No. 20-5806

PROVIDED TO QUINCY ANNEX ON

SEP 03 2020

FOR MAILING BY _____

Supreme Court, U.S.
FILED
SEP 04 2020
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY ROGELIO GRIEGO - PETITIONER

VS.

MARK S. INCH, SECRETARY,

FLORIDA DEPARTMENT OF CORRECTIONS,

RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Anthony R. Griego, pro se
DC# P36771
Quincy Annex
2225 Pat Thomas Pkwy.
Quincy, Fl. 32351

ORIGINAL

QUESTION(S) PRESENTED

I) Whether the state court's decision was contrary to or involved an unreasonable application of *Strickland v. Washington's* deficient performance analysis and or *Hill v. Lockhart's* and *Lee v. United States'* prejudice analysis where the "state court" determined that the lack of viable defense precluded such findings;

II) Whether the state court's decision was an unreasonable determination of facts in light of the evidence presented in the state court;

III) **(a)** Whether, in order to satisfy 28 U.S.C. 2254(d)(2), a movant must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether 28 U.S.C. 2254(e)(1) additionally requires a movant to rebut a presumption that the determination was correct with clear and convincing evidence;

(b) Also, when a movant attempts to rebut with clear and convincing evidence a presumption that the state court's factual determination was correct under 2254(e)(1), is a movant limited to only evidence that was presented in the state-court or can a movant rely on "extrinsic" evidence properly sought to be introduced in the federal court;

IV) Whether Petitioner made a substantial showing that he was denied his constitutional right to a full and fair jury trial due to ineffective assistance of trial counsel in violation of the 5th, 6th, and 14th, Amendments of the U.S. Constitution, and clearly established federal law in *Strickland v. Washington, infra*; *Hill v. Lockhart, infra*, and its progeny;

V) Whether this Court's decision in *Birchfield v. North Dakota,* holding that the State's may not criminally punish offenders for resisting an unconstitutional blood draw should be applied retroactively to cases on collateral review.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

Cases

Statutes

Other Authorities

Constitutional Provisions

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[x] For cases from federal courts:

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

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

[x] reported at *Griego v. Inch*, 2019 U.S. Dist. LEXIS 144676 (U.S.D.C. Fla. 2019); *Griego v. Inch*, 2019 U.S. Dist. LEXIS 145637 (U.S.D.C. Fla. 2019); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was **June 05, 2020.**

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

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

The 4th Amendment of the U.S. Constitution provides in part "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]"

Fifth Amendment

The 5th Amendment of the U.S. Constitution provides in part that "[n]o person 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[.]"

Sixth Amendment

The 6th Amendment of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment

The 14th Amendment of the U.S. Constitution provides in part that "[n]o 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 laws.

28 U.S.C. 2254 provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(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.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2253 provides in relevant part:

....

(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 [28 USCS ⊏ 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).

STATEMENT OF THE CASE

The jurisdiction of the U.S. District Court, Northern District of Florida was timely invoked pursuant to 28 U.S.C. 2254 by the Petitioner's filing of a Petition for Writ of Habeas Corpus by a person in state custody. The district court denied the petition and Petitioner timely appealed and subsequently sought a Certificate of Appealability from the U.S. Eleventh Circuit Court of Appeals. The circuit court denied the request for a certificate on June 5, 2020. This Court's jurisdiction is timely invoked.

State proceedings:

Stemming from a vehicle/pedestrian accident that occurred in the early morning hours on August 19, 2007, Petitioner was charged in the State of Florida, Santa Rosa County, with Count One-D.U.I. Manslaughter of Gerran Clayton Copeland in violation of sections 316.193(1) and 316.193(3)(a), (b), (c)(3)a, Florida Statutes. He was also charged with Count Two- Leaving the scene of a Crash involving a death (LSOA) in violation of section 316.027(1)(b), Florida Statutes (2007), and Count Three, resisting an officer without violence, in violation of s.843.02, Florida Statutes.

After a plea of guilty as charged to the offenses, Petitioner was sentenced on April 23, 2008, to 13 years in prison for Count One; 8 years in prison for Count Two, consecutive to the sentence in Count One; and 270 days in jail for Count Three, concurrent to the sentence in Count One.

Petitioner's state direct appeal was affirmed per curiam without written opinion on February 25, 2010. See, *Griego v. State,* 29 So. 3d 1121 (Fla. 1st DCA 2010) Relevant to these proceedings, thereafter Petitioner filed a timely Motion for Postconviction Relief pursuant to Florida Rules of Criminal Procedure 3.850 with an addendum thereto entitled "Final Amended Motion" for Postconviction Relief with Incorporated Memorandum of Law, alleging fourteen grounds.

The postconviction court scheduled an evidentiary hearing on all of Petitioner's claims except ground two, which challenged the voluntariness of his plea due to the trial court's conducting of an inadequate plea colloquy. Counsel was appointed to represent Petitioner at the evidentiary hearing which was held on January 27, 2015. The post-conviction motion was denied, and a timely appeal followed in which the First District Court of Appeal affirmed without

a written opinion the postconviction court's denial. See, *Griego v. State,* 207 So. 3d 224 (Fla. 1st DCA 2016)

In his post-conviction motion ground five, the Petitioner alleged that his trial counsel was ineffective in failing to adequately advise him that the law concerning the charge of leaving the scene of a crash involving death required that he have knowledge of injury before he made the affirmative decision to leave the scene of the crash, which is determined by the totality of the circumstances, including the nature of the crash. Also, that his actions could be considered as complying with the requirements of Florida law as he stopped close to the scene as possible at the nearby convenient store, reported to the store clerk and law enforcement of his involvement in a crash in which paramedics were summoned and rendered assistance to the victim, and provided his identification to law enforcement. Further, that his leaving the scene can be considered a defense to the charge where leaving the scene of the crash is the only way to call for assistance. In denying this claim the post-conviction court held:

> "The Court finds counsel's and Defendant's testimony credible that Defendant position was that he did not know that he hit a person. The Court also finds [Petitioner's mother's] testimony credible that counsel did not discuss with her any defenses to the leaving the scene of an accident charge. Based on the evidence before this Court, the Court finds that Defendant did not have any viable defenses to the leaving the scene of the accident charge....As there was no viable defense to leaving the scene of an accident given the circumstances of this case, Defendant has failed to demonstrate that counsel was deficient for failing to advise of any defense to the charge."

On March 6, 2017, Petitioner filed a pro se amended second or successive motion for postconviction relief alleging four grounds, among them was a claim that this Court's new decision in *Birchfield v. North Dakota, infra* entitled him to collateral relief as he was criminally punished for resisting an unlawful blood draw in violation of the 4th Amendment of the U.S.

Constitution. Petitioner argued that his conviction and sentence for count 3 should be dismissed and that he should also be resentenced on the other counts as well as the sentencing court increased his sentence based upon the resisting allegations. The court summarily denied the claim (without a hearing) on May 9, 2017, ruling that *Birchfield* had not been made retroactive to cases on collateral review by the U.S. or Florida Supreme Court and therefore Petitioner could not collaterally attack his conviction and or sentence. The appeal from said denial was also affirmed without a written opinion. See, *Griego v. State,* 258 So. 3d 389 (Fla. 1st DCA 2018)

Petitioner also filed a writ of habeas corpus on August 2, 2017, in the state appeals court alleging that the denial of his first post-conviction appeal without written opinion should be reconsidered in light of this Court's decision in *Lee v. U.S., infra* Petitioner argued that the previous post-conviction denial was wrongly decided on the sole basis of whether the Petitioner had a viable defense in which Lee established that that is not always the determinative factor in determining whether a movant can meet the prejudice prong of *Hill v. Lockhart, infra.* The state appeals court denied the petition on the merits without written opinion. *Griego v. State*, 232 So. 3d 982 (Fla. 1st DCA 2017)

Federal Proceedings

On January 29, 2017, Petitioner timely filed his first Petition for Writ of Habeas Corpus. An Amended Petition was filed with leave of court on March 16, 2017, raising ten grounds for relief. The Petitioner filed two separate Motions to Conduct Discovery and Financial Assistance to Hire an Expert and to expand the record with such evidence which was denied.

After the Respondent's Answer and the Petitioner's Traverse, wherein he again sought expansion of the record and an evidentiary hearing to meet his burden under AEDPA, the

Magistrate Judge filed its Report and Recommendation on July 01, 2019. The Magistrate Judge recommended that Petitioner's petition be denied, including Petitioner's request to conduct discovery, for financial assistance to hire an expert, for appointment of counsel, and to supplement the record. The Magistrate also recommended a certificate of appeal be denied as well opining that the "Petitioner has failed to make a substantial showing of the denial of a constitutional right." Petitioner filed his Objections to the Magistrate Judge's Report and Recommendation arguing in relevant part that the resolution of ground five was erroneous and unreasonable and that any decision to the merits of claim five without consideration of the evidence sought to be expanded into the record is erroneous. The Respondent did not file any cross-objections. The District Court Judge, Honorable Lacy A. Collier, entered an Order on August 26, 2019, adopting and incorporating by reference the report and recommendation, and denied the Petitioner's petition grounds 1-9, and dismissed for lack of jurisdiction ground 10 opining that the Petitioner was not "in custody". The District Court also denied Petitioner's motion to conduct discovery, for financial assistance to hire an expert, for appointment of counsel, and to supplement the record, as well as a certificate of appealability and leave to appeal in forma pauperis.

Petitioner filed a timely Notice of Appeal invoking the jurisdiction of the U.S. 11th Circuit Court of Appeals on September 24, 2019, and subsequently filed a Petition for Application for a Certificate of Appealability in the court of appeals. The 11th Circuit denied application on June 5, 2020. This petition timely follows.

REASONS FOR GRANTING THE PETITION

I. Conflict. In *Wood v. Allen*, 558 U.S. 290, 130 S. Ct. 841, 175 L. Ed. 2D 738 (2010) this Court granted certiorari to review a question that has divided the Courts of Appeal: whether in order to satisfy 2254(d)(2) a petitioner must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence. *Wood, supra*, 500 U.S. At 299. Interestingly, this Court has recognized this conflict on other occasions as well[1] but, on each occasion, ultimately decided not to reach the question because "our view of the reasonableness of the state court's factual determination in th[ose] case[s] do not turn on any interpretive difference regarding the relationship between these provisions." (Id. at 300)

Most recently, in B*rumfield v. Cain*, 135 S.Ct. 2269 (2015) this Court acknowledged, "[w]e have not yet 'defined the precise relationship between 2254(d)(2) and 2254(e)(1)." *Brumfield*, 135 S.Ct. At 2282. Thus, as this Court is well aware there continues to exist a conflicted reading of the relationship between 2254(d)(2) and 2254(e)(1).

In *Wood, supra*, this Court noted the conflict concerning the above mentioned provisions amongst the federal circuit courts: "See, e.g., 542 F.3d 1281, 1285, 1304, n. 23 (CA11 2008) (case below); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (CA9) (where a habeas petitioner challenges state-court factual findings ``based entirely on the state record," the federal court reviews those findings for reasonableness only under 2254(d)(2), but where a petitioner

---

1 See, *Rice v. Collins*, 546 U.S. 333, 339, 126 S. Ct. 969, 163 L. Ed. 2D 824 (2006); *Burt v. Titlow*, 571 US 12, 134 S Ct 10, 187 L.ed 2D 348, 571 U.S. 12 (2013), B*rumfield v. Cain*, 135 S.Ct. 2269 (2015)

challenges such findings based in part on evidence that is extrinsic to the state-court record, 2254(e)(1) applies), cert. denied, 543 U.S. 1038, 125 S. Ct. 809, 160 L. Ed. 2d 605 (2004); *Lambert v. Blackwell*, 387 F.3d 210, 235 (CA3 2004) (``[Section] 2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record"); *Trussell v. Bowersox,* 447 F.3d 588, 591 (CA8) (federal habeas relief is available only ``if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' 28 U.S.C. 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"), *cert. denied*, 549 U.S. 1034, 127 S. Ct. 583, 166 L. Ed. 2d 434 (2006); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (CA7 2008) (2254(d)(2) can be satisfied by showing, under 2254(e)(1), that a state-court decision ``rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision ``is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable" (internal quotation marks omitted))."

Petitioner contends that his case finally presents an opportunity for this Court to address the long-raised but yet unresolved question on the relationship between 2254(d)(2) and 2254 (e)(1) and therefore submits that this Court should grant certiorari to review these important conflicts.

II. The decision of the Court of Appeals is Erroneous.

A. The District Court decision was erroneous and unreasonable

In the Answer to claim five of the Petitioner's 2254 petition, the Respondent argued "given the totality of the circumstances surrounding Petitioner's guilty pleas (e.g. his plea colloquy, the unlikely prospect of prevailing at trial, and his prison exposure of 46 years), the [state review court] could have reasonably concluded that Petitioner failed to establish a substantial likelihood that he would have moved to withdraw his plea and gone to trial but for counsel's performance." The U.S. district court essentially adopted these arguments in it order. (See Appendix B p. 44-49) Pursuant to *Wilson*, under AEDPA the district court is required to "look through" the silent decision of the state review court "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. But the State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed" *Wilson v. Sellers*, 138 S.Ct. 1188, 1192 (2018)

There were no factual findings made by the state review court in which to attach the presumption under 2254(d) or 2254(e). See *Maddox*, 366 F.3d 1000-01 (citing *Wiggins*, 123 S.Ct 2539-40)

1) Whether the plea form and plea colloquy refute Petitioner's claim

The District Court relies on the plea form and the plea colloquy to hold that the record belies his claim that counsel failed to advise him of potential defenses and that "Petitioner cannot go behind the plea agreement and his sworn testimony that he was fully informed, was waiving any defenses, and was entering the plea voluntarily to offenses for which he agreed there was a

factual basis." (Appendix B R&R pg. 44-46) Petitioner contends that jurists of reason would disagree with the District Court's determination that the plea agreement and the plea colloquy are sufficient to refute the Petitioner's allegations that he was not advised/misadvised by counsel concerning the law pertaining to LSOA and/or viable defenses.

First, Petitioner contends that the plea form and the plea colloquy are general. Petitioner contends that neither the plea agreement nor the plea colloquy detail the Petitioner's understanding of the law pertaining to LSOA or whether he had any viable defenses or what defenses were discussed between Petitioner and his counsel, and as to which charge. All the colloquy reveals concerning a factual basis for the LSOA charge is that "*Petitioner left the scene and went to a convenient store where 911 was called.*" Additionally, the colloquy does not refute Petitioner's sworn, credible, and unrebutted allegations testified to at the postconviction evidentiary hearing that he was misadvised of the standard of proof regarding LSOA in that all that was required was knowledge of the crash, or that his counsel failed to advise him that the law requires knowledge of injury which is determined based upon the totality of the circumstances, including the nature of the of the crash and to which the requisite knowledge would have to be formed prior to making the decision to leaving the scene. The postconviction court found Petitioner's testimony credible and, as argued below, found that his trial counsel did not advise him as to the law pertaining to LSOA or any defenses related thereto. Therefore, Petitioner contends with the aforementioned reasonable jurists would not disagree that the plea agreement/colloquy is insufficient to refute the Petitioner's allegations that he was not advised/misadvised of the law pertaining to LSOA and related defenses.

2) Whether trial counsel's failure to advise Petitioner of viable defense renders Petitioner's plea involuntarily entered

As objected to in the District Court, the Petitioner contends that jurists of reason would disagree with the District Court's determination that "even if counsel failed to advise him of any defenses to the charge—or advised him there were no viable defenses—that does not render a guilty plea involuntary." (Appendix B R&R at pg. 46 citing *United States v. Ortiz-Sanchez*, 138 F. Appx. 921 (9th Cir. 2005)) It is well-established that trial counsel's ineffective assistance during the plea process may render a guilty plea involuntary. *Hill v. Lockhart*, 474 U.S. 52, 56-58, (1985). In *Hill* this Court recognized,

> "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." As we explained in Tollett v Henderson [citation omitted], a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann." (Id)

See also, *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2D 235 (1973); *McMann v Richardson*, 397 US 759, 770, 25 L Ed 2d 763, 90 S Ct 1441 (1970); *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010); *Edmondson v. Sec'y, Fla. Dep't of Corr.*, 2018 U.S. App. LEXIS 21261 (11th Cir. (Fla.) 2018) ("A defendant can overcome the otherwise voluntary and intelligent character of his guilty plea only if he can establish that the advice he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases in violation of *Strickland v. Washington*...") Clearly, the notion the District Court cited is inapposite and inapplicable here as Petitioner is making a substantive

claim of ineffective assistance of counsel which rendered his plea involuntary in accord with clear and well-established federal law and is thus unreasonable. For the state review court to adopt this reason it would be contrary to or involve an unreasonable application of clearly established federal law.

3) Whether Petitioner had a viable defense

The District Court finds "the evidence was not in dispute that Petitioner had actual knowledge he was involved in a crash – his airbags deployed and his windshield was smashed. The evidence would show that he did not stop to see if whatever or whomever he hit needed assistance, but instead drove to a convenience store. Once there, he first announced to the clerk that he hit someone but he did not attempt to contact law enforcement or seek medical assistance for the victim." (Appendix B p. 48)

First, the state post-conviction court found Petitioner's testimony credible concerning his position that he did not know he hit a person. See, *Marshall v. Lonberger,* 459 U.S. 422, 434 (1983) (federal courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."); *Consalvo v. Sec'y, Dept't of Corr.,* 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review.") Credibility and demeanor of a witness are considered to be questions of fact entitled to a presumption of correctness under the AEDPA. (Id.); See Also, 2254(e)(1) The State below nor the Respondent has ever contested this credibility finding by the state post-conviction court, therefore it is presumed correct. Thus, the Petitioner's testimony presented at the evidentiary hearing as to the facts of the crash and other circumstances cannot be second-guessed and must be accepted as

true.

The District Court makes three factual findings to opine that "[Petitioner] did leave the scene of the crash scene without stopping to determine if assistance could be rendered." (Appendix B p. 48) The first one appears to be that Petitioner had actual knowledge of the crash at the time of impact due to the airbag deployment and smashed windshield. Petitioner contends that this finding is unreasonable as it misapprehends or ignores Petitioner's testimony as to when actual knowledge of the crash was determined. Petitioner testified that he fell asleep at the wheel and he was startled awake by the deployment of the airbags. Upon awakening all he saw was the airbags deployed and a busted windshield, and darkness all around him due to there not being any street lights. He specifically testified that only upon arriving at the nearby convenience store he determined that he was actually involved in a crash as he was now able to view and assess the rest of the damage to the front area of the van.

The second factual findings that "the evidence would show that Petitioner did not stop to see if whatever or whomever he hit needed assistance, but instead drove to a convenience store," is likewise unreasonable because it is infected by legal error and also misapprehends or misstates the record or ignores the Petitioner's actual testimony. Florida law instructs that drivers of a vehicle involved in a crash which results in the injury or death of a person "shall immediately stop the vehicle at the scene of the crash, or close thereto as possible, and shall remain at the scene of the crash" until he or she has rendered reasonable assistance and provided identification. See, s. 316.027, & s.316.062, Fla. Stat. Florida case law posits that one stopping to make an investigation is a reasonable if not obligatory act towards completing the duties required by the statute. See, *Martin v. State,* 323 So. 2d 666 (Fla. 3rd DCA 1975); *Goodman v. State,* 2017 Fla.

App. Lexis 10689, 42 Fla. L. Weekly D1669 (Fla. 4th DCA 2017). Furthermore, in order to be found guilty of LSOA a driver must have knowledge he was involved in a crash and of the resulting injury prior to making an affirmative decision to leave the scene of the crash. See, *Sims v. State,* 998 So. 2d 494 (Fla. 2008) (citing *Triplett v. State*, 709 So. 2d 107, 108 (Fla. 5th DCA 1998))

The unrebutted and credible testimony of the Petitioner at the evidentiary hearing establishes that he reasonably complied with his duty to stop at the scene of the crash, or close thereto as possible in order to at least "ascertain whether any injury or damage occurred." Petitioner testified that at the instance of the crash occurring he did not know he hit a person because he fell asleep at the wheel and upon awakening all he saw was "pitch black" due to there not being any street lights. Petitioner testified he did not have any way of communication on his person and his van became disabled by the crash by the fuel-ignition shut off switch. Due to these circumstances, Petitioner particularly stated that he made the most reasonable conscious decision and indeed stopped at a nearby (only seconds away) convenience store **"to determine if I need help, and you know, basically determine what actually took place."**

The District Court's decision is infected by legal error because it does not take into account that Florida law permits drivers to stop "close to the scene as possible," "to at least ascertain whether any injury or damage occurred," which is exactly what Petitioner's unrebuted testimony establishes he did. Petitioner contends that Florida law takes into account that there are sometimes situations in which it would not be prudent or feasible for a driver to immediately stop at the scene of the crash and therefore includes the "*or as close thereto as possible*" provision. Such was the instant case. Logically, if Petitioner pulled over on the side of the road

with a disabled vehicle, no way of communication, and in a darkened (pitch black) area, even if Petitioner discovered an injured person at that time he would have had no option but to now walk to the same Tom Thumb store to call for help. For the District Court to find that the evidence shows the Petitioner did not stop to make an investigation is unreasonable as that is directly contradictory to the evidence presented. Additionally, the District Court does not take into account that a driver can only be criminally liable under Florida law if he had knowledge of the crash and resulting injury prior to making an affirmative decision to leave the scene. *Sims*, *supra*. The facts of the case show that Petitioner did not gain this knowledge until he arrived at the convenient store after he had already prudently proceeded to the store. Once there Petitioner stayed on the premises, alerted the store clerk to the crash which resulted in the clerk calling law enforcement and subsequently paramedics. Petitioner never attempted to leave the premises. There is no evidence that Petitioner was acted inconspicuously or attempting to evade law enforcement or hide anything. He alerted the store clerk to being involved in a crash and possibly hitting something and also approached and informed the first officer on scene of his involvement in a crash, as well as provided all necessary identification to law enforcement. There is nothing more Petitioner could have done to make an effort to comply with his duty under Florida law. Therefore, the District Court's decision is unreasonable.

The third factual finding by the District Court that upon arrival at the convenience store "[Petitioner] first announced to the clerk that he hit someone but he did not attempt to contact law enforcement or seek medical assistance for the victim" is likewise unreasonable as it misapprehends the record or ignores Petitioner's testimony and it is infected by legal error. Petitioner contends that under Florida law a driver's duty to render reasonable assistance is

triggered by one's knowledge of the injury or death. See *State v. Mancuso,* 652 So. 2d 370, 372 (Fla. 1995) ("[Florida Statute 316.027] requires an affirmative course of action to be taken by the driver and it necessarily follows that one must be aware of the facts giving rise to this affirmative duty in order to perform such a duty.") A jury is instructed to determine whether a driver "knew, or should have known of the injury to or death of the victim from all the circumstances, including the nature of the crash." See, Fla. Std. Jury Instr. (Crim) 28.4 (2008); see also *Sims*, *supra,* holding that knowledge of the crash and injury is required prior to a driver making an affirmative decision to leave the scene in order to be criminally liable under Florida law. The District Court did not make any factual findings on whether Petitioner knew, or should have known of the injury to the victim from all the circumstances, including the nature of the crash which would have triggered his duty to seek medical assistance for the victim. Petitioner's testimony at the evidentiary hearing established that he was not aware another person was involved at the instance of the crash occurring – he fell asleep at the wheel and upon being startled awake by the deployment of the airbags all he saw was the deployed airbags, a busted windshield, and pitch blackness all around him. Petitioner testified "[o]nce the impact occurred I didn't know what exactly happened. All I know is I seen the air bags. The air bags were deployed, and I seen the windshield. And all I seen was darkness all around me...And when I got to the store, I exited the vehicle. And that's when I saw the rest of the damage to the vehicle. So at that point is when I became aware that I hit something, but didn't know what it was." Petitioner's testimony establishes that he did not have actual knowledge he was involved in a crash until he was able to view and assess the damage to the van at the store. However, he could not determine what he hit as there was no visible indicators that would lead a reasonable person

to believe a person was involved, much less injured – there was no significant signs of blood or otherwise. Even the first officer on scene testified at a Pretrial Detention Hearing (which was included in the state record) that other than signs of a recent crash, at first glance he could not decipher what Petitioner hit. A determination on whether Petitioner "knew or should have known of the injury to or death of the person" is necessary and material towards Petitioner's guilt. *Mancuso, supra* at 372. The District Court's decision does not take into account this portion of Florida law and and misapprehends or ignores Petitioner's testimony with regard to such.

4) Whether the record supports Petitioner's claim that he would not have entered a plea but would have insisted on going to trial

Petitioner also contends that jurists of reason would disagree with the District Court's denial of ground five concerning whether the record supports Petitioner's allegation that he would not have entered a plea but would have insisted on going to trial absent counsel's deficient performance. Notably, the state post-conviction court nor the state review court made any findings as to prejudice and therefore there was no factual findings in which attach, despite the Respondent's argument that the appeals court "could have reasonably" adopted this reasoning. Even if the district court adopted this reasoning or made a *de novo* determination of the merits, Petitioner contends such was unreasonable and erroneous. Petitioner objected to the District Court's finding that "the circumstances surrounding both the crash and the entry of the plea leads to the conclusion that, in light of the evidence that he did leave the crash scene without stopping to determine if assistance could be rendered, there is no reasonable probability that Petitioner would have insisted on going to trial." (Appendix B p. 48-49) The district court opined that Petitioner only makes a "mere allegation" that he would have insisted on going to trial." (Id.)

First, Petitioner contends that this decision is contrary to or involved an unreasonable

application of clearly *Hill v. Lockhart*, and its progeny, including *Lee v. United States. Hill's* prejudice component does not require the petitioner to prove that he would indeed prevail at trial. See, Hill v. Lockhart, 877 F.2d 698 (1989) ("To succeed under Strickland, Hill need not show prejudice in the sense that he probably would have been acquitted or given a shorter sentence at trial, but for his attorney's error. **All we must find here is a reasonable probability that the result of the plea process would have been different -- that Hill "would not have pleaded guilty and would have insisted on going to trial," *Hill, supra*, 474 U.S. at 59 -- if counsel had given accurate advice**." (Id.); See also, Miller v. Champion, 262 F.3d 1066 (10th Cir. 2001)

Furthermore, in Lee v. United States, 137 S.Ct. 1958 (2017) this Court recently held that the lack of a viable defense does not foreclose a finding of prejudice in accord with *Hill* as "the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." Lee, 137 S.Ct. At 1966-67. "[W]e are instead asking what an individual defendant would have done, the *possibility* of even a highly improbable result may be pertinent to the extent it would have affected his decisionmaking." (Id) (Italics supplied) In this case, Petitioner pointed to un-rebutted objective evidence which was presented in the state courts, including his continued protestation of innocence from the outset of the case, that he would not have plead to leaving the scene of an accident and would have insisted on going to trial if not for counsel's failure to inform him of the elements of proof and law pertaining to the crime of leaving the scene of an accident involving injury/death. For the state court or the district court to narrow their analysis of *Hill & Lee's* prejudice component to whether the Petitioner indeed had a viable defense would result in an "unreasonable" decision in light of clearly established federal law. As shown below Petitioner presented more than sufficient

evidence to show that in light of his adamant and continued protestations of innocence that he did not leave the scene of an accident without trying to seek help or trying to comply with Florida law that even the "possibility" of obtaining a highly improbable not guilty verdict at a jury trial he would not have entered a plea but would have insisted on going to trial if trial counsel had competently advised him as to the law surrounding the offense of LSOA. The decision of the District Court was unreasonable.

Moreover, the decision of the state review court as adopted by the U.S. district court on whether the Petitioner presented sufficient evidence to meet the prejudice component of *Hill* is an unreasonable determination of facts in light of the evidence presented. Petitioner contends that jurists of reason would conclude that the un-rebutted record evidence show that under the totality of the circumstances the Petitioner would not have pleaded guilty but would have insisted on going to trial. No reasonable juror would disagree that Petitioner did not make a "mere" allegation that he would not have entered a plea but would have insisted on going to trial, as the District Court suggests. Several factors would lead to the conclusion that the Petitioner met the prejudice component of *Hill.* Taking into consideration the above regarding the District Court's misapprehension of his defense, the record evidence of Petitioner's credible and unrebutted testimony at the evidentiary hearing established a viable defense (consistent with Florida law). Additionally, the Petitioner did not make a mere self-serving allegation that he would not have pled guilty but would have insisted on going to trial. The Petitioner's credible and unrefuted testimony at the evidentiary hearing reveals that he has always professed his innocence towards the LSOA charge from the very day he was arrested and has held that position throughout all the proceedings, including sentencing, which his trial lawyer was cognizant, and Petitioner testified

of his desire of not wanting to plead guilty to the LSOA charge which Petitioner supported by introducing and reading into the record a letter written to the victim's family immediately prior to pleading wherein he begged for their intervention in not making him plead guilty to the crime of LSOA, in which no party has disputed. Also, the fact that Petitioner pleaded his "innocence" to the LSOA charge at his sentencing hearing, the fact that Petitioner had no benefit from pleading "open to the court" where there was no favorable recommendation made by victim's family as to a lenient sentence, no favorable plea offers made by the State, and in fact the contrary was argued by the State at Petitioner's sentencing hearing, the fact that the Petitioner was exposed to the same grim 46 years prison had he gone to trial and lost but which had he won could have his sentence exposure reduced drastically by 30 years!, the fact that Petitioner's trial counsel was nonchalant in discussing the LSOA charge with Petitioner despite Petitioner's claim of innocence and advised that the leaving the scene was of "minimal relevance" when it clearly was/is not (having a 30-year maximum exposure two times more than the D.U.I. Manslaughter charge), along with the fact that his counsel misadvised the Petitioner as to the requirements of proof pertaining to LSOA in that it only required knowledge of the crash as opposed to also discussing/informing him of the knowledge of injury element as discussed herein, the fact that the plea colloquy does not discuss with Petitioner any defenses with regard to LSOA or that counsel discussed with Petitioner any specific defense or the elements with regard to LSOA, the fact that the plea colloquy does not reference a sufficient statement as to the factual basis (including the elements) of LSOA but counsel merely states "he left the scene and went to a convenient store," and lastly, the fact that the plea colloquy does not show that the plea court found Petitioner's plea to be entered "knowingly, willfully, and voluntarily" as required by law,

all would support the argument that reasonable jurists would disagree with the District Court's resolution of this claim as it is clear that the Petitioner met his burden in proving the prejudice component of *Hill*. (Id.) The District Court does not point to any record evidence to rebut any one of the above mentioned factors. Therefore the District Court's finding is unreasonable in light of the evidence presented.

B. Post-Conviction Court Order: State Court's decision was unreasonable under 2254(d)(2) and the factual findings have been overcome by clear and convincing evidence in the record under 2254(e)(1)

Because it is the Petitioner's burden to prove that there is no reasonable basis for the state court to deny Petitioner Relief, See, *Wilson, supra* at 1198, 1203-04 (citing *Harrington v. Richter*. 562 U.S. at 98, 131 S.Ct., 770, (2011)) the Petitioner offers the following concerning the state post-conviction court's denial.

After an evidentiary hearing was held, the state postconviction court denied the Petitioner's claim that his trial counsel was ineffective for failing to adequately advise him that the law concerning the charge of leaving the scene of a crash involving death required that he have knowledge of injury before he made the affirmative decision to leave the scene of the crash, which is determined by the totality of the circumstances, including the nature of the crash. Also, that his actions could be considered as complying with the requirements of Florida law and that his leaving the scene was the only means to get help is a defense to the charge. In denying his claim the state post-conviction court held:

> The Court finds counsel's and Defendant's testimony credible that Defendant position was that he did not know that he hit a person. The Court also finds Ms. Griego's [Petitioner's mother's] testimony credible that counsel did not discuss with her any defenses to the leaving the scene of an accident charge. Based on the evidence before this Court, the Court finds that Defendant did not have any viable defenses to the leaving the scene of the accident charge. By Defendant's own admission at [the] evidentiary

> hearing, he pulled over at the Tom Thumb store not to call 911 or law enforcement for help, but because his van was disabled....This testimony, paired with Defendant's statement that he hit somebody, his laughter, and then changing his statement to say he thought he hit something, would have only shown that Defendant was concerned for his own welfare and not that of the victim when he stopped at the Tom Thumb store....As there was no viable defense to leaving the scene of an accident given the circumstances of this case, Defendant has failed to demonstrate that counsel was deficient for failing to advise of any defense to the charge.

Petitioner contends that the state-court's decision was unreasonable as 1) the findings are unsupported by sufficient evidence; 2) there was no factual finding made by the state-court at all concerning relevant issues; 3) the state-court's fact finding process was defective; 4) the state-court's factual finding was infected by legal error; 5) the state-court ignored evidence presented at the evidentiary hearing; 6) the state court plainly mistated the record in its findings which goes to a material factual issue that is central to the outcome of the claim; and 7) the state-court's decision was contrary to or involved an unreasonable application of *Strickland.*

1) Whether the state court decision was contrary to or involved an unreasonable application of Strickland.

Petitioner contends the state-court's decision regarding Petitioner's overall claim that counsel provided ineffective assistance for failing to advise him as law concerning the charge of leaving the scene of a crash involving death and other viable defenses, is unreasonable. The state court's ultimate decision that "as there was no viable defense to leaving the scene of an accident given the circumstances of this case, Defendant has failed to demonstrate that counsel was deficient for failing to advise defendant of any defense to the charge," is contrary to or involves and unreasonable application of *Strickland v. Washington*, 466 U.S. 668.

This Court in *Strickland* set forth the basic standards for determining whether trial

counsel rendered ineffective assistance. *Strickland* specifically states that when reviewing the deficient performance prong a reviewing court "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (Emphasis Added)

Petitioner contends by determining counsel's performance based wholly upon the viability of the defense in the instant case, the state-court narrowed *Strickland's* proper standard of review of the deficiency prong by not considering "all of the circumstances" that would justify a reasonable competent counsel to advise his client about "the law and circumstances" surrounding the offense charged (LSOA), despite clearly established federal law that an attorney has the 6th Amendment constitutional duty to inform a defendant of all pertinent matters bearing on the choice of whether to plead guilty. See, *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); see also, *Henderson v. Morgan*, 96 S. Ct. 2253 (1976); *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1404, 182 L. Ed. 2d 379 (2012), *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2D 284 (2010); *Bradshaw v. Stumf*, 545 U.S. 175, 183 (2005)

Had the state-court done so the circumstances present in the record that would show counsel's deficient performance are: 1) counsel's awareness of Petitioner's claims of innocence from the very date of arrest and Petitioner's desire not to plead guilty to the LSOA offense as told to counsel by Petitioner (which the state-court found counsel understood) and which Petitioner supported by a letter written to the victim's family which was provided to trial counsel; 2) the fact that there was no beneficial negotiated plea agreements/discussions with the State to resolve the case or beneficial victim input for a low sentence; 3) the fact that Petitioner's sentencing

exposure would have been the same had he proceeded to trial and lost, whereas had he won it would have been significantly (30 years!) less; and 4) the fact that counsel failed to even discuss with petitioner the law pertaining to LSOA as applied to the facts of his case and actually misadvised Petitioner of such when clearly established law provides a duty by trial counsel to advise a defendant about all pertinent matters bearing on the choice of whether to plead guilty or go to trial and that Petitioner be informed as to the elements of the charges.

Considering all of the aforementioned circumstances in this case it is only reasonable to conclude trial counsel was deficient. Thus, the state-court's decision considering only the viability of the defense is contrary to or involved an unreasonable application *Strickland.* Petitioner contends that no fairminded jurist would disagree that the state-court's decision was unreasonable.

2) Whether the state court's decision was unreasonable in light of the evidence presented as the the state court's decision is unsupported by sufficient evidence; its fact finding process was defective as it misapprehends, misconstrues, misstates, or ignores evidence in the record, the fact finding was infected by legal error; and no fact finding was made at all on relevant issues

The state-court's finding that counsel was not ineffective for failing to advise Petitioner of law concerning the charge of leaving the scene of a crash involving death and other viable defenses because Petitioner had no viable defense is also unreasonable in light of the evidence presented in the state court.

First the state post-conviction court found Petitioner's testimony credible in that counsel understood what Petitioner's position was as to the LSOA charge (i.e. that he did not know he hit a person). This credibility finding cannot be second-guessed and must be accepted. See *Pemberton v. Collins*, 991 F.2d 1218, 1225 (5th Cir. 1993) ("The habeas corpus statute obliges

federal judges to respect credibility determinations made by the trier of fact." (citing *Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 71 L. Ed. 2D 480 (1982)) Therefore Petitioner's testimony presented at the evidentiary hearing held in the state-court regarding the facts surrounding the LSOA charge and his trial counsel's deficiencies must be taken as true.

The state-court's factual finding that Petitioner admitted at the evidentiary hearing that "he pulled over at the Tom Thumb store, not to call 911 or law enforcement for help, but because his van was disabled, [which] could have been considered disabled by the flat tire or the fuel shut-off switch that would have been activated upon collision," is not supported by sufficient evidence in the record and also misconstrues/ignores the Petitioner's actual testimony.

Petitioner testified at the evidentiary hearing that due to the circumstances of the crash, including falling asleep at the wheel, and the pitch black lighting conditions due to there not being any street lights, at the instance of the crash occurring he did not know he hit a person. Petitioner stated he did not have any way of communication on his person and his van became disabled by the crash. Due to these circumstances, Petitioner stated that he made the most reasonable conscious decision and stopped at the nearby (only seconds away) convenience store "to determine if I need help, and you know, basically determine what actually took place." The Petitioner stated in essence that proceeding to the nearby store was the only reasonable and prudent thing to do under the circumstances.[2] Clearly, the evidence does not support the state-court's factual finding that Petitioner went to the nearby Tom Thumb store merely because his van was disabled but also to ascertain what actually took place and to seek out help, if necessary.

---

2 Logically, if Petitioner pulled over on the side of the road with a disabled vehicle, no way of communication, and in a darkened (pitch black) area, even if Petitioner discovered an injured person at that time he would have had no option but to now walk to the same Tom Thumb store to call for help.

The state-court's factual finding ignores/misconstrues Petitioner's actual unrebuted and credible testimony regarding his defense and is therefore "perforce unreasonable." See, *Maddox*, 366 F.3d 1000-01. Petitioner also contends that it is rebutted by clear and convincing evidence in the record as recited above.

Secondly, the state-court's factual finding that the Petitioner did not have a viable defense because [the evidence] showed that Petitioner was concerned for his own welfare and not that of the victim's when he stopped at the (nearby) Tom Thumb store is unreasonable, for one, based on the above. Also, the Petitioner's statement to the clerk in and of itself does not support such finding of Petitioner being concerned for his own welfare when considered in light of all the evidence as a whole. Taking into consideration Petitioner's actual unrebuted and credible testimony at the evidentiary hearing, Petitioner was not aware that he had struck a person until actually notified by law enforcement at the Tom Thumb store. Petitioner testified that there were no visible indicators that would give him knowledge (actual or constructive) that he hit a person. Petitioner testified that he did not see what he hit at the time of the crash occurring due to his falling asleep at the wheel. Upon being startled awake by the explosion of the airbags he only saw the cracked windshield, the deployed air bags, and darkness all round him. When he arrived at the Tom Thumb store he became aware he hit something due to the damage he viewed to the hood area of the van but did not know what it was. He did not see any blood or other evidence to indicate what he hit. The first officer on scene even testified at the Pretrial Detention Hearing that "other than signs of a recent crash he could not tell what Petitioner hit." and the store clerk also testified at the Pretrial Detention hearing that Petitioner stated he didn't know what he hit – "maybe a sign or something." Petitioner also reasoned that his statement to the store clerk that "I

think I hit someone, or something, I don't know what it was," was him attempting to report the crash under Florida law. Petitioner argued that it was only due to his report to the store clerk about being involved in a crash that the store clerk called law enforcement and Petitioner subsequently approached the first officer and reported the crash to him which in turn paramedics were eventually called. The evidence does not support that Petitioner was faced with a situation in which he was aware of the victim's condition (or that there was another party involved) and deliberately or negligently chose to ignore such only to seek help for himself.

Thus, in light of the evidence that was presented at the evidentiary hearing the state-court's decision that Petitioner did not have a viable defense because the evidence showed Petitioner was concerned for his own welfare and not that of the victim's when he stopped at the Tom Thumb store is unreasonable and or has been overcome by clear and convincing evidence in the state court record.

Furthermore, the state-court's decision that Petitioner did not have a viable defense is unreasonable because the state-court's faculty findings were infected by legal error. The state post-conviction court's assessment of the defense does not take into account the law pertaining to the offense of LSOA in that Florida law instructs that drivers of a vehicle involved in a crash which results in the injury or death of a person "shall immediately stop the vehicle at the scene of the crash, or close thereto as possible, and shall remain at the scene of the crash" until he or she has rendered reasonable assistance and provided identification. See, s. 316.027, & s.316.062, Fla. Stat. Florida case law posits that one stopping to make an investigation is a reasonable if not obligatory act towards completing the duties required by the statute. See, *Martin, supra*; *Goodman, supra*. Furthermore, in order to be found guilty of LSOA a driver must have

knowledge he was involved in a crash and of the resulting injury prior to making an affirmative decision to leave the scene of the crash which is determined by the totality of the circumstances, including the nature of the crash. See, *Sims, supra;* Fla. Std. Jury Instr. (Crim) 28.4 (2008) And that a driver's duty to render reasonable assistance is triggered by one's knowledge of the injury or death. *Mancuso, supra.* The state post-conviction court ignores Petitioner's testimony that he indeed stopped at a nearby (only second away) convenience store which Florida law permits and even instructs drivers to do to at least ascertain what took place. Therefore Petitioner contends that he complied with Florida law in this respect. He also reported the crash to the store clerk upon arrival at the store and the first officer on scene, and further provided his driver's license information, which also complied with Florida law. Further, Petitioner never left the scene of the Tom Thumb store or even attempted to leave, and could not return to the crash site due to the circumstances. Lastly, the state court relies upon after-the-fact (after the crash) evidence (i.e. Petitioner's statements to the store clerk) yet the state-court does not make an independent factual finding as to whether Petitioner's unrebuted and credible testimony as to the circumstances of the crash would have lead Petitioner to "know or should have known"of the injury to the victim, prior to making a decision to leave the scene in congruence with Florida law. The state-court did not point to any evidence to rebut Petitioner's credible testimony at the evidentiary hearing that he fell asleep at the wheel, and at the instance of crash occurring all he saw was busted windshield, the deployed airbags, and pitch darkness all around him. He did not see the victim before, at the time of, or after the crash. At the time of the crash the Petitioner was uncertain as to what took place – in other words, he did not have actual knowledge that a crash occurred. It wasn't until Petitioner arrived at the Tom Thumb store that he developed this knowledge of a

crash once he was able to assess the rest of the damage to the van. Petitioner testified by the time he reacted to the situation he realized his van was disabled and "fortunately at that time I saw the store up ahead."

Due to the circumstances of the crash there is not a reasonable probability that Petitioner "knew or should have known that he hit a person prior to making the decision to leave the scene (or point of impact) and proceed to the nearby Tom Thumb store. The state-court however appears to ignore the actual law with regard to how a driver violates the statute by relying only on after-the-fact evidence and not considering "the totality of the circumstances, including the nature of the crash." Thus the state-court's factual finding is infected by legal error, fails to make the necessary factual findings with regard to the circumstances of the crash, and ignored evidence presented in the state court. The state-court's factual findings are unreasonable and or have been overcome by clear and convincing evidence presented in the state court.

To the extent that the state-court does not make the necessary findings with regard to counsel's deficient performance as put forth by the U.S. district court, it is unreasonable as those findings are necessary to a determination of counsel's deficient performance. The district court opined "the Petitioner asserts that the post-conviction judge 'ultimately found that Petitioner's trial counsel did not advise defendant of such relevant information but that the Petitioner had no viable defense.' This mischaracterizes the post-conviction court's finding...[t]he post-conviction court found only that it was defendant's position that he did not know he hit someone and that under the circumstances of the offense, including the lack of a viable defense, defense counsel was not deficient."

By this opinion, it appears that the district court would agree that the state-court did not

make a factual determination on 1) whether trial counsel discussed the law surrounding LSOA and defenses thereto with the Petitioner; 2) whether counsel had a strategic reason for not doing so, or whether that decision was unreasonable; 3) whether counsel had a constitutional duty under the circumstances of the case (not the offense) as a whole to discuss such with the Petitioner; 4) whether the Petitioner's testimony that counsel failed to discuss such with him was credible; among other things However, the district court does not expressly make such a finding. Nonetheless, Petitioner contends that the state-court's failure to make essential findings shows that the state-court's fact finding process was defective, therefore its decision is unreasonable. This is illuminated by the fact that the state post-conviction court particularly found that counsel did not discuss with Petitioner's mother any defenses to LSOA yet failed to determine whether the same was true as to Petitioner. Such a finding would have been necessary to the resolution of Petitioner's claim. Notably, however, the state post-conviction court did cite to the Petitioner's allegations pertaining to counsel's deficient performance as raised in his motion and testified to at the evidentiary hearing as well as trial counsel's testimony but never made the factual finding mentioned above. Furthermore, the fact that the Respondent argues other reasons on why the state review court could have denied Petitioner's claim is also a quintessential showing of unreasonableness. See, *e.g. Wilson*, 138 S.Ct. at 1196.

With all of the foregoing Petitioner contends that he has shown that the state-court's decision was unreasonable as it was "contrary to or involved an unreasonable application of clearly established federal law, or involved an unreasonable determination of facts in light of the evidence presented in the state court." Wherefore Petitioner contends that the district court's reliance on these factors are erroneous and unreasonable.

C. Factual Finding by the state court was overcome by clear and convincing evidence outside the record under 2254(e)(1)

To be brief and clear, the evidence Petitioner moved to be be introduced in the federal court which was not presented in the State post-conviction court through no fault of his own is physical evidence that would corroborate petitioner's testimony. This evidence includes: DVD of store video-recording, minute-by-minute analysis of store video, Santa Rosa County Sheriff's Office (SRCSO) recording of call made by store clerk/witness, SRCSO witness statement audio-recording by store clerk, Payphone Records from Tom Thumb store, Sworn Witness statement made by store clerk, CD containing photos of accident scene & photos of Van at the store, CD containing photos of Van taken by Florida Department of Law Enforcement (FDLE), Google Map/Hampton Inn Map from Internet, Photos of Highway 98 during daylight hours, Florida State Troopers Accident Investigation Report, FDLE Reports, Post-conviction Expert Alan J. Armstrong Reconstruction Report, Sworn Affidavit of Gregory Copeland (Father of deceased), SRCSO dispatch records, New Reconstruction report of Reconstruction Expert (requested by Petitioner).

As presented in the District Court this evidence would corroborate the Petitioner's testimony of the facts and circumstances surrounding the crash and events afterward which would reasonably support a viable defense that he did not have knowledge of the crash and/or injury at the time of the crash and could not have developed knowledge of injury thereafter due to the nature of the crash and other circumstances, that he complied with Florida law by stopping close to the scene as possible by proceeding to a nearby (only second away) convenient store, alerting the store clerk to being involved in a accident in which law enforcement and paramedics were called, by approaching and making a report of the accident to the first officer on scene and

providing his identification/driver's license.

Petitioner contends that all of this evidence taken together will indeed show the circumstances Petitioner was faced with upon the accident occurring and in which would have led a reasonable person to take the same action as the Petitioner. The evidence will show that it was the only action Petitioner could have reasonably took due to the nature of the crash and the conditions of the night – it was pitch black! The photos of Petitioner's vehicle immediately after the crash will indeed show that there were no significant indicators that would lead a reasonable person to believe that another person was involved. In fact, this is verified by the first officer on scene's testimony that other than signs of a recent crash he could not decipher what Petitioner hit. Petitioner posited that it was only after the deceased was located that the officers took a closer examination of the van with high-capacity lighting and high-capacity camera lens to reveal minute traces of blood and hair follicles embedded in the busted windshield.

This evidence would amount to clear and convincing evidence to rebut the presumption of correctness of the factual findings made by the state courts and/or the findings made by the District Court below that Petitioner did not have a viable defense. Petitioner contends that this evidence should have been permitted to be introduced in the habeas proceedings and considered in determining the merits of the petition. Petitioner contends that this Court should grant certiorari to review this case as this evidence will show that the Petitioner is actually innocent of the accused crime of leaving the scene of a crash under Florida law to which Petitioner is currently serving an eight-year prison term.

On three separate occasion the Petitioner requested the U.S. District Court for the ability to conduct discovery and financial assistance to hire an expert, and also to expand the record.

The requests were related to a determination on the merits of his habeas corpus petition as well as showing his actual innocence to excuse any procedural defaults. The U.S. District Court on all occasions denied these requests without reason despite the objections lodged by the Petitioner in his Traverse and Objections to Report and Recommendation of the Magistrate Judge. (See Appendix B pg. 2) However, the Magistrate Judge, in the analysis section of its R&R stated "This Court's review 'is limited to the record that was before the state court that adjudicated the claim on the merits.'" (See, Appendix B pg. 12; citing *Pinholster*, 563 U.S. At 181. The Magistrate Judge however also recited the law under 2254(e)(1) in that "the state court's factual findings are entitled to a presumption of correctness and to rebut that presumption, the Petitioner must show by clear and convincing evidence that the state court determinations are not fairly supported by the record." (Appendix B pg. 12-13)

Petitioner contends that the District Court wholly and erroneously failed to consider the evidence the Petitioner sought to expand into the record in order to meet his burden under 2254(e)(1). The Petitioner lodged objections to such and raised in his application for a certificate of appealability as being erroneous.

For the above-mentioned reasons this Court should grant certiorari review in this case.

D. Petitioner has made a substantial showing of the denial of a constitutional right

The Constitution demands a defendant to receive the effective assistance of counsel during criminal proceedings, including the plea process. It is clearly established that the Constitution requires that a defendant be advised of the law pertaining to the charged offense. Prevailing professional norms also require trial counsel to inform and advise the Defendant about all pertinent matters bearing on the choice of whether to plead guilty or exercise his

constitutional right to a jury trial. The failure of an attorney to advise his client of the relevant law satisfies the first prong of *Strickland.*

Petitioner contends that the aforementioned arguments show that there was no reasonable basis for the state court or the District Court to conclude that Petitioner's trial counsel was not deficient in failing to advise him about the law pertaining to leaving the scene of a crash involving death. Petitioner made sufficient allegations in his state post-conviction motion and corroborated such at his evidentiary hearing supporting that his counsel failed to advise him about the relevant law pertaining to LSOA despite Petitioner's continued adamant profession of his innocence and his desire not to want to plead guilty to LSOA, and counsel's awareness of such. Petitioner's credible and unrebuted testimony at the evidentiary hearing revealed a reasonable basis to defend against the charge. There was no reasonable basis for trial counsel not to advise the Petitioner about the relevant law in this case and Petitioner has shown by evidence in the record that he would not have entered a plea but would have insisted on exercising his constitutional right to a jury trial had counsel adequately advised him.

Petitioner thus contends that this court should exercise certiorari review of this case.

III. The questions presented are important.

The long established right to the effective assistance of counsel in criminal proceedings is rooted and grounded in the 6th Amendment of the U.S. Constitution made applicable to the states by the 14th Amendment. Strickland v. Washington, 466 U.S. 668 (1984) This right encompasses and guarantees effective assistance in the plea process, which is a central component of the criminal justice system, Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366 (1985) Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1404, 182 L. Ed.

2d 379 (2012), Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and ensures that a criminal defendant's plea is entered knowing and voluntary. In order to be constitutionally effective counsel an attorney must provide his client "with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984). The failure of an attorney to inform his client of the relevant law satisfies the first prong of the *Strickland* analysis. Widen v. Sec., Fla. Dep't of Corr., 2010 U.S. Dist Lexis 87677 (U.S.M.D. Fla. 2010); U.S. v. Brown, 117 F. 3d 471 (11th Cir. 1997).

In *Lafler* this Court pointed out that over 95 % of convictions in America are the result of plea bargains. This case is one that highlights the importance of the effective assistance of counsel during the course of plea proceedings as it could hamper a meritorious defense being presented to a jury in which would establish the defendant's innocence. The denial effective assistance of counsel here deprived Petitioner of his constitutional right to a full and fair jury trial in which Petitioner desired the opportunity to establish his professed innocence. Petitioner met his burden under Strickland/Hill/Lee to prove both deficient performance by counsel and that he would not have entered a plea but would have insisted on going to trial.

Additionally, the federal provisions concerned here are relevant to finally give clarity to federal courts and parties alike concerning the burden of proof in habeas corpus proceedings, of which are also widely filed across the nation.

IV. Warrantless Blood Draw taken in Violation of the Fourth Amendment of the U.S. Constitution; Newly Recognized Right as announced by the U.S. Supreme Court in *Birchfield v. North Dakota* that states may not criminally punish a defendant for refusing a unlawful blood draw should be retroactively applied to cases on collateral review

The right to be free from unreasonable searches and seizures has long been a known constitutional right under the Fourth Amendment of the U.S. Constitution. Clearly established federal law holds that subject only to a few well-delineated exceptions, searches conducted without prior judicial approval are *per se* unreasonable under the Fourth Amendment. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Thus, law enforcement must obtain a warrant prior to searching or seizing one's person or property unless one of a few limited exceptions exist, including as in this case, exigent circumstances. In DUI cases where law enforcement seeks to withdraw blood from a suspect's person, the U.S. Supreme Court has long held that the dissipation of alcohol in a person's blood stream *may* qualify as an exigent circumstance. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966) Recently, the Court has clarified that the dissipation of alcohol by itself is not a *per se* exigent circumstance that allows law enforcement to forego obtaining a warrant in every drunk driving case but that it is a factor to be considered amongst many. Missouri v. McNeely, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696 (2013) Following this line of constitutional principles, the Court has also recently held in Birchfield v. North Dakota, that under the Fourth Amendment states may not criminally punish motorists for refusing to submit to an unlawful blood test. Birchfield, 136 S.Ct. at 2165.

Petitioner raised as claim in the state court and in his amended federal habeas corpus petition that the Court's recent decision in Birchfield should be retroactively applied to his case and that his conviction for resisting an unlawful blood draw should be vacated and, that his plea and/or

sentence for the other charges of DUI Manslaughter and Leaving the Scene of and Accident should also be set aside and remanded for a new trial or resentencing. Petitioner contends that if a defendant cannot be criminally punished for refusing an unlawful blood test according to the law then a judge or the State cannot use that basis to undermine the law and impose a sentence (enhanced or not) based upon what is prohibited by law.

The state post-conviction court's sole reason for denial was that *Birchfield* had not been announced retroactive.

Petitioner contends that the state court's jurisdiction to criminally punish him *IN ANY WAY* for resisting an unlawful blood draw is removed by the Court's holding in *Birchfield* where the Court held that "State's may not criminally punish a person for refusing an unlawful blood draw." The District Court failed to rule upon the contested issue of the Court's holding in *Birchfield* and a determination of whether Birchfield qualifies to be made retroactive. It is clearly established law that if the Court's new rule is determined to be one that requires retroactivity then a criminal defendant may obtain relief from the respective courts to gain the benefit of the new rule. Montgomery v. Louisiana, 136 S. Ct. 718, 728-32 (2016) In addition, the Court's new rule "places beyond the authority of the state the power to regulate certain conduct or impose certain penalties," thus as held by the Court in *Montgomery*, *supra*, "the Constitution requires state collateral review courts to give retroactive effect to that rule...regardless of when a conviction became final." (Id. 136 S.Ct. at 729) Notably, at least one state has recognized Birchfield's retroactivity. See, *Johnson v. State,* 916 N.W. 2d 674 (Minn 2018) cert. denied ___U.S. ____, 139 S.Ct. 2475 (2019); see also, *Fagin v. State,* 2019 WL 4853606 (Minn. 2019) The court in *Johnson* recognized that the rule announced in *Birchfield* was substantive and

applied retroactively to defendants on collateral review and because the Birchfield rule is essentially a challenge to the subject-matter jurisdiction of the convicting court, a guilty plea was not a bar to bringing an as-applied Fourth Amendment challenge to convictions like Johnson's. However, a second state court has made a decision contrary to *Johnson* and *Fagin* ruling that *Birchfield* does not overcome the retroactivity bar.

Petitioner contends that Birchfield is/should be made retroactive to cases on collateral review and that Petitioner's conviction for resisting an unlawful blood draw in violation of the 4th Amendment should be vacated, and Petitioner resentenced on the other offenses as the sentencing court used his resisting as a basis to impose a more severe sentence.

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully Submitted,

/s/ Anthony R. Griego, pro-se