No. 19-7204

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC WILSON - PETITIONER
(Your Name)

vs.

MARK INCH, Fla. Dept. of Corr. Secretary-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS ELEVENTH Cir.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ERIC WILSON
(Your Name)

HARDEE CORRECTIONAL INST.
(Address)

6901 State Road 62
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

SHOULD PETITIONERS NOTICE OF APPEAL HAVE BEEN CONSTRUED AS A REQUEST FOR A CERTIFICATE OF APPEALABILITY ON GROUNDS 1-12 AND 14-15, AND WAS FAILURE TO CONSTRUE THE NOTICE OF APPEAL VIOLATIVE OF PETITIONER'S DUE PROCESS AND EQUAL PROTECTION OF LAW PURSUANT TO THE U.S. CONST. AMEND 14TH .

WHETHER THE UNITED STATES ELEVENTH CIRCUIT COURT OF APPEAL APPLIED STRICKLANDS PREJUDICE PRONG UNREASONABLE TO PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESERVE *BATSON* ISSUE FOR APPEAL

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:

Richard Ansara, Esq., Miami, Florida;

Pamela Jo Bondi, Attorney General, Office of the Attorney General, State of Florida;

Anderson Brook, Assistant State Attorney, Miami-Dade State Attorney's Office;

Albert A.A. Cartenuto, Assistant Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Miami, FL;

Angel A. Cortiñas, Judge Third District Court of Appeal;

Victoria Del Pino, Judge Circuit Court of the Eleventh Judicial Circuit;

Joanne Diez, Assistant Attorney General, Office of the Attorney General, State of Florida, Miami, Florida;

Kevin Emas, Judge Third District Court of Appeal;

Ivan Fernandez, Judge Third District Court of Appeal;

Katherine Fernandez-Rundle, State Attorney, Miami-Dade State Attorney's Office;

Alvin Goodman, Esq., Assistant Public Defender, Miami, Florida;

Natalie Hanan, Assistant State Attorney, Miami-Dade State Attorney's Office;

Alison Haney, Assistant State Attorney, Miami-Dade State Attorney's Office;

Julie L. Jones, Secretary, Department of Corrections, State of Florida;

Bronwyn C. Miller, Judge Circuit Court of the Eleventh Judicial Circuit;

Yolanda Morales, Assistant Public Defender, Miami, Florida;

Federico Moreno, District Judge, United States District Court; Southern District of Florida;

Thomas Logue, Judge Third District Court of Appeal;

Carlos Martinez, Public Defender, Office of the Public Defender, Miami, Florida;

Michael Mervine, Chief Assistant Attorney General, Office of the Attorney General, State of Florida, Miami, Florida;

Federico A. Moreno, United States District Judge, United States District Court for the Southern District of Florida, Miami, Florida;

Janine Press, Assistant State Attorney, Miami-Dade State Attorney's Office;

Myles W. Raucher, Assistant Public Defender, Miami, Florida;

William Reich, Assistant State Attorney, Miami, Florida;

Edwin A. Scales, Judge Third District Court of Appeal;

Suzanne Sostmann, Assistant State Attorney, Miami-Dade State Attorney's Office;

Bertila Soto, Judge Circuit Court of the Eleventh Judicial Circuit;

Richard Suarez, Judge Third District Court of Appeal;

Elio Vazquez, Esq., Miami, Florida;

Jorge L. Viera, Assistant Public Defender, Miami, Florida;

Patrick A. White, Magistrate Judge, United States District Court; Southern District of Florida;

Eugene F. Zenobi, Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Miami, FL.

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TABLE OF AUTHORITIES CITED

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 ____I___ 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 United States district court appears at Appendix ____C__ to The petition and is

[ ] reported at_____; 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 appear 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 case from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 30, 2019.

[ ] 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: October 11, 2019, and a copy of the Order denying rehearing appears at Appendix ___I___.

[ ] 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. § 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

United States Constitution 14th Amendment states that: all person been or naturalized in the United States, and subject to the Jurisdiction thereof, are citizens of the United States wherein they reside, no State shall abridge the privileges or immunities of citizens of United States; nor shall any State deprive any person of Life, Liberty, or Property without due process of law, nor deny to any person within it's Jurisdiction the Equal Protection of the laws.

United States Constitution 6th Amendment states:.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses, against him, to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

1. Eric Wilson (Petitioner) is a State prisoner currently residing at Hardee Correctional Institution in Bowling Green Florida. Currently serving a life sentence for Armed Robbery Home Invasion, four Armed Kidnappings, two Aggravated Child Abuses and one Felonious Possession of a Firearm.
2. The trial commenced on January 3, 2011 Jury selection commenced on that day and lasted until January 11, 2011. Petitioner was tried jointly with two co-defendants. Petitioner was represented by Mr. Vazquez.
3. During Jury selection juror challenge conferences were held in which the parties exercised peremptory challenges.
4. Prospective Juror's Awatt, Snipes, Jackson, Bain and Hall were stricken by the prosecutor and are all African American. Juror Cuthbert served on the Jury, and is Caucasian.
5. During the selection the prosecution used a peremptory strike on Ms. Awatt a Black female and when asked for a race neutral reason explained that Ms. Awatts brother was serving life for murder and that she also had other family including an uncle who served time or was serving. [T. pg. 991-992]
6. The court found that a race neutral reason was required and excepted argument.
7. Counsel for Petitioners co-defendant stated she indicated to the State and Defense Counsel that she could be fair and impartial. [T. pg. 992] The trial court allowed the strike.
8. The prosecution exercised a peremptory strike on Ms. Snipes, another Black female. The prosecution was asked to provide a race and gender neutral reason.

9. The prosecution stated that Ms. Snipes indicated that her daughter had been arrested for getting into a fight, and that she Ms. Snipes had multiple arrest, granted they were further back in time but based on the number of arrest, dismissals, no actions, convictions the State was not comfortable with her as a Juror. [T. pg. 994].

10. Neither Counsel for defendant's objected.

11. The prosecutor exercise a peremptory strike on Mr. Jackson a Black male the prosecutor was asked to provide a race and gender neutral reason.

12. The prosecutor stated as the Court is aware, I ran Mr. Jackson's prior history. Mr. Jackson is a convicted felon. Had his rights restored, and I'm concerned about his contact with the criminal justice system.

13. The court allowed argument as to genuine or pretextual.

14. Counsel for the Petitioner stated Mr. Jackson was truthful and honest, informed that he had been convicted back in I believe it was the early 70's. He indicated also that his rights, civil rights had been restored as citizen of this community. Counsel asked that the strike be denied. [T. pg. 996]. The Court denied the request and found the reason provided by the prosecutor to be genuine.

15. The prosecution exercised a peremptory strike on Mr. Bain and was asked to provide a race and gender neutral reason. The prosecutor indicated that Bain nephew was serving 10 years in State prison for robbery and his son in serving 14 years for drug sale.

16. Petitioners Counsel stated that Bain is a military man, military police has no priors, answered questions truthfully, said he could be fair and impartial and that he should not be stricken. [T. pg. 999]

17. Counsel for one of the co-defendants added that the nephew had been released from

prison and turned his life around as a successful entertainer and wrestler, and that Bain should therefore not be excluded.

18. The Judge then accepted the peremptory challenge finding that the reason given was genuine and supported by the case law. Wilson's (Petitioner) Attorney objected for the record.

19. Jury selection resumed on January 10, 2011. The court brought in a new panel of prospective Jurors for questioning. This panel included Hall and Cuthbert. Hall was a high school teacher and had two brothers. Hall stated that one of her brothers was a federal corrections officer. Ms. Hall had another brother who served time in prison.

20. Ms. Cuthbert had a brother who had been charged with child abuse 20 years earlier and had served a term of probation she harbored no ill will towards the State Attorney's Office she also had an uncle who, when she was very young, served time for thief.

21. The State exercised its 14th peremptory challenge on Ms. Hall, Counsel for Petitioner requested a race-neutral reason for the challenge stating that Ms. Hall is a Black female. [T. 1379].

22. The prosecutor gave reason that Ms. Hall's brother served time in prison. [T. 1380].

23. The Court found that to be a race and gender neutral reason for the strike. [1380].

24. The Court adjourned for the day and when the trial resumed the next day, Counsel for co-defendant Kidd move to strike the entire panel, alleging systematic striking by the State of every African American Juror. [T. 1397-1402].

25. The Court questioned doesn't the law in the State of Florida recognize that contact with the criminal justice system is a race and gender neutral reason for strikes. [T. 1399].

26. Petitioner's counsel announced that he joined in the motion. [T. 1403]. The jury was

then sworn, with Ms. Cuthbert serving as a juror, at the trial Petitioner was found guilty as to all offenses for which he was charged, he was sentenced to life imprisonment on five of the offenses, and 15 years on the remaining three, all of the sentences were concurrent.

27. Petitioner appealed his conviction and sentences to the Third District Court of Appeal in case number 3D11-836. The first of the two issues in the brief appellant argued were that:

28. The trial Court erred in allowing the State to exercise peremptory challenges against two African American Jurors for a reason equally applicable to an unchallenged White juror and thus was a pretextual reason that was not genuine, in violation of the 14th Amendment to the United States Constitution, and Article I Section 16 of the Florida Constitution.

29. The Third District affirmed the conviction and sentences without opinion.

30. Petitioner pursued postconviction proceedings filed in May 2014 in which he argued that Defense Counsel provided ineffective assistance in violation of the 6th and 14th Amendment of the United States Constitution by failing to preserve for Appellate review the State's peremptory challenges of purposeful discrimination.

31. The trial court denied the claim by stating that the failure to preserve issues for appeal does not show the necessary prejudice under "*Strickland*" [citation omitted] rather prejudice is determined by the effect of a failure to preserve on the outcome of the proceedings.

32. "Every juror challenged by the State had either a personal history of arrest or a close relative with a previous arrest". "The fact that a prospective juror has been previously

arrested or has had a relative arrested has been repeatedly held to be a valid race-neutral reason for the exercise of a peremptory challenge". [citation omitted] "Further, the record reflects that Counsel did indeed object to many of the State's peremptory challenges and the Court conducted a particularized inquiry as to each challenged Juror".

33. "Thus, Defendant's contention is refuted by the record and Defendant has failed to establish prejudice, as required."

34. The Third District Court of Appeal affirmed the trial court's order without opinion. *Wilson v. State*, 190 So.3d 644 (Fla. 3rd DCA 2016).

35. Petitioner filed a federal Habeas Corpus petition in case number 16-23014 on July 12, 2016 the District Court ordered petitioner to file an amended petition in the required format. [Appx. A].

36. Petitioners petition included fifteen grounds, the grounds that an certificate of appealability was issued originally on in the Magistrate Judges report and recommendation were grounds one and thirteen.

37. Ground one is the trial court erred in allowing the state to exercise peremptory challenges against two African American Jurors for a reason equally applicable to an unchallenged White juror and thus was a pretextual reason that was not genuine, in violation of the 14th Amendment to the United States Constitution.

38. Ground thirteen of petitioners Writ argued that trial counsel was ineffective for failing to preserve for Direct Appeal issue that State prosecutors improperly used peremptory challenges to remove black jurors from panel.

39. After objections to the Magistrate Judges report an recommendation was filed, the Magistrate Judge issued a supplemental report and recommendation. [Appx. B]

40. The Magistrate Judge's rational for denying ground one was: "To be clear, the record shows no indication that the trial court was alerted to the ostensible disparity in treatment. Further, trial counsel did not object to juror Cuthbert's inclusion on the jury." In addition, juror Cuthbert was the last juror selected, which might have also resulted in her inclusion as part of the jury. Finally, juror Cuthbert's brother was no longer serving time or probation for his charges, and those charges were twenty years ago. Thus, juror Cuthbert's brother was no longer serving a sentence and the temporal proximity since he was charged may have been compelling to the Third District Court of Appeal when it affirmed the trial court's finding of genuineness. In fact, a combination of all these facts might have been the basis for its affirmance on direct appeal."

41. "Thus, Petitioner is unable to rebut with clear and convincing evidence, it cannot be said that the Third District Court of Appeal decided this claim in a manner that was contrary to or that was an unreasonable application of clearly established federal law. Nor could it be said that the determination of genuineness was an unreasonable determination of the facts given that the Third District Court of Appeal likely viewed juror Cuthbert as not similarly-situated. As such this Court must deny the claim."

42. The recommendation as to ground Thirteen of the supplemental report concluded that *Davis v. Sec'y Fla. Dept., of Corr.*, 341 F.3d 1310 (11th Cir. 2003) was not applicable to the prejudice prong of analysis under *Strickland.*

43. The Magistrate Judge Stated:

In this case, trial counsel was tenacious in alleging that there was a pattern, intentional or inadvertent, of eliminating African American venire members. As expressed earlier, trial counsel never identified the disparate treatment that Petitioner specifically addressed on

direct appeal, during postconviction, and in this appeal during postconviction, and in this Court namely juror Cuthbert's inclusion on the jury compared to venire members Bain and Hall's exclusion from it. Thus, unlike Davis this case does not fall in line with a failure to renew or perfect an objection for an appeal. Here, trial counsel never objected before the trial court judge pointing out ostensible disparity between empanelling juror Cuthbert and striking venire members Bain and Hall, this case appear to be more in line with *Jackson*, where a trial counsel remained "absolutely silent" on the factual basis of objections [citation omitted]. Accordingly, for the purpose of this claim, the prejudice analysis inquires whether there is some likelihood of a more favorable result at trial. [citation omitted].

44. Accordingly, with the benefit of a trial transcript and strong evidence of guilt, even if this Court were to review this case de novo, the undersigned would have more confidence had it been delivered by a jury that was more representative of the community where Petitioner was convicted and lived. [c.o.] Notwithstanding, it cannot be said that there is a reasonable probability that the trial would have come out differently. [c.o.]. This Court need not address whether trial counsel was deficient in not notifying the court of the alleged variance in treatment between these persons, as Petitioner has not satisfied the *Strickland* Standard. [c.o.]. Finally, even if s. 2254(d)'s additional restriction would apply, Petitioner could not prevail under a de novo review thereby showing he certainly cannot establish that the State court decision was contrary to or an unreasonable application of clearly established federal law.

45. The District Court Judge adopted the report and recommendation on August 15, 2018 denied the petition and granted a certificate of appealability as to ground (13) thirteen

which stated:

"Certificate of Appealability is GRANTED as to *Batson*-related claim raised in claim 13" [Appx. C].

46. On August 27, 2018 Petitioner filed a notice of appeal which stated:

"Petitioner pro-se hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final order of this Court rendered on August 15th 2018. The nature of the order is a final order denying the Petition for Writ of Habeas Corpus as to grounds 1-12 and 14-15, a certificate of appealability was granted as *Batson*-related claim raised in claim 13". [Appx. D].

47. Petitioner filed an initial brief [Appx. E] and Appellee's responded [Appx. F]. Petitioner then replied. [Appx. G].

48. On August 30, 2019 the Eleventh Circuit Court of Appeals per curiam opinion affirmed the District Court ruling stating that: "Wilson's [Petitioner] *Batson* argument is outside the scope of the certificate of appealability (COA), and in any event, Wilson has failed to meet his burden to show prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)" [Appx. I].

49. "The argument in Wilson's brief are outside the scope of the (COA). The District Court only granted a (COA) on ground 13. Ground 13 pertained to whether trial counsel was ineffective under *Strickland* for failing to preserve for direct appeal the variance in treatment between the two African jurors and the similarly situated Caucasian juror. The District Court specifically explained that it was not granting a (COA) on ground 1. In ground 1, Wilson argued that the State violated his rights under *Batson* because the reason for striking the two African American jurors was equally applicable to the

Caucasian juror. Wilson (COA) was thus expressly limited to the *Strickland* claim. Even so, Wilson brief focuses exclusively on his ground 1 argument that the State's race-neutral reason for striking the two African American juror was not genuine." "Wilson does not cite *Strickland* in his opening brief, let alone demonstrate that he could satisfy *Strickland's* high burden". [Appx. I].

50. Wilson has failed to meet his burden of showing that the State Court's decision was an unreasonable application of *Strickland* by finding that he failed to show that any ineffectiveness prejudiced the outcome of his trial. Even liberally construing his brief, Wilson's only argument is that a more racially balanced jury would have been less likely to convict him. To the extent Wilson's brief is within the scope of the (COA), he has failed to meet his burden of showing prejudice under *Strickland*.

51. Petitioner filed a motion for reconsideration [Appx. H]. The Eleventh Circuit Court of Appeals denied the motion. [Appx. I].

REASONS FOR GRANTING THE PETITION

52. The Eleventh Circuit Court of Appeals departed from accepted and usual course of judicial proceedings to treat a notice of appeal as a request for Certificate of Appealability violating petitioners due process of law and equal protection thereof. Petitioners notice of appeal states: "Notice is hereby given that Eric Wilson Petitioner pro-se, here by appeals to the Eleventh Circuit from the final order of this Court rendered on August 15th, 2018. The nature of the order is a final order denying the Petition for Writ of Habeas Corpus, as to grounds 1-12 and 14-15, a Certificate of Appealability was granted as *Batson* related claim raised in claim 13".

53. The Eleventh Circuit Court of Appeals have regularly construed a notice of appeals filed by pro-se appellants as a request for Certificate of Appealability under Federal Rule of Appellate Procedure 22(b)(2) which states: "A request addressed to the court of appeals may be considered by a circuit judge or judges as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitute a request addressed to the judges of the court of appeals".

54. Even if an appellant does not file a separate certificate of appealability motion in Appellate Court. Courts have held the notice to be a request see: *United State v. Futch*, 518 F.3d 887 (11th Cir. 2018), *Martinez v. Crew*, 2015 U.S. Dist Lexis 190369 (11th Cir. 2015).

55. For example, in the years following AEDPA's enactment, the Supreme Court and several lower courts concluded that even though a habeas corpus Petitioner Movant had failed to request a (COA), the appeal none the less should be permitted to go forward by treating the notice of appeal as a substitute for the COA see: *Slack v. McDaniel*, 529 U.S. 236 at

238-252 (1998).

56. The Eleventh Circuit Court of Appeals has entered a decision when denying the Petitioners motion for reconsideration in conflict with the decision of the United States Supreme Court and so far departed from the accepted and usual course of judicial proceedings.

I. Whether Petitioners Constitutional Rights Were Violated As To Ground One Is Debatable By Reasonable Jurist.

57. The Magistrate Judge's rationale for denying ground one was adopted by United States Southern District Court of Florida and affirmed by the Eleventh Circuit Court stating that the record shows no indication that the trial court was alerted to the ostensible disparity in treatment; contrary evidence exist within the record. Petitioners co-defendants counsel objected to the entire panel alleging a systematic striking by the State of every African American juror. This infers disparity in treatment. Further evidence in the record combats

58. the Magistrate Judges rationale that "Juror Cuthbert's brother was no longer serving time or probation for his charges, and those charges were twenty years ago, thus juror Cuthbert brother was no longer serving a sentence and the temporal proximity since he was charged may have been compelling to the Third District Court of Appeal when it affirmed the trial courts finding of genuineness". [Appx. B].

59. The transcript of the jury selection show two African-American juror's that had come in contact with the criminal justice system.

60. Ms. Snipes had multiple arrest "granted they were <u>further back in time</u>" and Mr. Jackson had been <u>convicted back in the early 70's</u> and had his civil rights restored as a citizen of the community.

61. The struck juror and the comparator juror do not need to exhibit all of the exact same characteristics and the inquiry must be confined to the reason the State provided for the strike. See *Herbert v. Rogers*, 890 F.3d 213 (5th Cir. 2018). The relevant characteristic is that all of the jurors in question has come in contact with the criminal justice system. Florida courts have held the reason provided by the State prosecution to be clearly error see: *Foster v. State*, 732 So.2d 22 (Fla. 4th DCA 1999). The State prosecutor stated that "I make it a procedure to run jurors for their priors history with the criminal justice system. [T. pg. 989-990] also see: *Hunter v. State*, 225 So.3d 838 (Fla. 4th DCA 2017). Further, once a prosecutor has offered race-neutral explanation for peremptory challenges, and trial court has ruled on ultimate question of intentional discrimination, preliminary issue of whether defendant made prima facie showing of intentional discrimination becomes moot. See: *Hernandez v. New York*, 111 S.Ct. 1857 (1991). The record show that the race-gender neutral reason was provided and ruled upon as to its genuineness. [T. 990, 991, 1010, 1399-1402.

62. If a prosecutor's proffered reason for striking a Black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step see: *Miller-El v. Dretke*, 545 U.S. 231 (2005). The record clearly shows that all named panelist including Ms. Cuthbert came in contact with the criminal justice system, and Ms. Cuthbert, Ms. Snipes and Mr. Jackson's experience was further back in time then the others, Ms. Hall and Mr. Bain's were with family members just as Ms. Cuthbert but all said they could be impartial.

63. The difference is that all the African American panelist were struck and Ms. Cuthbert

who was Caucasian served.

64. Under the circumstances the Eleventh Circuit Court of Appeals should have construed the notice of appeal as a request for a certificate of appealability as to grounds 1-12 and 14-15.

II. Unreasonable Application of Strickland's Prejudice Prong.

65. As a preliminary matter the United States Court of Appeal order stated that Wilson (Petitioner) initial brief are outside the scope of the (COA), the District Court only granted a COA on ground 13.

Petitioner argues that Courts have held that were issue are first addressed in the reply brief as facet of another claim and inextricably intertwined it should be heard. See: *Prieto v. Quarterman* 456 F.3d 511 (5th Cir. 2006). Such as Petitioners claim One and Thirteen the Certificate of Appealability characterized the issue as "*Batson* related claim raised in claim 13".

Petitioner argues that he raised claim Thirteen in his reply brief and it should be reviewed. The trial court denied Petitioners co-defendants motion to strike the entire jury panel [T. 1402] immediately thereafter Petitioners counsel Mr. Vazquez state: "Judge, we join in the motion".

66. This was for appellate purposes. In the case of *Davis v. Secretary for Dept. of Corr.*, 341 F.3d 1310 (11th Cir. 2003) the court found that: The United States Supreme Court held that *Strickland's* prejudice prong required the Petitioner in *Roe v. Flores-Ortega* 528 U.S. 470 (2000) at 484, to show that but for counsel's deficient failure to consult with him about an appeal, he would have timely appeal. Thus establishes that the prejudice showing required by *Strickland* is not always fastened to the forum in which counsel

performs deficiently even when it is trial counsel who represents a client ineffectively in the trial court, the relevant focus in assessing prejudice may be the clients appeal.

67. Therefore the Eleventh Circuit Court of Appeals determination that "Wilson has failed to meet his burden of showing that the State court's decision was an unreasonable application of *Strickland* by finding that he failed to show that any ineffectiveness prejudiced the outcome of his trial was an unreasonable application of *Strickland* because trial counsels role at the time was to preserve the issue for appellate review.

68. Petitioners counsel only part in the motion to strike the entire juror panel was after the trial court had already denied the motion and Petitioners counsel then join in on the motion for appellate purposes and therefore Petitioners burden should have been to prove that the outcome of the appeal would have been different if not for counsel deficient failure to show the variance in treatment.

69. The Eleventh Circuit Court of Appeals ruled that Petitioner failed to meet his burden of showing that the State Court's decision was an unreasonable application of *Strickland* by failing to show that any ineffectiveness prejudiced the outcome of his trial. The facts of the case should fall under *Flores-Ortega* and the prejudice should be that counsel's action affected the outcome of the appeal, and the case of *Foster v. State* 732 So.2d 22 (Fla. 4th DCA 1999), and *Hunter v. State* 225 So.3d 838 (Fla. 4th DCA 2017) shows a likelihood of a different outcome on appeal.

70. Petitioner argues that still he showed a difference in the outcome at trial. Petitioner state that he presented a reasonable hypothesis of innocence which the prosecutor never overcome. The Petitioner stated that he was at the scene to get a shave and haircut, denied that he wore a mask and that he had shotgun shells in his pocket.

71. Nonetheless, Petitioner avers that the prejudice prong as applied to the facts of his case was an unreasonable application of *Strickland*.

72. Therefore, Petitioner request that the proper prejudice prong be applied and relief be granted, granting him Habeas Corpus relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Erin Wilson

Date: 11/25/2019