ORIGINAL

Docket No.: (*to be assigned*)
19-5566

IN THE
SUPREME COURT OF THE UNITED STATES

REILIES WAYNE MILLER
Petitioner,

v.

STATE OF FLORIDA
Respondent,

On Petition for Writ of Certiorari from the Eleventh Circuit, United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Reilies Wayne Miller
DC No.: T48532
Holmes Correctional Institution
3142 Thomas Drive
Bonifay, Fl. 32425

QUESTION PRESENTED FOR REVIEW

1. Consistent with the Fourteenth Amendment and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) could the harmless error analysis applied by the State as to the self-defense jury instruction been improperly and incorrectly applied?

2. Could a claim be considered exhausted even though it did not specifically cite a federal question?

3. Consistent with the Fourteenth Amendment, Sixth Amendment, and Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of prejudicial misconduct during closing arguments?

4. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of allowing the defense's expert witness to testify?

5. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of exclude evidence of the victims drug withdrawals that caused him to act aggressively?

PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED AND CORPORATE DISCLOSURE STATEMENT

PLEASE TAKE NOTICE, those persons also having an interest in the outcome of the case are as follows:

- Berlin, Donn Padar, Circuit Judge, 12th Judicial Circuit, State of Florida
- Covington-Hernandez, Virginia M., United States District Judge
- Fraivilling, Karen, Assistant State Attorney, State of Florida
- Jackman, Arthur, Assistant State Attorney, State of Florida
- Moreland, Earl, State Attorney, 12th Judicial Circuit, State of Florida
- Riva, Debra Johnes, Circuit Judge, 12th Judicial Circuit, State of Florida
- Rushing, Karen E., Clerk of Court, Sarasota County, State of Florida
- Sanders, Richard J., Esq., Assistant Public Defender, State of Florida
- Warren, Elizabeth M., United States District Clerk
- Watts, Richard, Esq., Assistant Public Defender, State of Florida
- Moody, Ashley B., Attorney General, State of Florida
- Bondi, Pamela J., Former Attorney General, State of Florida

I hereby certify that no parent or publicly traded company, or corporation, has an interest in the outcome of this appeal.

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STATEMENT OF THE BASIS FOR JURISDICTION

The Eleventh Circuit, United States Court of Appeals, entered a final order denying on May 13th, 2019 the Petitioner's Motion for Reconsideration filed pursuant to 11th Cir. R. 22-1(c) and 27-2 following the February 13th, 2019 order denying a Certificate of Appealability and leave to proceed *in forma pauperis* in his 28 U.S.C. § 2254 proceeding. (Appx.(s) H, I). The time for review expires on August 12th, 2019. Sup. Ct. Rule 13.

STATEMENT OF THE CASE

The following is a concise statement of the facts material to the consideration of the questions presented. The review is a final decision rendered by the Eleventh Circuit, United States Court of Appeals, in which the questions of:

1. Consistent with the Fourteenth Amendment and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) could the harmless error analysis applied by the State as to the self-defense jury instruction been improperly and incorrectly applied?

2. Could a claim be considered exhausted even though it did not specifically cite a federal question?

3. Consistent with the Fourteenth Amendment, Sixth Amendment, and Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of prejudicial misconduct during closing arguments?

4. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of allowing the defense's expert witness to testify?

5. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of exclude evidence of the victims drug withdrawals that caused him to act aggressively?

are being raised.

The Petitioner was convicted after a jury trial of first degree murder and grand theft motor vehicle. The state trial court sentenced him to life in prison. On May 10th, 2013 the state appellate court *per curiam* affirmed the convictions and sentences. (Appx.(s) A, B). The state appellate court denied his Petition Alleging Ineffective Assistance of Appellate Counsel filed pursuant to Fla. R. App. P. 9.141(d) on September 28th, 2015. (Appx. F). The Petitioner filed for postconviction relief under Fla. R. Crim. P. 3.850 which was denied on August 19th, 2016. (Appx. C). The state appellate court on appeal from said denial issued a *per curiam* affirmed to deny further relief on May 5th, 2017. (Appx.(s) D, E). The Petitioner provided his petition to the Middle District, Tampa Division for the United States District Court which was denied on June 28th, 2018. (Appx. G). The Petitioner sought a Certificate of Appealability which was denied on February 13th, 2019 and then the subsequent Motion for Reconsideration filed was denied on May 13th, 2019. (Appx.(s) H, I). This Court has jurisdiction on this case.

Petitioner admitted to committing the offenses but claimed self-defense as to the murder charge. The basic facts were undisputed.

At around 6:00 a.m., Petitioner shot the victim (Joseph Hickey) several times. The shooting occurred in the back of a van Petitioner had stolen early that night from Mark Snowden. The van was being drive by Petitioner's sister (Alicia Millier), who was the crucial State witness. Petitioner, his sister, and the victim were all in the van for the ostensible purpose of doing a drug deal for oxycodone pills (Petitioner selling, victim buying). It was undisputed that this deal was actually a set-up; the issue was who was planning to rob whom. The State argued Petitioner had his sister planned to rob and kill the victim all along; the defense theory was that this was a legitimate deal from Petitioner's perspective but the victim tried to rob the Petitioner and the shooting was in self-defense.

The victim was shot with a firearm that Petitioner and/or his brother had stolen from a vehicle belonging to Charles Pauley about a week before the shooting. Petitioner brought the firearm to the deal. The State's evidence showed Petitioner shot the victim, without provocation, at close range in the head, within moments of the victim entering the van to do the drug deal. The defense version of events was presented in a recorded statement Petitioner gave to Detective Lefebvre, which was played for the jury. Petitioner told Lefebvre the shooting was accidental and it occurred as the two struggled for control of the firearm after the victim pulled a knife on him in the back of the van. There was a dispute about exactly when and where the shooting occurred. It was undisputed that the van -- with the Petitioner, his sister, and the victim inside -- was drive (by the sister) to a vacant lot with a sea

wall and then rolled forward toward the water (with only the victim still inside), ending up partly submerged and stuck over the sea wall.

It was undisputed that all of the main players were involved in illegal deals for oxycodone pills. Some (including Petitioner and his sister) were heavy users as well; it was undisputed the victim was a seller but the extent of his personal use was an issue. It was undisputed that the "deal" that ended in the victim's death arranged in a series of phone calls amongst the victim, Petitioner, his sister, and some friends of their that occurred over several hours before the fatal shooting.

Petitioner's sister pled guilty to murder and grand theft, she was sentenced to 10 years in prison followed by 10 years probation, and she was testifying as part of her plea agreement. She gave six pretrial statements, the first about a week after the shooting. She "lied over and over again" in the first three statements because she was afraid she would go to jail. Shortly after her arrest - - about two weeks after the shooting - - she decided to tell the "truth." This occurred after she was offered a deal from the State. She told the "truth" so she could get a reduced sentence.

Alicia testified that in the late evening/early morning hours before the shooting, she and Petitioner were getting high using pills. When they were very high and running low on pills, they discussed possibly robbing someone, to either get more pills or get money to buy them. The victim's name came up because they had sold him some pills a few weeks earlier, when they had some to sell (which they obtained through their own lawful prescriptions). The victim as known as someone who was always looking for pills to sell.

The victim had called earlier asking if she had any pills to sell. Now, she returned his call and told him she had 50 pills to sell at $8 each; in fact they had no such pills. After playing "phone tag" with the victim (with others, as discussed below, getting into the game), they set up a meeting. However, since they had no vehicle, Petitioner had to steal Snowden's van (which Petitioner knew was sometimes left on the street with the keys in it).

They discussed robbing the victim, and then the issue arose about what to do if he resisted, they discussed killing him. She said it would be better to just kill him when he got in the van and Petitioner agreed to shoot him with the stolen firearm.

After Petitioner stole the van, Petitioner sat in the front passenger seat as she drove to meet the victim. Through more phone calls, the victim directed them to his location and, when they saw him on the street, they stopped and he got in the passenger side cargo door.

She started to drive away, Petitioner and the victim exchanged a short greeting and Petitioner - - still seated in the front seat - - shot him. She didn't know where he shot the victim or if it was at close range. There was no struggle and the victim made no threatening moves or utterances before the shooting. She did not see the victim with a knife.

She asked if the victim as dead and Petitioner said he thought he was. Petitioner told her to drive to the water and, when they saw the vacant lot, they pulled in. They both got out of the van; Petitioner revved the engine, put the van in

drive, and jumped back as the van went forward. The van hit the seawall and got stuck.

Petitioner wanted to leave but she was afraid the victim might still be alive and she refused to go. Petitioner went to the van and shot into it 2 - 3 times; they then left.

Petitioner had taken $330 from the victim. He also took the victim's cell phone, which they destroyed and discarded as they fled. As they were walking, Petitioner "started to severely freak out, and he began assaulting himself," hitting himself in the face and chest. They went to a gas station and used the case to buy pills from her father, who was working there.

Petitioner's statement was taken about a week after the shooting. He admitted at the outset that he and his sister were "junkies." He initially denied ever meeting the victim or knowing anything about his death. He admitted someone named "Joey" had called his sister looking for pills and they got some to sell him but "Joey" never called back. Eventually, he told Lefebvre: 1) His sister set up a pill deal with the victim, in which they were going to sell him 50 pills they had; 2) he stole the van to drive to the meet; 3) when the victim got in the van, he (Petitioner) got in the back with him to complete the deal; 4) when he showed the victim the pills, the victim pulled a knife and "dove on me"; 5) the two struggled for a bit and the pistol, which Petitioner was carrying in his waistband, fell to the van floor; 6) the victim kicked him and both went for the gun and "now it's a fight for your life"; 7) as they wrestled for it, one of the victim's fingers pushed one of his

fingers and the gun went off; 8) the victim fell back Petitioner "freaked out," with his sister still driving but now screaming; 9) the victim got backed up, struggle continued, and the gun fired several more times; and 10) when they stopped in the vacant lot, he went into the victim's pockets and got his pills back and also took $28 from him, which was all he had on him.

Three of the victim's friends — James Josephson, Steven Harrison, and Cheyenne Ewing (the victim's girlfriend) — testified about the background events. All agreed the victim bought and sold pills for profit, although he never carried a weapon when doing so. Josephson and Ewing said the victim occasionally used a pill himself but he was not addicted and did not seem to be suffering any withdrawal-type symptoms the night before the shooting. Harrison also testified: 1) He knew Petitioner and his sister; 2) he saw Petitioner the date before the shooting and Petitioner showed him a pistol and asked where he could get ammunition for it; 3) Petitioner asked to borrow money from Harrison (to buy pills from someone else) the day before the shooting but Harrison refused; 4) the victim called Harrison and asked if he knew anyone with pills for sale and Harrison gave him Petitioner's phone number; and 5) after the shooting Petitioner called Harrison and told him that he (Petitioner) had been waiting for the vehicle in the van but he fell asleep; the victim never showed up, and he (Petitioner) had been beaten "by two blacks guys" who saw him in the van. Josephson also testified: 1) He saw the victim the day before the shooting and the victim was supposed to come to his house the next day; 2) when the victim didn't show the next day, he called the victim's

number 3) after several attempts, he finally got Petitioner to talk to him on the phone and Petitioner told him he knew nothing about the victim and refused to make any effort to help Josephson find the victim. Ewing also testified : 1) She sometimes helped the victim buy and sell pills; 2) she and the victim bought pills from Petitioner about 4-5 weeks before the shooting and Petitioner at that time was "shooting" something into his arm as the arrived and he looked "strung out" 3) that day and they didn't have any; 4) she fell asleep the night of the shooting and sometime later the victim nudged her awake and told her he was going to "the orange apartment" down the street; 5) the victim took (with her permission) several hundred dollars from her purse before he left; and 6) when she woke the next day, he was gone and she later learned he'd been killed. Detective Doug Sheardon, the first officer on the scene, found the van stuck on the sea wall, nose in the water, with the victim's body inside, up against the front seats. The driver's side door was open, the floor was covered in blood, and some drops of blood had dripped out of the back of the van onto the sea wall. Three people who lived near the sea wall (Julie McLaughlin, George Blaine, and Jeffery Rudd) testified to 1) hearing of seeing the van come down there; 2) hearing three "popping sounds"; 3) hearing voices and then seeing two people walking or running away from the van; and 4) hearing or later seeing the van hitting and getting stuck on the sea wall. Pauley the owner of the firearm that killed the victim — who was familiar with firearms in general and this one in particular — testified that the firearm did not have "hair trigger. "Rather it was hard to (fire) accidental(ly)"; one had to pull back the trigger to

discharge it. Evidence technician Lisa Lanham found seven shell casings, five spent rounds, and one live round in the van. Using trajectory rods, she determined that the path of the bullets was "from the front and/or side doors of the van toward the back". The pocket of the victim's short was pulled out. Another live round, apparently from the same batch (hand made by owner Pauley) later found under a mattress at the home shared by Petitioner and his sister. Deputy Julie Seal testified that, when they came to arrest Petitioner, he fled but he was quickly discovered hiding under a car. The medical examiner testified that the victim suffered four gunshot wounds and a "couple of other minor abrasions....on his face, nose, and fingers". The fatal wound was to the right side of the head, the wound was "elongated" and irregularly shaped because the angle at which this bullet hits kind of the side of the head rather than hitting directly on. The bullet exited the back of the head. Powder stripping around the entrance wound indicated the shot was fired from 6 to 18 inches away from the victim's head. The trajectory of the bullet, coupled with the blood splatter in the van's interior indicated the shot "would have come from the front to the rear because of its angling down." This "would be consistent with the victim relatively upright near [the van's] cargo door on the right hand side."

The other three gunshot wounds were to the back side of the right flank ("superficial"), upper right arm, and left right ("very superficial"). The other marks on the victim's body were consistent with the body sliding around in the van after being shot.

ARGUMENT

i. Consistent with the Fourteenth Amendment and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) could the harmless error analysis applied by the State as to the self-defense jury instruction been improperly and incorrectly applied?

The jury was given the following instructions of self defense:

"An issue in this case is whether [Petitioner] acted in self-defense. It is a defense to the offense with which [Petitioner] is charged if the death of [the victim] resulted from the justifiable use of deadly force.

'Deadly force' means force likely to cause death or great bodily harm.

The use of a deadly force is justifiable only if the defendant reasonably believes that the force is necessary to prevent imminent death or great bodily harm to himself while resisting:

1. another's attempt to murder him, or

2. any attempt to commit Robbery, or

3. any attempt to commit Robbery upon or in any vehicle occupied by him.

A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent.

1. imminent death or great bodily harm to himself or another, or

2. the imminent commission of Attempted Robbery against himself or another.

[definitions of robbery and attempted robbery]

However, the use of deadly force is not justifiable if you find:

[Petitioner] initially provoked the use of force against himself, unless:

a. The force asserted toward [Petitioner] was so great that he reasonably believed that he was in imminent danger of death or great bodily harm and has exhausted every reasonable means to escape the danger, other than using deadly force on [the victim].

b. In good faith, [Petitioner] withdrew from physical conduct with [the victim] and clearly indicated to [the victim] that he wanted to withdraw and stop the use of deadly force, but [the victim] continued or resumed the use of force.

In deciding whether [Petitioner] was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing [Petitioner] need not have been actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, [Petitioner] must have actually believed that the danger was real.

If [Petitioner] was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself.

In considering the issue of self-defense, you may take into account the relative physical abilities and capacities of [Petitioner] and [the victim].

If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether [Petitioner] was justified in the use of deadly force, you should find [Petitioner] not guilty.

However, if from the evidence you are convinced that [Petitioner] was not justified in the use of deadly force; you should find him guilty if all the elements of the charge have been proved."

Petitioner's counsel objected to the emphasized instruction. Although recognizing that "[i]t's not applicable in the case [and Petitioner] was definitely not entitled to it," the trial court gave it nonetheless "because I think I'm allowed to do it."

" '[G]enerally speaking, the standard of review for jury instructions is abuse of discretion'; however, discretion, as with any issue of law is strictly limited by case law." Newman v. State, 976 So.2d 76, 78 (Fla. 4th DCA 2008). A trial court has no

discretion to give an optional instruction that is unsupported by any evidence at trial.

The trial court erred in giving the Stand Your Ground jury instruction because the evidence did not support it and it could only confuse the jury. It was undisputed that Petitioner was engaged in illegal activity in a place he had no right to be when the shooting occurred. Thus, there was no evidence to support the instruction. Giving it could only serve to confuse the jury and undermine Petitioner's defense.

A similar situation occurred in Dorsey v. State, 74 So.3d 521 (Fla. 4th DCA 2011). Dorsey raised a self-defense claim to a shooting that occurred during an argument/fight at a party. Since he was a convicted felon, Dorsey was not allowed to possess the firearm he eventually used to shoot the victim. Defense counsel asked that the Stand Your Ground instruction not be given, because Dorsey was engaged in an unlawful activity when he used deadly force; thus, he argued, the Stand Your Ground instruction did not apply. The trial court denied that request and also denied the defense request for the following instruction:

> If you find that the defendant was engaging in an unlawful activity or was attacked in a place where he did not have the right to be then you must consider if the defendant had a duty to retreat. If the defendant was placed in a position of imminent danger or death or great bodily harm and it would have increased his own danger to retreat then his use of force likely to cause death or great bodily harm was justifiable.

The state appellate court held this was reversible error. The same logic articulated in Dorsey, 526 - 27, applies here. The instructions given did not properly

advise the jury of the elements of self-defense, particularly the duty to retreat, when the Stand Your Ground law does not apply. The instructions given could only have confused the jury regarding the elements of Petitioner's only defense. In such circumstances, the error is harmful.

The erroneous jury instruction is a fundamental error that violates the United States Constitutional 5th and 14th Amendment rights, which deny a fair trial jury deliberation and can only once read and given to the jury irreparably in fact decision, the harmless error test applies on both the state and federal level. *See* State v. Diguilio, 491 So.2d 1129, 1135, 1138 (Fla. 1986); *see also* United States v. Takhalov, 827 F.3d 1307 (11th Cir. 2016) (citing Chapman v. California, 87 S.Ct. 824 (1967)).

An irrelevant at the time standard jury instruction for "stand your ground" was given to the jury clearly denied the Petitioner a fair trial and deliberation. *See* In Re Winship, 397 U.S. 358, 361 - 64, 90 S.Ct. 1068 (1970). The allowing of this instruction was clearly contrary to United States Supreme Court holdings and unreasonable application thereof.

The State v. Diguilio, 491 So.2d 1129 (Fla. 1986) standard, set out by the Florida Supreme Court in determining whether an error is harmless sets forth:

> "The test is not sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probably than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate

> court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful."

Id. at 1139.

The harmless error test, as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. Hurst v. State, 202 So.3d 40 (Fla. 2016) (quoting State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986)).

Structural errors are errors that violate constitutional safeguards "whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). These errors completely undermine the reliability of a trial to serve "as a vehicle for determination of guilt or innocence." Rose v. Clark, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

The barrier set up by Chapman -- that an error is reversible unless the Court is satisfied beyond a reasonable doubt that it did not influence the jury -- is formidable. O'Neal v. McAninch, 513 U.S. 432, 438, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). As this Court has explained before, "beyond a reasonable doubt" is an exacting measure of certitude, requiring "proof of such a convincing character that [a person] would be willing to rely and act upon it without hesitation in the most important of [his] own affairs." United States v. James, 642 F.3d 1333, 1336 (11th

Cir. 2011). For this reason, the Chapman standard is the most difficult standard of harmlessness that the government can be required to satisfy. *See* United States v. Lane, 474 U.S. 438, 460-61, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). To carry its burden, the government must show that there is no "reasonable possibility that the [error] complained of might have contributed to the conviction." Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 943 (11th Cir. 2009). Notably, unlike plain error, this standard does not focus on whether, but-for the error, the outcome would have been different. Rather, it asks only "if there is any reasonable likelihood that the [error] could have affected the judgment of the jury." United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995). The Petitioner includes the above referenced argument and the argument presented in his 28 U.S.C. § 2254 and direct appeal initial brief (Case No.: 2D11-6133) *in toto generis.*

ii. Could a claim be considered exhausted even though it did not specifically cite a federal question?

The Middle District in their order denying stated that this issue was not exhausted as it was not presented in a federal constitutional light. This is incorrect and the Middle District United States District Court misapplied the law.

The general rule of exhaustion is not rigid and inflexible and is characterized by numerous qualifications and exceptions. To exhaust a claim for federal habeas corpus purposes, the petitioner must apprise the state court system of the facts and the legal theory upon which the petitioner bases his assertion. Galtieri v. Wainwright, 582 F.2d 348, 353 (5th Cir. 1978). Meeting this standard requires: (a)

that the petitioner previously have given the appropriate state court or (usually) courts the opportunity to grant relief on the claim on which federal review is now sought; and (b) that the petitioner have presented to the state courts what is, in substance, the same claim that he is now seeking to have the federal courts review. Vasquez v. Hillery, 474 U.S. 254, 257 (1986); Picard v. Connor, 404 U.S. 270, 278 (1971).

The Petitioner above has elucidated as to the two standards employed by the Federal Courts and State Courts as to the harmless error standard. The state court Diguilio harmless error standard was premised on the Chapman standard. Both set similar points of reference and rests upon the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the verdict. The state was thus placed on notice of the nature of his claim alleging a constitutional violation as to jury instructions when it applied a similar review standard as to the effect perpetuated, not to mention that as aforementioned an irrelevant at the time standard jury instruction for "stand your ground" was given to the jury clearly denied the Petitioner a fair trial and deliberation. *See* In Re Winship, 397 U.S. 358, 361 - 64, 90 S.Ct. 1068 (1970). These issues were clearly before the courts in a federal standpoint and thus should have been considered exhausted and ripe for full review.

iii. Consistent with the Fourteenth Amendment, Sixth Amendment, and Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of prejudicial misconduct during closing arguments?

To establish prosecutorial misconduct, not only must "the remarks be improper," but also "the remarks must prejudicially affect the substantial rights of the defendant." United States v. Wilson, 149 F.3d 1298, 1301 (11th Cir. 1998). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome would have been different." United States v. Hall, 47 F.3d 1091, 1098 (11th Cir. 1995).

Four factors are usually considered in determining whether a prosecutor's conduct had a reasonable probability of changing the outcome of a trial: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. United States v. Lopez, 590 F.3d 1238, 1256 (11th Cir. 2009). Improper statements may be rectified by a curative instruction. Id. The court considers whether a defendant's substantial rights were prejudiced "in the context of the entire trial and in light of any curative instruction." Wilson, 149 F.3d at 1301.

Clearly established federal law such as the holdings to Supreme Court's decisions as of the time of the relevant state-court decisions set forth in Darden v.

Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986). *See* Parker v. Matthews, 567 U.S. 37, 45-49, 132 S.Ct. 2148, 2155, 183 L.Ed.2d 32, (2012) (stating that Darden was the "clearly established Federal law" for purposes of prosecutorial misconduct.) In Darden, the Supreme Court held that improper comments by a prosecutor require a new trial only if they "so infected the [original] trial with unfairness as to make the resulting conviction a denial of due process." 477 U.S. at 181, 106 S.Ct. at 2471 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)); *see* Parker, 567 U.S. at 48-49, 132 S.Ct. at 2155. It is not enough that the prosecutor's comments were "improper," "offensive," "undesirable[,] or even universally condemned." Darden, 477 U.S. at 181, 106 S.Ct. at 2471. Rather the prosecutor's misconduct must render the defendant's conviction "fundamentally unfair." Id. at 183, 106 S.Ct. at 2472.

The Respondent did not cite any controlling authority to support their proposition that the prosecutor's comment concerning a presumption of the Petitioner's intent to kill, can be inferred from him carrying a gun to the scene, nor did the Respondent point out how these comments were not in fact damaging when taken in consideration of totality.

The United States Supreme Court has stated that one cannot "withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act" for "this presumption would conflict. With the overriding presumption of innocence which the law endows the accused and which extends to every element of the crimes." Morrissette v. U.S., 72 S.Ct. 240 (1952).

It can most definitely be said that "the contents of the first argument...were such as to utterly destroy the Defendant's most important right under our system" and "when...references in argument during a criminal trial are of such a character that neither rebuke nor retraction may entirely destroy their sinister influence...a new trial should be granted, regardless of the lack of objection or exception." Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979).

To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of establishing by a preponderance of the evidence that his attorneys performance was deficient and that he was prejudiced by the inadequate performance. Strickland v. Washington, 466 U.S. 668 (1984); Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (*en banc*). To establish deficient performance, the defendant must prove that his counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. To show that an attorney failed to discharge his or her Sixth Amendment duty a habeas petitioner must establish that the attorneys conduct amounted to incompetence under prevailing professional norms. The Strickland test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. A petitioner must establish that no competent counsel would have taken the action that his or her counsel did take. Hittson v. GDCP Warden, 759 F.3d 1210, 1248 (11th Cir. 2014). To show deficiency under the first prong of the Strickland standard, the defendant must show that his trial counsel's performance was not reasonable under the circumstances. This is a highly

deferential standard by which the court looks to prevailing norms of practice as reflected in the America Bar Association standards and the like [as] guides to determining what is reasonable. Strickland v. Washington, 466 U.S. 668, 688. There is a strong presumption that the challenged action constitutes sound trial strategy. Chateloin v. Singletary, 89 F.3d 749 (11th Cir. 1996); Jones v. Campbell, 436 F.3d 1285, 12983 (11th Cir. 2006). The reasonableness of counsels performance is to be evaluated from counsels perspective at the time of the alleged error and in light of all the circumstances , and the standard of review is highly deferential. Kimmelman v. Morrison, 477 U.S. 365 (1986); Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008). The reasonableness of a counsel's performance is an objective inquiry; and because counsel's conduct is presumed to be reasonable, for a petitioner to show that conduct was unreasonable, he must establish that no competent counsel would have taken the action in question. Chandler v. United States, *supra*; Jones v. Campbell, *supra*; Van Poyck v. Florida Dept. of Corrections, 290 F.3d 1318 (11th Cir. 2002); Haliburton v. Secretary for Dept. of Corrections, 342 F.3d 1233, 1243 (11th Cir. 2003). Newland v. Hall, *supra.* Because it is defendant's burden to show that counsel was ineffective, if all that is shown at an evidentiary hearing is that trial counsel has no memory of why he pursued a certain course of action during trial, this will not sustain the defendant's burden of demonstrating the absence of a strategic decision. Harvey v. Warden, Union Correctional Institution, 629 F.3d 1228 (11th Cir. 2011).

To establish prejudice, the defendant must show that there is 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. Strickland v. Washington, *supra.* Mills v. Singletary, 63 F.3d 999 (11th Cir. 1995); King v. Strickland, 748 F.3d 1462 (11th Cir. 1984); Meeks v. Moore, 216 F.3d 951 (11th Cir. 2000). The likelihood of a different result must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 792, 178 L.Ed. 2d 624 (2011); Lee v. Commissioner, Alabama Dept. of Corrections, 726 F.3d 1172, 1193 (11th Cir. 2013).

The Petitioner includes the above referenced argument and the argument presented in his 28 U.S.C. § 2254 and Motion for Post-Conviction Relief Fla. R. Crim. P. 3.850 *in toto generis.*

iv. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of allowing the defense's expert witness to testify?

The Respondent defense begins by misapplying the law to the facts of the Petitioner's claim. Suggesting that a claim of ineffective assistance is next to impossible to sustain. The proposition in reality is only an opinion as the Respondent can produce no factual data to demonstrate that only a small percentage of ineffective assistance claims prevail upon their merits the Respondent

attempts to relinquish their fore as prosecutor or defense and go sit in the seat of appellate judges.

The Petitioner's theory was self-defense, predicated on the fact that the victim was having withdrawal symptoms from the "use" of drugs, causing the victim to be aggressive and attempt to rob the Petitioner in order to satisfy his craving for more drugs. First of all quite naturally had the doctor been able to give expert testimony confirming that a person having withdrawal symptoms would exhibit volatile behavior it would fully support the Petitioner's theory of defense and undermine the prosecutions theory. The irrelevance was based upon a proposition that was irrelevant to the decision of whether the testimony was inadmissible. All the focus was placed upon whether the victim was "addicted" to drugs, which has in reality "no" bearing on the obvious fact. That the victim "used" drugs whether he was addicted to them or not. For withdrawal symptoms occur in numerous instances including medications or drugs that when taken in a consistent fashion cause the body's metabolism to "shift" in order to accommodate the residual effect's of the drug and create a "balance" or "tolerance" to the drug.

Once the medication or drug is abruptly stopped from being taken withdrawal symptom typically show.

The expert witness was supposed to be able to testify concerning the victim's propensity to be aggressive during a withdrawal of drugs testimonies by experts establishes the expert must meet.

As the testimonial evidence had a bearing upon whether or not the Appellant acted in self-defense to the victim's aggressive advances toward him the testimony had it been given would without a doubt had the potential of convincing the trier of fact. The Petitioner includes the above referenced argument and the argument presented in his 28 U.S.C. § 2254 and Motion for Post-Conviction Relief Fla. R. Crim. P. 3.850 *in toto generis.*

v. Consistent with the Fourteenth Amendment and Sixth Amendment did the Middle District Court and consequently the Eleventh Circuit for the United States District Court and United States Appellate Court respectively misapplied the law and facts to the issue of exclude evidence of the victims drug withdrawals that caused him to act aggressively?

Prior to trial the state filed a motion in limine requesting that the court prevent the defense from making any mention that the presence of controlled substances in the victim's system indicated opiate withdrawal or desperation. The court held that the defense could not make any mention in jury selection or opening statements of the defense contention that the presence of controlled substances in the victim's body indicates opiate withdrawal or desperation. The court also held that the defense was not precluded from attempting to present testimony on these issues during trial, should a proper predicate be laid and relevance be established.

During trial the state presented evidence from two witnesses that established that the victim was indeed using pills. The testimony from witnesses Cheyenne Ewing and James Josephnson supported the defendant's theory of defense which was that his action against the victim was in self-defense when the victim became aggressive and attempted to rob him. This laid out substantial predicate for expert

witness Dr. Goldberger to testify before the jury in this case. Dr. Goldberger testified that the victim's activities in seeking pills was consistent with someone suffering from withdrawal from drugs testifying that:

> "Someone who is a chronic user or abuser of an opiate drug like oxycodone, when the source of the drug is withdrawn, when there is no drug, then they begin to seek the drug and that's a component of the withdrawal. So as they begin to withdraw from the drug, they have a strong behavior to seek more drug to satisfy that craving.
>
> ...
>
> In addition to the drug-seeking behavior, there is other physiological and behavior changes that occur in the body. Some of the physiological changes would be flesh, some nausea, maybe vomiting, general sense of malaise, the medical term would be dysphoria, as well as the people become irritable and sometimes unpredictable in their behavior.
>
> Basically, they feel very bad, and the only way they know that they can satisfy this problem and to rid themselves of the withdrawal symptoms is to get more drugs."

The testimony by Dr. Goldberger was proffered and rejected by the trial court as being irrelevant to the defendant's theory of defense. This testimony was material and relevant to the defendant's theory of defense. The trial court denied the Petitioner his due process rights guaranteed by the constitution when it prohibited him from presenting extremely critical evidence in support of his defense to the jury. Had Dr. Goldberger been permitted to testify at trial on behalf of the defendant's theory of defense there is a reasonable probability that the jury would have believed Dr. Goldberger's expert opinion and would have believed the Petitioner's argument that the victim in this case was attempting to rob the Petitioner and that his actions were in self-defense, and that the victim could have been suffering from withdrawal of oxycodone pills. This fact is more evidence where expert testimony ahs been found to substantially influence a fact finder's decision.

The Petitioner includes the above referenced argument and the argument presented in his 28 U.S.C. § 2254 and Petition Alleging Ineffective Assistance of Appellate Counsel pursuant to Fla. R. App. P. 9.141(d)(1) *in toto generis*.

APPENDIX