPENDED AFTER 25 YEARS AT WHICH TIME PETITIONER WOULD BE PLACED ON SEX OFFENDER PROBATION FOR LIFE WITH AN ACTIVE GPS MONITOR. THE TRIAL COURT IMPOSED A CONCURRENT SENTENCE OF FIVE IN PRISON ON COUNT II. PETITIONER WAS AWARDED 577 DAYS OF PRE-SENTENCE JAIL CREDIT. PETITIONER FILED A MOTION TO CORRECT SENTENCING ERROR, PURSUANT TO RULE 3.800 (b) (2) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. THE STATE CIRCUIT COURT HELD A HEARING ON THE MOTION AND SUBSEQUENTLY DENIED IT.

PETITIONER APPEALED THE JUDGMENT TO THE FIRST DISTRICT COURT OF APPEAL (FIRST DCA); CASE NO: 1D09-1780. ON SEPTEMBER 29, 2010, THE FIRST DCA AFFIRMED THE JUDGMENT PER CURIAM WITHOUT WRITTEN OPINION. WILLIAMS V. STATE, 48 SO. 3D 59 (FLA. 1ST DCA 2010) THE MANDATE ISSUED NOVEMBER 24, 2010.

ON DECEMBER 9, 2010, PETITIONER FILED A PETITION FOR WRIT OF HABEAS CORPUS IN THE FIRST DCA, CASE NO: 1D10-6676, ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. HE SUBSEQUENTLY AMENDED THE PETITION. THE FIRST DCA DENIED THE PETITION ON THE MERITS ON FEBRUARY 23, 2011. WILLIAMS V. STATE, 60 SO. 3D 1076 (FLA. 1ST DCA 2011).

ON JUNE 13, 2011, PETITIONER FILED ANOTHER HABEAS PETITION IN THE FIRST DCA, CASE NO: 1D11-3386. ON JULY 15, 2011, THE FIRST DCA DISMISSED THE PETITION, PURSUANT TO BAKER V. STATE, 878 SO. 2D 1236 (FLA. 2004) WILLIAMS V. STATE, 68 SO. 3D 278 (FLA. 1ST DCA 2010) WILLIAMS V. STATE, 68 SO. 3D 278 (FLA. 1ST DCA 2010).

ON November 17, 2011, PETITIONER FILED A MOTION FOR POST-CONVICTION RELIEF, PURSUANT TO RULE 3.850 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE. THE STATE CIRCUIT COURT SET AN EVIDENTIARY HEARING AND APPOINTED COUNSEL FOR PETITIONER. FOLLOWING THE EVIDENTIARY HEARING THE CIRCUIT COURT DENIED THE RULE 3.850 MOTION. PETITIONER APPEALED THE DECISION TO THE FIRST DCA, CASE NO: 1D13-4269. THE FIRST DCA AFFIRMED THE DECISION PER CURIAM WITHOUT WRITTEN OPINION ON AUGUST 29, 2014. THE MANDATE ISSUED OCTOBER 20, 2014 WILLIAMS V. STATE, 144 SO. 3D 991 (FLA. 1ST DCA 2014).

ON MARCH 4, 2013, PETITIONER FILED ANOTHER HABEAS PETITION IN THE FIRST DCA, CASE NO: 1D13-1117. THE FIRST DCA AGAIN DISMISSED THE PETITION, PURSUANT TO BAKER, 878 SO. 2D AT 1236, ON MARCH 27, 2013 WILLIAMS V. STATE, 109 SO. 3D 889 (FLA. 1ST DCA 2013).

ON SEPTEMBER 12, 2013, PETITIONER FILED A HABEAS PETITION IN THE STATE CIRCUIT COURT. ON OCTOBER 29, 2013, THE CIRCUIT COURT CONSTRUED THE PETITION AS A RULE 3.850, AND STRUCK IT ON THE GROUND THAT IT FAILED TO COMPLY WITH THE CERTIFICATION REQUIREMENT OF THE RULES AND PETITIONER WAS REPRESENTED BY COUNSEL IN THE PENDING RULE 3.850 PROCEEDINGS.

ON FEBRUARY 26, 2014, PETITIONER FILED ANOTHER HABEAS PETITION IN THE STATE CIRCUIT COURT. THE COURT CONSTRUED THE PETITION AS A RULE 3.850 MOTION AND DENIED IT ON THE GROUND THAT THE ISSUES RAISED THEREIN COULD HAVE AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL. PETITIONER APPEALED THE DECISION TO THE FIRST DCA, CASE NO: 1D14-1454. THE FIRST DCA AFFIRMED THE DECISION PER CURIAM WITHOUT WRITTEN OPINION ON JULY 3, 2014, WITH MANDATE ISSUING AUGUST 29, 2014 WILLIAMS V. STATE, 145 SO. 2D 838 (FLA. 1ST DCA 2014).

ON OCTOBER 14, 2014, PETITIONER FILED A RULE 3.850 MOTION IN THE STATE CIRCUIT COURT ALLEGING NEWLY DISCOVERED EVIDENCE. PETITIONER FILED A NOTICE OF VOLUNTARY DISMISSAL ON OCTOBER 23, 2014. THE COURT GRANTED PETITIONER'S MOTION TO DISMISS THE RULE 3.850 MOTION ON MAY 19, 2015.

PETITIONER FILED HIS FEDERAL HABEAS CORPUS PETITION ON NOVEMBER 18, 2014.

ON FEBRUARY 5TH 2015 THE MAGISTRATE JUDGE IN THE NORTHERN DISTRICT ISSUED AN ORDER TO SHOW CAUSE; CASE NO. 4:14-cv-639/RH/EMT
ON AUGUST 21ST 2015 THE RESPONDENT FILED THEIR ANSWER BRIEF TO THE ORDER TO SHOW CAUSE.
ON OR ABOUT
THE RESPONDENT'S ANSWER BRIEF.

ON MARCH 14TH 2016 THE MAGISTRATE JUDGE ENTERED HER REPORT AND RECOMMENDATION RECOMMENDING THAT PETITIONER'S 2354(D) HABEAS CORPUS PETITION BE DENIED.

ON OR ABOUT MAY 25, 2016 PETITIONER FILED HIS MOTION OF OBJECTION, OBJECTING TO THE REPORT AND RECOMMENDATION. AND MOVED THE COURT WITH A MOTION TO STAY AND REVENUE.
ON APRIL 26TH 2016 THE MAGISTRATE JUDGE ENTERED AN ORDER OF A SUPPLEMENT REPORT AND RECOMMENDATION, RECOMMENDING THAT THE MOTION BE DENIED AFTER CONSIDERING THAT BOTH GROUNDS (8) AND (9) WERE TECHNICALLY EXHAUSTED.

ON AUGUST 1, 2016, THE UNITED STATES DISTRICT COURT JUDGE THE HONORABLE ROBERT L. HINKLE ADOPTED THE MAGISTRATE JUDGE'S REPORTS AND RECOMMENDATIONS, AND ENTERED AN ORDER OF DENIAL OF SAID PETITION AND CERTIFICATE OF APPEALABILITY.

ON NOVEMBER 8TH 2016, PETITIONER FILED A PETITION FOR CERTIFICATE OF APPEALABILITY IN THE 11TH CIRCUIT COURT OF APPEALS
ON OCTOBER 12, 2018, THE 11TH CIRCUIT COURT OF APPEAL ENTERED A ORDER OF DENIAL, DENYING PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY.

ON JANUARY 02, 2019, PETITIONER TIMELY FILED HIS MOTION FOR RECONSIDERATION, VACATE, OR MODIFY.
ON FEBRUARY 20, 2019, THE 11TH CIRCUIT COURT OF APPEALS ENTERED AN ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION, VACATE, OR MODIFY.

STATEMENT OF THE FACTS

ON APRIL 9TH 2008, A JURY TRIAL WAS CONDUCTED IN THE INSTANT CAUSE WHERE THE PETITIONER WAS CHARGED WITH TWO COUNTS OF LEWD OR LASCIVIOUS MOLESTATION CONTRARY TO F.S. 800.04 (5) (b) AND 800.04 (5) (c) (2).

PRIOR TO TRIAL, THE STATE OBJECTED TO THE COURT GIVING A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF SIMPLE BATTERY. THE STATE MAINTAINED THAT THE PETITIONER WAS NOT ENTITLED TO THE JURY INSTRUCTION BECAUSE THE INFORMATION DID NOT ALLEGE THAT THE TOUCHING WAS AGAINST THE WILL OF THE VICTIMS (T.I. 9-10). PETITIONER ARGUED THAT IF THE JURY FOUND THAT HE TOUCHED THE VICTIMS BUT HAD A REASONABLE DOUBT AS TO WHETHER THE TOUCHING WAS WITH LEWD OR LASCIVIOUS INTENT, THEN THE CRIME COMMITTED WOULD BE SIMPLE BATTERY. DURING THE CHARGE CONFERENCE, PETITIONER AGAIN REQUESTED THE JURY BE INSTRUCTED ON SIMPLE BATTERY (T.T. 86-89). PETITIONER MAINTAINED THAT THE LANGUAGE "UNLAWFULLY INTENTIONALLY TOUCH" IN THE INFORMATION IMPLIED LACK OF CONSENT BECAUSE AN UNLAWFUL TOUCHING MEANS WITHOUT CONSENT (T.T. 88). THE TRIAL COURT DISAGREED AND CONCLUDED THAT THE INFORMATION DID NOT ALLEGE LACK OF CONSENT BECAUSE THE CRITICAL LANGUAGE "AGAINST THE WILL" WAS NOT CONTAINED THEREIN (T.T. 86-89).

THE TRIAL COURT JUDGE AND THE STATE BOTH CONDED THAT THE EVIDENCE PRESENTED AT TRIAL SUPPORTED A SIMPLE BATTERY (T.T. 89).

THE TRIAL JUDGE FURTHER HELD, "SINCE IT'S A ONE DAY TRIAL, IT'S A VERY STRAIGHT FORWARD CASE, I'M GOING TO LET YOU ARGUE THE STRENGTHS AND WEAKNESSES TO THE JURY AND WE'LL SEE WHERE WE END UP IF THEY DECIDE, YOU KNOW, IF THEY ACQUIT ON COUNT 1, OR IF I END UP GIVING A SIMPLE BATTERY CHARGE AND THEY FIND HIM BATTERY, THEN I THINK THAT SOLVES IT BECAUSE I THINK IT AND WE HAVEN'T RESOLVED WHETHER LESSER INCLUDED BATTERY WOULD GO YET, BUT I THINK THAT THE BEST PART AT THIS STAGE IS TO JUST GO AHEAD AND DENY THE JUDGMENT OF ACQUITTAL ON COUNT (1) BUT WITHOUT PREJUDICE TO CONVINCE ME LATER IF IN CHANCE THERE IS A CONVICTION ON THAT COUNT. (T.T. Pgs. 80-81)

THE TRIAL JUDGE REASONED THAT I AM NOT GOING TO GRANT A JOA MID TRIAL, WHICH, IN ESSENCE IS NOT APPEALABLE BY THE STATE, AND IT'S A VERY IMPORTANT CASE SO THIS IS AN "ERROR" THAT CAN BE FIXED AFTER A JURY VERDICT IF THERE IS ONE OF GUILTY ON THAT COUNT. (T.T. Pgs. 80-81).

THE TRIAL COURT JUDGE HELD IN ITS DENIAL OF PETITIONER'S REQUEST FOR THE LESSER INCLUDED OFFENSE OF SIMPLE BATTERY (SEE T.T. Pgs. 81-89)

THE COURT: I AGREE, I AGREE YOU'VE GOT THE EVIDENTIARY FOUNDATION, THERE'S NOT A PROBLEM WITH THAT, I DON'T THINK THE STATE WOULD CONTEST THAT.

THE STATE: NO YOUR HONOR

THE COURT: I THINK THIS CASE IS ON POINT, AND IT'S FROM THE FLORIDA SUPREME COURT, AND THAT'S THAT, SO THE DEFENSE HAS PERSERVED IT FOR WHATEVER, SO THIS IS MY VIEW OF IT UNLESS THE STATE STIPULATES AND THE DEFENSE WAIVES, THEN I SHOULD NOT GIVE IT, AND THEY'RE WILLING TO STAND OR FALL ON THE MAIN CHARGE, IS THAT CORRECT?

THE STATE: YES YOU HONOR

THE COURT: SO TAKE BATTERY OUT.

THE PETITIONER AVERES THAT THE TRIAL COURT COMMITTED A PER SE REVERSIBLE ERROR AND A CONSTITUTIONAL VIOLATION OF DUE PROCESS WHEN SHE REMOVED THE LESSER INCLUDED OFFENSE OF SIMPLE BATTERY FROM THE STANDARD JURY INSTRUCTIONS UNDER FLA. STATUTE 800.04 (5) (b) AND 800.04 (5) (a) (2) AFTER DETERMINING THAT THE EVIDENCE ADDUCED AT TRIAL SUPPORTED THE REQUESTED INSTRUCTION, IN WHICH THE TRIAL COURT AND STATE BOTH CONCEDED THAT IT DID. (SEE T.T. Pgs. 81-89)

PETITIONER FURTHER AVERES THAT THE RECORD DEMONSTRATES THAT HE HAS PRESENTED THIS ISSUE THROUGHOUT HIS COURT PROCEEDINGS INCLUDING THE FIRST DISTRICT COURT OF APPEALS, THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, AND THE ELEVENTH CIRCUIT OF APPEALS.

THE PETITIONER APPEALED TO THE FIRST DCA DEMONSTRATING THE TRIAL COURT'S DUE PROCESS VIOLATION OF THE REFUSAL TO GIVE A REQUESTED LESSER INCLUDED OFFENSE JURY INSTRUCTION THAT WAS SUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL. PETITIONER

DEMONSTRATED ON DIRECT APPEAL THAT THE LESSER INCLUDED OFFENSE WAS WARRANTED WHEN A REASONABLE VIEW OF THE EVIDENCE WOULD PERMIT THE JURY TO FIND THAT HE COMMITTED THE LESSER, BUT NOT THE GREATER OFFENSE. ESPECIALLY, IN HIS CASE WHERE THERE WERE TWO ALLEGED VICTIMS WITH TWO DIFFERENT VERDICTS. THE JURY RETURNED A VERDICT OF GUILTY AS CHARGED AS TO COUNT (1) AND AS TO COUNT (2) GUILTY OF THE LESSER OF ATTEMPTED LEWD OR LASCIVIOUS MOLESTATION.

ON DIRECT APPEAL, THE FIRST DCA ENTERED A PER CURIAM AFFIRMED OPINION AFFIRMING THE TRIAL COURT'S REFUSAL TO GIVE THE REQUESTED LESSER INCLUDED OFFENSE OF SIMPLE BATTERY, AND THE TRIAL COURT'S REMOVAL OF THE LESSER INCLUDED OFFENSE FROM THE STANDARD JURY INSTRUCTIONS AFTER DETERMINING THAT THE EVIDENCE SUPPORTED THE INSTRUCTIONS (SEE T.T. PGS. 81-89).

ON NOVEMBER 18, 2014, PETITIONER HIS 2254 HABEAS CORPUS PETITION IN THE NORTHERN DISTRICT OF FLORIDA RAISING TEN (10) CLAIMS THREE (3) OF THOSE CLAIMS WAS RAISED ON HIS DIRECT APPEAL IN THE FIRST DCA.

CLAIM 1 THE TRIAL COURT ERRED IN DENYING PETITIONER'S REQUEST FOR A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF SIMPLE BATTERY.

CLAIM 2 THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL ("JOA") ON COUNT (1), BECAUSE THE STATE FAILED TO INTRODUCE COMPETENT SUBSTANTIAL EVIDENCE TO ESTABLISH THAT PETITIONER TOUCHED THE VICTIM ON HER BUTTOCKS OR BREAST AREA IN A LEWD OR LASCIVIOUS MANNER AND

CLAIM 3 PETITIONER'S LIFE SENTENCE IMPOSED ON COUNT (1), VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.

THE MAGISTRATE JUDGE IN HER REPORT AND RECOMMENDATION IN HER RECOMMENDATION CONCLUDED THAT THE STATE COURT'S ADJUDICATION OF THE SEVEN CLAIMS RAISED IN PETITIONER'S 2254 PETITION WAS ENTITLED TO DEFERENCE UNDER 2254 (d); AND THREE ADDITIONAL CLAIMS ASSERTED IN PETITIONER'S REPLY BRIEF, TWO CLAIMS WAS PROCEDURALLY BARRED (PETITIONER FAILED TO EXHAUST THE FEDERAL NATURE OF HIS CLAIMS OF TRIAL COURT ERROR IN THE STATE COURTS AND IS NOW PROCEDURALLY BARRED FOR DOING SO), AND THE STATE COURT'S ADJUDICATION OF THE THIRD CLAIM WAS ENTITLED TO DEFERENCE.

ON OR ABOUT MAY 25, 2016 PETITIONER FILED HIS MOTION OF OBJECTIONS OBJECTING TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS, WHERE SHE RECOMMENDED THAT HIS 2254 PETITION AND CERTIFICATE OF APPEALABILITY BE DENIED. PETITIONER MOVED THE COURT WITH A MOTION TO STAY AND ABEYANCE. PETITIONER ASSERTED IN HIS MOTION TO STAY THAT HE LISTED THE THREE (3) CLAIMS FROM HIS DIRECT APPEAL ON PAGE THREE (3) OF HIS 2254 PETITION AND THAT HIS HABEAS PETITION WAS A MIXED PETITION.

THE MAGISTRATE JUDGE ENTERED A SUPPLEMENTAL REPORT AND RECOMMENDATION WITHOUT SERVING THE PETITIONER A COPY OF THE REPORT IN WHICH THE PETITIONER ASSERTED IN HIS APPLICATION FOR CERTIFICATE OF APPEALABILITY (COA) THAT THE MAGISTRATE JUDGE VIOLATED HIS DUE PROCESS RIGHTS.

HOWEVER, IN HER SUPPLEMENTAL REPORT SHE REASONED THAT PETITIONER'S 2254 HABEAS PETITION WAS NOT A MIXED PETITION, ALTHOUGH TWO OF PETITIONER'S TEN (10) HABEAS CLAIMS WERE NOT FAIRLY PRESENTED TO THE STATE COURTS, THEY ARE TECHNICALLY EXHAUSTED, BECAUSE STATE COURT REMEDIES ARE NO LONGER AVAILABLE.

ON AUGUST 1ST, 2016, THE DISTRICT COURT JUDGE OF THE NORTHERN DISTRICT THE HONORABLE ROBERT L. HINKLE (U.S. DISTRICT JUDGE)

HELD IN HIS ORDER OF DENIAL OF PETITIONER'S 2254 PETITION: THE MAGISTRATE JUDGE ENTERED A SUPPLEMENTAL REPORT AND RECOMMENDATION CONCLUDING THAT THE MOTION TO STAY SHOULD BE DENIED. I HAVE REVIEWED DE NOVO THE ISSUES RAISED BY THE OBJECTIONS. THE REPORT AND RECOMMENDATION IS CORRECT AND IS ADOPTED AS THE COURT'S OPINION WITH THESE ADDITIONAL NOTES.

ON THE LESSER-INCLUDED-OFFENSE CLAIM, ANALYSIS OF THE MERITS START WITH THE SUPREME COURT'S DECISION IN BECK V. ALABAMA, 444 U.S. 625 (1980). THERE THE SUPREME COURT HELD THAT THE CONSTITUTION SOMETIMES REQUIRES A LESSER-INCLUDED-OFFENSE IN A CAPITAL CASE. BUT AS THE ELEVENTH CIRCUIT RECOGNIZED IN PERRY V. SMITH, 810 F.2d 1048-1080 (11TH CIR. 1987) THE SUPREME COURT HAS NEVER EXTENDED BECK TO NON-CAPITAL CASES. UNDER PERRY AND EASTER V. ESTELLE, 609 F.2d 756, 758 (5TH CIR. 1980) THE LAW OF THE CIRCUIT IS THIS: THERE IS NO CONSTITUTIONAL RIGHT TO A LESSER-INCLUDED-OFFENSE INSTRUCTION IN A NON-CAPITAL CASE.

OTHER CIRCUITS TAKE A DIFFERENT APPROACH, BUT THAT MAKES NO DIFFERENCE HERE, FOR TWO REASONS. FIRST, THIS CASE IS BEING LITIGATED IN THE ELEVENTH CIRCUIT, WHERE PERKY AND EASTER ESTABLISH THE GOVERNING LAW. SECOND, AND MORE IMPORTANTLY, UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT MR. WILLIAMS WOULD BE ENTITLED TO RELIEF ON THIS CLAIM ONLY IF THE STATE COURT'S RULING WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES, 28 U.S.C. 2254 (d) (1). BECAUSE THE SUPREME COURT HAS NOT EXTENDED BECK TO NON-CAPITAL CASES, MR. WILLIAMS WOULD LOOSE HIS LESSER-INCLUDED OFFENSE CLAIM, EVEN IF THAT CLAIM HAD BEEN PROPERLY EXHAUSTED.

ON NOVEMBER 8TH 2016 PETITIONER FILED AN APPLICATION FOR A CERTIFICATE OF APPEALABILITY (COA) IN THE ELEVENTH CIRCUIT COURT OF APPEALS. PETITIONER FILED A (51) PAGE APPLICATION AS TO THE TEN (10) CLAIMS RAISED IN HIS 2254 PETITION AS TO WHY A (COA) SHOULD BE GRANTED.

ON OCTOBER 12TH 2018 THE 11TH CIRCUIT ENTERED A (24) PAGE ORDER OF DENIAL DENYING PETITIONER'S (COA) APPLICATION.

ON JANUARY 02, 2019, PETITIONER TIMELY FILED HIS MOTION FOR RECONSIDERATION, VACATE, OR MODIFY WITH A SWORN AFFIDAVIT ATTACHED AS TO THE TEN (10) CLAIMS RAISED IN HIS 2254 HABEAS PETITION. (SEE MOTION FOR RECONSIDERATION).

THE PETITIONER ADDRESSED ALL TEN (10) CLAIMS IN HIS MOTION FOR RECONSIDERATION (ESPECIALLY CLAIMS EIGHT (8) AND NINE (9)).

PETITIONER ASSERTED THROUGH HIS STATE AND FEDERAL COURT'S PROCEEDINGS THAT THE TRIAL COURT'S REFUSAL IN CLAIM EIGHT (8) TO GIVE THE REQUESTED LESSER INCLUDED OFFENSE OF SIMPLE BATTERY JURY INSTRUCTION WAS IN ERROR, OBJECTIVELY UNREASONABLE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW AND A DENIAL OF DUE PROCESS WHEN THE EVIDENCE CLEARLY SUPPORTED THE CATEGORY TWO (2) LESSER INCLUDED OFFENSE INSTRUCTION. (SEE T.T. PGS. 81-89) WHERE THE TRIAL COURT DETERMINED THAT THE DEFENSE HAD THE EVIDENTIARY FOUNDATION FOR THE CATEGORY TWO (2) LESSER INCLUDED OFFENSE OF SIMPLE BATTERY THEN REMOVED IT FROM THE STANDARD SET OF JURY INSTRUCTIONS IN ACCORDANCE WITH FLA. STAT. 800.04 (5) (C) AND (B).

REASON FOR GRANTING THE PETITION

THE PETITIONER AVERS THAT THE ELEVENTH CIRCUIT COURT OF APPEALS REASONING IN THE BECK V. ALABAMA, 447 U.S. 625 (1980) HOLDINGS IS IN DIRECT CONFLICT WITH THE THIRD AND SIXTH CIRCUITS. IN THE YEARS FOLLOWING BECK, THE CIRCUITS SPLIT ON THE QUESTION OF WHETHER THE HOLDING IN BECK, THAT DUE PROCESS REQUIRES LESSER INCLUDED OFFENSE INSTRUCTIONS IN CERTAIN INSTANCES FOR CAPITAL DEFENDANTS, APPLIED TO NON-CAPITAL CASES AS WELL. THE THIRD (3RD) AND SIXTH (6TH) CIRCUITS EXTENDED THE REASONING IN BECK TO NON-CAPITAL CASES. SEE, E.G., VUJOSEVIC V. RAFFERTY, 844 F.2d 1023, 1027 (3RD CIR. 1988); FERRAZZA V. MINTZES, 735 F.2d 967, 968 (6TH CIR. 1984); HOLDING THAT IT IS CONSTITUTIONAL ERROR NOT TO GIVE A REQUESTED "LESSER INCLUDED OFFENSE" WHENEVER THE EVIDENCE WOULD SUPPORT A CONVICTION EITHER ON THE CHARGED OFFENSE OR AN UNCHARGED "LESSER INCLUDED OFFENSE" OR BOTH.

IN THE PRESENT CAUSE AT BAR, THE UNITED STATES DISTRICT JUDGE THE HONORABLE ROBERT L. HINKLE HELD IN HIS DENIAL OF PETITIONER'S 2254 HABEAS PETITION AND CERTIFICATE OF APPEALABILITY, THAT ON THE LESSER INCLUDED OFFENSE CLAIM ANALYSIS OF THE MERITS STARTS WITH THE SUPREME COURT'S DECISION IN BECK V. ALABAMA, 447 U.S. 625 (1980). THERE THE SUPREME COURT HELD THAT THE CONSTITUTION SOMETIMES REQUIRES A LESSER INCLUDED OFFENSE INSTRUCTION IN A CAPITAL CASE. BUT AS THE ELEVENTH CIRCUIT RECOGNIZED IN PERRY V. SMITH, 810 F.2d 1078, 1080 (11TH CIR. 1987), THE SUPREME COURT HAS NEVER EXTENDED BECK TO NON-CAPITAL CASES UNDER PERRY AND EASTER V. ESTELLE, 609 F.2d 756, 758 (5TH CIR. 1980), THE LAW OF THE CIRCUIT IS THIS: THERE IS NO CONSTITUTIONAL RIGHT TO A LESSER INCLUDED OFFENSE INSTRUCTION IN A NON-CAPITAL CASE.

OTHER CIRCUITS TAKE A DIFFERENT APPROACH, BUT THAT MAKES NO DIFFERENCE HERE, FOR TWO REASONS, FIRST, THIS CASE IS BEING LITIGATED IN THE ELEVENTH CIRCUIT, WHERE PERRY AND EASTER ESTABLISH THE GOVERNING LAW. SECOND, AND MORE IMPORTANTLY, UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT MR. WILLIAMS WOULD BE ENTITLED TO RELIEF ON THIS CLAIM ONLY IF THE STATE COURT'S RULING 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). BECAUSE THE SUPREME COURT HAS NOT EXTENDED BECK TO NON-CAPITAL CASES MR. WILLIAMS WOULD LOSE HIS LESSER INCLUDED OFFENSE CLAIM, EVEN IF THAT CLAIM HAD BEEN PROPERLY EXHAUSTED.

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IN CAPITAL CASES, A COURT MUST GIVE A REQUESTED INSTRUCTION ON LESSEER INCLUDED OFFENSES WHERE IT IS SUPPORTED BY THE EVIDENCE. BECK V. ALABAMA, 447 U.S. 625, 65 L.Ed. 2d 392, 100 S.Ct. 2382 (1980) THIS COURT APPLIES THAT REQUIREMENT TO NON-CAPITAL CASES AS WELL. BISHOP V. MAZURKIEWICZ, 634 F.2d 724 (3d Cir. 1980) CERT. DENIED. 452 U.S. 917, 69 L.Ed. 2d 421, 101 S.Ct. 3053 (1981). THIS REQUIREMENT IS BASED ON THE RISK THAT A DEFENDANT MIGHT OTHERWISE BE CONVICTED OF A CRIME MORE SERIOUS THAN THAT WHICH THE JURY BELIEVES HE COMMITTED SIMPLY BECAUSE THE JURY WISHES TO AVOID SETTING HIM FREE. SKEE KEEBLE V. UNITED STATES, 412 U.S. 205, 712-13, 36 L.Ed. 2d 844, 93 S.Ct. 1993 (1973). IN THE CURRENT CASE, MUDOSEVIC PRESENTED EVIDENCE SUPPORTING A CONVICTION FOR AGGRAVATED ASSAULT, BUT HIS EVIDENCE ALSO SUPPORTED A FINDING THAT MUDOSEVIC DID NOT CAUSE BARON'S DEATH, WHICH WOULD RELIEVE HIM OF LIABILITY FOR HOMICIDE. SINCE THE EVIDENCE SUPPORTED AN INSTRUCTION ON AGGRAVATED ASSAULT, AND SINCE SUCH AN INSTRUCTION WAS REQUESTED, THE TRIAL COURT COMMITTED ERROR BY REFUSING TO GIVE THE INSTRUCTION.

THEREFORE, A CRIMINAL DEFENDANT HAS THE RIGHT TO HAVE THE JURY INSTRUCTED ON HIS OR HER THEORY OF DEFENSE, SEPARATE AND APART FROM INSTRUCTIONS GIVEN ON THE ELEMENTS OF THE CHARGED OFFENSE. UNITED STATES V. OPELAN, 930 F.2d 1530 (11TH CIR. 1991) UNITED STATES V. LIVELY, 803 F.2d 1149 (11TH CIR. 1986) A TRIAL COURT MAY NOT REFUSE TO CHARGE THE JURY ON A SPECIFIC DEFENSE THEORY WHERE THE PROPOSED INSTRUCTION PRESENTS A VALID DEFENSE AND WHERE THERE HAS BEEN SOME EVIDENCE ADDUCED AT TRIAL RELEVANT TO THAT DEFENSE. UNITED STATES V. MIDDLETON, 690 F.2d 820, 826 (11TH CIR. 1982) CERT. DENIED, 460 U.S. 1031, 103 S.Ct. 1494, 75 L.Ed. 2d 929 (1983). THE TRIAL COURT IS NOT FREE TO DETERMINE THE EXISTENCE OF SUCH A DEFENSE AS A MATTER OF LAW, I.D. THE THRESHOLD BURDEN IS EXTREMELY LOW. "THE DEFENDANT IS ENTITLED TO HAVE PRESENTED INSTRUCTIONS RELATING TO A THEORY OF DEFENSE FOR WHICH THERE IS ANY FOUNDATION IN THE EVIDENCE." PEREZ V. UNITED STATES, 297 F.2d 12, 15-16 (5TH CIR. 1961) (EMPHASIS ADDED). 9 IN DECIDING WHETHER A DEFENDANT HAS MET HER BURDEN, THE COURT IS OBLIGED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE ACCUSED. UNITED STATES V. WILLIAMS, 728 F.2d 1402, 1404 (11TH CIR. 1984).

MOREOVER, ALTHOUGH THE UNITED STATES SUPREME COURT HAS HELD THAT A JURY IN A CAPITAL CASE MUST BE GIVEN AN INSTRUCTION ON LESSER-INCLUDED NON CAPITAL OFFENSES WHERE THE EVIDENCE WARRANTS SUCH A CHARGE, SEE BECK V. ALABAMA, 447 U.S. 625, 627, 65 L.Ed. 2d 392, 100 S.Ct. 2382 (1980), THE COURT EXPLICITLY RESERVED THE QUESTION WHETHER THE DUE PROCESS CLAUSE OF THE UNITED CONSTITUTION REQUIRES A LESSER INCLUDED OFFENSE INSTRUCTION IN NON CAPITAL CASES, ID. AT 638 N.

IN MAY OF 1982, IN THE CASE OF HOOPER V. EVANS, 72 L.Ed. 2d 367, 456 U.S. 605 (102 S.Ct. 2049) (1982), ON WRIT OF HABEAS CORPUS TO THE UNITED STATES SUPREME COURT, BECK WAS LIMITED TO THE QUESTION SUBMITTED ON HABEAS CORPUS AND WE EXPRESSLY POINTED OUT THAT WE GRANTED THE WRIT IN THAT CASE TO DECIDE WHETHER A JURY MUST BE PERMITTED TO CONVICT A DEFENDANT OF A LESSER-INCLUDED OFFENSE "WHERE THE EVIDENCE WOULD HAVE SUPPORTED SUCH A VERDICT" 447 U.S. AT 627, 65 L.Ed. 2d 392, 100 S.Ct. 2382. THUS, OUR HOLDING WAS THAT THE JURY MUST BE PERMITTED TO CONSIDER A VERDICT (PG. 373) OF GUILT OF A NON-CAPITAL OFFENSE "IN EVERY CASE" IN WHICH THE EVIDENCE WOULD HAVE SUPPORTED SUCH A VERDICT.

THE BECK COURT HELD THAT DUE PROCESS REQUIRES THAT A LESSER-INCLUDED OFFENSE INSTRUCTION BE GIVEN WHERE THE EVIDENCE WARRANTS SUCH AN INSTRUCTION.

NEVERTHELESS, THE NINTH CIRCUIT HAS RECOGNIZED THAT "THE REFUSAL BY A COURT TO INSTRUCT A JURY ON LESSER INCLUDED OFFENSES, WHEN THOSE OFFENSES ARE CONSISTENT WITH DEFENDANT'S THEORY OF THE CASE, MAY CONSTITUTE A COGNIZABLE HABEAS CLAIM" UNDER CLEARLY ESTABLISHED FEDERAL (2018 U.S. DIST. LEXIS) LAW SOLIS, 219 F.3d AT 929; SEE ALSO BRADLEY V. DUNCAN, 315 F.3d 1091, 1099 (9TH CIR. 2002) ("THE RIGHT TO PRESENT A DEFENSE WOULD BE EMPTY IF IT DID NOT ENTAIL THE FURTHER RIGHT TO AN INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER THE DEFENSE"); CONDE V. HENRY, 198 F.3d 734, 739 (9TH CIR. 2000) (AS AMENDED) "IT IS WELL ESTABLISHED THAT A CRIMINAL DEFENDANT IS ENTITLED TO ADEQUATE INSTRUCTION ON THE THEORY OF THE CASE" even ASSUMING FEDERAL DUE PROCESS SOMETIMES REQUIRES THAT A LESSER INCLUDED OFFENSE BE GIVEN, A COURT IS BOUND TO INSTRUCT ON A DEFENSE THEORY "WHEN THE EVIDENCE WARRANTS SUCH AN INSTRUCTION (CITING HOOPER V. EVANS; AND BASTON, 730 F.2d 1240).

CONCLUSION

PETITIONER REQUESTS THAT THE COURT GRANT THE INSTANT WRIT AND CORRECT A FUNDAMENTAL MISCARriage OF JUSTICE OF THE DENIAL OF THE PETITIONER'S DUE PROCESS RIGHTS AND GRANT RELIEF.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John O. Walsh

Date: 5/14/19