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In the

SUPREME COURT OF THE UNITED STATES

October Term 2020

LAWRENCE JOEY SMITH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it objectionable for a prosecutor to argue to the jury that a lack of evidence does not give rise to a reasonable doubt?

2. Is the Eleventh Circuit correct when it sets up two classes of litigants on issues of certificates of appealability: first, those who take no active role in litigating the Eleventh Circuit's review of a denial of a COA and second, those who chose to actively highlight one or more specific areas that warrant special attention? The Eleventh Circuit treats the second group as having waived any argument they do not specifically raise even where it is clear the focus on one or more issues does not constitute a waiver by the litigant.

LIST OF PARTIES TO PROCEEDING

1. Lawrence Joey Smith, Defendant/Petitioner
2. State of Florida, Plaintiff, Respondent

CORPORATE DISCLOSURE STATEMENT

None

LIST OF RELATED PROCEEDINGS

State v. Smith, 6th Florida Judicial Circuit, Case Number 99-3110-CFA, Doc 1652, Judgement entered April 22, 2008.

Smith v. State, SC01-2103, Florida Supreme Court (January 29, 2004).

Smith v. State, 2D08-2681, Florida Second District Court of Appeal (January 27, 2010)

Smith v. State, 2D12-3494, Florida Second District Court of Appeal (May 3, 2013).

Smith v. Sec, Dept of Corrections, 8:13-cv-2260-T-36AEP, Middle District, Florida (March 25, 2020).

Smith v. Sec, Department of Corrections, 11th Circuit, 20-11369-A, January 7, 2021.

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I. PETITION FOR WRIT OF CERTIORARI

Lawrence Joey Smith petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit

II. PARTIES AND OPINIONS BELOW

The parties are the same as indicated on the cover page. The Eleventh Circuit's unpublished opinion denying a Certificate of Appealability is attached as Appendix 1. The Eleventh Circuit's order denying Motion for Reconsideration is attached as Appendix 2. The other opinions and orders are as follows:

Smith v. State, 866 So.2d 51 (Fla. 2004)

State v. Smith, 6th Florida Judicial Circuit, Case Number 99-3110-CFA, Doc 1652, April 22, 2008 (Resentencing Order)

Smith v. State, 29 So.3d 304 (Fla. 2d DCA 2010) (table)

Smith v. State, 114 So.3d 181 (Fla. 2013) (table)

Smith v. State, 115 So.3d 1011 (Fla. 2d DCA 2013) (table)

Smith v. Secretary, Department of Corrections, 2020 WL 1451680 (Middle District, Florida 2020)

Smith v. Secretary, Department of Corrections, 2020 WL9258458 (11th Cir. 2020).

III. JURISDICTION

The Eleventh Circuit's denial of the Certificate of Appealability was dated November 20, 2020, but the Petitioner filed a Motion for Reconsideration that was denied on January 7, 2021. This Petition is timely based on Supreme Court Rule 13.1 and the Order of this Court dated March 19, 2020 granting an automatic 60-day extension of time for all petitions for writ of certiorari. Further, this Court has jurisdiction to review denials of certificates of appealability. *Hohn v. United States*, 524 U.S. 236 (1998). *See also 28 U.S.C. 2253.*

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment 5, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation."

28 U.S.C. 2253 bars plenary appellate review in habeas corpus proceedings unless a certificate of appealability is issued by either the district court or the circuit court. It provides:

> "(a)In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b)There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> (1)Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A)the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B)the final order in a proceeding under section 2255.

(2)A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3)The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

V. STATEMENT OF THE CASE

Appellant was tried and convicted of first-degree murder and attempted first degree murder for the death of Robert Crawford and the shooting of Stephen Tuttle. There were four people allegedly present at the time of the shooting (beyond the two victims). The Appellant was one of the four. The other three were Faunce Pearce, Teddy Butterfield, and Heath Brittingham. Pearce had held Crawford and Tuttle against their will on his own and forced Tuttle to perform oral sex on him at gunpoint prior to the Appellant, Butterfield and Brittingham arriving. *Smith v. State*, 866 So.2d 51 at 54 (Fla. 2004). According to the State's theory of prosecution, these four kidnapped the two victims and transported them at gunpoint to a separate location where they were shot: Mr. Crawford dying and Mr. Tuttle surviving. The State elected to prosecute only two of the alleged participants: Mr. Pearce and Mr. Smith. Butterfield and Brittingham were not prosecuted at all, and in the Florida Supreme Court decision, it was clear to the court the case turned on the credibility of Butterfield and Brittingham. *Smith v. State*, 866 So.2d 51 at 60

(Fla. 2004). The State apparently took Butterfield and Brittingham at their word that their involvement in the events of that night was *de minimis*. The State never offered any public explanation as to why they declined to prosecute Butterfield and Brittingham. As Judge Tepper noted in her resentencing order, Messrs Butterfield and Brittingham were not punished for murder, kidnapping, accessory to murder, or even improper display of a weapon.

Both Mr. Pearce and the Petitioner were originally convicted and sentenced to death. In both cases, the death sentences were reversed and resentencing proceedings were held.[1]

In the Appellant's resentencing, the jury voted 7-5 in favor of recommending a death sentence. A *Spencer*[2] hearing was held by Florida Circuit Judge Lynn Tepper. Id. Following that hearing, Judge Tepper issued an order sentencing the Appellant to life. She found the testimony from Butterfield and Brittingham against the Appellant utterly lacking in credibility. Judge Tepper found the Appellant's participation in the crime was no greater than the uncharged actions of Butterfield and Brittingham. By implication it was Pearce, who earlier in the evening had kidnapped and raped one of the victims, was the actual killer – note this Petitioner.

The Appellant appealed the order of his resentencing to Florida's Second District Court of Appeal. The appeal was denied without issuance of an opinion on January 27, 2010.

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[1] Pearce's underlying conviction was reversed as well. On retrial, he was convicted again and sentenced to life.

[2] *Spencer v. State*, 615 So.2d 688 (1993).

Following that denial, the Appellant filed a timely motion for post-conviction relief. All of the issues raised in his motion were denied without hearing by the circuit court judge on May 30, 2012.

The Appellant sought a timely appeal of the denial of post-conviction relief to the Florida Second District Court of Appeal. That appeal was also denied without an opinion. This occurred on May 13, 2013.

Following the denial of the appeal of his *3.850* motion, the Appellant filed his federal petition for habeas corpus relief on or about August 29, 2013. There is no dispute the petition was timely.

After review, United States District Court Judge Charlene Edwards Honeywell of the Middle District for Florida denied *2254* relief and in the same order denied a certificate of appealability.

The Appellant, at the time acting *pro se*, filed a timely notice of appeal. Further, he moved for an extension of time to file for a certificate of appealability from this Court. The Court granted him until May 28, 2020 to file that motion. The undersigned was retained during late April 2020 to litigate the certificate of appealability issue and filed a timely motion to that end.

The motion addressed one specific issue given the word limits of *11th Circuit Rule 27(d)(2)(A)* while specifically indicating the Appellant was not waiving any of the other issues in his case. The issue he focused on was improper comments made by the prosecutor in his closing argument.

In sub-claim 2(g) of his federal habeas petition, the Appellant argues his trial attorney failed to object or ask for a curative instruction in the face of the following argument by the assistant state attorney

during the State's closing in the guilt phase of the trial:

> "Speculative doubt, imaginary doubt, forced doubt, what does all that mean? I will tell you what. For instance, gunshot residue. You heard evidence of a gunshot residue test. It was performed on the hands of Lawrence Joey Smith. Granted, nobody else had one done. That's for you to consider. But you have no evidence of the results.
>
> "Mr. Hernandez says that since it wasn't introduced, it must have been negative. That's speculation. The evidence is is [sic] that a test was given. There is no evidence of the results.
>
> "I mean, if you wanted to speculate, I asked Miss – I believe it was Weigand – 'Do you know if it's even done anymore.'
>
> "Well, what can you speculate from the nature of those questions?
>
> "What you can speculate from the fact that at the time this guy was taken into custody he was wet, rolling around in the mud and the rain in his front yard? What can you speculate from that?
>
> "Your evidence is the test was given. Don't speculate. Your verdict has to be based on the evidence."

(Order denying *2254* relief). Judge Honeywell characterized the comments as a fair response to arguments made by the Appellant's trial counsel regarding drawing an inference from the fact that

since a gunshot residue test was given and the state did not produce any evidence of the result of that test -- it was fair to conclude the result was negative. Moreover, Judge Honeywell focused on the state court's findings in the post-conviction case that (quoting the trial court's order):

> "The court is unaware of what objection defense counsel could have reasonably made to the State's closing argument. Therefore, counsel was not ineffective for failing to make a groundless objection."

(2020 WL 1451680 at 30). Based on that, Judge Honeywell ruled "[t]he state court has answered the question of what would have happened had counsel objected to the prosecutor's comments during closing argument – the objection would have been overruled. Id. Judge Honeywell then concludes the "Petitioner has failed to establish deficient performance or prejudice with respect to this claim." Id. The judge does not actually analyze prejudice as to this issue in her decision but finds no prejudice nonetheless. Judge Honeywell found the prosecutor's comments proper because ultimately the State argued for a verdict "based on the evidence."

The Eleventh Circuit denied the motion for certificate of appealability with a brief order, holding:

> "Here, reasonable jurists would not debate the denial of Smith's claim. Trial counsel had no basis to object to the prosecutor's statement that the jury should not speculate but instead base its verdict on the evidence, particularly when it was in response to trial counsel's prior statement that Smith's gunshot

> residue test must have been negative because the state never presented the results at trial. In any event, the trial court properly instructed the jury that its verdict must be based solely on the evidence, the conflict in evidence, or the lack of evidence, which the jury is presumed to have followed. *See United States v. Wilson*, 149 F.3d 1298, 1302 (11th Cir. 1998) (stating that a jury is presumed to have followed a court's jury instructions)."

The court added his other claims were "abandoned" though the Petitioner expressly indicated he was not waiving those arguments. Id. at footnote 1. The Petitioner moved for reconsideration of the denial of the motion for certificate of appealability. In that motion, he argued the Court's ruling was at odds with its own decision in *United States v. Osmakac*, 868 F.3d. 937 (11th Cir 2017), where the prosecutor argued that a lack of evidence does not equate with reasonable doubt, prompting a curative instruction that was agreed to by the assistant U.S. attorney, the trial judge, the defense counsel and the three-judge panel of the Eleventh Circuit. Because the error was cured, the appellant in that case was not entitled to relief. The Petitioner argued in the instant case there was no logical distinction between the two comments. The Petitioner further argued he had not waived any of his other arguments as he had pled to the contrary in his motion. He further pointed out there was a differential treatment of *pro se* appellants and appellants represented by counsel in terms of the consequences of filing any elaboration beyond merely the notice of appeal. Under the appellate rules, the

court will review all claims if the movant files no motion but once a motion is filed the pleader is left with the choice of writing a perfunctory pleading with the court that would be little more than an inventory of the prior pleadings or under the Eleventh Circuit's position a motion that focuses in on one or two issues (one in this case) to the exclusion of all others because the choice was made to highlight an issue.

On January 7, 2021, the Petitioner's motion for reconsideration was denied. (Appendix 2).

VI. REASONS FOR GRANTING WRIT

This case presents the perfect vehicle for this Court to address two separate but important issues.

1. First, the Eleventh Circuit has, based on a one judge panel and without input from the Government, rewritten the definition of reasonable doubt. To be clear, this was not a situation where the Eleventh Circuit found the comment of the State was cured by the subsequent jury instructions. Likewise, it was not a finding by this one judge panel that the failure to object did not constitute fundamental error and was thus waived. Judge Jordan found, on his own, that there was no objection that could be made to a prosecutor who tells a jury reasonable doubt cannot be found from a lack of evidence. This Court has previously held the Due Process Clause of the Fifth Amendment includes the requirement of proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

This is a serious rewriting of the law to say the least. The undersigned can find no other case in the United States federal or state courts holding an objection to a prosecutorial comment that reasonable doubt is not a factor in analyzing reasonable doubt is

without any legal foundation. Although it was overruled on other grounds, this Court acknowledged in *Johnson v. Louisiana*, 406 U.S. 356 (1971)[3] that reasonable doubt can come from the lack of evidence. Id. at 360. This Court has approved jury instructions on reasonable doubt that include defining it as including a lack of evidence. *Victor v. Nebraska*, 511 U.S. 1 (1994); *Francis v. Franklin*, 471 U.S. 307 (1985); and *Jackson v. Virgina*, 443 U.S. 307 (1979).

Florida's Standard jury instruction on reasonable doubt specifically includes direction that reasonable doubt can be found from the lack of evidence. *Florida Standard Jury Instruction 3.7.* The Georgia pattern jury instructions state that a reasonable doubt can arise from "consideration of the evidence, a lack of evidence, or a conflict in the evidence." *Georgia Suggested Pattern Jury Instruction—Criminal 1.20.10 (2019)*. The Alabama standard jury instruction on reasonable doubt says it is a "doubt which arises from all or part of the evidence or from the lack of evidence and remains after a careful consideration of the evidence." *Alabama Standard Jury Instruction I..4.* The Eleventh Circuit's reasonable doubt instruction does not include language about the lack of evidence. In *United States v. Cleveland*, 434 Fed. App. 879 (11th Cir. 2011) the court stated a lack of evidence instruction was not necessary based on the Court's pattern instructions and added "[n]othing in the record suggests that the jury would have been misled as to whether they could consider a perceived paucity

[3] *Johnson* was obviously overruled on the issue of non-unanimous jury verdicts in the Court's last term in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020)

of evidence to mean that the government had failed to satisfy its burden of proof."

That said, the Eleventh Circuit itself ratified a curative instruction just four years ago in *United States v. Osmakac*, 868 F.3d 937 (11th Cir. 2017), the prosecutor made the following comments in closing:

> "So ladies and gentlemen, essentially what Mr. Tragos [Osmakac's counsel] has just stood up and asked you to do is to ignore every piece of evidence that has been entered in this case, to ignore everything that you can see and hear and judge on its own merits and to throw it out the window in favor of baseless speculation. That's what he's just asked you to do.
>
> You've seen enough during this trial to know that there are rules of evidence, that there are rules about what kinds of evidence can be entered in a case and what can't.
>
> Mr. Tragos asked you to speculate about why reports weren't entered, about why surveillance logs weren't entered, about why certain agents did or did not testify. All of those are things that are, unfortunately, not part of your consideration. The Judge makes those sorts of determinations if evidence is offered."

868 F.3d at 950. The defense counsel made an immediate objection based on it being "a fact that lack of evidence can be a reason for reasonable doubt." Id. It is clear from what ensued the defense objection was

sustained. First, defense counsel asked for a mistrial, which was denied. Id. The defense attorney then requested a curative instruction. Id. The judge determined to add to the Eleventh Circuit's standard reasonable doubt instruction the following language almost verbatim from the Florida state jury instructions: "[a] reasonable doubt may arise from the evidence, from a lack of evidence or from a conflict in evidence." Both parties agreed to that instruction. On appeal, the Eleventh Circuit easily found the Government improperly argued the jury should not consider a lack of certain evidence in its deliberations. Id. at 957.

This makes the broad holding in this Petitioner's case all the more baffling. It undermines the well settled law on reasonable doubt and allows future prosecutors *carte blanche* to argue a lack of evidence does not in fact lead to a reasonable doubt. It suggests deletions from standard jury instructions about reasonable doubt would be appropriate where they include the "lack of evidence" language has been historically included.

It constitutes a fundamental change in how we think about reasonable doubt and it, as noted earlier, was done not by a three-judge panel but rather a single judge issuing a sweeping opinion that has nearly the same precedential value as that of a full panel opinion with briefing by both sides.[4] It is not even clear the State of Florida would want such a sweeping change in the law. Prosecutors are not tasked with just seeking convictions but rather have a duty to see that justice is done. A prosecutor trying

[4] "Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority." *11th Cir. R 36-2. See also FRAP 36, 11th Cir. I.O.P. 7*

a state or federal case going forward in the Eleventh Circuit now has seriously conflicting guidance from that court on what is appropriate to argue to a jury. If they argue reasonable doubt cannot come from their failure to present sufficient evidence and the defense objects, the prosecutor can confidently point to Judge Jordan's decision in the instant case as persuasive authority on whether the objection is well taken. The jury will potentially hear conflicting directives from a state court judge when on one hand he or she overrules an objection regarding the lack of evidence and then an instruction that reasonable doubt *can* come from the lack of evidence. In federal court, the jury will only hear the trial judge's overruling of an objection regarding lack of evidence with no countervailing instruction because of the "persuasive authority" of the decision in the instant case.

Justice Sotomayor, writing in dissent to the denial of certiorari review in *St. Hubert v. United States*, 140 S.Ct. 1727 (2020) cautioned about the dangers of creating precedents with little or no argument, particularly in the absence of argument from the government and full briefing. Justice Sotomayor suggested the Eleventh Circuit in particular should not assign precedential value to cases where there has not been a "robust process." Id. at 1730.

The lack of a robust process here has gutted a well-established component of the reasonable doubt standard. Although the other federal circuits have varying instructions on reasonable doubt coming from the lack of evidence,[5] none of the other circuits have

[5] The First Circuit's instruction (3.02) refers to the "failure or inability of the government to establish beyond a reasonable doubt any essential element" of the crime. The Second and

ever held an objection to an argument by the government that lack of evidence is not a basis for finding reasonable doubt is not well taken. Again, prior to the Petitioner's case, there was no such case in the Eleventh Circuit.

This is not an abstract problem. It is well established that trial practitioners such as the undersigned have an ethical duty to share contrary authority with trial court's when arguing legal issues, even if it inures to the disadvantage of their client. The undersigned is now duty bound to bring this case to the attention of any judge where he makes an objection to the State making the argument made in the instant case. Moreover, any prosecutor doing his or her job is going to view this case holding as an opportunity to weaponize it against defense arguments the State has not provided sufficient evidence to prove their case. Given the problem of "recency bias" a trial judge would likely feel duty bound to go along with the "persuasive authority" of this decision made by one judge deciding whether to issue a certificate of appealability.

This case is the ideal vehicle for this Court to address not only the lowering of the burden of proof but also to address head on the practice of the Eleventh Circuit in habeas cases. It does not suffer

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Fourth Circuits apparently do not have pattern jury instructions in criminal cases. The Third Circuit's instruction (3.06) includes a lack of evidence instruction. The Fifth Circuit's instruction (1.05) does not include a lack of evidence instruction. The Sixth Circuit's instruction (1.03) does include such an instruction at paragraph 4. The Seventh Circuit's instruction (1.03) does not include a lack of evidence instruction. The Eighth Circuit's instruction on reasonable doubt (3.11) includes a lack of evidence instruction. The Ninth Circuit's instructions (3.5) do as well. The Tenth Circuit (1.05) does not discuss lack of evidence.

from the immediacy issues inherent in many capital cases. This case gives the Court an opportunity to review the certificate of appealability process anew and consider the ramifications of outputs from that abbreviated process.

2. Second, the Petitioner would incorporate the previous argument but add an additional layer to that argument. In this case, the Petitioner chose to focus his motion for issuance of a certificate of appealability on the above issue but made it clear in his pleading he wanted to be treated the same as *pro se* litigants and have the court consider all of his arguments as worthy of issuance of a certificate of appealability. It is the Eleventh Circuit's practice to consider all issues raised by a *pro se* litigant if they do nothing but file a notice of appeal of the denial of a *2254* petition that is accompanied by a denial of a certificate of appealability if there is no motion filed. The notice of appeal itself constitutes the motion. *See FRAP 22(b)(2)*. However, the second an attorney, or for that matter the *pro se* litigant, puts pen to paper and tries to argue why they are entitled to a COA they run the risk of waiving the issues they don't discuss or if they discuss all their issues within the confines of the word limit rules, they run the risk of not providing enough of an explanation regarding why the COA should be issued. It is a lose-lose proposition that punishes the active litigant and unfairly rewards the passive one.

Here, the harm is tangible. The Petitioner, in his pro se filing for federal relief under *28 U.S.C,. 2254*, argued, in addition to the closing argument issue, that he was harmed by his trial counsel's failure to impeach Butterfield and Brittingham. In his resentencing, where he represented himself pro se, he was able to impeach these two key witnesses for the

State's argument that he was the killer to such a degree that the trial judge found he was not the killer, despite the findings of the Florida Supreme Court to the contrary in their affirmance of his conviction. *Smith, supra*., 866 So.2d at 65. The Eleventh Circuit treated the election to focus on the closing argument problem as a waiver of the argument that the Petitioner did the job of impeaching those two witnesses while his trial counsel did not, even though he expressly reserved the argument in his motion for certificate of appealability.

The Petitioner here specifically indicated he was not waiving his other arguments but the Eleventh Circuit treated it as a waiver nonetheless. The Eleventh Circuit's decision is inconsistent with the Fifth Circuit's 1977 decision in *Blankenship v. Estelle*, 545 F.2d 510 (5th Cir. 1977), where that court stated:

> "Because court-appointed counsel failed to specifically raise and brief the *Giglio* issue, contends the State, Blankenship is foreclosed from urging it in this *court* — even *though* a liberal reading of his application might be found to raise the issue adequately. We simply cannot agree that this petitioner waived error because his appointed attorney failed to brief and argue a meritorious due process ground of error adequately raised in his pro se application."

Id. at 514. In *Blankenship*, the attorney didn't go as far as the undersigned did here – i.e. the undersigned specifically indicated he was not waiving his client's other arguments. The Petitioner's counsel, given a 5200 word limit, wrote a brief that used all 5200 words

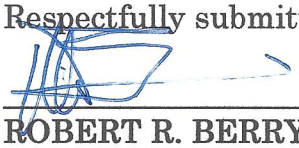
addressing the issue discussed in the first part of this Petition. *FRAP 27(d)(2)(A)* and *11th Cir. R. 22-1(b).*

This dichotomy could not have been the intention of the authors of the federal appellate rules, yet this is the result. Moreover, it could not have been the Court's intention that a single appellate court judge can undo an entire body of case law, redefining in the process the concept of reasonable doubt, in a denial of a certificate of appealability. Nonetheless, this is what happened here. Coupling this with substantial evidence the Petitioner here was not guilty of the offense he was convicted of based on the resentencing judge's analysis, it is imperative this Court review the process that led to this result. It has been almost a quarter century since this Court accepted the premise that it had a role in reviewing denials of certificates of appealability. *Hohn v. United States*, 524 U.S. 236 (1998). Sadly, the Court needs to provide some additional guidance to the circuits in order that lone judges do not set aside fundamental rights such as the one at issue here.

VII. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Petitioner prays this Court grant certiorari review for the reasons outlined herein.

Respectfully submitted:



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