Case No.: _
IN THE SUPREME COURT
OF THE UNITED STATES

20-6796

SIMON A. SANCHEZ,
Petitioner,

v

SECRETARY OF DEPARTMENT OF CORRECTIONS, et al.,
Respondent.
_____/

ON PETITION For CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully Submitted,

/s/ _____

SIMON A. SANCHEZ
DC#J38918
Florida State Prison – Main Unit
P.O. Box 800
Raiford, Florida 32083

RESPONDENT/ATTORNEY GENERAL,
THE CAPITOL, PL-01
TALLAHASSEE, FLORIDA 32399

QUESTION(S) PRESENTED

ONE

Whether Trial Counsel failure to object a factual withholding with Guilty modifications in two (Pharenteticals) of Jury instructions, prevented Juror's factual assessment that a piece of BB gun "was" or "was not" deadly weapon as additional charged offense, violated Sanchez Fair Trial and due process rights.

TWO

Whether the Circuit Court below exceeded the limited scope of COA Analysis, in finding additional non-disputed claims to decide the merits of the case first, rather than focus on a debatable inquiry only.

LIST OF PARTIES

ALL Parties appear in the caption of the Cover Page.

TABLE OF CONTENTS

INDEX OF APPENDICES

APPENDIX A: June 25, 2020, decision from the United States Court of Appeals, for the Eleventh Circuit.

APPENDIX B: April 10, 2019, decision from the United States District Court, Middle District of Florida.

APPENDIX C: September 14, 2020, Circuit Court Order denying a timely filed petition for rehearing and rehearing en banc.

APPENDIX D: Excerpts form COA decision in **September 18, 2019**, by the Circuit Court below granting in part COA.

APPENDIX E: Excerpts from Trial Transcripts, Police Reports, indictment and information.

APPENDIX F: Excerpts from Sanchez direct appeal attacking his conviction and sentence.

APPENDIX G: Excerpts from Sanchez Motion for Post-Conviction Relief, State Response and Sanchez Reply.

APPENDIX H: Excerpts from Amendments to Ground Four, Ten And Eleventh found in Respondents Section 2254 Exhibits filed in the United States District Court.

APPENDIX I: Excerpts from State Court Order denying Sanchez Motion For Post-Conviction Relief.

APPENDIX J: Excerpts from Sanchez Appeal to Motion for Post-Conviction Relief.

APPENDIX K: Excerpts from Habeas Corpus Proceedings under Section 2254.

APPENDIX L: Excerpts from Briefs Pertinent to the Ground allowed to Appeal in COA order.

APPENDIX M: Excerpts from Sanchez Petition for COA.

APPENDIX N: Excerpt from a timely petition for rehearing and rehearing en banc.

Respectfully Submitted this 11 day of December 2020.

/s/ _____

SIMON A. SANCHEZ
DC#J38918
Florida State Prison – Main Unit
P.O. Box 800
Raiford, Florida 32083

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CASES **PAGE(S)**

CONSTITUTIONAL AMENDMENTS

RULES

STATUTES

OTHERS

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 Appeal, for the Eleventh Circuit, appears at **APPENDIX A** to the petition and is unpublished.

The Opinion of the United States District Court, Middle District of Florida, Jacksonville Division, appears in **APPENDIX B** and is reported at **2019 U.S. District Lexis 61601**.

I. JURISDICTION

The date on which the United States Court of Appeal, for the Eleventh Circuit, decided my case was **June 25, 2020**.

A timely petition for Rehearing and Rehearing en banc was timely filed on **July 14, 2020**, and denied by the Circuit Court below on **September 14, 2020**. A copy of those filings appears at **APPENDICES C, AND N TO THE PETITION**.

AN extension of time to file a petition for Writ of Certiorari was requested, ~~but~~ this petition is timely filed, IN ABUNDANCE OF CAUTION, due TO No Ruling YET.

The Jurisdiction of this Court is invoked Title **28 U.S.C. Section 2254(1)**.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The **Fifth Amendment** due process clause; The **Sixth Amendment** Assistance of

Counsel, Notice and Jury Trial Guarantees and;

The **Fourteenth Amendment** right to due process; Taken together commands 1) effective assistance of Counsel at every Stage of a Criminal Prosecution and; 2) That "Any Fact", other than prior conviction that increases maximum Penalty for a Crime, "Must be charged in an indictment, submitted to a Jury for determination and proved beyond a Reasonable doubt."

Title 28 Section 2253 and 2254 APPEARS AT APPENDIX E.

III. STATEMENT OF THE CASE

1. OVERVIEW

In **September 18, 2019**, The United States Court of Appeal for the Eleventh Circuit (hereinafter Court below), Granted Certificate of Appealability (COA) as to Ground Eighth of the Twelve (12) grounds requested for Relief **(APPENDIX D, 14-15)**

The Court specifically expressed that the issue to be decided on the Appeal is that Defense Counsel failure to object to the Trial Court A) Crucial BB Gun factual omission in two [Pharentetical] of the Jury instruction concerning deadly weapon, B) it's impermissible substitution with the word "deadly weapon" and C) the recursive manner in which the deadly weapon word was modified, that tipped the scales in factor of a finding that the BB Gun was a deadly weapon, violating Fair Trial and due process Constitutional Rights. **See 28 U.S.C 2253(c)(3) and Fed. App. P. 22(b)(APPENDIX D, 14-15)**

In doing so, The Court analyzed Respondents prior misrepresentation and misconstruction of the claim, in which the State Courts and the district courts were misleading. Thus, diluting the district, and state court's below, erroneous conclusions based on Respondents false premises **(APPENDIX B, 14-15)**

On **June 25, 2020** The Circuit Court completely took a different course of Action contrary to the COA order **(APPENDIX A, 7-8)** and Title 28 U.S.C. 2253 Proceedings with erroneous conclusions that Sanchez claim a legal standard omission.

2. STATE COURT PROCEEDINGS

A. CHARGES, TRIAL AND APPEAL

Initially Petitioner was charged with three (3) Robbery Offenses. A Fourth Offense Attempted Arm Robbery was added in an Amended information, was severed from the others and form the basis of this review.

On that Four Count of the information, the State alleged that on **February 21, 2008**, Petitioner attempted to commit a Robbery with a deadly weapon, but without describing the object forming the basis for the deadly weapon additional crime, however, either the black revolver described by the victim or the piece of BB gun found the next day. **(Appendix E-1,2)**.

Whereas, Police Reports, 911 call and the victim (Monica Pate) attested that an Attempted Robbery was committed with a black revolver. **(Appendix E-3)**

On **February 22, 2008**, (The Next Day) Sanchez was arrested around the area and

a piece and a piece of BB gun was found in the back floor board of the passenger side of his vehicle **(APPENDIX E-4, 5-7)**. The piece of BB gun was different in shape and color from the black revolver described on the Police Reports, victim written statement and 911 call **(APPENDIX E, 3-7).** (The piece of BB gun was in the form of a semiautomatic pistol with a silver color on top of the barrel).

At trial, without notice and the state introduced the piece of BB gun, together with circumstantial pictures of where and how it was found and co-defendant unreliable testimony, as factual basis and crucial ingredient to prove the deadly weapon offense in connection to the Robbery. **(Appendix E 4, 6, 7, 10, 12)**

On cross-examination the victim was impeached as to her prior inconsistent description of a black revolver and adamantly admitted the unrelated similarities of the piece of BB gun in question. **(Appendix E-12)**

Sanchez testify on his defense that he did not use the piece of BB gun to committ. Any crime and was only a broken piece **(APPENDIX E 22-24)**

On closing argument the prosecutor with a visceral intensity and incorrect statement of law emphasized that even the Judge would agree in her instructions that BB gun is absolutely a deadly weapon:

> "BB gun is absolutely a deadly weapon if pointed and pull the trigger. She could have bleed to death. ... The Judge is going to read that instructions to you. You will take back." **(TR.280-**

Appendix E-26).

Soon after, the Trial Court instructed the Jury utilize the **Florida standard Jury instruction 15.1** that applied to Robbery. The instructions concerning deadly weapon contains two crucial [Pharenteticals] that, with due process concerns, sets the elements and guide the Courts as to how to instruct the Jury's to find the factual basis for the deadly weapon crime charged:

> "If you find that the defendant carried a [deadly weapon described in the change] in the course of committing the Robbery and that the [deadly weapon described in the charge] was a deadly weapon, you should find him guilty of Robbery with a deadly weapon.

But in doing so, the Trial Court hold the factual BB gun required modification in the [Pharenteticals] and instead, impermissibly supplanted with deadly weapon word in a recursive manner. the Jury was instructed that:

> "If you find that the defendant carried a "deadly weapon" in the course of committing the Robbery, and that 'the deadly weapon was a deadly weapon' 'you should find him Guilty of Robbery with a "deadly weapon". **(Appendix E 30, 37)**

Then, the Jury was instructed on the legal standards of deadly weapon **(Appendix E 30, 37)**

Minutes after the Jury was sent for deliberations on the Attempted Robbery and the deadly weapon findings. It took only 45 minutes to find both Guilty verdicts. In a two phase Trial: Attempted Robbery and additional deadly weapon charged crime. **(Appendix E 33) R-318).**

Sanchez was sentenced to ta thirty (30) years in prison as an habitual felony offender. (H.F.O), PURSUANT TO FLA. STAT. 775.084.

On Appeal, with an appellate trial Counsel, Sanchez raised for the first time the [Pharentetical] factual omission, its impermissible substitution and it's recursive manner of modification in the Jury instruction, as a foregoing conclusion telling the Jury that the BB gun is a deadly weapon and restrict them from consider, evaluate and determine the piece of BB gun as a potential deadly weapon.**(Appendix F 1-6)**

Respondents, on the other hand, with the same assistance Attorney General here, Thomas H. Duffy, did not dispute the merits of the claim. Instead contended that the error was not objected at Trial, was not fundamental and therefore was prematurely raised on direct appeal. Direct appeal was per curiam Affirmed. **(Appendix F 8-11).**

The Florida First District Court of Appeal (1 DCA) per curiam Affirmed the Judgment and Sentence **(Appendix F 12-13)**.

B. STATE POST-CONVICTION PROCEEDINGS

Thereafter, appearing Pro se, petitioner filed a timely **Fla. R. Crim. P. 3.850** Motion in **July 27, 2011**. An amended motion was filed on **June 28, 2012**, raising

twelve (12) grounds in total of ineffective assistance of Counsel. **(Appendix G 1-14)**

In ground seven (7), the issue Petitioner was granting of COA in the Circuit Court below, Petitioner claimed that his Trial Counsel failure to object to the Trial Court factual omission of the piece of BB gun in the [Pharentetical] of the Jury instruction, with foregone Guilty conclusions.

On **July 10, 2014**, the State responded that because the Jury was legally instructed on the law regarding deadly weapon, defendant failure to demonstrate legal deficiency.

As to ground one of his Rule **3.850 Motion** Petitioner claimed that even though trial Counsel object on withhold adjudication bases, Trial Counsel **in May 2009** sentencing hearing was prejudicially ineffective for to object to H.F.O. Sentence on the Ground that the State rely on a prior offense in which "Probationary Period was completed" together, as a key component factor, with a withheld adjudication that, "Florida and Federal Courts has recognized those prior offenses to be a non-existed conviction for **H.F.O.** purposes. **(Appendix G 2-3, E 38-43)**.

Therefore, the trial court ruled on the withholding and adjudication issue only, without the key component factor of "completion of probation."

The Post-Conviction Court denied re-sentencing based on, **Withmore v. State, 147 So. 3d 24, 25 (Fla. 1st DCA 2013)**, a Florida First DCA case law that came out Four (4) years after Trial Counsel challenged conduct, on sentencing hearing in **2009**, was to be evaluated. **(Appendix I 2-3)**.

In ground Fourth of his **Rule 3.850** motion, Petitioner claimed Trial Counsel failure to file a Motion to suppress "in" and "out" of Court identification, arguing in particular that the Prosecutor brought the victim to the Jury selection process and pointed out who Petitioner was for recognition purposes at trial. Appellant elaborated that regardless of a prior tainted identification in a photo line up, the victim never saw Petitioner in person prior to Jury selection simply because he was not the robber and the contested issue at trial was identification. **(Appendix G 4-5)**.

As to Ground ten of the **Rule 3.850** motion, Petitioner claimed Trial Counsel failure to call an expert to prove the Jury the inoperability of the irrelevant piece of BB gun introduced at trial, by the state to prove the deadly weapon element of the crime, arguing that such fact would create a well founded reasonable doubt that could have change the outcome of the BB gun/deadly weapon judgment and sentence. **(Appendix G 8-9)**.

In ground eleven petitioner claimed a conflict of interest because his lawyer helped Sanchez co-defendant/state join continuance of the case where the court clearly was against it,on the ground that it would create conflict with Petitioner speedy trial demand. Petitioner further argued that such continuance in the case prejudice the defense because it "gave the state additional (eight (8) more months) time to broke a deal with co-defendant to testify and produce a detrimental testimony against petitioner at trial. In addition, Petitioner contended that even Trial Counsel recognize his own mistake at trial

when he told the Jury "without co-defendant the State has not case, because he (co-defendant) has to tie everything together. **(Appendix G 9-12)**

After accepted the legal sufficiency of the claims four, tenth and eleventh on **March 25, 2014**, the court asked the state to response. The State did it on **July 14, 2014. (Appendix G 15)**. Petitioner reply to State Response. **(Appendix G 16-28)**

Nevertheless, the trial court backtrack all it's prior rulings and parties responses therein, and ordered that those grounds need to be amended within sixty days as legally insufficient. **(Appendix H 1-14)**

Sanchez timely comply **September 29, 2015**, with the Amended order. **(Appendix H 5-23)**

Nevertheless, the Post-Conviction Court denied grounds four, tenth and eleventh for failure to comply. **(Appendix I-2)**

On Appeal, Sanchez presented the Appellate Court proof of his compliance including the Post-Conviction Court docket sheet receiving such document. Respondents do not contest anything on the Appeal **(APPENDIX 13-14)**. The Appeal Court per curiam Affirmed on all grounds on **June 1, 2016**. **(Appendix J -15)**

C. Federal Habeas corpus proceedings in the United States District Court.

Clear on any time, Jurisdictional and Procedural Bars, Petitioner on **November 2, 2016**, file a **Section 2254** Petition for writ of habeas corpus relief, in the United States District Court, Middle District of Florida, Jacksonville Division, raising eleventh claims

of ineffective assistance of trial and Appellate Counsel. **(Appendix K 1-14)**

As to ground eight, keeping the same factual foundation of the claim (thereafter granted COA), Petitioner specifically asserted, that the State Court unreasonable applied **Strickland** Federal Law and unreasonable applied the facts of the case in light of the evidence presented in the Post-Conviction Proceedings. that Trial Counsel failure to object to the trial court; factual omission of the piece of BB gun in the Pharenteticals; failure to instruct the Jury as to how to evaluate the Broken piece of BB gun as a potential deadly weapon at Trial; and the [Pharentetical] impermissible modification in the Jury instructions invaded the Jury province by tipping the scales in favor of a finding BB gun as a deadly weapon, which is an error of Constitutional dimension **(APPENDIX K 8-9).**

Respondents, on the other hand once again twisted the presentation of Petitioner claim in a way that the District Court believed the claim to be a failure to ask that the Jury should have been told that a BB gun cannot be a deadly weapon. **(Appendix K 18-19)**

Thereafter, Petitioner reply to that response and specifically pointed out Respondents misrepresentation of facts, laws and evidence that missed the Principal Point of the Claim **(Appendix K 26-27)**.

Nevertheless, the district court without report and recommendation—though properly recognized the substance of the claim **(APPENDIX B 40-lines 5, 6, 7 and B**

41 line 16-17) that the Jury instruction should have specifically included term "BB gun" in the [Pharenteticals] as the weapon the state introduced as a bridge to prove the deadly weapon element of the crime charged; that the Jury was never instructed to evaluate and decide whether the piece of BB gun "was" or "was not" a deadly weapon based on the facts, law and Petitioner actions in the case and that Sanchez properly exhausted the claim as it is — denied habeas corpus relief based on Respondents false promises and misrepresentation of the claim. **(Appendix B 40-41)**.

On ground two petitioner claim that the State Post-Conviction Court discriminate and declined to Rule on Three federal claims on ineffective assistance of Trial Counsel to which; ground four —— failure to object to in and out of court identification; ground ten — failure to call expert in concern to the inoperability of the BB gun presented as a deadly weapon at trial; and ground eleven—conflict of interest. **(Appendix K 2-3)**.

Citing Federal Law specifically dealing with the mailbox rule subject, Sanchez ask the district court for Federal Review on the adequacy of the State Procedural Bars, unfairly imposed to his **Strickland** Federal claim, based on false premises. To Review those claims de novo due to state court refusal to Rule on **(Appendix K 2-3)**.

Respondents for their part, argue that petitioner never amended those claims, **(Appendix K-16)** but ironically it's own records filed in the district court, contains Sanchez amended compliance mailbox Rule to those three (3) Federal grounds received

in the Post-Conviction Proceedings by the State Court (Respondent exhibit to the district court document **23-23, page 56 of 86-Page Id.1775 (Appendix H 5-23)**.

Petitioner reply, in explicit terms with law, facts and evidence, pointed out this feature. **(Appendix K 23)**.

Ignoring such evidence, facts, law and the constitutionally of petitioner **Strickland** Federal claims, the district Court simply labeled the issue to be merely an error of state Post-Conviction Rules and declined it's Federal inquiry on the palpable discrimination by the state court of three (3) Federal claims **(Appendix B 17)**.

On ground three, Petitioner claimed that the state court unreasonable applied the federal holdings of Strickland, retroactive applications and ex Post facto Rules in order to summary denied a prejudicial ineffective assistance of Counsel claim for failure to object to H.F.O. sentence in **May 15, 2009**, based on a prior offense that does not constitute a conviction for H.F.O. purposes under state and federal law. **(Appendix K 5-7).**

In particular, petitioner asserted that the state court judged trial Counsel challenged conduct in **May 2009**, with a case law that come out **Four (4) years after the fact in 2013. Whitmore v. State, 147 So. 3d 24-25 (Fla. 1st DCA 2013)** Contrary to and unreasonable to the Strickland strick holding that a Court must evaluate and Judged Counsel performance based "on the facts of the particular case, viewed as of the time of Counsel challenged conduct. **Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct.**

20 52, 80 L. Ed. 2d 674 (1984); and against ex post facto and retroactive application. (Appendix K 5, 6, 7, 23, 24, 25-E 38-43).

Without deciding the questions presented, the district court merely replicated and stacked the state court unreasonable conclusions and federal laws misapplications. (Appendix B 18-20)

D. RULING BELOW.

On **September 18, 2019**, The United States Court of Appeal, for the eleventh circuit granted COA as to ground eight (8) (of eleven claims presented therein) that trial Counsel failure to object to the [Pharentetical] factual BB gun omission in the Jury instruction, it's impermissible substitution for the "deadly weapon" word in a recursive manner of modification. In doing so, the court below in specific terms:

First, instructively compared the **Florida Standard Jury Instruction 15.1**, used as a model by the trial court, to the Jury instruction unreasonably given in the case at trial, in order to clearly view the factual withholding [Pharentetical] error complained, (Appendix D, 14-15), WITH IT'S GUILTY SUGGESTIONS/MODIFICATIONS.

Second, the Circuit Court order expressed point blank and cast out Respondents previous misrepresentation of the claim, it's false premises of facts and unreasonable conclusions, in which the United States District Court and Post-Conviction Courts were previously misguided and lulled to Review the Claim. (Appendix D 14-15).

CONVERSELY, THE CIRCUIT COURT DENIED RELIEF, ON THE MISAPPREHENDED CONCLUSION OF "LEGAL STANDARDS OMISSION INSTRUCTIONS", THAT EXPLAIN HOW TO

define or what constitute a deadly weapon" correcting any "confusion of deadly weapon definitions" **(Appendix A, 7-8)**.

Nothing was said as to the factual omission of the piece of BB gun, and the crucial impermissible substitution with deadly weapon word, in a recursive manner of modification, however, **(Appendix A, 7-8).**

Thus, misapprehending and overlooking the COA explicit terms in contrary to title **28 U.S.C. 2253 (c)(3)**; and **Fed. R. App. P. 22(b)**, it's clarification of the claim, facts and law, Petitioner evidence to support and federal authorities that resolved previously issues on identical situations.

On ground two of his COA petition **(APPENDIX M 1-10)**, Petitioner asserted that on one hand, the district court limited it's **Section 2254** scope of review by declined to Rule on the adequacy of the state court astonishing procedural dismissal based on the false premises, that Petitioner never amended it's claims—as ordered to do so, and in contrary to the evidence he presented in support thereof,—~~that~~ discriminating against Petitioner three (3) Strickland Federal Claims. **(Appendix M 3-5)**.

And that, on the other hand, the district court exceeded the **Section 2254** scope of review by framing the issue and search for additional non-disputed factors to denied the claim. **(Appendix M 3-5)**.

The circuit court nevertheless, first rephrased the word "prior to" for "following" in the district court order with the conclusive meaning of "untimely" filed Amendment,

(Compare APPENDIX B 17), and banked it's COA denial on the erroneous district court unbalanced conclusions of 28 U.S.C. 2254 proceedings, thus, entering merit determination, rather than enter the debatability analyzes of COA, based on evidence, facts and law. **(Appendix D 6, 7, B 17)**.

As to ground three of his COA Petition, Petitioner presented, the circuit court below, the questions that the district court failure to resolve as to whether the:

> "State Post-Conviction Court unreasonable applied **Strickland**, **Retroactive** and **ex-post facto laws** by summary, denied a claim of Trial Counsel failure to object to H.F.O. sentence in May **2009** sentencing hearing —with a Florida 1st DCA case law that came out four (4) years **(in 2013)** after Trial Counsel challenged conduct? **(Appendix M 6-9)**.

Noted and avoiding the questions presented the circuit court below at the outset entered a merit determination, by searching for additional non-disputed grounds and case law to denied COA:

First, the Circuit Court framed the issue to be merely an imposition of Probation, rather than completion **(Appendix B 19 and D-8 and E 38-43)** as the evidence supports, to which is the key factor analyzes for determined such issue and in which state and Federal laws for decades has been explicitly clear on this point. and;

Second, to fit that non-disputed ground, the circuit court search for a distinguish inapplicable, and **predated-2009** case law Not cited, **(Appendix B 18 and D-8)**, and then justify the district court denial citing the distinguish case law, **State v. Richardson, 915 So. 2d 86, 89 (Fla. 2005)**, that dealed with "imposition of probation" only, rather than "completion of probation."

Thus, exceeding the scope of COA analyzes by inverted the **Section 2253** statutory course and order of operations, deciding the merits of the appeal first, rather then enter a debatable inquiry, then denying COA based on the new frame-search artificial grounds and it's actual merits. **(APPENDIX B-18, D 8, E 38-43)**.

Certiorari review is essentially necessary based on the following reasons:

IV. COMPELLING REASONS FOR GRANTING THE PETITION

First and foremost, this case is of **National and exceptional importance**; for if this honorable court not grant this Petition it would be a palpable **Miscarriage of Justice** committed not only to Sanchez, but to a thousand, hundreds of thousands and even millions of other similar situated defendants awaiting state trials, or collateral reviews on State and Federal Courts, where deadly weapon is an additional charged crime that increase sentence, in the state of Florida and many other states nationwide, not only on Robbery offenses, but in burglaries, batteries, kidnappings, murders, assaults. ....

Consequently opening a constitutional vault, that this honorable court in particular

has been guarded so hard and for so long, along with other courts nationwide, and surrendering it's federal constitutional power and control to the states by given an unjustifiable and illegitimate weapon to promote **Injustice**. Thus, trying all kinds of trials "without having to prove the factual basis of deadly weapon offenses.

In another words, if this honorable court denied this petition, the state would have the unusual an absolute constitutional federal power to control, introduce as a evidence and manipulate and irrelevant and unrelated objects at State Trial (same as it did here) — with whatever can stick view for deadly weapon purposes. Followed by the State Trial Courts authoritarian Factual omissions in the instructions, Prosecutors misstatements of Law and Trial Counsel significant silence — regardless of any **Fair Trial/Due Process** fundamental and crucial requirements against factual bogus convictions, just because down the line it can mask the constitutional factual violations, by citing this case with it's illusory and artificial conclusions that, because the Jury was given "legal explanations of how to define deadly weapon in General terms."

Therefore, covering Trial Counsel failure to object to a crucial factual omissions-impermissible substituted with recursive modifications, that carried hideous connotations of guilty in a Jury instructions. Thus, making an obliterate outcast of the **V, VI and XIV amendments Constitutional Rights,** rather than a boundary constitutional protection. Winship-Apprendi infra.

Second and of paramount importance, is that leaving the circuit court decision as

it stand now, definitely would poison the public confidence in the judicial system, it's conservative-democratic ideals reflected in this and other courts and the community at large. For in-particular:

1. The existence of **Title 28 U.S.C. §2253(c)(3); Fed. R. App. 22(b)**, with it's accepted and usual course of COA proceedings, would be meaningless or void as the circuit court below exemplary departure from it shows and;

2. Would destroy and transformed the **constitutional fair trial, due process** and reasonable doubt sacred principles, entrusted and maintained so callously in the Judicial System, to a disparatory or invalid tale of mockery that would serve just as a an arbitrary/discriminating passing glance on innumerable offenses in which deadly weapon is an additional and crucial charged crime to increase sentence. Giving the scene of the Judicial system and proceedings as a whole an unreal quality and false sense of Judicial protection.

In this vein, the after effects of not granting this Petition would consequently result as a federal authority of fundamental change in the Law-of **Title 28 U.S.C. §2253(c)(3); Fed. R. App. 22(b)** accepted and usual course of COA proceedings and the legendary and vital role of the indispensable reasonable doubt bedrock standard in criminal proceedings — and by extension as a Nationwide illegitimate excuse for the state to bypass is burden of proof every fact of the additional deadly weapon charge beyond a reasonable doubt.

Third and crucial, granting this petition would maintain uniformity with all United States Court of Appeals, this court, district courts and even state courts, thus, avoiding a significant palpable and inherit conflict in which other courts consistently has been previously resolved the same (issue of deadly weapon) factual omissions, impermissible substitution with recursive modifications in Jury instructions.

In sum, the Circuit Court below granted COA, but departed from it, as to failure to object to the factual piece of BB gun withholding, it's impermissible substitution and recursive modification that removed form the Jury the assessment of facts constituted the deadly weapon additional charged crime, contrary to V, VI, XIV of U.S.C.; APRENDI V. NEWYERSEY, 530 U.S. **446, 455, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Sandstorm v. Montana, 442 U.S. 510, 520, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); > in re winship 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed 2d 368 (1970); Bennett v. Graterford, 886 F. 3d 268, 285-286 (3rd Cir. 2018) Linch v. Dolce, 789 F. 3d 303, 309 (2nd Cir. 2015)**.

I.

Accordingly and all things considered, the bottom line of the issue here is that the circuit court below departed from the accepted and usual course of 28 U.S.C Section 2253proceedings by overlooked, misapprehended and missed the principal point of the appeal, **Sanchez** factual claim and the evidence presented **(Appendix A, 7-8 and D, 14-15)**.

Sanchez never merely claimed A) an insignificant, single or just a simple state law violation of B) confusing Jury Instruction that C) does not explain to the Jury the legal standards of deadly weapon. **(Appendix A, 7-8)** as the circuit court equivocally ruled **(Appendix D, 14-15-COA Order)**.

Neither a minor single claim under state law that can be cured, nor water down simply by legal choices, determinations and definitions of deadly weapon. **Id.**

What Sanchez always claimed, in which the COA order certify **(Appendix D, 14-15)**, was a substantial **six amendment constitutional** and prejudicial claim of ineffective assistance of Counsel for failure to object of a fair trial/ due process series of added-injury-to-injury violations OF WINSHIP-APPRENDI-SANDSTORM PROTECTIONS, that culminated in a "complete removal from the jury the assessment of facts and piece of BB gun" object, irrelevantly introduced by the state as a factual ingredient and crucial basis to prove the additional charged offense of deadly weapon-THAT INCREASE PENALTY **(Appendix D, 14-15 and Part III (2)(A)(B)(C)(D) above)**.

In short and realistically, the Jury instruction viewed as a whole was sterile, or for that matter lacking, of facts in concern to the piece of BB gun the state claimed to be used in the attempted armed robbery.

And every effort in the book was solidly made (by the Prosecutor-Trial Judge and because Counsel significant silence) to erase those facts from the Jury consideration and tipped the scales in favor of a finding that BB gun is a deadly weapon. The Started Point

that triggered those series of fair trial/due process violations is;

1. The state irrelevant introduction, over objection, of a semi-automatic piece of BB gun accompanied by unrelated to the Robbery photographs and inconsistent testimony; whereas the victim and Police Reports clearly indicate that a Black revolver was used to commit the Robbery **(Appendix E, 1);** whereas the indictment failed to include in the body of information the BB gun factual Basis **(Appendix E, 2)** **(Apprendi, 147 L. Ed. 2d at 440, 441, 446, ; relying on Jones v. United States, 526 U.S. 227, 243 (1999)** that first constitutional violation grows in importance by;
2. The Prosecutor visceral intensity in which he stressed the preordained idea, to the Jury at closing argument, that even the trial judge would agree with his opinion (and incorrect statement of Law) and would instruct them that BB gun is absolutely a deadly weapon, in that he told the Jury:

   > "BB gun is absolutely a deadly weapon if pointed and pull the trigger, she could have bled to death. .... The Judge is going to read the instructions. You will take back. **(Transcripts 280 – Appendix E)** **See Bennet 2018 U.S. App Lexis 4, 5, 31, 32** that Prosecutor/Trial Judge improper bonding or prediction ultimately began to take a different tone when;

3. The Trial Judge, while failure to correct the Prosecutor lead off misstatement of

law and bonding prediction, **(Bennett 2018 U.S. Lexis 5)** echoed those by factually omitted the piece of BB gun name in the [Pharenteticals] of the Jury instruction, contrary to the factual basis the state introduced as a crucial ingredient to prove the additional deadly weapon charge **(Appendix E 30-37) Apprendi 147 L. Ed. 2d at 441** (any fact other than prior conviction. ... has to be submitted to a jury and proved beyond a reasonable doubt).

4. But, such factual withholding was just the sub-final-catalyst point in which the factual question for the Jury was transformed to an affirmative suggestive statement when; **(Apprendi / Sandstrom, 442 U.S. at 520-24 (mandatory presumptious violates due process),** The Judge told the Jury;

> "If you find that the defendant carried a "deadly weapon". ... and that "the deadly weapon was a deadly weapon" you "should found him guilty". ... with a "deadly weapon" **(Appendix E 30-37)**

Thus, cementing the Prosecutor lead off prediction to the teeth, including the Final Words "you will take back" **(APPENDIX E-26)** For:

5. For the Judge did in fact sent the same erroneous instructions in writing, to the Jury for deliberations **(Appendix E-30, 37).**

Indeed, A perfect recipe for disaster, nonetheless, adding to that, trial Counsel significant silence might as well create the perfect storm. Buck supra, 2017 U.S. Lexis

34. For there were too many violations, again and again, that passed before the Juror's, without Counsel objections to go unnoticed or be taken as a mere wretched coincidence.

The converse is true.

At that point, even a Juror with a Preternatural grasp of the statutory deadly weapon law would have lost his [her] grip after listening, 1) The Prosecutor bonding prediction with the Trial Judge; 2) The Trial Judge failure to correct such lead off flat out error; 3) The Trial Judge confirmation when it told the Jury "the deadly weapon was a deadly weapon, you should found him guilty. .... with a deadly weapon"; and on top of it; 4) Defense Counsel significant silence. **Id at Bennett 2018 U.S. Lexis 5, 31, 32; Buck 2017 U.S. Lexis 33-34.**

Accordingly, creating a reasonable likelihood that at least in the eyes of the Judge, Prosecutor and Trial Counsel the "Piece of BB gun was absolutely a deadly weapon." definitely, a mandatory presumption at least. **See Sandstorm at 442 U.S. 515.** For as it turns out the Jurors were just a normal persons, with natural instincts. Not trained in the puzzled of law. Nor there were told that have to judge the piece of BB gun facts in concert with the legal standards of deadly weapon, to reach a verdict; consequently, Guilty was just the handiest, obviously common and most natural reasoning for them to pick, Particularly if Trial Judge/Prosecutor confirmed opinion.Human Nature spoke for itself. THAT WAS CLEAR. INEVITABLE.

A Foregone conclusion and order, nonetheless, for a conviction of an uncharged and unproven additional crime. Winship supra. But none of the above was even mentioned in the Circuit Court below order **(Appendix A 7-8)**

B.

Nevertheless, has any doubt to factually consider the piece of BB gun in the Jurors minds by the wayward course the case had taken, the suggestive line of events and vicious cycle of unleashing stream of packaged conclusions that BB is a deadly weapon, such doubt was cast-out, killed on the spot, written off from their memory and cosigned to oblivion by the legal determinations and definitions of a deadly weapon.

For the after the fact "Legal definitions of deadly weapon" has the same recursive common denominator as the former ailing instruction when viewed in context. , it tells the jury;

"deadly weapon" this, "weapon" that, "deadly weapon", "deadly weapon". ....

(Appendix E 30-37)

Both carried with assertiveness the same hideous connotation, deadly weapon.

Both, lacked directly or indirectly the facts of the piece of BB gun the state claimed to be used in the Robbery. **(Appendix E 30-37)**

Both, put it together amplified guilty cue, rather than cure sanitize or water down the factual BB gun omission. Not even re-calibrated or balanced out at least.

It surely doesn't tender within it's body the certain and specific lack of the

constitutional factual questions removed from the Jury, as to whether the piece of BB gun "was" or "was not" a potential deadly weapon. Bennett, Supra at 285 (quoting Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (under Federal Law, "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. This is so even when other language correctly explain the law.

Both, contains no specific and assertive factual information and sent the wrong message to the Jury. Not a factual one, but a suggestive one. One of Guilty, however. For it sent, not even a factual hint nor, even a tailored factual advertisement. It directs the Juror's to reach a factualess deadly weapon verdict with Guilty suggestions.

(APPENDIX E 30-37) Sandstrom, Id at 520-24

Both, were so strikingly similar, that it was hard to differentiate from one to the other, in the Juror's eyes, ears and mind. Thus, given them no room other than apply both as part of the same unifying designed theme or elaborate variation made from a mix of different components.

A flashback, endgame or ripple effect of the same factual omission with mandatory presumption.

It was timely taken as if it carried means to an end. A fast ball in the game strengthen the Prosecutor/ Trial Judge jointed opinion that BB gun is absolutely a deadly weapon. For in context with the record and the instructions viewed as a whole, the Jury

was in explicit terms directed;

> Prosecutor: "BB gun is absolutely a deadly weapon. .... The Judge is going to read that instructions to you will take back"
>
> **(Transcripts 280-Appendix)**
>
> Trial Judge: "If you find that defendant carried a deadly weapon. ..... And that the deadly weapon was a deadly weapon, you should found him guilty. ..... with deadly weapon."
>
> **(Appendix E)**

in the same pattern the Judge continued:

> "deadly weapon" this. ... "deadly weapon" that . .... "weapon" this and that. .... **(Appendix E)**

Under those Prosecutor arguments and such instructions, the Jurors was definitely "not free to exercise it's collective judgment" and to reject what it "did" or "did not" find trustworthy of:

I. the piece of BB gun as a potential deadly weapon.

II. BB gun relevancy in contrary to the revolver describer by the victim and Police Reports before Trial.

III. Victim credibility about the impeached inconsistency of black revolver versus piece of BB gun A) it's different shapes and; B) it's different color, passed before them at trial.

IV. The State evidence/testimony relevant or not to the piece the BB gun as the Prosecutor claimed to be used in the Robbery.

V. Sanchez testimony on the stand that he did no use the piece of Bb gun to committ any crime.

Ultimately, that Factual decisions should have been left to the Jury as the Sole trier of facts. Not taken it out and replaced with recursive modifications conveying guilty. Sandstrom supra Winship/Apprendi supra.

Simply put, viewed as a whole and in context with the Trial Record, the instructions were too factually impotent, factually messy and too factually ineffectual to balanced out a question for the Jury to consider as to whether the piece of BB gun "was" or "was not" a potential deadly weapon.

In contrast, it only conveyed guilty or at least tipped the scales in favor of a finding that a BB gun is a deadly weapon.

Such facts are more evidenced in the fact that the Jury shockingly took only 45 minutes in what was suppose to be a two phase deliberations; 1) one for Attempted Robbery alone and; 2) for the additional weapon finding. **(Appendix E 33)**

It was inevitable, because there was not factual equilibrium and the average Juror's simply follow the Prosecutor and trial court continuous commands and Trial Counsel significant silent. Federal case, that conflicts with the circuit court below, on

identical situations, confirms that;

C.

In **Lynch Supra**, the 2nd Judicial Circuit faced atmost the same identical situation. **Lynch** Counsel requested a factual instruction "under state law", on a Robbery with a deadly weapon charge, that the Jury be charged with the factual necessary ingredient to find that Lynch possessed dangerous instrument at the time of the Robbery. The trial court refused to give the factual instruction.

In an appeal to the **Section 2254** proceedings the circuit court found appellate Counsel ineffective for failure to raise the preserved withholding factor in the instruction as a defense to bogus factual conviction on deadly weapon. Regardless of the sufficient evidence against him.

The only inconsequential differences between Lynch and Sanchez is that 1) Trial Counsel objected and 2) in contrast Sanchez Counsel failure to object to the factual withholding.

In **Davis v. Strack, 2001 U.S. App. Lexis 23399**, the United States Second Circuit First declined the Respondents incorrect invitations to depart from 28 U.S.C. 2253 proceedings,and then held that a factual withholding instruction A) (Against defense Counsel contentions) on Justification with respect to a homicide charge, in which B) he was entitled under state law occurred and C) with the effect to deprive Davis entirely of his defense,on which he had significant possibility of prevailing,and to

ensure conviction. Further the court clarify that the factual withholding error was of immense importance; not a minor error of state law in explaining the legal standards to the Jury.

In Conflict with Davis, first the circuit court departed From 28 U.S.C. Proceedings (COA 14-15) then held, in contrary to the appeal, claim and evidence, that Sanchez claims A) minor state law error in explaining the legal standards of deadly weapon th the jury and B) Federal Court barred relief (Court Order at 7-8). Sanchez was entitled to have his Jury factually instructed not only under instructional [Pharenteticals] but under **V, VI, VIV, Amend. U.S.C.; Apprendi, in re winship** and Sandstorm supra, according to the piece of BB gun facts of the case in context, AND in wish he had significant possibility of prevail; For the jury witnessed firsthand 1) the irrelevancy of the black revolver described in police reports against 2) the piece of BB gun introduced at trial in wish 3) the victim got caught testifying on impeachment (Appendix E-12) 4) Sanchez testimony that he did not use that BB gun to committ any crime 5) the obvious incapacity of the broken piece of BB gun as a Potential deadly weapon. ...

In **Bennett v. Grateford, 2018 U.S. App. Lexis 7505 886 F. 3d 269;** The United States Third Circuit Court ON same double factor of mandatory presumptions, was confronted with a prosecutor incorrect arguments as a matter of law compounded instructional errors. Id at 275. or vice versa, trial Judge echoing prosecutor impropriety that the Jury instructions Id at 288, That an accomplice or conspirator is equally guilty of

First degree murder, that Albeit single, under state law, relieved the State of it's burden to prove the specific intent to kill factor of First degree murder, to the point that other instructions does not cure the factual suggestiveness.

First the third Circuit Court declined the Respondents strange suggestions to depart from the authorized and certified issue an the COA order under Title 28 U.S. 2253, Id at 866 F. 3d 280.

As explained above, Sanchez Prosecutor misstatements, predicted bonding and visceral arguments were echoed in the trial court Jury Instructions tipping the scales in favor of a finding that BB gun is a deadly weapon. **(Appendix E 26, 30, 37)** in which the court departed from according to the COA terms **(Appendix D-14-5) Bennett Id at 886 F. 3d 280.**

In **Dixon v. Williams, 2014 U.S. App. Lexis 11025**, the United States 9th Circuit Court resolved a situation in which the State Trial Court of Nevada charged a single word from "reasonable" to "unreasonable" in "the Standard self defense Jury Instruction under state law." The Circuit Court concluded that such minimal charge made more onerous for the defendant to prove his self defense theory. Regardless of the overwhelming evidence of Guilty and the remaining instructions contradicting the constitutional error "under state law."

Lastly, in **Williams v. Swartout, 2014 U.S. App. Lexis 20412**, in a **Section 2254** appeal in The United States 9th Circuit, the State Trial Court omitted the word "not" on

a single passage of a State Law **Jury Instruction**. The Circuit Court held that such Factual error had an injurious and substantial influence on the Jury regardless of the ample evidence of guilty, the Jury instructions as a whole contradicting that statements and the trial court several attempts to rehabilitate the Jury-discovered error.

Sanchez claim here is stranger than Dixon and Williams Supra, because there was not deadly weapon overwhelming evidence and rather was ample factors disputed that offense.

Overall,, the granting of this petition on the above ground is essentially necessary and of national importance.

II.

Grant this Petition on this foregoing ground is also of National and exceptional importance for the avoiding imminent spread of; miscarriage of justice nationwide to other habeas Petitioners; poison the Public confidence in the Federal System of, Section 2253-COA Procedures, it's democratic ideal, it's principles reflected and the community at large in with conflict with other federal precedents.

In particular, because the adequacy of State Procedural Bars to the Assertion of Federal questions. .... is not within the State prerogatives to decide; rather adequacy itself is a federal question, **Cone v. Bell, 556 U.S. 449, 465-466, 129 S. Ct. 1768, 173 L. Ed. 2d 701 (2009)**, and Federal Courts must carefully ascertain themselves and examine state procedural requirements to ensure that they do not operate to discriminate against

claims of Federal Rights. **Brown v. Wester R. Co. of Ala. 338 U.S. 294, 298-299, 70 S. Ct. 105, 94 L. Ed. 100 (1949)**.

In Addition, leaving the Lower Court decision as it stand now, would conflict and allow other courts nationwide to sanction and depart from the accepted and usual procedural course of:

1) **28 U.S.C. 2253**-COA debatability analysis. **Buck v. Davis, 137 S. Ct. 759, 197 L. Ed. 2d 1; 2017 U.S. Lexis 1429**. and;
2) **28 U.S.C. 2254**- Federal Habeas Corpus Proceedings. **16B C. Wright, A. Miller S.E. Cooper Federal Practice and Procedure §4026, P. 386 (2d Ed. 1996)** (Nothing "Risk that discretionary Procedural Sanctions may be invoked more harshly against disavored Federal Rights. ..... denying [litigants] a fair opportunity to present Federal Claims); See also **Bear v. Kindler, 558 U.S. _____ 130 S. Ct. 612, 620, 175 L. Ed. 2d 417 (2009)** (Justice Kennedy concurring).

Along with the above Federal Principles, Sanchez presented in his COA Petition two interrelated Procedural Questions **(Appendix M 3-5)**. Whether it was debatable for the district court to:

First, exceed it's scope of **Section 2254** - Federal Parties Presentation Requirement and **Look through methodology** – by erroneously changing the course of Sanchez substantial federal claim to fit a non-disputed factor, or additional reason

(Appendix M 3-5-B-17) for subsequently;

Second, Limit it's **Section 2254** scope of Federal Review-by removed itself from a careful Federal assessment of the adequacy of the state court discriminatory and arbitrary dismissal/denial based on artificial false premises of three (3) recognizable Strickland/Federal Claims of ineffective assistance of Counsel **(Appendix H 5-23, M 3-5)** that;

Ultimately gives the Federal System as a whole an unreal quality and false sense of Federal Judicial Protection with catastrophic Manifest Injustice and Conflicting Consequences.

In Short, the heart and centerpiece of Sanchez COA request was the debatability of the district court Procedural imbalanced misapplications of **Section 2254 Scope** of Federal Review.

Nevertheless, without decided none of the Federal Questions presented, the Circuit Court denied COA but it reached that conclusion only after essentially deciding the Appeal on the merits, **Buck Supra 2017 U.S. Lexis 1429 at 25, 26, 27-28**, because before anything the Circuit Court substantially and incorrectly re-modified the facts/searching for additional reason to fit, or stack, the already erroneously accommodated language and **Section 2254** imbalanced misapplications of the district court. For the Circuit Court;

On one hand, from the outset substituted the word "Prior to" in the district court

order for the word "following" the dismissal of Sanchez **Rule 3.850** motion. A changing language that in context implied an "after the fact" of dismissal, rather than "timely amended" as it should be **(compare Appendix B-17, Appendix D 6-7 and Appendix K 2-3 and H 5-23)**; then on the other hand, added the incorrect factual modification as additional reason to fit the erroneous district court Section 2254 misapplications on the merits, then justified the COA denial of Sanchez claim based on continuous artificial adjudication of the actual merits **(Appendix B-17, D 6-7, K 2-3 and H 5-23).**

Contrary to the COA denial, and district court erroneous conclusions for that matter, Sanchez never essentially claimed that; **A)** the State Court failure to applied a State Procedural Rules that; **B)** following the dismissal of his **Rule 3.850** he amended three (3) grounds of the motion and **C)** the State Court ignored his Amendments **(compare Appendix B-17, Appendix D 6-7 and Appendix K 2-3)**.

Sanchez substance of his claims was that the state court **A)** deliberately discriminate on **B)** three (3) Federal ineffective assistance of Counsel Claims-for failure to; **1)** object to in an out of Court identification procedures; **2)** Call expert in concern to the inoperability of the peace of BB gun used as a deadly weapon and; **3)** Conflict of interest-and **C)** based on the False premises that Sanchez failure to Amend.

(Appendix K 2-3 and H 5-23)

Word games definitely does not answer serious constitutional questions, however, it only leaves the 28 U.S.C. 2253 proceedings with an unread quality and false sense of

Judicial protection, poisoning the public confidence an the community at large. An identical situation was decided in **Cone v. Bell Supra**, in which this Honorable Court was prompted to Grant Certiorari on a Procedural Bar situation based on identical False Promises, in which the Federal Circuit Court repeating the district court erroneous banked conclusions considered itself barred from reaching the merit's of the claim. Id A 556 U.S. at 452, 462, 466. **(Appendix B-17)**

Moreover, Contrary to the COA amplifications of the district court erroneous banked conclusions here, Respondents in this case never asserted that the three (3) substantial claims were merely state law violations that barred relief, **Cone 556 U.S. at 469.** indeed, the unique substantial posture of Sanchez Federal Claims were never barred under state rules for failure to Amend (more than enough evidence supports Sanchez timely Amendments) **(Appendix H 5-23)** nor those claims were decided in the State Court, or any Federal Courts on the merits. De novo review and grant of Certiorari is essentially necessary.

GROUND THREE

Public confidence Nationwide; Federal and State Courts uniformity; Justice and; Judicial System democratic/conservative ideals would be preserved in granting the Petition on this ground. For the Circuit court below Manifest Injustice in it's COA Ruling speak for itself.

Sanchez especially explained that the underlying question presented, debated but

evidently ignored by the district court, was that the State Court unreasonable "Judged Counsel challenged conduct **in 2009** with, **Whitmore v. State, 147 So. 3d 24 (Fla. 1st Dist. 2013)**, A four (4) years after the fact case law, that came out in **2013**. and that Counsel obviously could not have known or predicted in **May 2009** sentencing hearing. **(Appendix M 6-9)** Contrary to the holdings of;

Strickland Supra, 466 U.S. at 690 (A Court deciding an actual ineffective assistance of Counsel claim must Judge and evaluate the reasonableness of Counsel conduct based on the facts of the Particular case, viewed as to the time of Counsel conduct); **Lynch Supra, 789 F. 3d at 312** and; **Sanchez** addressed the facts that **Whitmore 2013** has not **retroactive** consequences on **Sanchez** case, because Sanchez conviction and sentence became final and fully adjudicated in **June 10, 2010**, three (3) years prior. Compare **Teague v. Lane, 489 U.S. 288, 104 S. Ct. 1060, 103 L. Ed. 2d 59 (1989); > Bryan v. Warden, 787 F. 3d 253 (11th Cir. Fla. 2013); > Freeman v. State, 698 So. 2d 810 (Fla. 1997)**

In this vein, the substantial issue under Strickland was that Trial Counsel failure to object to A) an H.F.O. sentence that banked on a prior offense, for which "Sanchez completed his Probationary Period," that B) did not constitute a conviction under state and federal law, for **H.F.O.** purposes **(Appendix K 3, 6, 7, 23, 24, 25, M 6-9)** In that **Sanchez** cited the Strick holding of, **Ovestreet v. State, 629 So. 3d 125 (Fla. 1993); > Wright v. State, 691 So. 2d 1140 (Fla. 1st Dist. 1997); > Allen v. State, 654 So. 2d**

1027 (Fla. 1st DCA 1995) and; > U.S. v. Gispert, 864 F. Supp. 1193 (S.D. Fla. 1994) (holding that in Florida, the key component of prior offenses is the "completion of probation," together with withheld adjudication, does not constitute a conviction); **U.S. v. Smith, 856 F. Supp. 665 (S.D. Fla. 1994); > U.S. v. Thompson, 756 F. Supp. 1492 (N.D. Fla 1991)**

As a final contention, Sanchez asserted that "no other case law or precedent existed, prior to **May 15, 2009** sentencing hearing, that contradict Overstreet principles that a "completion of Probation" withheld adjudication constitute non-existed conviction. **(Appendix M 6-9)**

But, the Circuit Court below obviously noted but instead of Correct the District Court plain error—of banked duplicity of state Court unreasonable **Strickland, ex post facto and retroactive applications**,; it

1. changed the substantial facts and legal key components of Sanchez claim from "completion of probation" **(Appendix B-18-20, D-8)** to merely a "resulting imposition of probation" then;
2. search for a non-disputed, distinguish and additional case law, **State v. Richardson, 915 So. 2d 86 (Fla. 2005)**, that fits it's incorrect artificial re-modification of facts **(Appendix B 9-10, D-8)**, in order to;
3. Determine the appeal on the merits first, rather than enter debatable analysis. **Buck v. Supra Id at Lexis 1429 25-28**.

prior offenses and **C)** anticipate the details the State would emphasize. In particular, where Counsel had known that the State:

1. Intended to seek higher sentence by proving defendant had a significant history of felony convictions under state law and;
2. Would attempt to establish this history by proving defendant prior convictions and;
3. introduce transcripts. This honorable court held that Counsel had duty to make all reasonable efforts, under the circumstances presented, to obtain and learn what it could about the prior offense the state would use to seek maximum penalty and anticipate details the state would emphasize, even when he seek other mitigating avenues. Same as Rompilla, Sanchez Counsel knew that the state (1) intended to seek enhanced H.F.O. sentence **(Appendix E 38-43)** by proving two prior felony offenses on of which constitute non-conviction.

(2) Would attempt to establish this history by proving H.F.O. requirements to those two prior convictions and;

(3) Introduce fingerprints and transcripts, and Sanchez Trial Counsel failure;

(a) Obtain a prior conviction file readily available at the courthouse were Sanchez is to be sentenced **(Appendix E 38-43)**

(b) examined and learn that Sanchez completed his Probationary Period and withheld adjudication was imposed – on which constitute a non-existed

conviction on one offense **(Appendix E 39-43)** and;

(c) anticipate the detail of State arguments based on the "completion of Probation" factor for **H.F.O. Sentencing**. Even tough he argue about withheld adjudication only, without the completion of Probation requirement. **(Appendix E 44-47)**

See also **U.S. v. Otero, 502 F. 3d 331 (3rd Cir. 2008)**.

In Sum, the substantial ineffective Assistance of Counsel claim was never resolved in the State Courts, United States District Courts and the Court below. de novo review and granting of Certiorari is essentially necessary.

V. CONCLUSION

For the above mentioned reasons this court should grant the Writ of Certiorari, Appoint Counsel for Petitioner in this Cause and Order full briefing.

Respectfully Submitted,

/s/ _____

SIMON A. SANCHEZ
DC#J38918
Florida State Prison – Main Unit
P.O. Box 800
Raiford, Florida 32083