20-7248

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN PAGE, Petitioner, vs. **MARK INCH,** Sec'y FDC, Respondent,	**Case No:** _____

PETITION FOR WRIT OF CERTIORARI

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

Petitioner:

Jonathan Page
DC# E39833
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539-6708

Respondent:

Attorney General, State of Florida,
444 Seabreeze Boulevard Suite 500
Daytona Beach, Florida 32118

QUESTIONS PRESENTED

1. **Whether counsel was ineffective when he failed to timely object to the lower court expressly limiting the independent act jury instruction to the primary offenses?**

CORPORATE DISCLOSURE STATEMENT

There are no corporations that are or hold 10% or more of any publicly held company and all parties to the proceeding whose judgment is sought to be reviewed are contained in the caption of the case.

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CITATION TO OPINION

The opinions of the United States Court of Appeal appears at Appendix I and K to the petition are unpublished.

The opinion of the United States District Court appears at Appendix G to the petition and is unpublished.

BASIS FOR JURISDICTION

The date on which the U.S. Court of Appeals decided Petitioner's case was August 26, 2020. A timely motion for reconsideration was denied by the United States Court of Appeals on October 13, 2020 and a copy of the order denying the motion for reconsideration appears at Appendix K.

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

CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

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

SIXTH AMENDMENT

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

FOURTEENTH AMENDMENT

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the Stater wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner proceeded to trial on charges of first degree premeditated murder, attempted first degree felony murder with a firearm, and attempted robbery with a firearm (Appendix A). The jury found Petitioner guilty of the next lesser offense in each count: Count one: Second-degree murder, Count two: Attempted felony murder without a firearm, and Count three: attempted robbery without a firearm (Appendix B).

Petitioner's sole issue in the lower court was based on trial counsel's failure to object to an incomplete, independent act defense instruction (Appendix D, p. 6). As elaborated in Petitioner's Reply to Respondent's Supplemental Response (Appendix E), trial counsel rendered ineffective assistance "for failing to object to an insufficient independent act instruction, because it only instructed that the defense applied to the primary offenses." Hence, it failed to inform the jury that the independent act defense applied to the primary *and* all the lesser included offenses. (Appendix D, p. 6; Appendix B). In support, Petitioner alleged that since he was found guilty of lesser offenses; the ones not reflected on the independent act instruction, he is entitled to relief based on the denial of his Constitutional right to effective assistance-of-counsel." (Appendix E). The claim was exhausted in the lower court resulting only in a silent *per curiam* denial.

STATEMENT OF FACTS

The first witness to testify at Petitioner's trial was Marvis Christian. He stated that he was sitting in the driver's seat of Willie Parker's car, smoking a joint with Mr. Parker when two people put guns through the open back passenger window of the car (Composite Appendix F, pp. 393-394). Mr. Christian exited the car when he heard one of the guns cock like it was going to be fired. However, he exited to find a third person on his side of the vehicle, wielding a gun pointed at him (Composite Appendix F, pp. 397). Ultimately, he was pushed to the ground by the

bigger man before hearing 13 or 14 shots being fired into Mr. Parker's vehicle (Composite Appendix F, pp. 398-400, 416).

Meanwhile, the big man gets off Mr. Christian and attempts to unjam his gun, so Mr. Christian takes the opportunity and runs away from the big man; while running, he was hit with one bullet (Composite Appendix F, pp. 418-420). Subsequently, he fell and the big man walked up to him still attempting to unjam the gun—pulling the trigger, and trying to shoot him (Composite Appendix F, pp. 421-422). However, the big man left without being able to shoot him (Composite Appendix F, p. 423).

Mr. Christian never saw the face of his assailant (it was very dark, and neither recognized him, nor knew his race (Composite Appendix F, pp. 413, 424)), but he testified that the man was much bigger than he was. Further, he believed from the size and the voice of the man, he was Laurence Alvarado (Composite Appendix F, pp. 425). When asked whether he knew the Petitioner, he stated that he did because they grew up together and they were cousins, and notably, his voice was not the voice of the big man (Composite Appendix F, p. 425).

State witness Carlos Buckner then testified that he picked the Petitioner up from Vahteice Kirkman's (codefendant who actually committed the murder of Willie Parker) house. Petitioner was in a van and had been shot in the leg; Mr. Buckner was instructed by Vahteice to take him home. On the way there, Mr. Buckner noticed that Petitioner's .40 caliber pistol was jammed (Composite Appendix F, pp. 661-663); Petitioner allegedly said that Vahteice shot him on accident, and that Petitioner shot Marvis Christian during a robbery (Composite Appendix F, p. 664).

State witness Leon Jenkins testified that Petitioner told him he was with the guys that committed the offenses against Willie Parker and Marvis Christian, that he did not know they

were there to commit a robbery and ran when the robbery began because he did not want anything to do with it. Subsequently, he was shot by one of his codefendants while he was running away (Composite Appendix F, pp. 696-697).

Petitioner testified that on the day of the incident Vahteice Kirkman, Carlos Buckner, and Christopher Pratt came to his house and picked him up just to ride around and listen to music; Petitioner did not see any weapons in the vehicle and there was no mention of any robbery (Composite Appendix F, pp. 834-835). When the group approached Willie Parker's vehicle they stopped and Petitioner got out and proceeded to Mr. Parker's vehicle to talk to him because they were friends. However, before he could make it there he noticed that the people he was riding with were pulling out guns and cocking them. Petitioner immediately took off running from them and was shot in the leg for it (Composite Appendix F, pp. 836-837). Petitioner did not know that a robbery was planned and never intended to participate in any crime against Willie Parker, because Mr. Parker was his friend (Composite Appendix F, p. 848).

Petitioner ran from the scene to Sparkle James' house because it was the closest place he felt safe. However, because of his injury, he was really slow getting there and Mr. Kirkman was already there when he arrived (Composite Appendix F, pp. 841-842). Mr. Kirkman told Petitioner that it was he who shot him and warned him not to say anything lest he finish the job (Composite Appendix F, p. 843). On his way home, Petitioner came across Carlos Buckner again and Mr. Buckner drove him home; Petitioner did not have any firearm on him the night of the incident (Composite Appendix F, p. 844).

The State's theory of the case was that (Composite Appendix F, p. 905)("[Petitioner]'s the muscled guy in the crew, he's the principal to this robbery, and he knew it was going to go down, and he's the guy that took Marvis down to the ground and had a knee in his back."); (Composite

Appendix F, p. 922)("[Petitioner] is responsible for each and every action of Mr. Pratt and Mr. Kirkman...[Petitioner is] the guy who shot Marvis Christian...he's the guy that was masked and committed this crime."); (Composite Appendix F, p. 944)("We know that Marvis has tried to leave and had been stopped by [Petitioner]..."). Moreover, the State's theory was unquestionably that Petitioner was the person who shot Marvis Christian, *with a firearm,* and attempted to rob him.

Petitioner's sole defense to the offenses relied on the independent act instruction. In accordance with the defense theory of independent act, the jury was instructed:

> If you find that the crime alleged was committed, an issue in this case is whether the crime of Robbery with a Firearm/Attempted Robbery with a Firearm was an independent act of a person other than the defendant. An independent act occurs when a person other than the defendant commits or attempts to commit a crime:
>
> 1. Which the defendant did not intend to occur, and
> 2. In which the defendant did not participate, and
> 3. Which was outside of and not a reasonably foreseeable consequence of the common design or unlawful act contemplated by the defendant.
>
> If you find that the defendant was not present when the crime of robbery with a firearm/Attempted robbery with a Firearm occurred, that, in and of itself, does not establish that the robbery with a Firearm/Attempted robbery with a Firearm was an independent act of another.
>
> If you find that the Robbery with a Firearm/Attempted Robbery with a Firearm was an independent act of [codefendant], then you should find [Petitioner] not guilty of First Degree Felony Murder, Attempted First Degree Felony Murder and Attempted Robbery *with a Firearm.*

(Composite Appendix F, pp. 974-975)(emphasis added)[1]; the instruction did not include any lesser offenses in the defense (second-degree murder, attempted felony murder without a firearm, or attempted robbery without a firearm). In the end, the jury rejected the State's theory that he was a participant by finding that he did not possess a firearm on counts two and three, and by finding him guilty of the lesser offense of second degree murder in count one. Hence, the jury's

1 The sentence structure; the lack of a comma between Attempted First Degree Felony Murder and Attempted Robbery, indicate that the "with a firearm" element includes both offenses; not just the attempted robbery.

verdict indicated that they relied solely on the principal theory to find Petitioner guilty.

The District Court rejected Petitioner's claim that his independent act instruction was misleading and improperly limited his defense to only the primary charges, finding that the state court's denial of the claim was not an unreasonable application of Strickland because, "Petitioner was convicted of the primary offenses of attempted first degree [felony murder] and attempted robbery. The jury clearly did not find that those crimes were the independent acts of another person." (Appendix G, p. 7; Doc. 23 at 7). The Court concluded that Petitioner "failed to show that the outcome of his trial would have been different if the trial court had provided an independent act jury instruction on the lesser included offenses." (Appendix G, p. 7; Doc. 23 at 7).

TIMELINESS OF THE PETITION

Pursuant to Title 28, U.S.C. § 1651, the Supreme Court of the United States and all courts established by Act of Congress may issue all writs necessary or appropriate in and of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 13.1 of the Supreme Court Rules provides that a Petition for Writ of Certiorari seeking review of a judgment of a United States Court of Appeals is timely when it is filed with the clerk within 90 days after entry of the judgment.

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on October 13, 2020. This petition is timely filed pursuant to Rule 29.2, Supreme Court Rules, as it is submitted by Petitioner, an inmate confined in an institution, filed on the ____ day of _____, 2021, by delivering it to prison officials with a declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and by first class U.S. Mail postage prepaid.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THAT COUNSEL'S FAILURE TO OBJECT TO THE COURT IMPROPERLY AND EXPRESSLY LIMITING THE INDEPENDENT ACT JURY INSTRUCTION TO THE PRIMARY OFFENSES CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL, OFFENDS DEFENDANT'S RIGHTS TO DUE PROCESS, AND OFFENDS DEFENDANT'S RIGHT TO A FAIR TRIAL.

SUPPORTING FACTS

Petitioner contends that trial counsel was ineffective for failing to object to the improperly limited, independent act jury instruction. Petitioner proceeded to trial on the charged crimes of first degree premeditated murder, attempted first degree felony murder with a firearm,a and attempted robbery with a firearm (Appendix A - Indictment). The jury then found Petitioner guilty of all lesser included offenses. The District Court found that Petitioner was convicted of his primary charges and then denied Petitioner's habeas petition for Petitioner's alleged inability to establish prejudice under *Strickland.*

Petitioner submits that the verdict form, when taken together with the independent act defense instruction, indicates that the jury acquitted Petitioner of the primary offenses based on the independent act instruction. Moreover, the jury instruction, as read, instructed that Petitioner could be acquitted of *only* the primary offenses under the independent act defense; there was no further provision for the lesser offenses listed on the verdict form. For instance, the lower court instructed without objection:

"If you find that the Robbery with a Firearm/Attempted Robbery with a Firearm was an independent act of [codefendant], then you should find [Petitioner] not guilty of First Degree Felony Murder, Attempted First Degree Felony Murder and Attempted Robbery with a Firearm." (Appendix B). The face of the verdict form shows that the jury determined Petitioner was not

guilty of the primary offenses listed in slot "a)", "First Degree Felony Murder, Attempted First Degree Felony Murder, and Attempted Robbery with a Firearm"; the very offenses which the independent act instruction indicated Petitioner could be found not guilty of under that defense (Appendix C). Hence, Petitioner was found guilty of all lesser included offenses, i.e., offenses which the independent act instruction did not include.

In contrast, the District Court determined that Petitioner was found guilty of the primary offenses of Count Two, Attempted First Degree Murder and Count Three, Attempted Robbery, and therefore, the Court determined that Petitioner failed to show the defense instruction was deficient in order to establish that a proper instruction would have changed the outcome of his trial (Appendix G, p. 7). Like the state court, the District Court has made an unreasonable determination of the facts in light of the evidence presented and therefore cannot be relied upon as a proper and fair determination of the claim.

Moreover, the District Court's contention that Petitioner was found guilty of the primary offenses is contrary to the face of the record; the jury verdict on its face shows that they rejected the primary options on the verdict form. Moreover, the verdict form rejected the first option for counts two and three as being committed *with a firearm*; which would be the primary offense.

The jury was specifically instructed that the independent act defense only allowed for exoneration for the commission of the offenses *with a firearm.* Accordingly, because the plain language of the jury instruction only provided a defense to the offenses committed with a firearm, the jury could not be expected to wholly acquit the Petitioner beyond what was specifically permitted by the plain reading of the instruction; that being only the commission of attempted felony murder and attempted robbery *with a firearm,* for which Petitioner was duly acquitted. Moreover, it is well established that jurors are presumed to follow the court's

instructions. *Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001)("We have stated in numerous cases . . . that jurors are presumed to follow the court's instructions."); *Raulerson v. Wainwright*, 753 F.2d 869, 876 (11th Cir. 1985) ("Jurors are presumed to follow the law as they are instructed.").

In sum, clear and convincing evidence reflects that the denial of relief up to this point has been based on the unreasonable determination that Petitioner was found guilty of the primary offenses charged, and therefore showing no need for a proper independent act instruction (Appendix H, 3-12). Moreover, the lower courts have failed to look to the face of the record to determine whether Petitioner's claim has merit—the plain language that the jury was given clearly limited the sole defense to only the offenses in option "a)" of the verdict form. Had the courts read the independent act instruction which specifically provides exoneration of only the offenses committed with a firearm in counts two and three, then they would have been required by law to reverse this case for a new trial with a proper independent act instruction (Appendix J, pp. 2-8).

Additionally, based on the above, and the facts produced at trial, Petitioner submits that the jury's verdict indicates that they rejected the State's theory that he was the muscled up big man that shot and robbed Marvis Christian; the State offered no other evidence reflecting their belief in Petitioner's participation besides Petitioner being the man that attempted to kill Marvis Christian. Meanwhile, Petitioner's defense was that once he realized that a robbery of his friends was about to occur, he ran from the scene and was shot in the process; completely consistent with the independent act defense. Under Florida law, the independent act doctrine applies "when one cofelon, who previously participated in a common plan, does not participate in acts committed by his cofelon, 'which fall outside of, and are foreign to, the common design of the

original collaboration.'" *Ray v. State*, 755 So. 2d 604, 609 (Fla. 2000) *(quoting Ward v. State*, 568 So. 2d 452, 453 (Fla. 3d DCA 1990)). Under these limited circumstances, "a defendant whose cofelon exceeds the scope of the original plan is exonerated from **any** punishment imposed as a result of the independent act." *Id.* (emphasis added). Here, Petitioner's independent act instruction did not provide an avenue for exoneration of "any" punishment, but only the primary offenses committed with a firearm.

Therefore, Petitioner submits that the lower court's conclusion that the independent act instruction was not deficient, was based upon an unreasonable determination of the facts in light of the evidence presented. Moreover, without the inclusion of the option to acquit Petitioner of the lesser-included offenses, the jury was without any avenue to fully acquit him even if they believed his theory of defense. *See, Motley v. State*, 155 Fla. 545, 20 So. 2d 798, 800 (Fla. 1945) (describing law as well-settled that a defendant "is entitled to have the jury instructed on the law applicable to his theory of defense where there is evidence introduced in support thereof.").

DENIAL OF A CONSTITUTIONAL RIGHT

Petitioner has demonstrated above that his jury received a deficient independent act instruction, and that he was prejudiced by the deficiency because it limited the jury's acquitting power to only the primary offenses; which they acquitted him of. Consequently, Petitioner has established that trial counsel rendered ineffective assistance for failing to object to the deficient instruction and ensure that the sole defense encompassed the primary offenses and all the lesser-includes. Hence, a substantial showing that Petitioner was denied a constitutional right to effective assistance of counsel has been made and any assertion to the contrary is an unreasonable application of *Strickland.*

Moreover, Petitioner established above, through the required clear and convincing evidence of §2254(e)(1), that the lower courts have made improper factual determinations based

on the erroneous belief that Petitioner was convicted of the charged primary offenses. Consequently, the claim now before this Court has been rejected based upon an unreasonable determination of the facts in light of the evidence presented—denying Petitioner proper consideration of his *Strickland* claim and his right to effective assistance of counsel.

In sum, Petitioner properly alleged the necessary allegations in the state court to provoke the application of the *Strickland* prongs, and therefore, the District Court erred in finding that the state court did not unreasonably apply the *Strickland* prongs when it denied the claim. Notably, as was the case here, when the most recent state-court decision on the merits does not explain its rationale for affirming the petitioner's conviction and sentence, federal courts must "look through the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188, 1192, 200 L. Ed. 2d 530 (2018). Looking through, Florida courts have consistently held that it is error for a defense instruction not to mention that the instruction applies to the lesser-included offenses. *See Michel v. State*, 989 So. 2d 679, 681 (Fla. 4th DCA 2008)(defendant was entitled to a jury instruction on the justifiable use of deadly and non-deadly force as a defense to battery, as a lesser included offense of aggravated battery, where the evidence presented supported such instructions); *Simon v. State*, 589 So. 2d 381, 382 (Fla. 4th DCA 1991)(defendant was entitled to a jury instruction on the justifiable use of non-deadly force as a defense to battery on a police officer, as a lesser included offense of attempted first degree murder, where evidence existed to support that instruction).

Therefore, Petitioner submits that he has appropriately and fully established that he was denied the effective representation of counsel.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ of Certiorari in this case, appoint counsel for Petitioner to represent him, and order full briefing.

Respectfully submitted,

Jonathan Page DC# E39833

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed a true and correct copy of this document in the hands of Okaloosa Correctional Officials, with prepaid postage for mailing to: Office of the Attorney General, State of Florida, 444 Seabreeze Blvd Suite 500, Daytona Beach, Florida 32118, on this 8 day of Dec 2020.

Jonathan Page DC# E39833
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539-6708

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN PAGE, Petitioner, vs. **MARK INCH,** Scr'y FDC, Respondent,	**Case No:** _____

Petitioner hereby certifies that the following Petition for Writ of Certiorari complies with the type-volume limit, typeface requirements, and type-style requirements[1] of Rule 33.1 and contains 3,364 words.

Petitioner: _____ Dated: 12/8/20

Jonathan Page
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1 Petitioner's petition was prepared using 'Open Office' (the only word program available), and the required type-style 'Century' is not contained therein. Therefore, the petition has been prepared using 'Times New Roman.'