NO.: 20-7904

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE SIMMONS,

ORIGINAL

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

BRUCE SIMMONS
283 S.W. 8th Street
Dania Beach, Florida, 33004, Apt. 4
Pro se Counsel

QUESTIONS FOR REVIEW

1. WHETHER THE PRINCIPLES OF DUE PROCESS ARE OFFENDED BY THE LOWER COURTS' APPLICATION OF AN INCORRECT LEGAL STANDARD IN ASSESSING THE PETITIONER'S ACTUAL INNOCENCE CLAIM—AS ENUNCIATED BY *MCQUIGGIN V. PERKINS*, 133 S. CT. 1924 (2013); *MURRAY V. CARRIER*, 477 U.S. 478 (1986), *SCHLUP V. DELO*, 513 U.S. 298 (1995); AND *BOUSLEY V. UNITED STATES*, 523 U.S. 614 (1998)—WHERE THE DECISION CONFLICTS WITH FEDERAL LAWS ON FUNDAMENTAL CONSTITUTIONAL ISSUES AND FEDERAL LAW?

2. WHETHER UNDER THE DUE PROCESS CLAUSE, A MISCARRIAGE OF JUSTICE OCCURS WHEN THE PETITIONER IS CONVICTED FOR A NON-EXISTENT OFFENSE OR AN OFFENSE NOT KNOWN TO THE LAW BUT THE COURT FAILS TO ADDRESS THE CLAIM?

3. WHETHER, UNDER THE DUE PROCESS CLAUSE, A MISCARRIAGE OF JUSTICE OCCURS AFTER THE DISTRICT COURT RULES THAT THE PETTIONER'S ACTUAL INNOCENCE CLAIM HAD NEVER BEEN ADDRESSED ON THE MERITS, BUT THEN DENIES THE PETITION AS AN ATTEMPT TO RE-LITIGATE CONVICTIONS AND/OR AS AN UNAUTHORIZE ATTEMPT TO USE THE WRIT OF ERROR CORAM NOBIS AS A VEHICLE, WHICH EXPRESSLY CONFLICTS WITH DECISIONS OF THIS COURT AND ITS OWN PRECEDENTS IN *UNITED STATES V. MORGAN*, 346 U.S. 502 (1954) AND UNITED STATES V. *MILLS*, 221 F. 3d 1201 (11th CIR. 2000)?

CERTIFICATE OF INTERESTED PERSONS

Petitioner, Bruce Simmons, certifies that the following list of persons have an interest in the outcome of this appeal, and that all, save for the Eleventh Circuit Court of Appeals, are from the Southern District of Florida.

1. The United States Court of Appeals for Eleventh Circuit.
2. The Honorable Ursula Ungaro (U.S. Dist. Court Judge).
3. The Honorable William J. Zloch (U.S. Dist. Court Judge and Trial Judge).
4. The Honorable Cecilia M. Altonaga (U.S. Dist. Court Judge).
5. The Honorable Patrick A. White (Magistrate Judge).
6. The Honorable Lisette Reid (Magistrate Judge)
7. United States Attorney, Ariana F. Orshan.
8. Mr. Bruce Simmons (Petitioner) *Pro se.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CONTINUATION OF AUTHORITIES: **Page No.**

CONTINUATION OF AUTHORITIES: **Page No.**

CONTINUATION OF AUTHORITIES: **Page No.**

OTHER STATUTES AND AUTHORITIES

NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRUCE SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Bruce Simmons respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals

for the Eleventh Circuit, rendered and entered in on May 29, 2020, in *Simmons v. United States,* Case No. 19-14385-DD (App. A-1) which affirmed the judgment of the United States District Court for the Southern District of Florida. (App. A-2)

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit's Order denying the Petition is attached as App. A-1; and the denial of Rehearing and Rehearing En Banc is attached as App. A-3.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the Rule of the Supreme Court of the United States. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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 the due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI:

> 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV:

> Section 1. ... 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 ... deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

STATEMENT OF THE CASE AND RELEVANT FACTS

As a preliminary statement, Petitioner would place this Honorable Court on Notice that any references to the Trial Record/Transcript (TR) denotes the "*Supplemental Appendix (Vol. 3) for the United States [Government] Record on Appeal in the Eleventh Circuit*. That is, the transcripts of the trial, referenced by Petitioner, bears the "*same page numbers*" in the "Government's Supplemental Appendix" filed in this appeal with the Eleventh Circuit Court of Appeals which can verify the truth of Petitioner's statements proving his facts and innocence. As such, whenever "TR" is referenced, it reflects the Govt.'s "Supplemental Appendix" from Eleventh Circuit, as well as references made by Petitioner.

1. On December 22, 1998, a federal grand jury returned a two-count indictment against Petitioner, Mr. Simmons, charging him with "knowingly and intentionally distribut[ing] a Schedule II controlled substance containing a detectable amount of cocaine [powder cocaine]; in violation of Titles 21, U.S.C., § 841(a)(1) and 18 U.S.C. § 2, aiding and abetting." (App. A-4) (S.D. FL., No. 98-cr-6232—CR-DE 3)

2. A jury trial began on April 12, 1999, and on April 13, 1999, the jury returned a guilty verdict on each of the two counts charged (Id. at D.E. 40).

3. On June 25, 1999, the district court sentenced Petitioner to 240 months' imprisonment, as to each count, with a $5,000 fine, to run concurrently with each other followed by three (3) years of supervised release. (CR-DE 71, 73)

4. Petitioner filed a *pro se* Writ of Error Coram Nobis petition, which was denied on June 17, 1999, and an appeal was affirmed on May 26, 2000 (*United States v. Simmons*, 99-12589-JJ (11th Cir. 2000)); (App. A-7).

5. Petitioner, via appointed counsel, appealed his convictions for the April 13, 1999 convictions which were *Per Curiam Affirmed* in an unpublished decision *United States v. Simmons*, 237 F.3d 634 (11th Cir. 2000).

6. On December 18, 2000, Petitioner's Motion for Rehearing and Rehearing En Banc was denied (245 F.3d 797 (11th Cir. 2000)), and on March 5, 2001, this Court denied Petitioner's Petition for Writ of Certiorari. See *Simmons v. United States*, 121 S. Ct. 1247 (2001).

7. On March 30, 2001, Petitioner filed his first § 2255 Motion to Vacate convictions and sentences (D.E. 1, 2, SDFL Case No. 01-cv-6504), to which the Government filed its Response and argued, *for many years to follow*, that Mr. Simmons "was granted permission to file a *Supplemental Brief* in his direct appeal of his convictions and had raised *the same issues in the Supplemental Brief as was*

raised in the § 2255 motion (that is, the Government argued that the claims "were ***procedurally barred*** as having *already been rejected on the merits on direct appeal*") (App. A-9).

8. The Magistrate Judge agreed with the Government's position and recommended that Petitioner's § 2255 motion be dismissed as "*procedurally barred.*" (D.E. 25, No. 01-cv-6504) (below shown in App. A-5 at 1)

9. The District Court Judge *adopted* the Magistrate's Report and Recommendation and dismissed the initial § 2255 motion, *without ever addressing the merits*, stating that it, the court, "agreed that the Court of Appeals granted Mr. Simmons permission to file a *pro se* Supplemental Brief to raise the same issues raised in the § 2255 motion, and the issues [were] *procedurally barred.*" (App. A-5) (Final Order of August 22, 2002).

10. Petitioner was denied a COA by both the district court and the Court of Appeals (D.E. 34, No. 01-cv-6504).

11. Petitioner continued his efforts to obtain judicial review of his claims, attempting to prove his innocence from **1999-2016** and beyond, *to no avail*, faced with the same, "*procedural bar*" arguments from the Government and Courts. (See Case No. 16-61256-CIV-ZLOCH) (outlining Petitioner's filings over the years).

12. On June 10, 2019, Petitioner filed an Error Coram Nobis petition raising an *actual innocence* claim, and on September 25, 2019, the Magistrate Judge issued a Report and Recommendation ("MJRR") for dismissal on the basis that the "actual innocence" claim had *been ruled upon and rejected **[on the merits]** on direct appeal.* (App. A-6) (Case No. 19-cv-61443, DE13 at 2).

13. Rejecting the MJRR, supra, the district court held that Petitioner's claim had *not*, in fact, been ruled upon on the merits as determined by the MJRR *and the previous [district] courts' decisions before it.* Specifically, the district court held that: "In sum, the instant claim *has never been addressed on the merits* and Petitioner has sought relief for this specific claim *at least four times*." (App. A-2 at 4)

14. Petitioner appealed to the Eleventh Circuit, which was *affirmed.* (App. A-1)

15. Petitioner filed a timely Motion for Rehearing and Rehearing En Banc to the Court of Appeals, and on February 16, 2021, the Court denied the Rehearing and Rehearing En Banc. (App. A-3)

16. On February 24, 2021, the Court of Appeals issued its Mandate. (App. A-8)

17. This Petition follows and is timely.

REASONS FOR GRANTING THE WRIT

1. This case present questions of exceptional and potentially recurring national importance deserving of this Court's attention. Certiorari should be granted to determine and/or clarify whether the courts' decisions are a denial of Due Process and/or Equal Protection, and to prevent future reoccurrences where the court applied an *incorrect legal standard* in assessing the actual innocence claim from Petitioner's § 2255 motion which had been declared, *but now corrected*, procedurally barred.

2. **Secondly**, this Court should grant certiorari because the district court's decision, and Court of Appeals' affirmance, thereof, offends Due Process and expressly *conflicts* with decisions of this Court, in *Gebardi v. United States*, 287 U.S. 112 (1932), and its own precedents in *United States v. Martin*, 747 F. 2d 1404 (11th Cir. 1984) where Petitioner has been convicted for "*non-indictable offenses*" and/or "*offenses not known to the law.*"

3. **Thirdly**, certiorari should be granted because the district court's denial of Petitioner's reliance on the Writ of Error Coram Nobis, and the Court of Appeals' affirmance, thereof, violated the Due Process Clause where the district court ruled—contrary to this Court's longstanding decision in *United States v. Morgan*, 346 U.S. 502 (1954), and its own binding precedent under *United States v. Mills*, 221 F. 3d 1201 (11th Cir. 2000)—that the writ was unavailable to someone like Petitioner.

ARGUMENT ISSUES ONE

THE DISTRICT COURT APPLIED THE INCORRECT LEGAL STANDARD IN ASSESSING PETITIONER'S CLAIM OF ACTUAL INNOCENCE BASED ON THE COURT'S FINDINGS OF FACT AND CONCLUSIONS

1. APPLICABLE LAW:

Although some of the cases referred to, in support of the arguments below, involved "*summary judgments*" orders, and the instant case involved an alleged "*merits determination*," that *distinction is one without a difference* in that the rationale therein applies equally to "any decision" on appellate review so as not to deprive the appellate court, or petitioner, of a proper determination *on the merits*.

With that in mind, this Court has *vacated and remanded* cases in which the district court's order, as in the instant case, fail to *assert its reason(s)* for its decision. Additionally, in a number of cases, the Fifth and Eleventh Circuits have urged the district courts to "*state the reason for its decision.*" See *Huckeby v. Frozen Food Express*, 555 F. 2d 542, 545 (5th Cir. 1977) (Order did not reveal basis for district court's decision; court concluded that the case was dismissed for want of jurisdiction; "a concise statement by the district court of the grounds for its decision is desirable."); *In re Ford Motor Co.*, 345 F. 3d 1315 (11th Cir. 2003) (district court "*provided no substantive explanation*" for its decision); *Serra Chevrolet, Inc. v. General Motors Corp.*, 446 F. 3d 1137, 1151 (11th Cir. 2006) (same); *Broadwater v.*

United States, 292 F. 3d 1302-03 (11th Cir. 2002) (same); Erco Industries, Ltd. v. Seaboard Coastline Railroad Co., 644 F. 2d 424 (5th Cir. 1981) (recognizing that Rule 52(a) requirements of findings and conclusions are not applicable but reiterates that "*the parties are entitled to know the reasons* upon which summary judgment was based in order to facilitate appellate review"); Farbwerke Hoeschst A.G. v. M/V "Don Nicky," 589 F. 2d 795, 798 (5th Cir. 1979) ("If there was *some rationalization or explanation* which would have eliminated the apparent conflict in the affidavits here, *an outline of the court's underlying reasoning* could have prevented the necessity for reversal."); Cooper v. General Motors Corp., 651 F. 2d 249, 250 n. 1 (5th Cir. 1981) ("We note once again that it is *difficult to fathom unspoken reasons*, and that district would render better service to the litigants and facilitate the review of their actions *if they would at least dictate into the record the reasons* for their rendition of a summary judgment."); Hanson v. Aetna Life & Casualty, 625 F. 2d 573, 575 (5th Cir. 1980) (court noted that prior admonitions *calling for statements of reasons* had been precatory in character but that nevertheless "we have in practice insisted that district courts record—however informally—*their reasons for entering judgment*, at least where their underlying holdings would otherwise be ambiguous or inascertainable. The court found that was the situation and vacated and remanded.") Montgomery v. Otis Elevator Co., 472 F. 2d 243 (5th Cir. 1973) ("court

had no way of knowing whether trial judge misapprehended the state of the facts").

Decisions of the Fifth Circuit, rendered prior to October 1, 1981, are *binding precedent* in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981). More importantly, this Court, in Carter v. Stanton, 405 U.S. 669, 672, 92 S. Ct. 1232, 1234, 31 L. Ed. 2d 569 (1972), *vacated and remanded* where the district court's order was "*opaque and unilluminating* as to either the *relevant facts or the law*.

Because the district court's order, in this case, simply *outlined the procedural history* of prior decisions surrounding Petitioner's actual innocence claim, but then concluded that "[none of those courts' prior decisions] **addressed the merits** of Petitioner's actual innocence claim," (App. A-2 at 4, ¶ 3), the district court's statement—that "*the Petition is denied because it fails on the merits*"—is the type of "**one sentence orders**" that has been held to be *insufficient* to sustain a court's denial. That is, the same Court of Appeals, in this case, has held that:

> "[T]he district court's **one sentence order** perfunctorily stated that the district court had considered the motion and was "of the opinion defendant's motions are due to be denied." *The orders are devoid of any facts and any legal analysis*." (italic emphasis added)

Quoting Danley v. Allen, 540 F. 3d 1298 (11th Cir. 2008) (district court denied motion ***without any explanation***, and on appeal the court vacated and remanded with

instructions for district court "to consider the case in full and enter ***reasoned order which discuss the facts alleged in the ... complaint and detail the legal analysis used by the district court to reach its conclusions regarding the [complaint.]***"). Danley, 480 F. 3d at 1092. See also, Granite Rock Co. v. Int'l Bhd. Of Teamsters, 561 U.S. 287, 306 (2010), where this Court explained, as relevant here, that:

> "Respondent did not brief both arguments because they *genuinely could not brief both arguments*. As a result, there is zero circuit court authority in opposition calling Petitioner's [argument] into question. This Court could grant this petition on that basis alone." (emphasis added)

Petitioner would argue, respectfully, that like the district courts before it, the district court, in this proceeding, *likewise failed to address the merits of the actual innocence claim*, when faced with this record evidence, below in Section 2, because "**the court genuinely could not address the merits**" without, also, ***conceding*** that Petitioner has served nearly twenty (20) years of his life in a federal prison not only for, as shown below, a "***non-existent offense***," but also for an alleged offense for which the Government's attorney and its sole witness has *manifested* Petitioner is *completely innocent of having committed.* This Court should grant review here.

When evaluating the sufficiency of the evidence, in the district court, the proper *standard of review* is whether a rationale trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99

S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *United States v. Ward*, 197 F. 3d 1076 (11th Cir. 1999) (same). A reviewing court will not re-weigh evidence or resolve conflicts in testimony; instead, evidence is reviewed in the light most favorable to the verdict, with deference to the jury's assessment of the weight and credibility of the evidence. *Glasser v. United States*, 315 U.S. 60 (1942) (must view the evidence in the light most favorable to the government); *United States v. Cooper*, 203 F. 3d 1279 (11th Cir. 2000) (same). None of that was conducted in the district court in this proceeding.

Under *In re Winship*, 397 U.S. 358 (1970), the Due Process Clause of the Fifth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime charged.* This proof, the Court held, "is required by the Due Process Clause in criminal trials, [and] is among the essentials of due process and fair treatment." (Id.) This Court stated that "[t]he reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risks of convictions resting on factual error." (Id.) In *Murray v. Carrier*, 477 U.S. 478 (1986), this Court held, in relevant part, that:

> "In appropriate cases the principles of comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration .... [W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal [] court may grant the writ even in the absence of a showing of cause for the procedural default."

No guilty evidence, *whatsoever*, was presented at Petitioner's trial. This Court, in Bousley v. United States, 523 U.S. 614 (1998), citing Schlup v. Delo, 513 U.S. 298, 327-28 (1995), held that in order "to establish actual innocence, the petitioner must demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him;" and in Dretke v. Haley, 541 U.S. 386, 158 L. Ed. 2d 659 (2004) this Court explained that, "not all claims of actual innocence will involve threshold constitutional issues." (Id., 158 L. Ed. 2d at 669)

Unlike this Court's observation in Herrera v. Collins, 506 U.S. 390, 404-405 (1993), Petitioner's claim does not constitute a "*freestanding*" constitutional claim of actual innocence for which this Court has not, yet, decided; but rather, Petitioner, in his *first timely* 2255 motion asserted his claim as "*ineffective assistance of trial and appellate counsel*" under the Sixth Amendment—for failing to challenge or adequately challenge the sufficiency of the evidence (App. A-6 at 7, ¶ 5) which, until recently, had previously been deemed *procedurally barred* on a "*mistaken belief*" of the district courts below (App. A-2 at 4, ¶ 3) but now *corrected*. (App. A-2)

Petitioner would suggest that the proper "standard" for assessing his actual innocence claim, under the current facts, would or could be governed by one of several standards, but certainly *not* the "***new reliable evidence***" standard applied by the district court and affirmed by the Court of Appeals in this case. Here, the district

court should first have, *sua sponte*, invoked the "*nunc pro tunc*" doctrine and assessed the claim as though it were hearing it for the *first time* in a timely section 2255 motion under the Sixth Amendment; or, the district court was required to apply the standard of "*Plenary Review*," as shown below, based solely and expressly on the *ruling* by this district court—that the claim, for almost twenty (20) years had *never* been, and *wrongfully* so, *addressed on the merits*.

2. ACTUAL INNOCENCE CLAIM
TRIAL TESTIMONY OF FBI AGENT:

Applying the above laws to the *indisputable* facts, *infra*, of this case, no reasonable juror would have convicted the Petitioner of the crimes of "*distribution of cocaine*" as charged in the Indictment. (App. A-4) In this case, the government called *one witness* in an effort to prove its case against Petitioner, Special Agent (FBI) Adrienne Sullivan, before the Government "**rested its case.**" (TR-163, L. 12-13) (copy of trial record is on file in this case (11th Cir. at 19-14385-DD) (Supplemental Appendix of the United States, Vol. 3, at 163, L. 12-13).

In its opening arguments to the jury, in an effort to prove the "*distribution of cocaine*" charges against Petitioner, the Government argued that:

> "You are going to learn that on January 2nd of 1998 and again on January 23rd of 1998 a man sold a significant quantity of cocaine *to someone he thought was a drug dealer* who in fact turned out to be **an Undercover FBI Agent *accompanied by an informant***. The evidence will prove that that man was this

> defendant *Bruce Simmons* (TR-83, L. 17-22).... You will learn about how on two occasions, as I said, **this defendant sold cocaine**, the first time, January 2nd, 1998, **he sold** about four ounces or a quarter pound of cocaine **to an informant and an Undercover Agent**, and on the second occasion, January 23rd, 1998, **the defendant sold** approximately a quarter of a kilogram or about nine ounces of cocaine **to the Undercover Agent *and informant***."

(TR-84, L. 6-12). The government declined to call the alleged informant to testify at Petitioner's trial, despite the fact the informant was, then, incarcerated on unrelated drug charges. (Govt.'s Supp. App., Vol. 3 & TR-164; 247) Therefore, the government based its *entire case* upon the testimony of Special Agent Sullivan (FBI), its *sole witness* called against Mr. Simmons, the Petitioner.

Keeping in mind that the Government vehemently argued that [Petitioner] Mr. Simmons **sold** cocaine **to** the **FBI Agent** and **informant**. Conversely, however, during cross-examination, the sole witness called by the Government, Special Agent Sullivan (FBI), never testified that she, or anyone else, ever saw Petitioner with, sell, possess, or distribute any cocaine or other narcotic substance to anyone. In fact, Agent Sullivan testified that **(1)** "[she] never discussed purchase price [for drugs] with Mr. Simmons." (TR-95); Agent Sullivan testified that **(2)** "[she] did not know if there was contraband in the confidential informant's underwear before he made contact with Mr. Simmons because she did not search [his] groin area." (TR-116;

118); Agent Sullivan testified that **(3)** "to my knowledge no male Agent searched the informant prior to informant making contact with Mr. Simmons." (TR-120); the Agent, Sullivan, testified that **(4)** "Mr. Simmons' finger prints were not taken off of the plastic bags containing the cocaine" of which Mr. Simmons testified to never touching. (TR-158-159); Agent Sullivan testified that **(5)** "[she] was not involved with any surveillance whatsoever and that she stayed at a 7-11 store while the informant, Melvin Brown, and Mr. Simmons departed the area and she just sat there and waited until the trio returned." (TR-153); Agent Sullivan testified that she **(6)** "did not hear any conversation during the absence of the [informant], driver, and Mr. Simmons, and [did] not know if the [informant's] recorder was turned on." (TR-154); Agent Sullivan testified that "**(7)** on January 23, 1998, once the [informant] returned to the 7-11 store and entered [her] vehicle, [that she] followed the vehicle containing Mr. Simmons and the driver of the vehicle to a residence, [and that she] stayed on the outside [and] the [informant] went into the house and he later came out and entered her vehicle; [and that she] had no contact with Mr. Simmons at that time and never spoke with Mr. Simmons." (TR-155, 156); Agent Sullivan testified that **(8)** "the [informant] stayed in the residence maybe 10 to 15 minutes before exiting [and] reentered her vehicle and subsequently pulled from his pocket a plastic bag containing a white substance which was later identified as cocaine." (TR-113, 114);

Agent Sullivan testified that **(9)** during [her] entire investigation of [the Petitioner] Mr. Simmons [that she] "**never physically saw Mr. Simmons give narcotics to the Informant.**" (TR at 155-157] Bearing in mind that the informant did *not testify* in Petitioner's trial (TR-164; 247), and the fact that after FBI Agent Sullivan testified, *and calling no other witness*, the government "*rested its case against Mr. Simmons*," (TR-163, L. 12-13). Based on this record evidence, no *reasonable* juror would have found the Petitioner guilty of distribution of cocaine to the Agent and/or informant.

3. INCORRECT LEGAL STANDARD

While it may have appeared, *at face value*, that the district court was going to, or did, apply the *standard* under the teachings of *Bousley*—that "a petitioner must demonstrate that in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," (App. A-2 at 5, ¶ 4)—being the court referred to that particular language, but the court went on, immediately thereafter, and stated that "[a] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. .... To be credible, such a claim requires [this] petitioner [Mr. Simmons] to support his allegations of constitutional error with *new reliable evidence* ... that was not presented at trial ... Petitioner [Mr. Simmons] has not ... alleged any new evidence, let alone new *reliable* evidence, of

his actual innocence. His claim is one of legal innocence, not factual innocence." (App. A-2 at 6, ¶ 1-2) (*italic* emphasis in the original). The district court does not provide any analysis of Petitioner's allegations of innocence against the record to show issues in dispute, and it cannot because there is no evidence to dispute Petitioner's claim of factual innocence in this record whatsoever; and no one can muster up any evidence to "dispute" Petitioner's innocence claim.

Here, the court clearly asserted that "Petitioner," in the case *sub judice*, "was required to allege a ***constitutional error*** with ***new reliable evidence*** that was not presented at trial." (Id.) The district court continued, and rather than provide *any analysis* whatsoever of its *reasoning* or *explaining* "how" the court reached its so-called "*merits determination*," that Petitioner was making a "*legal*" innocence rather than a "*factual*" innocence argument, the court simply concluded by stating that "the Petition is denied because it *fails on the merits*." (App. A-2 at ¶ 1-2)

Bearing in mind the above facts, the *legal standard* for deciding Petitioner's actual innocence claim is not governed by the "***cause and prejudice*** standard" as in *Murray v. Carrier*. Nor does the legal standard requiring the petitioner to "support his allegations of constitutional error with *new reliable evidence* not presented at trial" govern this claim, as in *Schlup v. Delo*, in which a petitioner must also make a

showing of a "*threshold constitutional violation*," **as applied by the district court in this case**. However, *Schlup v. Delo* would appear to govern this case, to the extent, when "a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error," (*Schlup*, 513 U.S. at 316.)

Petitioner would suggest, however, that the legal standard to govern this case was outlined, also, in *Bousley v. United States*, to the extent a petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him," *Bousley*, 523 U.S. at 623. Petitioner would argue, respectfully, that the district court *erred*, however, in requiring him to "support his allegations of "constitutional error" with *new reliable evidence*." This is so because of the district court's ruling that "the instant claim [actual innocence] ha[d] **never been addressed on the merits** and Petitioner ha[d] sought relief for this specific claim at least four times." (App. A-2 at 4, ¶ 3) Under this ruling, which was *not challenged* by the Government despite its argument on appeal to the contrary, the district court was required to hear the actual innocence claim **anew** and also under the doctrine of "**ineffective assistance of counsel**," just as this Court stated in *McQuiggin v. Perkins*, supra, a procedurally barred claim, yet he made the credible

showing of actual innocence, and this Court stated that:

> "[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief."

However, in order to do so, Petitioner would suggest that the district court was required to apply the "**nunc pro tunc**" doctrine in order to *return Petitioner to the position he would have been absent the "judicial error"* after the court ruled that "Petitioner's actual innocence claim had never been addressed on the merits [when it was timely and properly submitted in his first 2255 motion to vacate that was wrongfully declared procedurally barred]." (App. A-2 at 7, ¶ 2)

This doctrine, *nunc pro tunc*, even in immigration cases, has been applied as far back as 50 years "[to] achieve equitable results serving the interests of the agency and the individual alike." See *In re Lei*, 22 I. & N. Dec. 113, 132 (BIA 1998). Moreover, federal courts also "rel[y] on the doctrine, in order to return aliens to the position in which *they would have been*, but for a *significant error*, in their immigration proceedings." *Edwards v. I.N.S.*, 393 F. 3d 299, 308-09 (2d Cir. 2004); see also *Batanic v. I.N.S.*, 12 F. 3d 662, 667 (7th Cir. 1993); and *De Cardenas v. Reno*, 278 F. Supp. 2d 284, 294 (D. Conn. 2003) (administrative oversights and also procedural defects deprived [petitioner] of an important opportunity to make her

case for section 212(c) relief). This Court has held that the:

> "Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Thus, a remedy must "**neutralize the taint**" of a constitutional violation, id., at 365." (bold emphasis added)

Quoting *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1388 (2012). This ruling, above, should have been, and is being requested herein to be, applied in the context of the case *sub judice* where justice required the district court to place Petitioner in the same position he would have occupied, *absent the judicial error*, at the outset.

Under that position, the district court should have allowed Petitioner's actual innocence claim, in fact Petitioner's *entire* 2255 motion—which incorporated the claim—to be heard ***anew*** *without* application of the "*new reliable evidence*" standard, or other hurdles applicable to defendants who, themselves, caused a procedural default or other procedural obstacle preventing review of their claim(s). Unlike in the instant case, where the lower courts *created the impediment* that prevented Petitioner from having his claim(s) addressed on the merits when they should have been, (App. A-2) the actual innocence cases, including *Murray v. Carrier*, *Schlup v. Delo*, and *Bousley*, each involved a case in which the defendant, or the attorney, *created the impediment* that formed the basis upon which they found

themselves, as it relates to obtaining a subsequent review of their *actual innocence* claim. Yet, those cases were *permitted* to proceed through the "fundamental miscarriage of justice" doctrine based upon a *credible* showing of actual innocence and/or a constitutional violation.

Conversely, however, Petitioner, here, was the victim of an *erroneous* and/or *mistaken procedural bar theory*, based on a judicial error, and not of Petitioner's doings or of counsel's, which has now been corrected. Yet, the Government and the lower courts, by their arguments seek to preclude Petitioner from ever having his actual innocence claim from truly being addressed on the merits despite an extensive *credible* showing, as shown above in Section #2 pages # 16-19, which constitutes as much of a factual innocence claim as can ever be presented.

Petitioner, like *Perkins* and *Dretke*, initially raised his actual innocence claim in his first *timely* filed post-conviction 2255 motion to vacate as "ineffective assistance of counsel" for failing to challenge the insufficiency of the evidence to convict. (App. A-2 at 3, ¶ 3) From that point, and the next twenty (20) years, the Government argued that Petitioner's actual innocence claim had been "*addressed on the merits and rejected.*" (App. A-9) (Govt.'s Resp. to first 2255 motion arguing "procedural bar theory"); (App. A-6) (Report of Magistrate showing the history of filings making same "*procedural bar*" argument). Because the district court's final

order *clarified* that Petitioner's actual innocence claim had "*never been addressed on the merits*" when it should have been (in 2001) (App. A-2), the proper remedy was for the district court to hear this case *anew* and under the "PLENARY" standard of review. The standard of review under a § 2255 motion is plenary. *Kaufman v. United States*, 394 U.S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1072 (1969); *Glock v. Singletary*, 36 F. 3d 1014 (11th Cir. 1994) (same).

Because the district court applied the "*new reliable evidence*" standard to Petitioner's Writ of Error Coram Nobis—after ruling that the "actual innocence claim had been sought at least four specific times and had never been addressed on the merits"—the court erred in failing to applying the *nunc pro tunc* doctrine, *Plenary or De novo Review*, and by failing to address the actual innocence claim under the Sixth Amendment ineffective assistance of counsel doctrine. The Court of Appeals erred, also, in affirming the district court's decision in violation of the Due Process Clause requiring this Court's attention and reversal under "*stare decisis*."

ARGUMENT ISSUE TWO

PETITIONER WAS CONVICTED FOR A NON-EXISTENT OFFENSE UNDER FEDERAL LAW IN VIOLATION OF THE DUE PROCESS CLAUSE, WELL ESTABLISHED FEDERAL LAW, IN VIOLATION THIS COURT'S DECISION AND OF ITS OWN CIRCUIT PRECEDENT

4. NON—EXISTENT OFFENSE NOT KNOWN TO THE LAW

AIDING AND ABETTING:

Under "Title 18 U.S.C. § 2, aiding and abetting is not a separate crime, but is inherently embodied in all indictments for substantive offenses." *U.S. v. Stitzer*, 785 F. 2d 1506, 1518 n. 7 (11th Cir. 1986) (citations omitted). The law makes clear that "one cannot aid and abet himself." *U.S. v. Martin*, 747 F. 2d 1404 (11th Cir. 1984). Title 18 U.S.C. § 2, which makes he who aids and abets the commission of an offense punishable as a principal, is an *alternative* charge in every count, whether explicit or implicit, and the rule is well established, both in the [Eleventh] Circuit and others, that one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense. *U.S. v. Gower*, 447 F. 2d 187 (5th Cir. 1971); see *Bonner v. City of Prichard*, 661 F. 2d 1206 (11 Cir. 1981) (holding that "all cases from the Former Fifth Circuit Unit B, and cases prior to September 30, 1981 are *binding precedent* in the Eleventh Circuit").

However, a defendant can only be liable on an aiding and abetting theory if the government proves that the substantive offense, which the defendant allegedly aided and abetted, *was actually committed by someone else*. The proof required for criminal liability on an aiding and abetting theory requires *no less* than the proof required for the principal offense itself. *United States v. Trevino*, 556 F. 2d 1265

5th Cir. 1977); United States v. Frazier, 605 F.3d 1271, 1279 (11th Cir. 2010) ("to prove guilt under a theory of aiding and abetting, the government must show that someone *other than the defendant* committed a substantive offense"); United States v. Schwartz, 666 F.2d 461, 463 (11th Cir. 1982) (same); United States v. Samuels, 308 F. 3d 662 (6th Cir. 2002) ("one cannot aid and abet with a government informer"); and United States v. Martino, 648 F.2d 367, 405 (Former 5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S. Ct. 2020, 72 L. Ed. 2d 474 (1982) (same); Sears v. United States, 343 F.2d 139 (Former 5th Cir. 1965) (same); United States v. Lively, 803 F. 2d 1124 (11th Cir. 1986) ("it is legally impossible to conspire [or aid and abet] with a government agent or informer").

In the instant case, no person, *other than Petitioner*, was named or charged in the indictment as being involved in or with the alleged drug offenses charged in this case. (App. A-4) (Indictment). Petitioner was charged, also, under the aiding and abetting statute, 18 U.S.C. § 2. (Id.). Moreover, the trial judge gave the jury an instruction on "aiding and abetting," stating that "[Petitioner] could be convicted for the conduct of others, *just as though he committed the crimes himself*, under aiding and abetting." (Govt.'s Supp. Appendix, Vol. 3, at 260) (TR. at 260) Compare Gebardi v. United States, supra, (showing that "aiding and abetting without proof of other is *non-indictable* offense under federal law").

In *Martin*, supra, the Eleventh Circuit, explaining the basis for which to constitute an "*offense not known to the law*," went on to state that:

> "The difficulties in this case with counts one and two arises from the presence of several factors: the *affirmative inclusion of aiding and abetting* in these two counts, though it was not required to be alleged, the *failure to charge any person other than Martin* of a principal offense, and the *giving of a jury instruction on aiding and abetting other persons* when under the evidence *no person other than* Martin committed a principal offense...Taking count one as an example, the *only principal offense charged is attempt to possess with intent to distribute*. The *only person charged* with committing that offense is Martin. The indictment can be read, therefore, as charging an offense *not known to the law,* i.e., Martin's aiding and abetting himself...We cannot exclude the possibility that the jury convicted Martin of offenses alleged improperly, not cured by jury instructions, and not supported by the evidence. What we have said with respect to count one applies equally to count two. The convictions on both counts *must be reversed*." (italic emphasis added)

Petitioner's facts are virtually *indistinguishable* from *Martin's*, other than the fact that there was *no evidence* Petitioner committed or attempted to commit the *substantive* offenses, while in *Martin*, there was testimony from two *non-indicted* co-defendants testifying that *Martin* did, in fact, *attempt* to commit the crimes. (Id.) See also, *United States v. Cowart*, 595 F. 2d 1023, 1030, n. 10 (Former 5th Cir. 1979) (stating "there can be no aiding and abetting without a principal"). Importantly, the Government, itself, in the instant case, has previously argued to the Eleventh Circuit

Court of Appeals that it, the Government, could *not prove* at trial that Petitioner "[*committed the crimes of conviction*] and, therefore, had to rely on an aiding and abetting theory in order to convict [Petitioner] *as a principal*." Specifically, the Government argued that:

> "Simmons was properly convicted for distributing cocaine, a crime he participated in with another individual. Therefore, the government's reliance at trial on an *aiding and abetting theory in order to convict Simmons as a principal* was proper given the government's theory that Simmons ***may or may not*** have completed *all of the predicate acts himself.* (all emphasis added)

(App. A-7 at 5); see also, *United States v. Simmons*, No. 99-12589 (11th Cir. 1999) (Unpublished). Clearly the Government has *unequivocally conceded* that there was no evidence to prove that Petitioner committed the *predicate acts*, or elements, of the distribution offenses."

As in *Martin*, supra, Martin was the *only person charged* with committing the crimes, and, likewise, Petitioner was the only person charged with committing the crimes. (App. A-4) As in *Martin*, aiding and abetting was included in both counts of the indictment, though it was not required to be, as likewise, Petitioner's two counts included aiding and abetting. (App. A-4) As in *Martin*, the court instructed the jury on the law of aiding and abetting "other persons," when under the evidence no one else committed or attempted to commit the crimes, as also in Petitioner's case, there

was no evidence that Petitioner committed the substantive crimes (Government ***concedes*** that there was no evidence Petitioner committed the *substantive* counts himself) (See App. A-7 at 5) and/or (*United States v. Simmons*, No. 99-12589 (11th Cir. 1999) (Unpublished)).

Following the Eleventh Circuit's precedent, *Martin*, supra, Petitioner's indictment can be read, therefore, as charging *an offense not known to the law,* i.e., *Simmons' aiding and abetting himself.* As the Eleventh Circuit held in *Martin*, supra, the same must apply equally to Petitioner, Mr. Simmons, that:

> "We cannot exclude the possibility that the jury convicted *Martin* [or Simmons] of offenses alleged improperly, not cured by jury instructions, and not supported by the evidence. What we have said with respect to count one applies equally to count two. The convictions on both counts must be reversed."

Here, Petitioner, like *Martin*, supra, has been convicted for "*an offense not known to the law*," aiding and abetting himself. (See also *Gebardi*, supra) Clearly, as a matter of law, Petitioner has demonstrated, based upon *Gebardi* and Eleventh Circuit precedents, that his convictions are "*non-existent offenses* under federal law and/or unindictable offenses," which must be reversed as a matter of well-established law. *Gebardi*, supra, *Martin*, supra; see also *Cargill v. Turpin*, 120 F. 3d 1366 (11th Cir. 1997); *United States. v. Hutchinson*, 75 F. 3d 626 (11th Cir. 1996); and *United States v. Hogan*, 986 F. 2d 1364 (11th Cir. 1993) holding that:

> "One panel of the Eleventh Circuit cannot revisit another panel's decision. That is, each succeeding panel is bound by the holding of the first panel to address an issue of law unless and until that holding is overruled *en banc* or by the [United States] Supreme Court."

Therefore, because *Martin* and Petitioner's cases are virtually *indistinguishable*, except that Petitioner's case is more *onerous* in that there was *no evidence* that Petitioner, unlike *Martin*, committed or attempted to commit the substantive offenses, Due Process, clearly established federal law, and the Equal Protection Clause demands that Petitioner's convictions—under the "*non-existent offense*" or "*offense not known to the law*" doctrine, *inter alia*—be reversed and vacated. This Court, under "*stare decisis*," should intervene and direct the Court of Appeals to Reverse and Vacate the convictions and dismiss the indictment. It is so prayed.

ARGUMENT ISSUE THREE

THE DISTRICT COURT'S DECISION, AND COURT OF APPEALS' AFFIRMANCE THEREOF, DENYING PETITIONER'S USAGE OF THE WRIT OF ERROR CORAM NOBIS, AS A VEHICLE, WAS IN ERROR

The Government, for almost twenty (20) years, argued that the Petitioner's actual innocence claim was *procedurally barred*, and the district court agreed. (App. A-9; A-6; and A-5, respectively) Because of the district court's current ruling—that the actual innocence claim had *never been addressed on the merits* [*due to a judicial Error*]—the question, here, is whether Petitioner was entitled to, or was correct in

relying upon the Writ of Error Coram Nobis, as a vehicle, to have his claim addressed on the merits after his imprisonment and supervised release was completed. The facts and laws demand the question be answered in the affirmative.

5. CORAM NOBIS WAS THE PROPER REMEDY

APPLICABLE LAW

Coram nobis jurisdiction arises pursuant to *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954). Federal courts have authority to issue a writ of error coram nobis under the All-Writs Act, 28 U.S.C. § 1651(a). As explained by this Court, in *Morgan*, the writ of error coram nobis is a remedy "*available to vacate a conviction when the petitioner has served his or her sentence and is no longer in custody* because the results of the conviction may persist." Subsequent convictions may carry heavier penalties, [and] civil rights may be affected." Id., at 512-13, 74 S. Ct. 247 (quoting *U.S. v. Peter*, 310 F. 3d 709, 712 (11th Cir. 2002)).

The Court went on to state that "the law recognizes that there must be a *vehicle* to correct errors of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid. In essence, the writ of error coram nobis acts as an assurance that deserved relief will not be denied as a result of the technical limitations of other post-conviction remedies." (citation omitted) (quoting *Peter*, 310 F. 3d at 712). Coram nobis jurisdiction exists only to correct [a] manifest injustice.

See *Rener v. United States*.", 475 F. 2d 125, 127, (5th Cir. 1973)." *Lowery v. U.S.*, 956 F. 2d 227, 230 (11th Cir. 1992).

Moreover, the *Morgan* majority, after examining those errors for which the writ was issued at common law, wrote: "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. at 507-11, 74 S. Ct. at 250-53. Such compelling circumstances exist only when the error involves a matter of fact of the most fundamental character which has *not* been put in issue or *passed upon* and which renders the proceeding itself irregular and invalid." (citing *U.S. v. Mayer*, 235 U.S. 55, 69, 35 S. Ct. 19, 59 L. Ed. 129 (1914)), quoting *Moody v. United States*, 874 F. 2d 1575, 1576-77 (11th Cir. 1989).

A manifest injustice occurs when a defendant, as here, has been wrongfully deprived of access to the courts in an effort to prove his innocence for almost twenty (20) years; where the Government has *conceded*, albeit inadvertently, that the Petitioner was convicted for a crime [*not charged*]; and where the Petitioner has been convicted for a "*non-existent offense*" under federal law.

6. ANALYSIS

Contrary to the lower courts' decisions, that Petitioner was not entitled to use a coram nobis petition to have his actual innocence claim addressed on the merits, or otherwise, that Petitioner was [improperly] attempting to *re-litigate* his convictions through the writ of error coram nobis, the district court's ruling, itself and the basis thereof, dispels that notion. In support, Petitioner offers the following.

DIRECT APPEAL

In his direct appeal of his convictions, Petitioner, via appointed counsel, raised *one issue* for appellate review: "Whether the district court properly limited Simmons's [Petitioner's] cross examination of a government witness concerning a non-testifying confidential informant's criminal history?" (App. A-2 at 2, § I) Petitioner, without permission from the Court, submitted a *pro se* supplemental brief, which was *not addressed on the merits* by the Court. (Id., at n. 1)

CORAM NOBIS PETITIONS

Petitioner, while still incarcerated, filed three (3) coram nobis petitions seeking to have his claims, including actual innocence and conviction for non-existent offenses, addressed on the merits, *to no avail.* The petitions were dismissed, *without addressing the merits*, because "coram nobis unavailable when the petitioner is still in custody." (App. A-2 at 3, § II)

HABEAS PETITIONS

Petitioner, while incarcerated, filed at least seven (7) habeas petitions alone, seeking relief on the basis of, *inter alia*, actual innocence. The first was the § 2255 motion alleging "ineffective assistance of counsel" for failing to raise, among other things, "the sufficiency of the evidence to convict, and the improper jury instruction [on aiding and abetting others]," which were dismissed *without addressing the merits* allegedly on the basis that the "issues or similar issues had been *rejected in [Petitioner's] direct appeal from the pro se supplemental brief filed by Petitioner.* (App. A-2 at 3, § III; at 4) (showing all motions and petitions filed by Petitioner was denied on "*procedural [bar] grounds*," but *never* addressed on the merits).

It is *important* to note, however, that this claim—that *similar issues* were *rejected in the direct appeal* on Petitioner's "*pro se* Supplemental Brief" *has been the driving force, the backbone, and sole basis* of the Government's and the district courts' *reason(s)* for denying and/or dismissing Petitioner's pleadings, including his *first 2255 motion*. Conversely, the Eleventh Circuit Court of Appeals, itself, was compelled to "*correct and/or to clarify*" the record to dispel that notion, although the lower courts continued, to this day, to disavow and/or to outright and flatly disregard the Court of Appeals' final order. Otherwise, this petition would not have ever been necessary. That is to say, the Court of Appeals, in response to a "Judicial

Complaint" filed by Petitioner, stated, in relevant part, that:

> "The record shows that in Appeal No. 99-12064 the U.S. Court of Appeals for the Eleventh Circuit ("the Court") affirmed Mr. Simmons' criminal convictions in an opinion issued on October 27, 2000. Mr. Simmons filed a § 2255 habeas corpus petition in Case No. 01-civ-6504-Zloch that was dismissed by the district court on August 22, 2002 ... In Appeal No. 06-15755, Mr. Simmons appealed the district court's decision ... In brief, Mr. Simmons complains that in its opinion in Case No. 06-15755, the Court stated that Mr. Simmons had asked for permission to file a supplemental brief in his direct criminal appeal, and that the Court [stated that it] had granted his request. Mr. Simmons [however] points out that by [our] Order dated January 21, 2000, th[is] Court had in fact **denied** his motion for leave to file a supplemental brief ... Mr. Simmons alleges that the ***erroneous statement*** *in the Court's opinion* constitutes fraud ...[but] Mr. Simmons provides no evidence ... that Judge Dubina or any other panel member knew that the statement in the Court's opinion with respect to the filing of a supplemental brief was **incorrect** [at the time the statement was made]."

(App. A-10) While the complaint was dismissed, the Eleventh Circuit *unequivocally conceded* that "it had not, in fact, *ruled on the merits of any claim* Petitioner raised in his pro se Supplemental Brief on direct appeal. (Id.)

Suffice it to say, however, that in spite of the Court's Order, *clarifying* that it, the Court, "had **denied** Petitioner's [Mr. Simmons'] request to file a Supplemental Brief in his *Direct Appeal*," every district court and each government attorney, thereafter, continued to use the "*procedural bar theory*" to blocking Petitioner from

having his claim(s), and *first § 2255 motion issues*, from being addressed *on the merits*. (*See App. A-6 at 3-5*) (showing pleadings filed, over 20 years, by Petitioner and dismissed or denied without addressing the merits based expressly upon the so called "procedural bar" related to the *pro se Supplemental Brief* that the Court explicitly disavowed—addressing its merits—in the Judicial Complaint). (App. A-10) (Judicial Complaint *clarifying* that "Supplemental Brief, on *direct appeal*, was denied) Therefore, impossible for any claim to have been addresses on direct appeal.

ATTEMPTING TO RE-LITIGATE CONVICTIONS

The district court denied the coram nobis petition alleging that the Petitioner is attempting to *re-litigate* his convictions. (App. A-2 at 6, ¶ 3) (stating "Coram nobis is inapplicable if the petitioner merely wishes to re-litigate criminal convictions ... That is exactly what Petitioner is attempting to do in this proceeding ... Thus, even taking Petitioner's factual allegations as true, he is not entitled to *coram nobis* relief because he is attempting to re-litigate his conviction.") Clearly the district court is "*straddling the fence*" and her conclusions are *conflicting* in and of themselves. This is so, however, because, on the one hand, the district court has concluded that "the Court has never ruled on the merits of Petitioner's actual innocence claim," (App. A-2 at 4, ¶ 3; at 7, ¶ 2); and, on the other hand, the district court concluded "Petitioner is attempting to re-litigate his [actual innocence claim] criminal convictions." (See

App. A-2 at 6, ¶ 3)

The actual innocence claim, which was raised in Petitioner's *first timely* § 2255 motion to vacate *under ineffective assistance of counsel* for failing to challenge the sufficiency of the evidence, (App. A-2 at 3, ¶ 3) has already been determined to have been *erroneously* declared procedurally barred (App. A-10; App. A-2 at 4, ¶ 3) by the district court's Order (actual innocence "claim had never been addressed on the merits.") (App. A-2 at 7, ¶ 2) There, because the district court *concedes* that the actual innocence claim had never been addressed on the merits, the claim, actual innocence—which undoubtedly proves the convictions were in error—simply cannot be an attempt to ***re-litigate*** something, a claim, that has *never been litigated in the first instance.*" Nor can these matters be *divorced* from each other.

Therefore, the district court's ruling, that the actual innocence claim had never been addressed on the merits, in and of itself, denounces any notion that Petitioner was "attempting to re-litigate" his criminal conviction. In other words, the district court's conclusion—that the "Petitioner was attempting to *re-litigate* his criminal convictions" [by proving his actual innocence]—would send a misguided message that "proof of actual innocence *cannot* result into a reversal of the convictions." This, ***with all due respect***, makes no sense whatsoever. Especially when the sole purpose of proving one's innocence is, itself, to overturn and/or reverse the conviction(s) of

one who is *actually innocent* of the crimes of convictions. For these reasons, the district court's "re-litigate criminal conviction" theory should be *rejected*, and the decision denying relief on the basis of the same should, likewise, be *rejected.*

Coram nobis was the proper remedy under the facts of this case. The writ is "appropriate only when there is and was no other available avenue of relief. Morgan, 98 L. Ed. 248 (1954); Moody v. United States, 874 F. 2d 1575, 1578 (11th Cir. 1989). Petitioner had no remedy, after filing at least seven (7) petitions that were wrongfully barred from review. (App. A-2 at 3, ¶ 3) Secondly, the writ may issue "only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." Moody, 874 F. 2d at 1576-77. Petitioner's *actual innocence* and *ineffective assistance of counsel* claims were among the claims wrongfully dismissed as procedurally barred and "never addressed on the merits." (App. A-2 at 3, ¶ 3; at 4, ¶ 1-3) The district court's order, as pointed out, displays the facts necessary for application of the writ in this case. The claim has never been addressed on the merits in almost twenty (20) years of filings based solely on a *mistaken belief* in the nature of a "Judicial Error." On this basis, Petitioner's reliance and usage of the writ was, as a matter of law, correct and proper. The lower courts erred, *reversibly*, in their decisions, and this Court should intervene to erase the *stigma* of injustice attached

to the wrongful convictions. Or, alternatively, this Court should Grant, Vacate, and Remand (GVR) this case to another judge not previously assigned to this case for further proceedings as determined by this Court including, if deemed applicable, an *Evidentiary Hearing* on *each and every claim* presented in Petitioner's *first timely*, but erroneously dismissed, § 2255 motion in Case No. 01-civ-6504-Zloch (App. A-2 at 3, ¶ 3). Under Section 2255, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," the court shall "grant a prompt hearing thereon, law with respect thereto." However, if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007); and *Aron v. United States*, 291 F. 3d 708, 715 (11th Cir. 2002).

It is noteworthy, however, to assert that the record evidence in the case discloses that "any *reasonable* fact-finder would, if not outright voting for acquittal, certainly, in fact, have entertained a reasonable doubt of Petitioner's guilt," to say the least; however, "the constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are *morally blameless*." *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508 (1975) (requirement of proof beyond a reasonable doubt is not limit[ed] to those facts which, if not proved, would wholly exonerate the accused).

In order to preserve the integrity of this Court's line of decisions, this Court should reverse the Court of Appeals' affirmance of the lower courts' decisions, here, denying relief to Petitioner. This Court has held that:

> "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights [are] alleged... loss of liberty and sometimes loss of life... are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation."

Sanders v. United States, 373 U.S. 1, 24, 83 S. Ct. 1081 (1963); see also, *Wade v. Mayo*, 334 U.S. 672, 681, 68 S. Ct. 1270, 1275, 92 L. Ed. 1647 (1948). Therefore, Petitioner *prays* for this Honorable Court to vacate and reverse the decisions of the district court and Eleventh Circuit Court of Appeals, already delayed 20 plus years, even at this late date and time. Better, as here, that justice be delayed, than not at all.

CONCLUSION

WHEREFORE, based on the foregoing petition, facts and authorities, this Court should GRANT the Writ of Certiorari to the Court of Appeals for the Eleventh Circuit or, otherwise, GVR this case with instructions as deemed just and fair and right as demanded by the Due Process Clause of the United States Constitution.

Respectfully submitted,
Bruce Simmons
Bruce Simmons-*Pro se*