NO. 19-8207

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID DWAYNE BROWN —PETITIONER

VS.

MARK S. INCH —RESPONDENT(S)

ON PETITION FOR A WRIT OF HABEAS CORPUS TO

THIRD DISTRICT COURT OF APPEAL, FLORIDA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF HABEAS CORPUS

DAVID DWAYNE BROWN #180307

FLORIDA STATE PRISON P.O. BOX 800

Raiford, Florida, 32083

SUPREME COURT OF THE UNITED STATES
Case No.: _____

In re: David Dwayne Brown,
***Pro Se*, Petitioner**

L/T Case No: F03-21018A

PETITION FOR WIT OF HABEAS CORPUS

Petitioner, David Brown pursuant to 28 U.S.C. §2254, §2241, and §2242 files his Petition for an extraordinary Writ of Habeas Corpus as an original matter:

I. Question(s) for Review:

The issue(s) presented is based on a claim of actual innocence, supported by newly discovered evidence, the new evidence is not proffered as a "freestanding" claim, but proffered as a "gateway" claim entitling him to a *de novo* review of the merits of Petitioner's defaulted Constitutional claims, *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

II. List of Parties:

All parties are [redacted] listed in the caption of the case in the cover page. The Respondant in this case is:

Mark S. Inch, Secretary, Florida Dept. of Corrections.

III. Table of Authorities

Other Rules / Statutes

Constitution Provision(s)

IV. Table of Contents:

INDEX TO APPENDICES

Appx. K - Florida Supreme Court order November 21, 2019, Case # SC19-1565.

Appx. L - Affidavit of Hurley Lee Brown DC # 402730.

Appx. M - Affidavit of Tarron K. Brown DC # M14318.

Appx. N - Sworn Statement of Collies J. Robinson.

Appx. O - Affidavit of Victim Lawrence Wade

Appx. P - Police Narrative of Petitioner's Alibi.

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a Writ of Habeas Corpus issue to review the judgment below.

Opinions Below

For Cases from State Courts:

The Opinions of the Highest State Court to review the merits appears at Appendix A-F; H-I to the Petition and is unpublished.

The Opinions of the State Supreme Court appears at Appendix J and K to the Petition and is unpublished.

Jurisdiction

For Cases from State Courts:

The date one which the Highest State Court decided my case was June 14th, 2019, a copy of that decision appears at Appendix I.

A timely Petition for rehearing was thereafter denied on the following date: November 21st, 2019 and a copy of that order appears at Appendix K.

Constitutional and Statutory Provisions Involved

United States Constitutional Amendment VI: In all Criminal Prosecutions, the accused shall... have the Assistance of Counsel for his Defense.

United States Constitutional Amendment XIV: All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the united States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the 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 its jurisdiction the equal protection of the law.

Florida Statutes:

s. 90.404(2)(a), Fla. Stat. (2004)

s. 90.84(2)(c), Fla. Stat. (2018)

Reason for not making Application to District Court of the District Petitioner is held §2242

The reason for not making application to the District Court Petitioner is held, is because Petitioner cannot obtain approval VIA §2244 application from the United States Court of Appeals, Eleventh Circuit to file a Second / Successive Habeas Petition.

Relief Sought

Relief sought is from the judgment of a state court, applicant seeks evidentiary hearing to develop the facts to aid the court in an equitable ruling.

IV. Exhausted Remedies 28 U.S.C. §2254 (b)

1. On October 19, 2018, petitioner filed habeas petition asserting actual innocence based on newly discovered evidence in Florida's Third District Court of Appeal in case no: 3D18-2157. (Appx. A)

2. On October 29, 2018, state appellate court on its own motion, transferred habeas petition to state trial court with instructions to appoint counsel for petitioner limited to the issues raised in petition, and to treat petition as if filed in trial court, on October 19, 2018. Appointed counsel shall within a reasonable time (not to exceed (90) ninety days) amend or adopt the existing petition so trial court may rule upon it. (Appx. B)

3. On March 13th, 2019, state appellate court denied petition to order trial court to rule on habeas petition within (30) days, then held the petition is stricken pursuant to the opinion in *Brown v. State*, 229 So.3d 415 (Fla. 3DCA 2017), barring further pro se pleadings, not disclosed by petitioner to this court in this case. (Appx. C)

4. On April 22, 2019, state appellate court ordered State of Florida to file status report in this cause within ten (10) days of the order, including inquiry as to whether petitioner is represented by court appointed counsel in accordance with court's order of October 29, 2018. (Appx. D)

5. On May 1, 2019, State of Florida responded to the court's April 22,2019 order.

(Appx. E)

6. On May 7, 2019, State of Florida supplemented its response to appellate court's order of April 22, 2019. (Appx. F)

7. On May 17, 2019, United States Court of Appeals, Eleventh Circuit, denied leave to file second habeas petition. (Appx. G)

8. On June 5, 2019, petitioner filed pro se petition for enforcement of appellate court's order of October 29, 2018 in state appellate court. (Appx. H)

9. On June 14, 2019, state appellate court held, "pro se petition for enforcement of order of October 29, 2018 is unauthorized." (Appx. I)

10. On September 4, 2019, pro se petition for writ of habeas corpus filed in State Supreme Court presenting new evidence supporting actual innocent claim. (Appx. J)

11. On November 21, 2019, state Supreme Court in case #SC19-1565 dismissed pro se habeas petition holding, "relief is unauthorized and declined rehearing." (Appx. K)

V. Exceptional Circumstances warranting the Court's discretionary powers

Petitioner new evidence in support of his actual innocence is not being proffered as a "freestanding" claim. The new evidence is being proffered as a "gateway" claim so the court may review the merits of his defaulted constitutional violations that ocurred in trial, see Schlup v. Delo, 513 U.S. 298 (1995).

Petitioner can establish a showing by the preponderance of the evidence he is actually innocent under the manifest injustice standard.

1. New evidence: Affidavit of Hurley L. Brown #402730

On May 9, 2017, inmate Hurley L. Brown #402730, while housed at Florida State Prison (FSP), wrote a affidavit fixing his thumb print to it and stated, "while in a holding cell at Medical, he heard a inmate he never saw before telling another inmate about the case he was in prison for. When David Brown's name was mentioned, Hurley Brown asked was David Brown from Miami, and do they call him Dabo?" The inmate who was doing all the talking said, "yes, Dabo is my co-defendant, even though he didn't have anything to do with the murders. But I would help Dabo, but not until I see if I could get out, if I can't then I'll free Dabo." The inmate said he was from Miami, and Hurley Brown found out his name was "Kojack." Hurley Brown gave Kojack's physical description. (see Appx. L)

2. Affidavit of Taronn K. Brown #M14318

In August 2017, petitioner received mail from "Trust in God Ministry" via U.S. Mail. Enclosed was among other things an affidavit wrote by Taronn K. Brown, (see Appx. M). Taronn averred that in May of 2017, while housed at FSP in the same unit with Collies Robinson "Kojack"' Mr. Robinson sought legal help from Taronn. Robinson told Taronn in a braggardly manner about his case in detail, how he and his true partner "Ahmed Jones (Jones) committed the murders at a house on 19th Avenue and 49th Street in Miami, Florida back in July 2003. Robinson did so hoping Taronn could help him get his confession thrown out.

Robinson ultimately told Taronn among many details of how the crime was

committed and weapons used, that he initially confessed and implicated petitioner to protect Jones. But told police everything he said was "false" and a "lie". Taronn went on to describe further conversation with Robinson, how Robinson said, "petitioner was falsely convicted for the crime, because petitioner was not involved in the murders, and Jones was his partner, but he would eventually help petitioner get out of prison, but not until he himself was sure he had no way out of prison". (see Appx. N)

B. Habeas Review of Claims of Constitutional Error

Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as a bulwark against convictions that violates fundamental fairness, *Engle v. Isaac*, 456 U.S. 107, 126 (1982).

Petitioner's habeas petition for relief turns on the application of the manifest injustice standard to his claim of actual innocence. The exceptional circumstances surrounding petitioner's actual innocence claim acts as a "gateway" that entitles him to review on the merits of the defaulted constitutional claim(s) that occurred at trial.

Petitioner's asserting claims of actual innocence as a gateway, must establish that it is more than likely than not that no reasonable juror would have convicted him in light of the new evidence, *Schlup*, 513 U.S. at 327

In reviewing a claim of actual innocence, the habeas reviewing court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial. Id at 327-328.

C. The habeas court consideration of all evidence.

Petitioner's conviction was based primarily on the testimony of three convicted felons, who were all under the influence of alcohol, marijuana, and crack/cocaine at the time of the incident. The only surviving victim Mr. Wade has recanted his previous out of court identification of petitioner (Appx. O). Mr. Mathis testified, "Petitioner entered the yard smoking a Newport cigarette before grabbing the gun" (Tr. p.515-516; 518-519 6/8/04). The State of Florida argued," The guy who did this was smoking a cigarette according to Mathis." (Tr. p.919 6/14/04). However, the DNA evidence show "NONE" of the petitioner's DNA matched the DNA found on the cigarette and cigar filters found at scene. (Tr. p.738-740 6/9/04).

Mr. Aquamina testified, "Petitioner was the person he saw on the night in question" (Tr. p.337-338 6/7/04). However, Aquamina could not pick petitioner's photo out of a photo lineup but was ~~to~~ told by police to pick petitioner's photo. (Tr. p.365-366; 389-390; 392 6/7/04). Aquamina could not give a clothing description of what petitioner was wearing on the night in question. (Tr. p. 368-369 6/7/04). State prosecutor conceded there is no evidence to contradict police told Aquamina to pick petitioner's photo (Tr. p.925 6/14/04). Aquamina "never" gave a courtroom identification of petitioner (Tr. p.926 6/14/04).

Mr. Evans testified, "He saw petitioner enter the yard, grab the AK-47, and ultimately shoot the victim who was on the ground in the middle of the west yard, while fighting the other victim". (Tr. p.805-813; 819-820 6/11/04). The direct evidence from

Officer Chavez show victim #1 was on the ground in the middle of the west yard, and victim #2 was on the ground in the southwest corner of the yard, 33 feet from victim #1. (Tr. p.440; 445; 463 6/7/04). The medical evidence show victim #1 death was caused by a shotgun (Tr. p. 578 6/8/04), and the victim #2 his death was caused by multiple shots consistent with a high-powered rifle such as a A.K. 47 (Tr. p.587; p.594-596 6/8/04). The M.E. discussed ~~tow~~ two of victim #2 wounds, one to his spinal cord, likely paralyzing him, causing the voluntary loss of his legs (Tr. p.596 6/8/04), and one wound to his cheek, the bullet passing through his brain (Tr. p.599 6/8/04), stating he would not have moved again, this wound was immediately fatal. Based on this evidence, it would have been humanly impossible for victim #2, to have been shot with the A.K. 47 where Evans said he was, the middle of the west yard ground, move 33 feet to the southwest corner of the yard. Evans also replied "yes" to police questions of another person name "Duval" was the person who came back and grabbed the gun. (Tr. p.824 6/11/04) (Evans sworn statement p.15).

DNA evidence supported "none" of Petitioner's DNA was found under the victim's fingernails (Tr. p.740-743 6/9/04). DNA evidence supported "no serological or biological" evidence was found on the items taken from Petitioner's car (Tr. p.735-736 6/9/04). Forensic evidence supported "none" of Petitioner's fingerprints was found at the scene, nor on any evidence recovered at the scene (Tr. p.785-787 6/11/04).
The only physical evidence linking Petitioner to the scene was his hat with his DNA in it found out in the yard. (Tr. p.732-733 6/9/04). However, there was no direct evidence

provided that the perpetrator had on a hat (Tr. p.368-369 6/7/04; 829 6/11/04). There was no direct evidence when the hat was placed on this location or how it came to be found in its location. see *Ballard v. State*, 923 So.2d 475, 483 (Fla.2006) (held the evidence was insufficient to sustain Ballard's conviction, we noted the lack of direct evidence from the state... showing when the hair and print were left or how they came to be left in their location). Moreover, there was direct evidence this was Petitioner's regular hangout, and he was at the location the day prior to the shootings where they all had their chairs out in the same yard his hat was found, playing cards, talking and chilling (Tr. p.502-503 6/8/04).

The DNA, Forensic, and Medical Evidence Petitioner has shown, when taken in conjunction with the affidavits of Mr. Wade, H.L. Brown's, and T. Browns has made a persuasive showing that no reasonable juror would have convicted him in light of such evidence, requiring a de novo review of the merits of his constitutionally barred claims. Also, petitioner asserts this new evidence was not known to him, Gaer or the court at the time of trial, and could not have been known by him or Gaer by diligence because Robinson committed a Bruton violation, see *Bruton v. United States, 391 U.S.* 123 (1968), 88 S. Ct. 1620, and Robinson invoked his right to silence when police interviewed him about his statements about petitioner. See *Henyard v. State,* 992 So.2d 120, 126 n.3 (Fla. 2008) (A declarant who asserts the Fifth Amendment right against self-incrimination is "unavailable"). The new evidence would probably produce an acquittal on retrial. *Jones v. State*, 591 So.2d 911 (Fla. 1991); s. 90.804 (2)(c), Fla. State.

(2018); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

VI

Statement of Case

A. Presentation of Constitutional barred claims

Petitioner is entitled to the issuance of a writ of habeas corpus discharging him from the first-degree murder convictions and sentences because the violation of his protected autonomy right ranks as error called "structural". The violation of petitioner's Sixth Amendment secured autonomy was complete when Gaer usurp control of an issue within petitioner's sole prerogative. Also, Gaer was ineffective in misadvising petitioner about testifying in violation of Florida and United States Constitutions.

1. Petitioner asserts that his autonomy to choose the objective for his defense is to maintain his innocence is a fundamental right, and defense counsel Gaer negated his autonomy by overriding his objective for his defense violating Sixth and Fourteenth Amendments of U.S. Constitution.

In *McCoy v. Louisiana*, 584 U.S. ___ (Slip op. at 1-13), the court held that a defendant has the right to insist that counsel refrain from admitting guilt... Guaranteeing a defendant the right "to have the Assistance of Counsel for his defense," the Sixth Amendment so demands. With individual liberty-and, in capital cases, life-at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense. *McCoy*, 584 U.S. at ___ (Slip op. 1-2).

Unlike McCoy, the death penalty was waived in this case, however, the reasoning in McCoy is applicable and persuasive in this case. Seymour Gaer (Gaer) became lead

counsel in October 2003, petitioner informed Gaer that "he was not involved in the murders, he was not present when the murders occurred, he was home at the time the murders occurred, his sister Elizabeth Ricketts[1] came over to his home between 10:30p.m. and 11:30p.m., to help out with cooking and cleaning due to his back injury. After helping out, they sat around talking until about 1:00a.m." Petitioner informed Gaer he gave the same alibi to police (see Exhibit (P)), and that he was not involved in the murders. Petitioner informed Gaer that this is the position he is taking and wish to pursue an acquittal under mis-identification defense because he was not involved in the murders, nor present during the murders, and gave Gaer Mrs. Ricketts contact information.

[1]Mrs. Ricketts passed away in 2009.

In March 2004, the defense demanded a speedy trial. on April 26, 2004, the defense moved to suppress petitioner's statement to police that he was the middle man in a drug transaction between the victims and the drug supplier. (Tr. p.1-44 4/26/04). During the motion to suppress hearing, the police consistently verified petitioner denied being present during the murders or involved in the murders on both direct and cross examination:

[State] Q: Okay. what about at the time of the Murders?

[Police] A: He stated he was there earlier that evening, on the 20th, which was Sunday, asking for the money. But then left and never returned. So he was not present during the time of the murders.

Q: He denied involvement in the murders, correct?

A: That is correct.

Q: He denied being even present at the time of the murders?

A: That is correct. (Tr. p.14 4/26/04).

[Gaer] Q: "...what I'm simply asking you is, he then gave you a statement claiming, in essence, that he wasn't there, true?"

A: Yes. (Tr. p.17 4/26/04);

The court in denying the motion to suppress stated, "I think that officer Gunnels was very honest and straightforward. She said the defendant told me he was not present at the time of the murders..." (Tr. p.43 4/26/04). Trial commenced on May 3, 2004, at which time Gaer representing petitioner's objective for his defense to the court, informed the court, "My client has maintained his innocence since the day he said not guilty". (Tr. p.61 5/3/04).

On May 17, 2004, it was revealed that Gaer entered a "not guilty" plea on petitioner's behalf to the new indictment from December 2003, in petitioner's absence, (Tr p.901-903 5/17/04), but with petitioner present, the defense re-pleaded not guilty (Tr. p.904 5/17/04). On May 20, 2004, the state informed the court, the indictment is defected, and petitioner needs to be re-indicted. On May 25, 2004, petitioner was re-indicted, the death penalty was waived, and trial was set to re-start June 1, 2004. Prior to June 2004 trial starting, Gaer informed petitioner, he was still maintaining his innocence, he was not involved in the murders or present during the murders at the June 2004 trial,

and pursuing an acquittal under mis-identification defense."

Then on June 7, 2004, Gaer conceded petitioner's involvement in the murders, when petitioner denied any involvement, and maintained his innocence, by telling the jury, "What the evidence will show is that Nathan Mathis is there, he ends up on the roof, lifts up his head and what does he see? He sees David Brown, Eric Williams, and Edward Bernard fighting over the gun. That is what he see." (Tr. p.311-312 6/7/04). But Mathis denied ever seeing petitioner and the victims fighting over the gun while on the roof. (Tr. p.523-524; 526-527 6/8/04). This was the same gun the state argued petitioner killed Mr. Williams with. (Tr. p.913 6/14/04).

In *Florida v. Nixon*, 543 U.S. 175 (2004), the court repeatedly and firmly based its holding on the premise that Corin had (and met) an affirmative duty to consult with his client, see id. at 181 ("Corin attempted to explain this strategy to Nixon at least three times"); id. at 189 ("Corin was also obliged to, and in fact several times did, explain his proposed trial strategy to Nixon"). But this insistence only makes sense if one first assumes the defendant's agency can shape the outcome. If Gaer, being made fully aware through discovery, the motion to suppress hearing, and petitioner, that he was not involved in the murders nor present during the murders, and has maintained his innocence since the day he said not guilty, can overrule petitioner's informed and final decision without consulting petitioner about the trial strategy to concede his involvement in the murders, so Gaer can later argue self-defense, whence the need for such substantial consultation? At best, the duty to consult would be reduced to no duty to

consult. But see *Strickland*, 466 U.S. at 688 (separately discussing the duties "to consult with the defendant on important decisions" and "to keep defendant informed of important developments in the course of the prosecution").

Because Gaer never consulted petitioner about the trial strategy to concede his involvement in the murders, petitioner's silence must not count against him as a tacit consent. He could not consent to the strategy. It was for Gaer to tell him about, prior to implementing it because this guilt-based defense is the equivalent to a guilty plea, and requires express consent by Brown before following its course, see *Brookhart v. Janis*, 384 U.S. 1,7 (1966) (holds that express consent is necessary for decisions that are "equivalent of a guilty plea"). Here in this case, the only reason that Brown became aware of the self-defense part of Gaer's strategy was because there were discussions with the trial court about Brown perhaps needing to testify in order to put self-defense into issue. (Tr. p.752-762 6/11/04). At which time Brown objected, after it was made known to him, then the following occurred:

Gaer: [To Court] "number two is my client wishes to have self-defense instruction stricken from the instruction. Since 'I" asked for it... and "I" requested it... I think I have the right to ask it to be withdrawn." (Tr. p.839 6/11/04).

The Court: [To Brown} "Gaer has indicated to me that you don't want the instruction on self-defense given, is that correct?"

Brown: "Yes."

The Court: "So if you understand that if I take out the justifiable use of deadly force

instruction... Gaer cannot argue self-defense to the jury?"

Brown: "Yes, indicating he understood."

The Court: "You don't want that in?"

Brown: "No." (Tr. p.841-842 6/11/04).

Viewing Gaer's conduct to concede Brown's involvement in the murders so he could later argue it was self-defense without consulting Brown and obtaining consent, as part of a trial strategy or tactic, is to ignore the obvious. By such conduct Gaer was betraying Brown by deliberately overriding Brown's plea of not guilty. Self-defense is an affirmative defense to first-degree murder, and affirmative defenses does not concern itself with elements of the offense at all; it concedes them. see *State v. Cohen*, 568 So.2d 49, 51-52 (Fla.1990) (An affirmative defense does not concern itself with the elements of the offense at all; it concedes them). Therefore, since the affirmative defense of self-defense "concedes" the elements of murder, its function is the "equivalent of a guilty plea", requiring Brown's express consent prior to Gaer admitting brown's involvement in the murders over his denial of any involvement. see *McCoy* 584 U.S. at ___ (Slip op., at 5) (State *v. Carter*, 270 Kan. 426, 440 (2000) (Counsels admission of client's involvement in murder when client maintained his innocence contravened Sixth Amendment right to counsel and due process right to a fair trial.).

Brown relies rather heavily on cases involving the right of a criminal defendant to self-representation to support Gaer violated his autonomy. see *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Faretta v. California*, 422 U.S. 806 (1975). Brown's contention is that

the express and implied constitutional guarantees that add up to an accused's right to manage and conduct his or her own criminal defense require this court to hold that Gaer's confounding Brown's defense position requires reversal of the judgment. In *Faretta*, the Supreme Court spoke to the rights of a defendant under the Sixth Amendment, stating:

"The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It ~~has~~ is the accused, not counsel, who must be "confronted with witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." "422 U.S., at819.

In *Treece v. State*, 313 Md. 665 (1988), a long line of lower court decisions was overturn[ed] when the appellate court held, "that a criminal defendant who is competent is entitled to decide whether to assert the defense of lack of criminal responsibility." The rationale of earlier cases had been that counsel has full say to make tactical decisions. It was decided the rationale in *Faretta*, instead, should govern and should shift authority for the decision whether to assert an insanity defense from counsel to defendant. In *Faretta*, the Supreme Court held that a criminal defendant who intelligently and voluntarily choose to represent himself or herself cannot be compelled to be represented by counsel. The Maryland court observed:

"The court recognized the importance of counsel to a fair trial; it affirmed the right of every defendant, rich or poor, to the assistance of counsel; but it held, "that a defendant

who intelligently and voluntarily chooses to represent himself cannot be compelled to be represented by counsel." *Treece*, 313 Md. at 673-674 (quoting *Faretta*, 422U.S., at 834).

Although the issue is not the same, the above reasoning is applicable and persuasive in Brown's case. Brown denied any part in the charged offenses. In statements to the jury, Gaer conceded Brown's involvement in the murders because Gaer was presenting self-defense. In other words, with Brown charged alternatively with premeditated first-degree murder or felony murder, Gaer's strategy was to direct the jurors toward Brown committed the charged offenses in self-defense rather than in premeditation. There was no defense evidence; the State's evidence placed Brown in the midst of the murders and identified him as the shooter.

With individual liberty-and, in capital cases, life-at stake, it was Brown's prerogative, not Gaer's, to decide on the objective of his own defense. Brown decided that objective for his defense prior to demanding a speedy trial where he expressly told Gaer, "he was not at scene at the time of the killings of his friends, he is innocent, and wants to pursue an acquittal under misidentification defense". At that point, Gaer had no right to overrule Brown's protected autonomy and concede Brown's involvement in the murders, so he could later argue Brown acted in self-defense. (Tr. p.311-312 6/7/04). Moreover, the evidence from Mathis contradicted what Gaer told the jury in opening statements the evidence would show he saw while on the roof during the incident. (Tr. p.523-524; p.526-527 6/8/04).

The decision to plead guilty or not guilty is a fundamental constitutional right

guaranteed to Brown. Brown's choice to plead not guilty required the state to prove guilt beyond a reasonable doubt. However, when Gaer conceded Brown's involvement in the murders against Brown's wishes, in order to gain Florida Standard Jury Instruction 3.04, so he could argue self-defense, Gaer relieved the State of that burden. Under this jury instruction, self-defense results in a tacit admission that Brown committed the murders but suggest to the jury there exists a legal excuse for Brown's conduct. see *Smith v. State*, 698 So.2d 632, 633 (Fla. 2d DCA 1997).

Violation of Brown's protected autonomy was complete when Gaer usurp control of Brown's autonomy to decide the objective of "his defense." It is irrelevant whether Gaer provided effective representation following the violation of Brown's autonomy. Brown argued his autonomy claim on incorrect grounds, that is, "Gaer's failure to investigate self-defense" in the Eleventh Judicial Circuit Court in Miami-Dade, Florida and the United States District Court, Southern District of Florida. Despite incorrect grounds, both courts, acting as gatekeepers with plenary knowledge of the law chose not to address Brown's claim as a clear claim sounding autonomy, but decided Brown's autonomy under ineffective assistance of counsel standard and not the autonomy framework.

Brown's concerns implicated his constitutional rights related to fundamental choices. Trial court not only failed to evaluate Gaer's decision after inquiring into the details of the dispute over the self-defense instruction, it also failed to assess whether any improper actions had already resulted in a constitutional violation, see Bergerud,

223 p.3d at 706 (Colo.2010) (...where the defendant's concerns implicated his constitutional rights to his authority over related fundamental choices, a trial court {must} inquire the details of the dispute in order to evaluate the attorney's decision. It [must] assess whether any improper actions have already resulted in a constitutional violation...). had trial court done the latter assessment, it would have discovered that Gaer never consulted Brown and obtained consent to override Brown's autonomy, before admitting Brown was involved in the murders; trial court would have discovered Brown denied any involvement in the murders since day one of pleading not guilty, and wanted Gaer to pursue an acquittal under mis-identification defense. Trial court would have found that, had Brown knew of Gaer's plan to admit his involvement in the murders, Brown would have objected just like he did upon learning about Gaer's plan to argue self-defense.

Gaer knew of Brown's complet[e] oppos[ition] to telling the jury anything other than, "he was not present at scene at the time of the killings of his friends, and this is a case of mis-identification by three convicted felons who were all under the influence of alcohol, marijuana, and crack/cocaine for more than four hours prior to the incident, because Brown constantly told Gaer so." Still with no knowledge that Gaer had admitted to the jury in opening statements that he was involved in the murders, Brown pressed Gaer at closing arguments to ask questions from mis-identification defense, but Gaer refused and told the court, "My client wants me to ask questions from misidentification to I don't know what else". (Tr p.882 6/14/04). The Court told Gaer to look at Brown's

questions, see if any are legal and proper. If they are questions that you can work into your argument you do that." Gaer replied, "I can't do this... judge, let me just go on. I can't take this." (Tr. p.882-883 6/14/04). The Court replied, "You have the right to make a tactical decision on what defense to present... that's why you are counsel on the case." (Tr. p.884 6/14/04).

Gaer's overall conduct in overriding Brown's desired defense objective violated Brown's constitutional right to make the fundamental decision regarding his case. see *McCoy*, 584 U.S. at ___ (slip op., at 5) (citing *Cook v. State*, 977 A.2d 803, 842-846 (Del. 2009) (held counsel's pursuit of a "guilty but mentally ill" verdict over the defendant's "vociferous and repeated protestations' of innocence violated defendant's constitutional right to make the fundamental decision regarding his case).

The Sixth Amendment guaranteed Brown "the Assistance of counsel for his defense." see *Faretta v. California*, 422 U.S. 806, 823 (1975). The Supreme Court of the United States explained, "[t]he right to defend is personal," and a defendant's choice in exercising that right "must be honored out of "that respect for the individual which is the lifeblood of the law"." ibid. (citing *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970). The choice is not all or nothing: to gain assistance, Brown needed not surrender control entirely to Gaer. For the Sixth Amendment, in "granting Brown personally the right to make his defense," "speaks of the "assistance" of counsel, and an assistant, however the expert, is still an assistant.' *Faretta*, 422 U.S., at 819-820; see Gannett v. DePasquale, 443 U.S. 368, 382, n.10 (1979) (the Sixth Amendment "contemplate(s) a norm in which

the accused, and not a lawyer, is master of his own defense").

Trial management is the lawyer's province; counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to include regarding the admission of evidence". *Gonzalez v. United States*, 553 U.S. 242, 359 (20080 (internal quotation marks and citations omitted). Some decisions, however, are reserved for the client-notably, whether to plead guilty, waived the right to jury trial, testify in one's own behalf, and forgo an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category, thus, belongs to Brown. *McCoy*, 584 U.S., at ___ (Slip op. at 6).

Just as Brown may steadfastly refuse to plead guilty, so may he insist on maintaining his innocence in a run-of-the-mill trial where his individual liberty is at stake. These are not strategic choices about how best to achieve Brown's objectives; they are choices about what brown's objectives in fact are. see *weaver v. Massachusetts*, 582 U.S. ___, ___ (2017) (Slip op., at 6) (self-representation will often increase the likelihood of an unfavorable outcome but "is based on the fundamental legal principal that a defendant must be allowed to make his own choices about the proper way to protect his own liberty"); *Martinez v. Court of Appeal of Cal.*; *Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) ("our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the state").

Gaer may have reasonably assessed a confession of guilt to the criminal acts because he was presenting self-defense as best suited to avoiding a First-degree murder conviction. But Brown did not share that objective. Brown wished to avoid, above all else, the opprobrium that came with admitting he killed his friends. It was for Brown to make the value judgment whether "to take a minuscule chance of not being convicted and spending a life in... prison"); Hashimoto, Resurrecting Autonomy: The Criminal Defendant's Right to Control the case, 90 B.U.L. Rev. 1147, 1178 (2010) (for some defendant's, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life... sentence"); cf. *Jae Lee v. united States*, 582 U.S. ___, ___ (2007), (Slip op., at 12) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certai[n]" conviction (emphasis deleted)).\

When Brown expressly asserted that the objective of "his defense" is to maintain innocence of the charged criminal acts, Gaer must abide by that objective and may not override it by conceding guilty to criminal acts because he was presenting self-defense. U.S. Const., Amdt. 6 (emphasis added); see ABA Model Rule of professional Conduct 1.2 (a) (2018) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation"). Gaer in any case, was required to discuss his developed trial strategy with Brown, see *Nixon*, 543 U.S., at178, explaining why, in his view, conceding guilt to the criminal acts would be the best option, he did not do so.

Brown was never given an opportunity by Gaer prior to opening statements to directly protest or consent to that concession strategy because Gaer never informed

Brown, and Brown never heard Gaer conceding his guilt at opening statements. However, because Gaer's concession strategy was part of Gaer's entire defense strategy, when brown objected to the self-defense part of that strategy, the objection covered Gaer's overall defense strategy, including the concession part of that strategy, even though brown was not made aware of the concession part of Gaer's strategy. Brown's objection to Gaer's strategy also served notice that he never consented to Gaer acting as a surrogate and waive his autonomy to decide the objective for his defense was to assert innocence. *Nixon*, 543 U.S., at 187; see also *McCoy*, 584 U.S. at ___ (slip op., at 6).

Florida v. Nixon, supra, is not to the contrary. Nixon's lawyer did not negate Nixon's autonomy by overriding Nixon's desire defense objective, for Nixon never asserted any such objective. Nixon "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested," counsel's proposed approach. 543 U.S., at 181. Nixon complained about the admission of guilt only after trial. Id., at 185.

Brown in contrast, had Gaer negate his autonomy by overriding Brown's desired defense objective to maintain he did not kill his friends. There were never any discussions about conceding Brown was the guy fighting both victims over the gun because Gaer was presenting self-defense. Brown did not wait until after trial to object to Gaer's trial strategy, this Brown did in open court (Tr. p.839; p.841-842 6/11/04).

See *McCoy*, 584 U.S., at ___ (Slip p., 9) (quoting Cooke, 977 A.2d, at 847) (distinguishing Nixon because, "[i]n stark contrast to the defendant's silence in that case,

Cooke repeatedly objected to his counsel's objective of obtaining a verdict of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty").

Had Brown declined to participate in his defense then Gaer would have been at liberty to guide the defense pursuant to the strategy he believed to be in brown's best interest. But Brown did participate in his defense, presenting Gaer with express statements of his will to maintain innocence, at which point Gaer was no longer at liberty to steer the ship the other way. *Gonzalez*, 553 U.S., at 254 (Action taken by counsel over his client's objections... has the effect of revoking counsel's agency with respect to the action in question).

Three other state Supreme Courts have addressed like conflicts. *People v. Bergerud*, 223 P.3d 686, 691; *Cooke*,997 A.2d, at 814; *Carter*, 270 Kan., at 429, 14 P.3d., at 1141.

These were not strategic disputes about whether to concede an element of a charged offense, they were intractable disagreements about the fundamental objective of the defendant's representations. For Brown, that objective was to maintain "He did not kill his friends," because he was home when the crime arose. (Tr. p.50; p.51; p.61 5/3/04). In this stark scenario, the majority of state courts of last resort have held that counsel may not admit his or her client's guilt of a charged crime over the client's intransigent objection to that admission.

Because Brown's autonomy, not Gaer's competence, is in issue, the ineffective-assistance-of-counsel jurisprudence, Strickland *v. Washington*, 466 U.S. 668 (1984), or

United States v. Chronic, 466 U.S. 648 (1984), must not be applied to Brown's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice, see *Strickland*, 466 U.S., at 692. Here, however, the violation of Brown's autonomy right was complete when Gaer usurp control of those basic trial rights given directly to Brown by the United States and the Florida Constitutions, then only to have the trial court reinforce Gaer's usurpation by telling Gaer, "You have the right to make a tactical decision on what defenc[e] to [p]resent... that's why you are counsel on the case." (Tr. p884 6/14/04). see *McCoy*, 584 U.S., at ___ (Slip op., at 11).

Violation of Brown's Sixth Amendment-secured autonomy ranks as error of the kind our Supreme Court of the United States decisions have called "structural; When present, such an error is not subject to harmless-error review. See e.g. *McKaskle v. Wiggins*, 465 U.S. 168, 177, n.8 (1984) (harmless-error analysis is inapplicable to deprivations of the self-representation right because the right is either respected or denied; its deprivation cannot be harmless); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (choice of counsel is structural); *Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (public trial is structural).

Structural error "affects the framework within which the trial proceeds,' as distinguished from a lapse of flaw that is "simply an error in the trial process itself.' *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). An error may be ranked structural, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interests," such as "the fundamental legal principal that a

defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U.S., at ___ (slip op., at 6) (citing *Faretta*, 422 U.S. at 834). An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as of a judge's failure to tell a jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt. 582 U.S. at ___ (Slip op. at 6-7) citing *Gonzalez-Lopez*, 548 U.S. at 149, n.4, and *Sullivan V. Louisiana*, 508 U.S. 275, 279 (1993)).

Under at least the first two rationales, when Gaer negated Brown's autonomy by overriding his desired defense objective to maintain he was not involved in the murders, structural error occurred. *McCoy*, 584 U.S. at ___ (Slip op., at 12) (*Cooke*, 977 A.2d at 849, counsel's override negated *Cooke's* decisions regarding his constitutional rights and created a structural defect in the proceedings as a whole). Gaer's admission of Brown's involvement in the murders against his wishes and without consulting Brown prior to doing so, blocked Brown's right to make the fundamental decisions about his own defense. And the effects of the admission were immeasurable because the jury was almost certainly swayed by Gaer's admission of Brown's involvement in the murders.

Brown's right to personally make his defense is the core concern of the Sixth Amendment and the chief issue relevant to this petition. Failure to protect Brown's autonomy would have dire consequences for the justice system as a whole. Once Brown communicated to Gaer that he did not kill his friends, and Gaer even plead Brown not

guilty in his absence (Tr. p. 902-904 5/17/04), to concede Brown's involvement in, the murders so he could later argue self-defense in incompatible with the Sixth Amendment. Because the error was structural, Brown must be afforded a new trial without any need first to show prejudice. *McCoy*, 584 U.S. at ___ (Slip op. at 12-13).

2. Gaer's misadvice to Brown about testifying, violated Sixth Amendment.

On June 11, 2004, Gaer advised Brown, "if he testified that he was home when this crime arose, and his sister was at his home between 10:30p.m. and 1:00a.m., the jury would automatically be advised of the specific nature of his prior felony convictions in order to show similarity and propensity to commit similar crimes of violence." (Tr. p.756-757 6/11/04).

Brown contends that because of this alleged erroneous advice from Gaer, he chose not to testify, and his decision not to testify was involuntary. Brown's claim is analogous to those case holding a defendant's reliance on erroneous advice renders a plea involuntary. *Montgomery v. State* 615 So.2d 226, 228 (Fla. 5th DCA 1993); *Tarpley v. State*, 566 So2d 914 (Fla. 2d DCA 1990).

The initial question is whether Brown was properly advised about the consequences of testifying. Under section 90.610, Florida Statutes, (2004), brown could have been impeached with a conviction for a crime punishable by death or imprisonment in excess of one year. Additionally, convictions for crimes involving dishonesty or false statements were admissible to attack Brown's credibility. *State v. Page*, 449 So.2d 813 (Fla. 1984).

However, unless Brown lied about his background, the jury is not advised of the specific nature of the crime, only that it involved a felony or a crime involving dishonesty or false statement. *Gore v. State*, 573 So.2d 87 (Fla. 3d DCA), rev. denied, 583 So2d 1035 (Fla. 1991). Depending on the court's vantage point, it will appear the general substance of Gaer's advice is correct, If brown had taken the stand, the jury could have heard that he had a criminal record and the nature of it is a felony or a crime involving dishonesty. If Brown had lied about his background, the jury could have found out about the specific nature of the offenses.

However, Gaer's advice that the jury would have been advised of the similarity of the crimes, and brown's propensity to commit similar crimes of violence are not accurate statements. First of all, the prosecution's presentation of similar fact evidence is generally not contingent on whether or not Brown took the stand. See §90.404 (2)(a), Fla. Stat. (2004); *Williams v. State*, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S. Ct. 102 (1959).

Therefore, because of the erroneous advice, brown avoided the witness stand to prevent the presentation of so-called Williams Rule evidence, *Simon v. State*, 47 So.3d 883, 885 (Fla. 3d DCA 2010) (held in addition to determining whether defendant voluntarily agreed with counsel not to testify, the court must also address whether counsel's advice not to testify was deficient because no reasonable attorney would give such advice.); *Strickland v. Washington*, 466 U.S. 668 (1984).

Reason(s) Relied On For Granting The Petition

Question 1: This Court should decide whether a state court of last resort failure to enforce its appellate order on state trial court for not ruling on pro se petition for writ of habeas corpus that presented actual innocence claim which was supported by newly discovered evidence, where newly discovered evidence was proffered as a "gateway" claim so the merits of constitutional barred claims may be reviewed, violated defendant's constitutional rights under the Equal protection clause and Due process clause of the Fourteenth Amendment?

(A) Florida's Third District Court of Appeal decision conflicts with relevant decisions of this Court and other state courts of last resort. see. Schlup v. Delo, 513 U.S. 298, 327 (1995); Hearns v. State, 54 So.3d 500 (Fla. 3d DCA 2010).

(B) The constitutional rights at issue are of fundamental importance and Florida's Third District Court of Appeal ruling runs contrary to the text and history of the rights that is guaranteed by the Fourteenth Amendment.

(C) Mr. Brown's case presents an excellent vehicle for the resolution of this important constitutional question.

Conclusion

Adequate relief in this cause cannot be obtained in any other form or from any other court because in state court, he has been barred from filing pro se pleadings, and United States Court of Appeals of the Eleventh Circuit, has not granted petitioner leave to file second or successive habeas petition.