ORIGINAL

No. 19-7545

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIE PALMER,– PETITIONER,

vs.

MARK INCH, AND ASHLEY MOODY,– RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIE PALMER

Everglades Correctional Institution

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000

(Phone Number) Warden

QUESTION(S) PRESENTED

Whether the courts below decided an important federal question in a way that conflicts with the relevant decisions of this Honorable Court when they denied --without an evidentiary hearing -- Petitioner's Rule 3.850 motion for postconviction relief alleging Petitioner was denied his six amendment right to effective assistance of counsel for failing to request a special jury instruction on abandonment, all based on an unreasonable determination of the Facts.

LIST OF PARTIES

[X] 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:

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INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Rule

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

[X] For cases from **federal courts:**

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

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

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

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.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[ ] is unpublished.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 Eleventh Judicial Circuit in and for Miami-Dade appears at Appendix B 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[ ] is unpublished.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 April 26, 2018.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition rehearing was denied by the United States Court of Appeals on the following date: November 1, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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:**

[ ] A timely petition 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

AMENDMENT 6

Rights of the accused.

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 witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was charged by amended information with robbery with a deadly weapon (Count One), and grand theft (Count Two). After a jury trial, Petitioner was convicted as charged. The trial court sentenced Petitioner to a term of life imprisonment for Count One as a prison releasee reoffender, and to a concurrent five-year sentence for Count Two. Petitioner appealed, and the Fifth District Court of Appeal ("Fifth DCA") of Florida per curiam affirmed Petitioner's judgment and sentence.

Petitioner filed a motion for postconviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, and the trial court summarily denied the motion. Petitioner appealed, and the Fifth DCA per curiam affirmed the final Order of the trial court denying relief on Petitioner's Rule 3.850 motion. Subsequently, Petitioner filed a second Rule 3.850 motion, which the trial court denied as successive. The Fifth DCA affirmed per curiam.

On November 24, 2015, Petitioner filed a pro se 28 U.S.C. § 2254 habeas petition in the United States District Court for the Middle District of Florida. Petitioner requested relief on four grounds, and Ground One, on which this Honorable Court granted certificate of appealability, Petitioner asserted that counsel failed to request jury instruction on abandonment in violation of Petitioner's right to the effective assistance of counsel, 6th Amendment Right of the United States Constitution.

After Respondent filed a response to Petitioner's petition for writ of habeas corpus in accordance with the United States District Court's instruction, Petitioner filed a Reply and an Amended Reply.

The United States District Court Judge denied Petitioner's petition for writ of habeas corpus and certificate of appealability concluding that Petitioner's act of force was committed subsequent to the taking of the Wal-Mart property, and that the taking and the threat of force or violence constituted a continuous act. The United States District Court Judge did not discuss how Petitioner was not deprived from the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution for counsel failing to request a jury instruction on abandonment when the facts as established by the trial court during trial support such an instruction.

Petitioner filed a motion for a Certificate of Appealability (COA) with the United States Court of Appeals for the Eleventh Circuit on June 14, 2018. On August 16, 2018, the United States Court of Appeals granted a COA on whether the state court's denial of Mr. Palmer's claim of ineffective assistance of trial counsel for failure to request a special jury instruction on abandonment was based on an unreasonable determination of facts, where the state court determined that counsel's performance was not deficient because the trial evidence did not support a special instruction on abandonment.

After Petitioner and Respondents filed brief on the merits the United States Court of Appeals for the Eleventh Circuit affirmed the decisions of the courts below. Petitioner's motion for rehearing was denied on November 1, 2019.

Petitioner Willie Palmer continues to serve a life sentence in prison on the above styled cause.

The Petitioner filed a timely petition for writ of certiorari in this honorable court.

STATEMENT OF THE FACTS

In this case, at trial, a store surveillance videotape was introduced by the State. (Vol. II, TT 75). The videotape shows Mr. Palmer, pushing a shopping cart, entered the grocery section of Wal-Mart one night. Mercy Morgan, a security employee of Walmart, testified that she noticed Petitioner and began to observe his actions. (Vol. II, TT 62, 64). Palmer went to the men's department and selected some shirts, pants, and underwear. (Vol. II, TT 65-66). Palmer took the items in the cart and placed them in the tote and put the tote in the cart. *Id*. He then grabbed two pillows and put them in the cart. (Vol. II. 67). The merchandise in the cart totaled $310.27.[1] Morgan radioed to David Fournier, another Wal-Mart employee, to assist her and contacted the Sheriff's office as she followed Palmer. (Vol. II, TT 68; Vol. III, TT 138).

Palmer proceeded to the general merchandise entrance of the store. Palmer passed all registers without paying for the items and stopped by the greeter. (Vol. II, TT 67, 69). Palmer spoke to the greeter for a short time before he attempted to leave the store. (Vol. II, TT 69). Morgan identified herself to Palmer and told Palmer he needed to come back into the store and go to her office. Id. Palmer walked backwards into the store with the cart. (Vol. II, TT 69; Vo. III, TT 141). Fournier, who had been waiting outside, walked into the store and grabbed the cart Palmer was pushing. (Vol. II, TT 140-141). Fournier told Palmer he needed to go to the security office with him and Morgan. (Vol. II. TT 70; Vol. III TT 141).

[1] Trial counsel, upon Palmer 's approval, conceded he was guilty of misdemeanor theft and resisting a merchant. (Vol II, TT 42-51; Vol. IV, TT 347-354).

Morgan who was still on the phone with the Sheriff's office told Palmer she was on the phone with the Sheriff's office. *Id*.

Palmer tried to get around Fournier to leave. (Vol. II, TT 70; Vol. III, TT 142) The video shows Ms. Morgan was stationed behind the Petitioner Mr. Palmer at all times. Mr. Fournier was in front of the Petitioner coming from the outside. Palmer let go of the cart he had been pushing at some point and had just tried to leave. (Vol. II, TT 113; Vol. III, TT 158-159). Palmer became more agitated the longer Fournier and Morgan refused to let him leave. (Vo. III, TT 142). Morgan looked down at Palmer's hands and notice Palmer was carrying a pocket-knife. (Vol. II, TT 71). In the excitement, Morgan yelled out that Palmer had a knife. (Vol. II, TT 72; Vol. III, TT 143). Fournier looked at Palmer's hands as Morgan yelled and saw the pocket-knife. (Vol. III, TT 143). The pocket-knife in Palmer's hand did not have the blade exposed nor did he point it at anyone. (Vol. II, TT 72; Vol. III, TT 145).

Fournier told Palmer, "you don't want to do this." (Vol. II, TT 72). Palmer told Fournier, "You better move." (Vol. III, TT 143). Palmer then left Wal-Mart and ran across the parking lot. (Vol. III, TT146). A customer followed Palmer and took down his license plate number. (Vol. II, TT80; Vol. III, TT 146). That number was then forwarded to the Sheriff's office. (Vol. II, TT 81; Vol. III, TT 146).

Deputy Fletcher observed Palmer's car driving on U.S.1 in Rockledge a short while later. (Vol. III, TT 186). He stopped the car as it pulled into a parking lot. (Vol. III, TT 187). Palmer was ordered out of the car and searched. (Vol. III, TT 187, 206). The pocket-knife that Morgan and Fournier saw at Wal-Mart was found in

Palmer's right front pocket. (Vol. II, TT 74; Vol. III, 147-148, 207, 216). Morgan was later brought to the location and was able to positively identify Palmer as the one who attempted to steal the items from Wal-Mart. (Vol. II, TT 87; Vol. III, TT 195-196).

In denying Petitioner's motion for judgment of acquittal, the trial court judge stated that

> [Petitioner] approached the - - what the witnesses have called "the last point of sale." And passed that.
> He did so by deception as Mr. Lason points out. So the record is clear, it appears that he did that by deception, not by force.
> When he is confronted by Ms. Morgan and Mr. Fournier, he attempts to leave. He does not have the property with him, but he attempts to leave.
> And by their testimony, in the course of doing that, he retrieves from his pocket a razor knife.

Trial Transcripts at p. 280.

On the instant claim, the State Circuit Court denied Petitioner's motion for post conviction relief stating that

> At trial, both mercy Morgan and David Fournier testified that the Defendant passed all points of sale with the shopping cart, then he displayed the knife, and then he left the store without the merchandise . . . The evidence does not support a special jury instruction on abandonment. The Defendant did not receive ineffective assistance of counsel, and he is not entitled to relief in Ground One.

Order denying Defendant's motion for post conviction relief at p. 3.

The United States District Court concluded on the same ground that

> Petitioner did not pay for the items, and instead he passed the point of sales and tried to exit the store. (Id. at 75-76). Morgan requested the assistance of another

> employee, and called the Brevard County Sheriff's Office. Id. at 76).
> Morgan then approached Petitioner as he exited the door, and she identified herself as security. (Id. at 77). Petitioner walked backwards into the store, and employee David Fournier ("Fournier") requested that Petitioner follow them to Morgan's office (Id. at 77-78). Morgan stated that Petitioner did not abandon the items, appeared angry, and had his hand on the cart as he tried to leave. (Id. at 119). Morgan observed a black object with silver in Petitioner's hand and believed it was a knife. (Id. at 79). Morgan was very scared and stepped out of Petitioner's way. (Id. at 80-82). Petitioner subsequently left the store and drove away. (Id. at 88-89) . . . Therefore, defense counsel did not act deficiently and counsel's failure to request an instruction on abandonment did not result in prejudice because Petitioner was not entitled to such an instruction. The state court's denial of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law. Accordingly, claim one is denied pursuant to §2254(d).

United States District Court Order at pp. 5-7.

On the issue presented in this petition, the United States Court of Appeals concluded that the finding of the trial court on postconviction relief was not based on an unreasonable determination of the facts, as it is consistent with the testimony of both Morgan and Fournier.

Petitioner asserts that he argued in the lower courts that the Walmart surveillance video "clearly showed that he abandoned the merchandise before he threatened security personnel at the store. However, the United States District Court did not view the video.

REASONS FOR GRANTING THE PETITION

Petitioner, Willie Palmer, an inmate in the Florida Department of Corrections, asks this Honorable Court to decide whether the lower courts conclusion that counsel was not ineffective for failing to request an instruction on abandonment was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. On this line, this Court should conclude that the state court was not merely wrong but actually unreasonable. This honorable Court should hold that Palmer's trial attorney rendered constitutionally deficient performance, which did prejudice his defense.

I. The lower courts erred in deferring to the State postconviction court's ruling that Petitioner received effective assistance of counsel under Strickland where the State postconviction court's ruling was based on an unreasonable determination of the facts in light of the evidence presented that counsel failed to request an instruction on abandonment that was supported by the evidence.

This Honorable Court has recognized that the Sixth Amendment's guarantee that ``[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense" entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence. *Strickland* v. *Washington*, 466 U.S. 668,685-687 (1984). Under *Strickland*, this Honorable court first determine whether counsel's

representation "fell below an objective standard of reasonableness." Then the Court asks "whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla* v. *Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland, supra*, at 688, 694.

Under Strickland, supra, this Court has stated that the first prong-constitutional deficiency-is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla, supra*, at 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.*, at 688, 104 S. Ct. 2052.

Petitioner asserts that in this case, pursuant to Strickland, it was unreasonable for his lawyer to fail to request an instruction on abandonment that was supported by the evidence indicating that there was a break in the chain between the taking and the use of force in this cause. As argued below, Florida law clearly establishes the dismissal of a robbery charge when evidence showed that Defendant took property without use of force, abandoned property, and then used force to leave. See Peterson v. State, 24 So. 3d 686 (Fla. 2nd DCA 2009), see also State v. Baker, 540 So. 2d 847 (Fla. 3rd DCA 1989).

In Florida, **the abandonment of property defense** is an available defense to robbery. Florida decisional law has established that a defendant who uses force after abandoning stolen property cannot be convicted of robbery because the robbery statute requires that the taking and the use of force constitute a continuous series of acts or events. For example, in *State v. Baker*, 540 So. 2d 847 (Fla. 3d DCA1989), the Third District relied on this rule to hold that the trial court properly dismissed a robbery charge. In *Baker*, the defendant shoplifted merchandise from a store in a shopping mall. Upon noticing the guards approaching him, *Baker* put down the [merchandise] and began to run. The guards stopped *Baker*, who put up a struggle, shouting that he be left alone and that he had a gun. At no time during the struggle did *Baker* attempt to grab the abandoned [merchandise] and run; [it] remained on the floor. Based on these facts, the Third District held that the *Baker* did not commit robbery as a matter of law because he "took the property without any use of force and abandoned the property before he used force to flee from the security guards." *Id*. at 848.

Similarly, in *Simmons v. State*, 551 So. 2d 607 (Fla. 5th DCA1989), the Fifth District held that the defendant's robbery conviction could not stand. There, the undisputed facts established that the *Simmons* shoplifted merchandise from a store, was apprehended by store employees, and was escorted back into the store. Once back in the store, "the defendant removed the merchandise from her person and threw it to the floor." *Id*. at 608. Store employees then instructed

Simmons to accompany them to the security office. "Only then did the defendant begin to resist and she struggled with one of the employees." *Id.* The Fifth District reversed the *Simmons'* robbery conviction because "[t]here was no relationship between the force used and the taking as required by the [robbery] statute." *Id.; see also Kimbrough v. State*, 788 So. 2d 421, 421 (Fla. 1st DCA2001) (reversing the defendant's robbery conviction based on insufficient evidence because "'the taking was completed without any use of force and the property abandoned before any force was employed'") (quoting *Simmons*, 551 So. 2d at 608).

Likewise, in *Garcia v. State*, 614 So. 2d 568 (Fla. 2d DCA1993), the Second District reversed the defendant's robbery conviction. There, *Garcia* "attempt[ed] to throw a duffle bag filled with [stolen] merchandise over the [store's] fence to his companion. When approached by the security guard, the two men abandoned the bag and ran. . . . In a nearby parking lot, [the defendant] slowed down and pointed a handgun at the pursuing security guard." *Id.* at 569. The Second District held that, since *Garcia* "did not place the security guard in fear during a continuous series of acts or events in connection with the taking of property, he could not be convicted of robbery." *Id.*

More over in *Peterson v. State, 24 So. 3d 686* (Fla. 2nd DCA 2009) the State appellate concluded that, where the facts are disputed as to whether the defendant abandoned the stolen property prior to threatening or using force, a special jury instruction is required to "inform the jury that if the property was

abandoned prior to the use of force, under the law the taking and the use of force were not a continuous series of acts or events." *Id.* at 690.

In this case, the standard instruction given at trial (Fla. Std. Jury Instr. (Crim.) 15.1) required the jury to find that force was used "in the course of the taking," which was then defined as "prior to, contemporaneous with, or subsequent to" the taking and that the use of force and the taking of the property "constitute[d] a continuous series of acts or events." However, the standard instruction did not inform the jury that if the property was abandoned prior to the use of force, under the law, the taking and the use of force were not a continuous series or acts or events.

Petitioner submits that defense counsel was constitutionally ineffective for failing to request the special jury instruction on abandonment, thus denying the Petitioner a fair trial. Furthermore, in applying the established Florida law to the facts as stated in the record in this cause, Petitioner was guilty only of the misdemeanor offense of resisting a merchant. See § 812.015(6), Florida Statute.

Critically, due to counsel's deficient performance, the jury was never provided with a special instruction on an abandonment defense while there was ample evidence of an abandonment of property. An instruction on robbery in this case was ineffective if it was not accompanied by an instruction on abandonment of property. See *Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015). In Crace, the Court of Appeals affirmed the granting of Crace's petition for writ of habeas corpus on trial counsel's failure to request a jury instruction that would

have allowed the jury to convict Crace of a lesser offense. See *Crace v. Herzog*, at 840. Because in Florida, the offense of robbery is nullified when the person has abandoned the goods and then uses force, it follows that the jury in this case had to receive a much needed special instruction on abandonment in order to seek the truth of what really happened on the offense charged by the State in this cause.

In the instant case, had counsel requested a jury instruction on abandonment there is a reasonable probability that the jury would have convicted the Petitioner only of the misdemeanor offense of resisting a merchant. See § 812.015(6), Florida Statute.

The Respondent argued in the lower court that Petitioner was not entitled to an instruction on abandonment because such an instruction was not supported by the evidence in this case.

However, the Respondent's assessment of the facts does not fully and adequately show the order of events concerning the criminal offense in question in this case. The record demonstrates that Defense counsel commented in opening statements on the abandonment defense and its application to this case. (T.T. Vol. II., Petitioner. 56-57). Furthermore, during trial, counsel questioned both State witnesses (Mercy Morgan and David Fournier) in line with an abandonment defense. Ms. Morgan testified that when Petitioner had passed all points of sales, she approached Petitioner and asked him to accompany her because he had unpaid merchandise. At that point, Petitioner

refused and left the cart/merchandise. Ms. Morgan testified that Petitioner tried to get pass Mr. Fournier "without possession of the merchandise." (emphasis added)(T.T. Petitioner.112-113). Petitioner submits to this Honorable Court that at this point the abandonment of the goods was completed.

The testimonial evidence as recorded on DVD shows that Petitioner abandoned the merchandise before Petitioner made any effort to walk pass Mr. Fournier to exit the store. This evidence adequately supports an abandonment defense.

Petitioner asserts that the standard robbery instruction as given did not cover Petitioner's theory of defense since Petitioner abandoned all the goods prior to the use of force. Petitioner has demonstrated that he met the Strickland deficient performance prong when his trial counsel failed to request an instruction on abandonment.

However, without assessing the above stated facts and law correctly, the United States District Court cited to *Rockmore v. State,* 140 So. 3d 979 (Fla. 2014), to conclude that the theft of property and use of force in this case were a continuous series of acts or events.

Petitioner's case is distinguished from Rockmore in that in Rockmore there was competent, substantial evidence supporting his conviction for robbery with a firearm in that Rockmore's victim testified that Rockmore threatened him with a gun while fleeing with stolen property.

More important in this case, based on the above stated facts and law, there was competent, substantial evidence demonstrating that the abandonement of the property and the alleged use of force was not a continuous series of acts.

Petitioner submits that the trial judge in denying Petitioner's motion for judgment of acquittal observed first hand and confirmed that there was no continuous series of acts.

> [Petitioner] approached the - - what the witnesses have called "the last point of sale." And passed that.
> He did so by deception as Mr. Lason points out. So the record is clear, it appears that he did that by deception, not by force.
> When he is confronted by Ms. Morgan and Mr. Fournier, he attempts to leave. He does not have the property with him, but he attempts to leave.
> And by their testimony, in the course of doing that, he retrieves from his pocket a razor knife.

Trial Transcripts at p. 280.

Petitioner submits to this Honorable Court that the trial judge was in the best position to determine the evidence. Thus, unlike Rockmore, Petitioner has produced convincing credible evidence that he abandoned the merchandise before he made any effort to walk past Mr. Fournier to exit the store. T.T. Petitioner.112-113.

Petitioner further asserts that the United States District court did not owe the State postconviction court deference under 28 U.S.C. § 2254(d)(2), and should have granted Petitioner's writ.

The United State Court of Appeals for the Eleventh Circuit incorrectly found that the Petitioner failed to make any argument in the Federal District Court that the Walmart surveillance video shows the Petitioner abandoned the merchandise before the alleged knife was produced. The United State Court of Appeals for the Eleventh Circuit in its August 15, 2019, order affirming Petitioner's 2254 Habeas Corpus stated the Petitioner forfeited any argument that the surveillance video provides evidence of abandonment by not raising that argument before the district court of evidence. In support of its order, the Court cited *Reaves v. Sec'y. Fla. Dep't. of Corr.*, 872 F.3d 1137, 1150 (11th Cir. 2017) (quoting *Maradiago v. United States*, 679 F.3d 1286, 1293 (11th Cir. 2012)). However, the Eleventh Circuit Court of Appeals did overlook pertinent facts that shows the Petitioner did not forfeit his argument concerning the Walmart surveillance video, thus distinguishing him form *Reaves* and *Maradiago* supra.

The Petitioner's case is distinguished from Reaves supra. In Reaves supra, the Court stated

> "[b]ecause Reaves did not present any claims to the district court about the combined impact that the trial counsel's errors at the guilt phase may have had on the penalty phase, or any claim about the testimony of Ressler of Dr. Cheshire, the district court should not have presented the claim for him. Instead, in the proceeding on remand from his Court, the district court should have reviewed and decided only the one claim Reaves pleaded."

Id. at 1150

In Petitioner's case, the record shows the Petitioner's 2254 Habeas Corpus petition does argue that the State Court's denial of his 3.850 motion for postconviction relief resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the State Court proceeding.[2] In the state court proceeding, the Petitioner clearly raised the argument that the Walmart surveillance video provided evidence that the Petitioner abandoned the property and that Counsel was ineffective for failing to request the special jury instruction on abandonment. In fact, the Eleventh Circuit Court of Appeals agreed the Petitioner raised the Walmart surveillance video in his 3.850 motion for postconviction relief. The State court failed to hold an evidentiary on this ground; thus, the issue of the Walmart surveillance video was never adequately resolved in the State court.

Unlike the Eleventh Circuit Court of Appeals order affirming the district court's denial of this claim, the Petitioner's 2254 petition along with his reply does show the Petitioner did argue the Walmart surveillance video through the testimony of Ms. Morgan and Mr. Fournier. In Petitioner's reply, he states Ms. Morgan testimony at trial transcripts 67-75 would show the Petitioner's alleged displaying of the knife occurred only after all the merchandise had been abandoned to Walmart employees. At page 74-75 of the Petitioner's trial transcripts it shows the State introducing and offering evidence States Exhibit B the Walmart surveillance video, which was authenticated through Ms. Morgan testimony. See page trail transcripts pages 74-75 of Ms. Morgan trial testimony.

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[2] The Court should take into consideration that the Petitioner filed his title U.S.C. § 2254 Writ of Habeas Corpus petition pro se and that the title 28 U.S.C. § 2254 Writ of Habeas Corpus form directed the Petitioner to ("Do not argue or cite case law. Just state the specific facts that support your claim"). The Petitioner followed those directions when filling out the form.

Also, the Petitioner's reply in the Federal Court, states Mr. Fournier testimony at trial transcripts 140-152 would show the Petitioner's alleged displaying of the knife occurred only after all the merchandise had been abandoned to Walmart employees. At page 149-152 of the Petitioner's trial transcripts, it shows the State re-publishing the video with Mr. Fournier in front of the jury while Mr. Fournier testifies with laser pointer to show what happened in the video. See trial transcripts at pages 149-152 of Mr. Fournier trial testimony.

The Petitioner's case is further distinguished from Reaves, supra, in the in Reaves, supra, this Court stated that "Reaves was represented by experienced counsel in his federal habeas proceedings and was required to raise the claim in his 2254 petition if he wanted federal relief on it." The United State Court of Appeal overlooked that the Petitioner was a pro se litigant in his 2254 petition and in his reply, the Petitioner did mention that the Wal-Mart surveillance video did show the Petitioner abandon the property before displaying the alleged knife through Ms. Morgan and Mr. Fournier trial testimony as stated above.

Even the trial court judge who did review the Walmart surveillance video during Ms. Morgan and Mr. Fournier testimony saw the Petitioner abandon the property before displaying the alleged knife. The trial court stated that

> [Petitioner/Petitioner] approached the – what the witnesses have called "the last point of sale." And passed that.
> He did so by deception as Mr. Lason points out. So the record is clear, it appears that he did that by deception, not by force.

> When he is confronted by Ms. Morgan and Mr. Fournier, he attempts to leave. He does not have the property with him, but he attempts to leave.
> And by their testimony, in the course of doing that, he retrieves from his pocket a razor knife.

Trial Transcript at p. 280.

The state court and federal district court failed to hold an evidentiary hearing concerning the facts presented in ground one of Petitioner's 3.850 motion for postconviction relief which included the Walmart surveillance video that showed the Petitioner did abandon the property before displaying the alleged knife. An evidentiary hearing was required in the federal district court because the state court failed to make the factual finding concerning the Walmart surveillance video showing the Petitioner did abandon the property before displaying the alleged knife making counsel ineffective for failing to request the special abandonment jury instruction. Petitioner is entitled to a Federal evidentiary hearing because he was unable to develop his claim in state court despite his diligent effort by 2254(e)(2). See *Breedlove v. Moore*, 279 F.3d 952, 959 (11th Cir. 2002) (that stated "[i]n the instant case, the record clearly indicates the Breedlove sought an evidentiary hearing on his *Brady* claim at every stage of his state proceedings. The state courts denied him the opportunity to present evidence related to his *Brady* claim; therefore, he was prevented from developing a factual basis for his claim in state court. In light of this fact, 2254(e)(2) does not preclude an evidentiary hearing in Breedlove's case." However, unlike Breedlove's the Petitioner is entitled to an evidentiary

herein because he has demonstrated that his factual allegations, if proven, would indicate that trial counsel was ineffective for failing to request the special jury instruction on abandonment in this case. Thus, the state court's denial was objectively unreasonable in light of the evidence presented in the state court. 2254(d)(2).

Appointed counsel in the Eleventh Circuit Court of Appeals retrieved the Walmart surveillance video showing the Petitioner did abandon the property before displaying the alleged knife and attempted to introduce such video to no avail.

Had an evidentiary hearing been held in either the State or Federal Courts the video along with the testimony of Ms. Morgan and Mr. Fournier would have been presented showing that trial counsel was ineffective for failing to request the special jury instruction and abandonment. There is a reasonable probability if the special jury instruction on abandonment been given the outcome would have been different in that the jury would have found the Petitioner guilty of the lesser included offense of misdemeanor resisting a merchant.

This Court has stated that criminal cases will arise where the only reasonable and available defense strategy requires counsel to act consistently with such a defense. See *Harrington* v. *Richter*, 562 U.S. 86, 106, 131 S. Ct. 770 (2011). Petitioner contends that this was such a case. As argued in the lower courts, Petitioner contends that any reasonably competent attorney would have requested the special jury instruction on abandonment, especially in this

case where it was Petitioner's sole defense and the facts supported the giving of such instruction.

Petitioner submits to this Honorable Court that there is certainly no question concerning whether Petitioner abandoned all the goods before Petitioner displayed the knife. Thus, under the facts and the law, trial counsel had an obligation in requesting a special jury instruction on abandonment.

Additionally, Petitioner submits that "strategic choices must be respected . . . if they are based on professional judgment." Strickland, 466 U.S. at 681. But here, Petitioner's trial counsel has never explained why he did not request a special instruction on abandonment.

This Honorable Court has stated that an attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. See, *Kimmelman* v. *Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574 (1986) (finding deficient performance where counsel failed to conduct pretrial discovery and that failure ``was not based on 'strategy,' but on counsel's mistaken belie[f] that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense").

Therefore, Petitioner's trial counsel was ineffective for failing to request a special jury instruction on abandonment, and because it was error to fail to do so in any event under the facts and law of this case, this Honorable Court should find that Petitioner has satisfied the first prong of the Strickland/AEDPA test.

When this Honorable Court turns to the issue of prejudice it must assess: (1) whether the instruction, if requested, should have been given; and (2) if the instruction had been given, was there a reasonable probability that the outcome of the proceedings would have been different. See *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir.2016).

First, if requested, the trial court would have given the special jury instruction on abandonment based on the evidence presented at trial. As discussed at length above, Petitioner produced evidence that he abandoned all the goods before the use of force took place in this case. Trial counsel spoke in opening arguments of an abandonment defense and cross-examined state witnesses (Ms. Morgan and Mr. Fournier) along an abandonment of property defense. All the facts of this case as clearly presented in the record before this court support a special instruction on abandonment. To leave the jury without a special instruction on abandonment that would have exonerated the Petitioner of the offense of robbery was a disservice to the Petitioner and the Sixth Amendment of the United States Constitution. Petitioner was entitled not only to an instruction on robbery, which he received, but also to an instruction defining that if he abandoned all the merchandise prior to the use of force, he was not guilty of robbery. See Simmons, supra. Notably, the State postconviction court did not make any findings about why counsel did not request a special jury instruction on abandonment.

In addressing the second question in regards to giving the special

instruction on abandonment and such an instruction having a reasonable probability that the outcome of the proceedings would have been different, this Honorable Court should look to the importance of the instruction under the facts of this case. The principal prejudicial factor lies in the manner in which the jury was instructed to determine whether the Petitioner's guilt on robbery was based on Petitioner's actions. The jury was well aware that "robbery' is defined as the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. 812.13(1), Fla. Stat. (2013).

Defense counsel attempted to distinguish robbery and a much lesser offense (resisting a merchant) since Petitioner abandoned all the goods prior to the use of force. In moving for judgment of acquittal, trial counsel argued that there was no force used in taking the property and that the only force utilized in this case was done after Petitioner had abandoned the property. (Vol. III, T.T. 264-265, 270-271, 273-274, 278). Thus, the facts in this case expose the consequences of trial counsel's omission.

It cannot be overemphasized that, according to what was testified to by the State witnesses (Ms. Morgan and Mr. Fournier) in this case, Petitioner did abandon all the goods prior to the use of force. Trial counsel's argument that Petitioner abandoned all the goods prior to the use of force was not supported

by a definitive and binding statement on the law establishing that Petitioner did not commit robbery in this case.

A court's issued jury instruction carries the command and force of law in a way that statements made by counsel cannot; thus the prejudice that arises from an omitted jury instruction is not cured by counsel mere arguments.

The record before this Court shows that neither the trial Court nor the United States District Court has made a determination by citing to specific portions of the evidence about at what point Petitioner did abandon the merchandize prior to leaving the store. This is a critical point of Petitioner's claim related to a much needed instruction on abandonment of property defense.

The State postconviction court ruling was based on an unreasonable determination of the facts in light of the evidence presented at trial. Additionally the Federal District Court's ruling was also based on an unreasonable determination of the facts in light of the evidence presented at trial even when its conclusion is considered through the deferential lens of AEDPA.

Based on the above stated facts and law, it seems reasonably probable that, if the jury would have received a much needed special jury instruction on abandonment of property, a jury would have concluded that Petitioner was not guilty of robbery with a deadly weapon in this case.

On a last note, this Honorable Court should note that a verdict of **resisting a merchant** (*See* 812.015(6), Florida Statute) would have resulted in a

substantially shorter sentence in this case. Under Florida law, robbery with a deadly weapon is punishable by a term of years not to exceed a life sentence. By contrast, the offense of resisting a merchant is a misdemeanor punishable by a maximum if one year in prison. Here, Petitioner was sentenced to life in prison. Because there is a reasonable probability that the jury would have found Petitioner guilty only of the offense of resisting a merchant, he would have received another chance at civilian life one day. This difference in the applicable sentences is undoubtedly prejudicial. See Glover v. United States, 531 U.S. 198, 202-204, 121 S.Ct. 696 (2001) (holding that Sixth Amendment prejudice resulted from an unasserted error that added six to twenty-one months to the Defendant's sentence).

In sum, the trial court should have given the special jury instruction on abandonment if asked. Trial counsel's presentation of an abandonment defense during trial did not cure the lack of an instruction on this matter. Under Florida law, all the facts of this case as they appear on the record before this court present a reasonable probability that the outcome of Petitioner's trial would have been different if the special instruction on abandonment of property had been given, and this Honorable Court should find that Petitioner was prejudiced by his trial counsel's failure to request the special jury instruction on abandonment of property.

II. The Question Presented is Important.

Petitioner is presenting an important Federal question of constitutional dimension in which the lower courts did not apply the standard prescribed by this Court in Strickland, supra, appropriately to the facts of the Petitioner's case. Petitioner affirmatively asserts that this case would have had a different outcome if the lower courts had conducted an evidentiary hearing to determine why counsel chose such a line of conduct by failing to apply the correct law that applied to Petitioner's case. On this line, if the district Court or the trial court would have conducted an evidentiary hearing on this matter, Petitioner's trial counsel could not have justified not requesting the abandonment jury instruction when in fact that was cousel's defense in opening argument and throughout the trial and cross examination. Rather, Petitioner's counsel would have admitted that he would have investigated and advanced the special instruction on abandonment of property.

In this case, this Honorable Court should set a new precedent requiring that cases like the Petitioner's be set for an evidentiary hearing to determine whether counsel was ineffective for failing to request the abandonment jury instruction as guaranteed by the Sixth Amendment of the United States Constitution.

A review of the decision below is important because this Honorable Court should find that the State postconviction court's denial of Petitioner ineffective assistance claim was based on an unreasonable determination of the facts in

light of the evidence presented in the State Court even when viewed through the additional lens of AEDPA. Specifically, given the facts presented at Petitioner's trial, the State postconviction court erred in disregarding the deficiency and the prejudice created by the omission of a jury instruction defining the abandonment of property prior to the use of force. The judgment of the United States Court of Appeal should be vacated and the case remanded for further proceedings.

In sum, lower courts across this nation would benefit greatly from this Court's input on an issue like Petitioner's because it would clarify and set a consistent standard throughout the courts. Moreover, a decision in this case would no doubt bring more justice to the effective assistance of counsel guaranteed by the United States Constitution.

Petitioner respectfully requests that this Honorable Court reverse the United States Court of Appeal's denial of his case.

CONCLUSION

The Petitioner respectfully prays that this Honorable Court grants his petition for a writ of certiorari.

Date: January 24, 2020

Respectfully submitted,

Willie Palmer

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No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

WILLIE PALMER,– PETITIONER,

vs.

MARK INCH,

ASHLEY MOODY, – RESPONDENT(S).

PROOF OF SERVICE

I, Stevrick Tavah Jackson; DC No.: M58172, do swear or declare that on this date, January 24, 2020, as required by Supreme Court rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Office Of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on January 24, 2020.

Willie Palmer

Willie Palmer, DC# E26976

APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated August 15, 2019.