20-5018

ORIGINAL

No. TBA

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IN THE
Supreme Court of the United States

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ROY HOWARD MIDDLETON, JR
*Petitioner,*

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Mark S. Inch
and
ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
*Respondent(s).*

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On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Roy Howard Middleton, Jr.
Petitioner, *pro se*
Desoto Correctional Institution
13617 South East Highway 70, Arcadia, Florida 34266

## QUESTIONS PRESENTED

I. Petitioner asks did the United States Court of Appeals for the Eleventh Circuit and the District Court for the Northern District of Florida apply federal law issued by the Supreme Court of the United States in a way that frustrates and undermines its holdings set forth in *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970) (citing *Green v. United States*, 355 US 184, 78 S.Ct. 221 2 L. Ed. 199, 205, 61 ALR2D 1119 (1957))?

II. Petitioner asks did the United States Court of Appeals for the Eleventh Circuit and the District Court for the Northern District of Florida apply federal law issued by the Supreme Court of the United States in a way that frustrates and undermines its holdings set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?

## LIST OF PARTIES

THE LIST OF THE PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS THE SUBJECT OF THIS PETITION IS AS FOLLOWS:

1. Ashley Moody, Attorney General for the State Florida

2. Honorable W. Joel Boles, Circuit Court Judge, 1st Judicial Circuit, Escambia County, Florida

3. Roy Howard Middleton, Petitioner

4. Michael R. Ufferman, Private Attorney, Tallahassee, Florida

5. Nancy A Daniels, Public Defender, Escambia County, Florida

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## TABLE OF AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals denying a certificate of appealability appears at **Appendix A** to the petition and is reported at *Middleton v. Sec'y Dep't of Corr.*, No. 19-12380-B, 2019 U.S. App. LEXIS 36025 (11th Cir. Dec. 3, 2019).

The order denying reconsideration appears at **Appendix B** to the petition and is reported at *Middleton v. Sec'y Dep't of Corr.*, No. 19-12380-B, 2020 U.S. App. LEXIS 8878 (11th Cir. Mar. 20, 2020).

The opinion of the United States District Court appears at **Appendix C** to the petition and is reported at *Middleton v. Sec'y Dep't of Corr.*, No. 3:17cv261, 2019 U.S. Dist. LEXIS 86996 (N.D. Fla., May 23, 2019).

## JURISDICTION

The date on which the United States Court of Appeals decided this case was December 3, 2019.

A timely motion for reconsideration was denied by the United States Court of Appeals on March 20, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Rule 13.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Section 9, Clause 2, United States Constitution**, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

**Amendment V, United States Constitution**, "No person shall be deprived of Life, Liberty or property without due process of law..."nor "twice put in jeopardy of life or limb" for the same offense...

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

**Amendment XIV, Section 1, United States Constitution**, "No State shall make or enforce any law which [...] shall 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 laws."

## STATEMENT OF THE CASE

The state court records reflect the essential and material facts are as follow. On July 20, 1998, the State Attorney for Escambia County, Florida filed an Information charging Petitioner with Second Degree Murder with a Firearm.

On October 6, 1998, this charge became null and void when the State filed an Indictment charging Petitioner with First Degree Murder with a Firearm.

On June 6-8, 2000, a trial by jury was conducted wherein the jury returned a verdict, apparently giving Petitioner an "**implied acquittal**" of First Degree Murder, finding him guilty of the lesser included offense of Second Degree Murder with a Firearm; therein the trial court sentenced him to thirty-five (35) years imprisonment to the Department of Corrections (DOC).

Thereafter Petitioner filed a Motion for Post Conviction Relief which was reversed on appeal and remanded for a new trial. See, *Middleton v. State,* 41 So.3d 357 (Fla. 1st DCA 2010).

The state court record further reveals that although the jury had **acquitted** the Petitioner of First Degree Murder by finding the Petitioner guilty of the less serious offense of Second Degree Murder, at the new trial, the State in violation of the federal constitution protection against double jeopardy, once again, under the original indictment, pursued a charge of First Degree Murder. At trial the Petitioner was found guilty by the jury of First Degree Murder.

Petitioner appealed on grounds of double jeopardy and the First District Court of Appeals agreed with the Petitioner; and without directing the lower court to retry the Petitioner on the charge of Second Degree Murder, the appeal court

reversed and remanded back to the lower court with instruction to simply re-sentence Petitioner under the judgment of the lesser included offense of Second Degree Murder. Thus, the trial court sentenced the Petitioner to thirty five (35) years imprisonment. See also, *Middleton v. State,* 131 So.3d 815 (Fla. 1st DCA 2014).

This was the initial manifested error in this case which results in a miscarriage of justice, as it violates the prohibition against double jeopardy. The state appeal court was without authority to enter the unlawful judgment for Second Degree Murder and the sentence meted out by the trial court.

This is true because the trial for the First Degree Murder was unlawful since it runs afoul of the federal constitution prohibition against double jeopardy. When the state appeal court entered that judgment for the Second Degree Murder, it deprived the Petitioner of the opportunity to have a jury hear the case of Second Degree Murder and the lesser included Manslaughter. The jury was also forbidden from further debate of Petitioner's innocence.

It was clear error, committed by the state appeal court, to strip the jury of its pardon power on the charge of Second Degree Murder. There is a reasonable probability that had the jury received the Second Degree Murder trial, the jury would have at the very least, been allowed to pardon the Petitioner of Second Degree Murder.

After several attempts to have this manifested error/miscarriage of justice heard in post conviction motions and appeals (to no avail) in the state court the Petitioner presented the same federal claims to the Federal Northern District Court

of Florida. However, instead of correcting this federal constitutional manifested error, the Federal Northern District Court of Florida entered an order summarily denying Petitioner's Federal Habeas Corpus Petition. Further, the District Court entered an order denying certificate of appealability, leave to appeal in *forma pauperis* and directed the Clerk to enter judgment against Petitioner.

Even though, the record reflects clear manifested error, the Eleventh Circuit Court of Appeals has declined to hear and review this constitutional error. By the Eleventh Circuit failure to review and correct the manifested error committed by all the courts before it, federal and state; thus, this Court must constitutionally intervene to rectify a fundamental miscarriage of justice.

More so, the court seemingly relied on the state's factual propositions and citations, which were inaccurate and erroneous resulting in a manifested error of law and fact.

As a result of both state and federal courts ignoring such constitutional violations, the Petitioner now sits imprisoned doom to spending a large portion of his life condemned without just opportunity to be heard by a jury.

## REASONS FOR GRANTING THE PETITION

**I.** The United States Supreme Court has authority to reverse a circuit court of appeals decision to affirm the District Court's order denying a petition for writ of habeas corpus attacking a state conviction on federal grounds where it misconstrued, misapplied, or misconceived an applicable United States Supreme Court opinion.

Petitioner relies on the following analysis which demonstrates a sufficient reason and/or justification for this Court to grant this writ. The Petitioner asserts that a double jeopardy violation occurred when his conviction was reversed on appeal, and the State retried him on the same charge, under the same indictment, and bearing the same docket number. The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

The underlying facts of this case are strikingly similar to *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970).

It is undisputed that petitioner's second trial for first degree murder, after having previously been acquitted of that charge, violated the Double Jeopardy Clause of the Fifth Amendment.

In *Price v. Georgia*, 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 2d 300 (1970), Price was charged with murder and the jury returned a verdict of guilty to the

lesser included crime of voluntary manslaughter. Price's conviction was reversed on appeal due to an erroneous jury instruction, and a new trial was ordered. Price was subsequently retried on the charge of murder, and the jury again found him guilty of voluntary manslaughter. Price was denied relief by the Georgia Court of Appeals and the Georgia Supreme Court. This United States Supreme Court granted certiorari and reversed. Citing to *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896), this Court noted, "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Price*, 398 U.S. at 326. This Court found that because *Price* was tried on the same charge, the risk of conviction on the greater charge or murder was the same in both cases, and the second trial violated the Double Jeopardy Clause of the Fifth Amendment because it is written in terms of potential or risk of trial and conviction, not punishment.

In *Morris v. Mathews*, 475 U.S. 237, 106 S. Ct. 1032, 89 L. Ed. 2d 187 (1986), this Supreme Court later distinguished *Price* from proceedings in which the jury did not acquit the defendant of the greater offense, but found the defendant guilty of the greater offense, and thereby guilty of the alternative lesser offense.

The Louisiana Supreme Court twice relied upon *Mathews*, to conclude that although the State erred in retrying the petitioner for the crime of aggravated burglary, the jeopardy-barred prosecution was remedied due to the petitioner

ultimately being convicted of unauthorized entry of an inhabited dwelling, which is a lesser-included, nonjeopardy-barred offense.

In *Mathews*, James Mathews was initially charged with aggravated robbery to which he pled guilty. Mathews then (unlike petitioner herein who claimed self defense) made additional incriminating statements, leading to him being tried for and found guilty of aggravated murder. He was sentenced to a term of life imprisonment. On remand, the appellate court determined that the Double Jeopardy clause barred Mathews's conviction for aggravated murder, and, in accordance with state law, modified the conviction of aggravated murder to murder and reduced Mathews's sentence.

In Petitioner's case, the state appeal court agreed with the State that the proper disposition was not to reverse and remand for a new trial but rather to reverse and remand with directions that the trial court reduce Petitioner's conviction to the lesser included offense of second degree murder with a firearm and re-sentence him accordingly, relying solely on *Mathews*, supra.

In order to cure the constitutional infirmity in this case, the Petitioner, at the very least, should be placed back into the original position minus the influence of the error, which the state court found to be satisfying to grant a new trial on second degree murder. *Middleton*, 41 So.3d at 362. Evenly, had the state court followed the dictates of Florida Statute *924.34* Petitioner, at worse, would have been faced with a trial for second degree murder with manslaughter as the lesser included offense. Instead, the state court decided to give Middleton a conviction of second degree

murder (without a jury's finding of such); thus, putting him in a far worse situation than he was in prior to the error.

Consequently, this decision caused Petitioner to suffer a true miscarriage of justice. As noted by this Supreme Court, the only issued before it was "whether reducing respondent's conviction for aggravated murder to a conviction for murder is an adequate remedy for the double jeopardy violation." *Id.* at 245. This Court held that, "when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy-barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonje opardy-barred offense absent the presence of the jeopardy-barred offense." The Court noted that the basis for finding or presuming prejudice present in *Price* (the possibility that the murder charge against Price induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence), was not present since the jury did not acquit Mathews (as in the present case of Petitioner Middleton acquittal) but rather found him guilty of the greater offense of aggravated murder, and *a fortiori*, the lesser offense of murder.

Under the factual circumstances of Petitioner's Middleton case, he has pled and demonstrated but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding would have been different. As such, it cannot be said that the jury necessarily found that the Petitioner's conduct satisfied the elements of First Degree Murder. Accordingly, the Petitioner's ultimate conviction for Second

Degree Murder cannot be deemed curative of the double jeopardy violation. Given the differences between the Petitioner's second trial and the challenged proceedings in *Mathews*, the analysis in the factually similar *Price* case controls.

Lastly, as in *Price*, unlike *Mathews*, Petitioner second trial was before a jury. This Court in *Price* credibly worried about the "risk or hazard of trial and conviction" stemming from the improper second charge. In particular, it registered concern that the jeopardy-barred charge "induced the jury to find [the defendant] guilty of the less serious offense...rather than to continue to debate his innocence. Because Middleton's second trial was a jury trial, "the primary evil addressed in *Price*-the risk of jury prejudice-is present" here.

It is certainly true, as this Court may conclude, that *Price* is "factually similar" to this case. And it must further conclude that the Eleventh Circuit Court of Appeals, in not applying *Price* in review of Middleton's Fifth Amendment claim, did in fact contravene clearly established federal law under AEDPA.

II. This Court has long recognized the application of *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) wherein relief is authorized if a state court has arrived at a conclusion contrary to that reached by the Supreme Court on a question of law or if the state court has decided a case differently than the Supreme Court on a set of materially indistinguishable facts.

In petitioner's case he more than met this standard of review by demonstrating *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.

Ed. 2d 674 (1984), and further the standard of review in this Court is that set forth in 28 U.S.C. 2254(d). Pursuant to that statute, an application for a writ of habeas corpus shall not be granted with respect to any claim that a state court has adjudicated on the merits ***unless*** the adjudication has "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding

A habeas petitioner who asserts that he was provided with ineffective assistance of counsel must affirmatively demonstrate (1) that his counsel's performance was "deficient", *i.e.*, that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced his defense, *i.e.*, that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial in which the result is reliable. The petitioner must make both showings in order to obtain habeas relief based upon the alleged ineffective assistance of counsel. *Id.*

If the petitioner satisfies the first prong of the *Strickland* test, however, his petition nonetheless must affirmatively demonstrate prejudice resulting from the alleged errors. *Earvin v. Lynaugh*, 860 F.2d 623, 627 (5th Cir. 1988). To satisfy the prejudice prong of the *Strickland* test, it is not sufficient for the petitioner to show that the alleged errors had some conceivable effect on the outcome of the proceeding. *Strickland v. Washington, supra*, 466 U.S. at 693. Rather, the petitioner

must show a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Martin v. McCotter, supra*, 796 F.2d at 816. The petitioner need not show that his counsel's alleged errors "more likely than not" altered the outcome of the case; he must instead show a probability that the errors are "sufficient to undermine confidence in the outcome." *Id.* at 816-17 (citation omitted). Both the *Strickland* standard for ineffective assistance of counsel and the standard for federal habeas review of state court decisions under 28 U.S.C. 2254(d)(1) are highly deferential, and when the two apply in tandem, the review by federal courts is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009).

Also as argued in Point I, it is undisputed that petitioner's second trial for first degree murder, after having previously been acquitted of that charge, violated the Double Jeopardy Clause of the Fifth Amendment. To add insult to injury, counsel also failed to object to justifiable use of deadly force instructions which negated Petitioner's sole defense of self defense.

Finally, trial counsel failed to file a petition for writ of prohibition after the trial court erroneously denied Petitioner's motion to dismiss the indictment charging first degree murder.

Since petitioner satisfied the first prong of the *Strickland* test, overlooked by the lower court, his petition nonetheless affirmatively demonstrates prejudice resulting from the errors.

To prove counsel was deficient, the defendant offers that counsel's representation fell below an objective prevailing professional standard of reasonableness. This assessment is determined by looking to the situation of his three failures enumerated above and this Court must respectfully conclude that there exist a strong presumption that counsel's conduct does not fall within the wide range of reasonable professional assistance and the record certainly discloses that these actions of Petitioner's counsel can be reasonably part of a sound trial strategy. Thus, Petitioner's claim must prevail as the above showing is one that petitioner certainly can and does make in his case. See e.g., *Earvin v. Lynaugh*, 860 F.2d 623, 627 (5th Cir. 1988); *Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

The Eleventh Circuit has failed to recognize the issues presented were adequate to deserve encouragement to proceed further. Thus, this Court may afford the Petitioner the one percentage it holds in deciding whether to accept or deny such case upon request via writ of certiorari. See *Tennard v. Dretke*, 542 U.S. 274, 282, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)).

Upon due consideration, this Supreme Court of the United States should grant certiorari and reverse.

## CONCLUSION

In view of the foregoing facts, arguments, and authorities, Petitioner respectfully submits that a writ of certiorari should be granted.

So Mote Be.

Respectfully submitted,

/s/ Roy H. Middleton

Roy Howard Middleton Jr., Petitioner

Date: June 18th, 2020