Case No.: 19-7908

11th Circuit Case No.: **19-11861-D**

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY RASHONE PRUNTY,
Petitioner,

vs.

SECRETARY, FL. DEPT. CORR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR CERTIORARI

LARRY RASHONE PRUNTY
Pro Se
DC No.: 818067
Century C.I.
400 Tedder Road
Century, Florida 32535

Wednesday, March 4, 2020

THE QUESTION PRESENTED

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN APPLYING THE TWO PRONG SLACK V. MCDANIEL, TEST (PROCEDURE AND MERITS) IN DETERMINING THE GRANT OR DENIAL OF A CERTIFICATE OF APPEALABILITY WHEN THE PROCEDURAL ASPECTS OF PETITIONER'S 28 U.S.C. § 2254 PETITION WERE NEVER IN ISSUE; THEREBY, DENYING PETITIONER DUE PROCESS OF LAW?

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OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are unpublished: [1] Order of the Eighth Judicial Circuit, In and For Alachua County Florida, denying Petitioner's Postconviction Motion, dated, August 31, 2016; [2] Magistrate Judge, Charles A. Stampelos's, Report and Recommendations ("R&R"), dated, October 2, 2018; [3] Order of United States Chief District Judge, Mark E. Walker, adopting the Magistrate's R&R, over Petitioner's Objections, dated, April 2, 2019; [4] Order of United State's Circuit Judge, William H. Pryor Jr., denying Petitioner's motion for a Certificate of Appealability, and leave to proceed *in forma pauperis ("IFP")*, dated October 7, 2019; [5] Order, of the United State's Circuit Court, denying Petitioner's motion for reconsideration, dated December 9, 2019.

STATEMENT OF JURISDICTION

The District Court and the Court of Appeals for the Eleventh Circuit denied Petitioner's request for a Certificate of Appealability. In Hohn v. United States, 524 U.S. 236 (1998), this Court held that, pursuant to 28 U.S.C. § 1254(1), the United States Supreme Court has jurisdiction, on *certiorari*, to review a denial of a request for a Certificate of Appealability by Circuit Judge or Panel of a Federal Court of Appeals.

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CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The right of a State prisoner to seek federal *habeas corpus* relief is guaranteed in 28 U.S.C. 2254. The standard for relief under "AEDPA" is set forth in 28 U.S.C. § 2254(d)(1)

STANDARD OF REVIEW

Denial of Certificate of Appealability

In Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029 (2003), this Court clarified the standards for issuance of a Certificate of Appealability ("COA"):

[…] A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right". A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitution claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further […] We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for *habeas corpus*. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *Id.*, 123 S.Ct. at 1034. citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)

PREFACE

The application, by a reviewing court, of an incorrect standard or review has immediate due process implications for the petitioner who the incorrect standard was applied. Quang Ly Tran v. Gonzales, 447 F.3d 937, 943 (6th Cir. 2006). Consequently, a reviewing court's failure to apply the correct standard of review is *per se* reversible. MacLachlan v. ExxonMobil Corp., 350 F.3d 472 (5th & 11th Cir. 2003).

Moreover, this Court has held that the incorrect application of a legal standard is subject to remand. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017); Moore v. Texas, 137 S.Ct. 1039 (2017).

Therefore, the Eleventh Circuit, when applying the incorrect legal standard enunciated by this Court in Slack v. McDaniel, *supra*, in determining whether to grand Petitioner a COA, denied Petitioner the due process of law, entered an improper determination in conflict with the decision of this Court, and departed from the accepted and usual course of judicial proceedings, in the issuance of a COA, thus requiring this Court to exercise its supervisory power.

STATEMENT OF THE CASE

Petitioner was convicted in Alachua County, Florida, State Court of Home Invasion Robbery with special findings that Appellant, as a principal or co-defendant, was armed with a deadly weapon (firearm), and that he concealed his face with a mask. Consequently, Appellant was sentenced to life in prison as a Prison Release Reoffender ("PRR").

Arrest and Charges

On October 26, 2011, Petitioner was arrested in Alachua County, Florida on a single charge of Home Invasion Robbery, in violation of §812.135, Florida Statutes ("FS").

On October 27, 2011, Assistant Public Defender ("APD"), Canaan Goldman, was appointed to represent Petitioner. On the same date, APD Goldman filed a Notice of Discovery Pursuant to Florida Rules of Criminal Procedure ("Fla.R.Crim.P.").

On December 1, 2011, The State filed an information charging Petitioner with Home Invasion Robbery in violation of §812.135, FS, and filed its initial discovery exhibit with a demand for reciprocal discovery.

On January 17, and 23, 2012, Petitioner responded to the State's discovery demand and filed a Notice of Alibi.

On March 19, 2012, after a great deal of back and forth with the State in an attempt to obtain Closed Circuit Television ("CCTV") footage, which would prove his alibi, Petitioner filed a motion to allow issuance of a *Subpoena Duces Tecum*.

On March 30, 2012, the Trial Court held a hearing on the motion, and granted it ordering that the Clerk shall issue a *Subpoena Duces Tecum* to Wal-Mart 3570 SW Archer Road, Gainesville, Florida 32608 for the transaction receipts/ purchase detail, audio/ video recordings of the registers, audio/ video recordings of the parking lot, audio/video recordings of the entry and / or exists, audio video recordings of the men's clothing area, and a list of the shift personnel name, position, age and gender for October 25, 2011 between the hours of 8:00 pm and 11:30 pm.

On April 25, 2012, Wal-Mart Loss Prevention Officer, Pamela Hubbart, confirmed in a letter to Petitioner's Counsel, in response to the Court ordered *Subpeona Duces Tecum*, that there was no retained copy of the events on October 25, 2011.

On April 27, 2012, Petitioner's Counsel filed, and served by hand on Assistant State Attorney ("ASA"), Jacob McCrea, a Motion for Sanctions for Destruction/ Loss of Audio/ Video.

On April 27, 2012, Petitioner's Counsel filed, and served a Notice of Expiration of Speedy Trial ("NOEST") and Motion for Discharge on ASA, Jacob McCrea, by interoffice mail.

On May 7, 2012, the Court held a hearing on the NOEST in conjunction with prior motions for a continuance, which should be charged to the State. During the hearing the Court ordered that the two continuances be charged to the State, and that the NOEST was timely filed, and bound the Court to hold Petitioner's trial within 15 days of the NOEST, which was docketed by the Clerk on April 30, 2012. Petitioner's trial was moved from May 15 to May 14, 2012 to comply with Rule 3.191(p)(3), Fla.R.Crim.P.

On May 11, 2012, Petitioner's Counsel filed an emergency motion seeking to withdraw from Petitioner's case due to a conflict of interest. The Court granted the motion and appointed the Office of the Regional Conflict Counsel, Mr. Allen Bushnell, to represent Petitioner.

On May 14, 2012, Petitioner's Counsel, Mr. Bushnell, sought a continuance, and asked the Court to charge it to the State. The Court charged the continuance to Petitioner.

On May 30, 2012, the State filed an amended information charging Armed Home Invasion Robbery in violation of

§812.135(2)(a), FS. On June 13, 2012, a further amended information was filed this time charging Home Invasion Robbery with a Firearm and Concealment of the Face with a Mask or Clothing in violation of §812.135(2)(a) and §775.0845, FS.

Trial

On June 18, 2012, Petitioner's trial commenced, and on June 20, 2012, his trial concluded with the Jury finding him guilty as charged of Home Invasion Robbery with special findings that Petitioner as a principal or co-defendant was armed with a deadly weapon (firearm), and that he concealed his face with a mask. Petitioner was sentenced to life as a PRR.

Appeal

On July 13, 2012, Petitioner appealed to the First District Court of Appeal ("DCA"), raising a single claim that the trial court fundamentally erred in instructing the jury on the law of principals. On March 5, 2013, the DCA *per curiam* affirmed, and on May 13, 2013, the DCA issued its mandate.

On August 29, 2013, Petitioner filed a petition for a Writ of *Habeas Corpus* in the First DCA alleging that his appellate counsel rendered ineffective assistance having failed to appeal the failure of the trial court to hold a Richardson hearing, and charging the continuance to the defense rather than the State.

The DCA denied the appeal on the premise of Baker v. State, 878 So.2d 1236 (Fla. 2004) (Petitioner cannot circumvent the application of Rule 3.850, Florida Rules of Criminal Procedure ("Fla.R.Crim.P.) See Prunty v. State, 121 So.3d 1161 (Fla. 1st DCA 2013)).The Florida Supreme Court denied review. Prunty v. State, 130 So.3d 693 (Fla. 2013).

Post-conviction Proceedings

On March 2, 2014, Petitioner filed his first motion for postconviction relief under Rule 3.850, Fla.R.Crim.P. Petitioner voluntarily dismissed the motion prior to a ruling on the merits, and filed an amended motion.

On November 19, 2014, the Postconviction Court dismissed both the March and the October 2014 motions without prejudice.

On February 12, 2015, Petitioner filed a Rule 3.850 motion, but on December 10, 2015 voluntarily dismissed the motion. Petitioner then filed an amended motion raising 21 claims.

On August 31, 2016, the Postconviction Court summarily denied Petitioner's claims in the December 10, 2015 motion. Petitioner appealed to the First DCA without filing a Brief.

On March 28, 2017, the First DCA *Per Curiam* affirmed the Postconviction Court's Order. On May 22, 2017, the First DCA issued its mandate.

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On July 12, 2016, Petitioner filed a Motion to Correct Sentencing Error, which, on September 6, 2016, was denied. Again, Petitioner appealed without filing a Brief, and on March 8, 2017, the First DCA *Per Curiam* affirmed. The DCA issued its mandate on May 4, 2017.

On May 2, 2017, pursuant to the mailbox rule, Petitioner, a prisoner in the custody of the Florida Department of Corrections, proceeding *pro se*, filed a petition for a Writ of *Habeas Corpus* and Supporting Memorandum, pursuant to 28 U.S.C. §2254 raising a total of seven claims; four claims of ineffective assistance of counsel based on counsel:

> (a) failing to file proper motion to suppress evidence,
> (b) failing to file proper motion for judgment of acquittal,
> (c) failing to file a motion for speedy trial, and
> (d) failing to file a motion for amendment to the information after the speedy trial period expired.

In addition, a further three claims of violations of his constitutional rights:

> (e) the trial court violated his 4th, 5th, 6th, and 14th Amendment rights by giving a jury instruction on elements not charged in the information,
> (f) his 4th, 5th, 6th, and 14th Amendment rights were violated when the State used hearsay and improper prosecutorial comments during trial and closing arguments after a

motion in limine had been filed prohibiting the use of jail calls and third-party testimony, and
(g) the State court proceedings were tantamount to a "Rubber Stamp" lacking substantive and procedural due process; court agreed and grant [] issues raised; however, accord/ afforded no relief, no evidentiary conclusive findings and no equal protection.

On April 30, 2018, Respondent filed her answer, and on June 28, 2018, Petitioner filed his reply with accompanying exhibits.

The Matter was referred to the United States Magistrate Judge, Charles A. Stampelos, for Report and Recommendation pursuant to 28 U.S.C. §636, and Northern District of Florida Local Rule 72.2(B).

On October 2, 2018, the U.S. Magistrate Judge recommended that the Court Deny Petitioner's §2254 petition. Further recommending that a Certificate of Appealability be denied along with leave to appeal *In Forma Pauperis*.

On March 20, 2019, Petitioner filed Objections to the Magistrate Judge's R&R, conceding to the magistrates R&R with respect to claims: [E] Due Process & IAOTC - Non Adversary Probable Cause Determination; Ground 2, Erroneous Principals Instruction; Improper Prosecutorial Comments; and Ground 4, Substantive and Procedural Due Process.

On April 2, 2019, United States Chief District Judge, Mark E. Walker, adopted over Appellant's Objections, as the Court's Opinion, the Magistrate Judge's R&R, denying Petitioner's 28 U.S.C. §2254 petition on the merits.

On May 1, 2019, Petitioner filed a Notice of Appeal, and moved the Circuit Court for a COA and leave to proceed *IFP*. In moving for a COA, Petitioner sought a COA on his IAOTC claim for failure to move to suppress evidence; his IAOTC Speedy Trial Claim; his IAOTC claim failing to move to prevent the filing of an amended Information after the speedy trial time had elapsed; and his IAOTC claim that Counsel failed to object to inadmissible hearsay.

On October 7, 2019, U.S. Circuit Judge, William H. Pryor Jr., Denied Petitioner a COA and leave to proceed *IFP*.

The Circuit Court's Denial of a COA

In denying Petitioner a COA and leave to proceed *IFP*, U.S. Circuit Court Judge, William H. Pryor Jr., stated:

> To merit a certificate of appealability, Prunty must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478 (2000). Because Prunty has failed to make the requisite showing, his motion for a [COA] is DENIED.

Motion for Reconsideration

On October 22, 2019, Petitioner moved for reconsideration of the Circuit Court's denial of his application for a COA and leave to proceed *IFP;* pointing out that the Court had incorrectly set a two-prong test (merits and procedure) to its consideration of Petitioner's application for a COA when his *habeas corpus* petition was not denied on procedural grounds.

Moreover, Petitioner sought reconsideration solely on his speedy trial IAOTC claims, and not only pointed out that a two-prong test was incorrectly applied, but reargued his speedy trial claims in light of the evidence exhibited to his motion.

On December 9, 2019, Circuit Judges William Pryor and Rosenbaum, denied petitioner's motion for reconsideration "because he has offered no new evidence or arguments of merit to warrant relief." The Order was unsigned.

FACTS UPON WHICH PETITIONER RELIES

28 U.S.C. §2254 Proceedings

On May 2, 2017, Petitioner filed his § 2254 *habeas corpus* petition, and on October 2, 2018, the Magistrate Judge, Charles A. Stampelos, recommended the Court deny on the merits, and not on procedural grounds, Petitioner's 28 U.S.C. § 2254 petition, a COA and leave to appeal *IFP*.

On March 20, 2019, following proper procedure, Petitioner filed Objections to the Magistrate Judge's R&R.

On April 2, 2019, United States Chief District Judge, Mark E. Walker, adopted over Appellant's Objections, as the Court's Opinion, the Magistrate Judge's R&R, denying Petitioner's 28 U.S.C. §2254 petition on the merits, and on May 1, 2019, Petitioner filed a Notice of Appeal, and moved the Eleventh Circuit Court for a COA and leave to proceed *IFP*.

On October 7, 2019, United State's Circuit Judge, William H. Pryor Jr., Denied Petitioner's motion for a COA, and leave to proceed *IFP*. Petitioner moved for reconsideration.

Motion for Reconsideration

Petitioner moved for reconsideration on the premise that the Circuit Court had incorrectly set a two-prong analysis (merits and procedure) to the consideration of his application for a COA, when Petitioner's 28 U.S.C. § 2254 petition was not denied on procedural grounds. Moreover, Petitioner moved the Court for a COA solely on his speedy trial arguments, presented new evidence to support his argument, in the form of exhibits, and reargued his speedy trial claims in light of this new evidence.

On December 9, 2019, however, Circuit Judges William Pryor and Rosenbaum, denied petitioner's motion for reconsideration "because he has offered no new evidence or arguments of merit to warrant relief." The Order was unsigned.

Accordingly, Petitioner seeks *certiorari* review in this Court to determine if the Eleventh Circuit correctly applied a two-prong test, Slack v. McDaniel, *supra* at 478, when his 28 U.S.C. § 2254 petition was denied solely on the merits.

THE QUESTION PRESENTED

ARGUMENT

DID THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERR WHEN APPLYING THE TWO PRONG SLACK V. MCDANIEL, TEST (PROCEDURE AND MERITS) IN DETERMINING THE GRANT OR DENIAL OF A CERTIFICATE OF APPEALABILITY WHEN THE PROCEDURAL ASPECTS OF PETITIONER'S 28 U.S.C. § 2254 PETITION WERE NEVER IN ISSUE; THEREBY, DENYING PETITIONER DUE PROCESS OF LAW?

The question before this Court is a simple one, and is one of great public importance, should the Eleventh Circuit Court of Appeals considered the issuance of a COA in Petitioner's application, under a two-prong test, Slack v. McDaniel, *supra* at 478, when his § 2254 *habeas corpus* petition was not denied on procedural grounds, but solely on the merits.

Reasons for Reconsideration — Procedural Issues

Firstly, the Eleventh Circuit Court's reliance on Slack v. McDaniel, *supra* at 478, wherein Petitioner must overcome a two-prong hurdle for the issuance of a COA, was in the circumstances a misapplication of Slack v. McDaniel; primarily, because Petitioner's § 2254 petition was denied by the District Court based on the Magistrate's R&R, which was not based on procedural grounds, but instead on the merits.

Petitioner moved for a COA on several issues, none of which concerned a denial on procedural grounds. Therefore, for the Eleventh Circuit Court to apply the two-prong test, Slack v. McDaniel, *supra* at 478, was a misapplication of the law. In the instant case the Eleventh Circuit should have been guided by Slack v. McDaniel, *supra* at 484:

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. (Emphasis added.)
>
> The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds. We hold as follows:
>
> > When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying

> constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Petitioner, moved for a COA on claims, which were dismissed on the merits, and not on procedural grounds. Not the State Postconviction Court, the State Appeal Court, nor the Federal District Court denied Petitioner's claims on procedural grounds.

Therefore, for the Eleventh Circuit to apply a two-prong test based on Slack v. McDaniel, *supra* at 478, was a misapplication of the law. Petitioner's motion for a COA should have been reconsidered on this very basis alone. Slack v. McDaniel, *supra* at 484.

Reasons for Reconsideration — Issues of Merit

Petitioner was not obliged to show that his appeal would succeed. Barefoot v. Estelle, 463 U.S. 880, 893 (1983). It was unnecessary for Petitioner to show that some jurists would grant his petition. Moreover, the Circuit Court should not have denied a COA merely because it believed Petitioner's ineffective assistance of counsel claims did not demonstrate an entitlement to relief. Miller-El v. Cockrell, 537 U.S. 322 (2003)

The Narrow Question

This Court is asked to resolve the narrow question of whether or not the two-prong test enunciated in Slack v. McDaniel, *supra*, should be applied to an appellant/ petitioner who was not denied on procedural grounds, but rather on the merits of his underlying claims.

REASONS FOR GRANTING THE PETITION

This Court should resolve the very narrow question presented herein, which is of great public importance, in favour of Petitioner because the misapplication of a legal standard amounts to a denial of due process.

Clearly, when applying the incorrect legal standard enunciated by this Court in Slack v. McDaniel, *supra*, the Eleventh Circuit denied Petitioner the due process of law by entering an improper determination, which was in conflict with the decision of this Court, departing from the accepted and usual course of judicial proceedings, and requires this Court to exercise its supervisory power.

Consequently, this Court's failure to correct the misapplication, by the Eleventh Circuit, of the legal standard set by it, in Slack v. McDaniel, *supra*, would result in the denial of due process to § 2254 petitioners in that Circuit.

CONCLUSION

This Court should issue a writ of *certiorari* instructing the Eleventh Circuit to determine Petitioner's application for a Certificate of Appealability and leave to proceed *In Forma Pauperis* based on the correct standard of review.

Respectfully,

/s/ Larry R. Prunty
Larry Rashone Prunty
DC #818067
Pro Se

UNNOTARIZED OATH

I, Larry Rashone Prunty, HEREBY CERTIFY, under the penalties of perjury and administrative sanctions from the Florida Department of Corrections, including the forfeiture of gain time, if this petition is found to be frivolous or made in bad faith, that the facts in the foregoing petition are true and correct, and that I have a reasonable belief that the petition is timely filed. I further certify that I understand the English language, and that I have read the foregoing petition.

Respectfully,

/s/ Larry R. Prunty
Larry Rashone Prunty
DC #818067
Pro Se