No. 20-7989

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

CASH WALLACE PAWLEY, SR.
PETITIONER

vs.

STATE OF FLORIDA
RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT SOUTHERN DIST. OF FLORIDA
AND THE 11TH CIRCUIT COURT OF APPEAL'S DENIAL OF A COA

PETITION FOR WRIT OF CERTIORARI

CASH WALLACE PAWLEY, SR.

OKEECHOBEE CORRECTIONAL INSTITUTION
3420 N.E. 168th STREET
OKEECHOBEE, FLORIDA, 34972

QUESTION(S) PRESENTED

1. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEAL SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND/OR SANCTIONED A DEPARTURE BY A LOWER COURT, WHEN IT ERRED IN ITS UNELABORATED DENIAL OF A CERTIFICATE OF APPEALABILITY[1] ON PETITIONER'S TWENTY-SEVEN (27) CONSTITUTIONAL CLAIMS, OF WHICH SEVENTEEN (17) WERE DENIED BY THE DISTRICT COURT, ERRONEOUSLY, AS PROCEDURALLY BARRED (UNEXHAUSTED), THREE (3) WERE ERRONEOUSLY RULED AS NOT COGNIZABLE ON FEDERAL HABEAS REVIEW, AND SEVEN (7) WERE ERRONEOUSLY DENIED ON THE MERITS IN AN ACTUAL INNOCENCE CASE
SEE ALSO [APPENDIXES B, A]

2. WHETHER THE DISTRICT COURT ERRED IN DENYING 'MOTION FOR SUMMARY JUDGMENT' ON ALL CLAIMS RAISED ON HIS §2254 HABEAS CORPUS PETITION
SEE ALSO [APPENDIX J]

3. WHETHER THE DISTRICT COURT ERRED IN DENYING AN EVIDENTIARY HEARING WHERE, ALTHOUGH REQUESTED IN THE STATE TRIAL COURT, THE TRIAL COURT REFUSED TO HOLD AN EVIDENTIARY HEARING
SEE ALSO [APPENDIX K]

4. WHETHER THE DISTRICT COURT ERRED IN DENYING PETITIONER'S TWENTY-SEVEN (27) CONSTITUTIONAL CLAIMS AS "UNEXHAUSTED, PROCEDURALLY BARRED AND MERITLESS" IN AN ACTUAL INNOCENCE CASE
SEE ALSO [APPENDIXES I, H, G, F, E]

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[1] And "Motion To Reconsider, Vacate, or Modify Denial of Application for COA."

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[✓] All parties do not appear in the caption of the case on the cover page to the proceeding in the court whose judgment is the subject of this petition is as follows:

* See attached "CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT" (From the 11th Circuit Court Filings)

[Appendix L]

RELATED CASES

1. United States Court of Appeals for The Eleventh Circuit
Cash Wallace Pawley, Sr. v. State of Florida, et al;
Secretary, Florida Dep't of Corrections
Case No.: 20-11466-J
Disposition: Rehearing denied on February 23rd, 2021
Unelaborated denial of COA on January 21, 2021.

2. United States District Court (Southern District of Florida)
Cash Wallace Pawley Sr. v. Mark S. Inch, Secretary
Case No.: 4:17-CV-10027-KMM
Disposition: Denied with no COA on March 30, 2020

3. 16th Judicial Circuit Court Key West, FL (Monroe County)
State of Florida v. Cash Wallace Pawley
Case No.: 2012-CF-818-AKW (Original Case)

4. 3rd District Court of Appeal
Cash Wallace Pawley v. State of Florida
Case No.: 3D13-2992 (Direct Appeal of Judgment and Conviction)
Disposition: Denied without Opinion on May 25th, 2015.

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APPENDIX C - Motion to Reconsider, Vacate, or Modify Denial of Application for COA. Filed February 5th, 2021.

APPENDIX D - Motion for Certificate of Appealability following Denial of COA Request by the District Court. Filed July 14, 2020. (with Motion for Leave to Exceed Page Limitation).

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APPENDIX K - Petitioners Motion for Mandatory Evidentiary Hearing. August 29, 2017.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 (c), (c) (2)

28 U.S.C. § 2254

Rule 22 (b) (2) FRAP

Eleventh Circuit Rule 22-1 (c)

Eleventh Circuit Rule 27-2

Rule 12 (b) (6) FRAP

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[✓] For cases from **federal courts**:

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

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[✓] is unpublished.

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

[ ] reported at _____; or,

[✓] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was January 21, 2021.

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

[✓] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 23, 2021, and a copy of the order denying rehearing appears at Appendix A.

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

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and *Hohn v. United States*, 524 U.S. 236, 238, 252 (1998) (United States Supreme Court has jurisdiction under 28 U.S.C. §1254(c) to review denials of an application for a Certificate of Appealability by a Circuit Judge or panel).

STATEMENT OF THE CASE AND STATEMENT OF FACTS ALLEGED ON HABEAS CORPUS

Petitioner was convicted in Florida state court of attempted first degree murder, aggravated assault, and [simple] battery. He was sentenced to 45 years (35 prison plus 10 probation) on the attempted murder count, 5 years prison (consecutive) for the aggravated assault, and 1 year county jail (time served) on the misdemeanor battery.

Petitioner filed all of his timely postconviction motions and appeals attacking an array of prosecutorial misconduct, judicial misconduct, trial court errors, jurisdictional errors, ineffective trial counsel, ineffective appellate counsel, and other constitutional violations. Each one was completely and properly placed before the courts as a violation of Petitioner's U.S. Constitutional Rights, thus giving the State courts the fair opportunity to pass on the constitutional violations. Other than the trial court's opinion denying his Rule 3.850 motion, not one single other court gave him the respect of an opinion in his case – although most of the forty U.S. Constitutional violations were egregious, abusive, and clear on the record.

The petitioner avers that an enormous miscarriage of justice has occurred, as he is actually and truly innocent in fact and in law, creating the need for his Federal habeas corpus petition, to right what is wrong by granting justice where justice is

due.[2] Although the petitioner has unfortunately had to raise dozens of claims of injustice and constitutional betrayal by the prosecutor, defense counsel and the courts themselves, "It is needless to enter into many reasons for quashing the conviction, where one alone is sufficient."[3] However, Petitioner would be remiss in his duty to address such grievances committed in his district, not only for his own sake, but for all those who may follow through the same treacherous domain and suffer the same fate at the hands of those whom have turned their backs on honor, integrity and principle. Those who betray the very oath they have taken, and commit tyranny.[4]

This case derived from an accident. Nothing more. The result of carelessness on the victim's own part. She broke (state and federal) law by **surreptitiously** giving the Petitioner a Schedule IV, federally controlled substance known as "Ambien" (a hypnotic sedative) with known outrageous side effects.[5] The Petitioner, a small local business owner in Key West, Florida, whom was used to working up to 17 hours a day, thought that the love of his life (his fiancé) was giving him an herbal remedy for sleeplessness – "Melatonin" – a natural herbal

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2 For "the job of the courts is not to dispose of cases, but to decide them justly." Jim Carrigan, American Jurist, Justice, Supreme Court of Colorado, 1977.

3 William Murray, British Chief Justice (1756)

4 "It is from petty tyrannies that larger ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in the soil grow great, and, in growing, break down the foundations of liberty." – Wiley B. Rutledge, *Thomas v. Collins*, 323 U.S. 516 (1944).

5 See FDA.gov. website for list of horrific side effects including but not limited to, Hallucinations, Homicidal ideations and acts, suicidal thoughts and actions, memory loss, sleep activities, etc.

supplement. The sedatives were hers, and she was well aware for years that Petitioner never took any narcotics or sedatives whatsoever. But that night, unfortunately, his fiancé (the alleged victim # 1), had been on a drinking binge with her longtime girlfriend from Chicago, for over 13-hours. The Petitioner, on the other hand, had been working his business all day an all night, as this was his busiest week of sales for the entire year.

The dosage she gave the Petitioner, on three occasions in just a 6-hour period, was 6-times the legal dosage mandated by the Food & Drug Administration (FDA). The result was catastrophic. The hallucinations suffered (by the Appellant) were horrific. He knew not what he did. He was on "Planet Zion" trying "to meet the director" (according to the police affidavits and testimony).

The result – a "minor" few seconds long hallucinatory skirmish where his fiancé sustained "one" superficial laceration (skin deep cut) to the "right back of her neck,"[6] and the Petitioner somehow was stabbed and cut four times (to which no one claims responsibility for). A simple tragedy that the prosecution then turned into a travesty of justice. In fact, the prosecutor never even spoke to the alleged victim (Pawley's fiancé) for almost a year after the incident (only days before trial began making first contact). They turned an accident into an outrageous charge of "premeditated first degree attempted murder" without a shred of evidence to support such a charge; and then pursued the Petitioner with a vengeance so full of

[6] According to the medical records.

hate, that they transgressed far outside the law, and the Constitution of the United States (and Florida).[7] They obfuscated the truth-seeking function of the court, violating the very foundations of justice and jurisprudence.[8]

The process wasn't fair, the trial most definitely wasn't fair, the sentencing wasn't fair – and justice was not served.[9]

The State continuously refused to follow the laws of the land – from beginning to end. In fact, they aggressively pursued just the opposite – lawlessness. They consistently maneuvered outside the confines of the law by:

a.) Conducting an unconstitutional search of Petitioner's pre-trial jail cell, removing **all** of his attorney-client privileged confidential notes, letters, correspondence, and trial strategy.

b.) Solicited known false testimonies.

c.) Illegally deposed the Petitioner (also without his attorney present).

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7 Interestingly, the very prosecutor in Petitioner's trial committed suicide shortly after Petitioner's corrupted trial.

8 "Those who make the attack ought to be very well prepared to support it."-Sir Giles Rooke, English jurist, *Almgill v. Pierson* (1797), 2 Bos & Pull. 104
"Truth and falsehood, it has been well said, are not always opposed to each other like black and white, but oftentimes, and by design, are made to resemble each other so as to be hardly distinguishable; just as the counterfeit thing is counterfeit because it resembles the genuine thing." – Sir Anthony Cleasby, English jurist, *Johnson v. Emerson* (1871), L.R.6.Ex. Ca. 357

9 No more truth could be explained in the instant case, than by Alan M. Derschowitz: "The prosecution is perfectly happy to have the [theory] of guilt come out, but it, too, has a truth to hide; it wants to make sure the process by which evidence was obtained is not truthfully presented because, as often as not, that process will raise questions." – U.S. News & World Report, 9 August 1982.
"No pain equals that of an injury inflicted under the pretense of a just punishment." – Luperico Leonardo de Argensola, Spanish Poet and Dramatist, Sonetus.

d.) Placed a confidential informant in his jail cell to rifle through his attorney-client notes, letters and trial work-product to acquire protected information.

e.) Misinformed the jury of the law and the State's burden (to prove every element of the crimes)

f.) Intentionally thwarted the Petitioner's only and viable defense by obstructing the service of his thirty-four witnesses (34) witness subpoenas – so that not one single witness would appear to testify to the truth of the events that occurred that day.

And so many more violations, that the drafters of our U.S. Constitution have rolled over in their graves.[10] The petitioner deserved more – not only because he served his country in the Marine Corps – but because he is an American by blood and by birth. He has an inalienable right to enjoy that birthright, and the axioms that are guaranteed by his blessed Constitution...due process being one of the greatest.[11] The court was ultimately without jurisdiction to even try the petitioner due to the fraud the prosecutor perpetrated on the court when he swore under oath

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10 "No [prosecutor] is above the law and no [defendant] is below it; nor do we ask any man's permission when we require [the prosecutor] to obey it. Obedience to the law is demanded as a right; not asked as a favor." – Theodore Roosevelt.

11 "What due process of law means to Americans...is bound up with our traditional notions of *magna carta*. Whether all that has been read into [that] document is...legally sound, is not of first importance; belief itself is a historical fact...legend and myth cannot be left out of account on tracing the sequence of cause and effect." – Helen M Cam, English Historian
"Constitutions are intended to preserve practical and substantial rights, not to maintain theories." – Oliver Wendell Homes, Jr. 194 *U.S.* 451, 457 (1904).
"The precepts of law are these: to live honorably, to injure no other man, to render every man his due." – Justinian I, Institutes, c. 533

that he'd received required sworn testimony (from the alleged victim(s) to establish probable cause – when, in fact, he'd received absolutely nothing from any "material witness." [12] But, it didn't stop there. The State continued to compound the injustices through the series of statutory and constitutional violations portrayed throughout Petitioner's federal petition for justice.[13]

However, one of the most egregious atrocities committed by the State (besides the fraud and illegal search and seizure conducted on Petitioner's jail cell), was the intentional thwarting of Petitioner's only defense at trial - by not serving his thirty-four (34) witness subpoenas – destroying his ability to present a meaningful and full defense, to prove there was no *mens rea*[14] in this alleged crime; therefore making it an innocent act in both fact and law. (Involuntary Intoxication – a temporary insanity defense.)

And since Florida Law[15] adheres to the principles mandated by the M'Naghten Rule – that a man whom is insane cannot form the intent necessary to commit a crime – and it was clearly established as an "undisputed" fact, that the

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12 "This won't be the first time I've arrested somebody and then built my case afterward." – James Garrison, District Attorney, New Orleans, La.
"Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." – *Louis Brandeis, Olmstead v.* U.S., 277 U.S. 438 (1928)

13 "The law is [only] good if a man use[s] it lawfully" – The Bible; 1 Timothy 1:8
"Too often, practitioners of the law are...not creators of legal justice and do not, in fact, understand the philosophical basis of law, its ultimate goals, or its importance...in a democratic society." – Robert John Henle, American Educator, Pres. Georgetown University

14 "The act does not constitute a criminal [offense] unless the mind is criminal." – Latin legal phrase (*mens rea*).

15 FLCRIMSUB § 45 and Florida MODEL PENAL CODE § 4.01

alleged victim, herself, gave the "Ambien" surreptitiously to the Petitioner, and his reaction to that 6-times overdose (per federal law) was well-documented in the police affidavits, in the 2 ½ hour surreptitious audio recording of the Petitioner (by the police), and testified to at trial – the Appellant was clearly entitled to a judgment of acquittal – as the prosecutor completely failed to prove the "required" additional elements of "intent" and "sanity" - once sanity was "introduced from any of the four corners of the proceedings."[16]

To add insult to all of the preceding injuries sustained by the Petitioner at the hands of the State of Florida, the Sentencing judge then refused to hear any mitigating evidence regarding "involuntary intoxication", and ultimately sentenced Petitioner to an [illegal] and highly disproportionate sentence more than 5-times greater than the "Recommended" sentence by Legislature. This sentence also violated the maximum sentence allowed under Florida Law (15 years) pursuant to Florida Statue § 777.04(4)(c), for the "Attempted" crime. The law is was clear, but again was not followed at sentencing, nor on postconviction – violating the federal due process rights of Petitioner.[17]

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16 "The doctrine of the law then is this: that precedents and rules **must** be followed unless flatly absurd or unjust; for though their reason be not obvious at first view, we owe such a deference to former times as not to suppose that [they] acted wholly without consideration." – Sir William Blackstone.
"There is no superstitious sanctity attached to precedent... Courts can only maintain their authority by correcting their errors to accord with justice and the advance and progress of each age." – Walter Clark, American jurist.

17 "We better know there is fire whence we see much smoke rising than we could know one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot." – Abraham Lincoln.

The judge sat through a trial full of perjured testimony, solicited and elicited by the prosecutor himself, compounded by that prosecutor throughout the trial and in closing arguments; and then a litany of additional untruths and exaggerations perpetrated on the court – by the prosecution – at sentencing. False information that was wholly considered by the judge when passing down [the illegal] sentence. A clear violation of due process under the 5th and 14th Amendment.

The whole truth is that the Petitioner truly is innocent (in fact and in law) and deserves justice. That is what he has been asking for, for nine (9) long years... The liberty he deserves; nothing less.[18]

The Petitioner was never even allowed to present [any] defense when the court and clerk refused to serve his thirty-four (34) witness subpoenas, resulting in a "spurious legal proceeding where the outcome [was] already predetermined." (Kangaroo Court).[19] Upon stealing the Petitioner's "confidential" defense "playbook" (his attorney-client notes, papers, and defense strategy) from his jail cell, the prosecution violated both the 4th, 5th and 6th Amendment rights of the

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18 "Those who think that the information brought out in a criminal trial is the truth, the whole truth, and nothing but the truth are fools. Prosecuting... a case is nothing more than getting to those people who will take your side, who will say what you want said." – F. Lee Bailey, NY Times Mag., 20 September 1970.
"And finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error..." – Thomas Jefferson.

19 Even God himself did not pass sentence upon Adam before he was called upon to make his defense: "Adam, Where are you?" ..."Have you eaten of the tree which I commanded you not to eat?"..."Why did you do that?" – The Bible, Old Testament, Genesis
"COURTROOM: A place where Jesus Christ and Judas Iscariot would be equals, with the betting odds in favor in Judas." – H.L. Mencken
"It is better that ten guilty persons escape than one innocent suffer." – Sir William Blackstone, Commentaries on the Laws of England, 1765-1769.

Petitioner – **forever foreclosing on his ability to receive a fair trial**. The bell cannot be unrung. The damage is done. The harmless error analysis (rule) does not apply. A manifest miscarriage of justice has occurred, for which the Petitioner deserves a complete discharge; *res judicata* of any further action by the State of Florida.[20] He deserves his family back,[21] his career, and his reputation. He is "actually" innocent by all standards. And for the "accident" that occurred, he is truly sorry. Even the love of his life knew that something was terribly wrong when she asked the policeman... "Does he know he stabbed me?" [App. M] (Originally App. "CK", Exh. "5"; pg. 9, Line 4, in Petition for Writ of Habeas Corpus).

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20 "It is just as well that Lady Justice is blind. For she may not approve of the things that are perpetrated in her name." – Cash Wallace Pawley, Sr. (Petitioner).

21 Although **both** of his parents died within the last year.

REASONS FOR GRANTING THE PETITION

INTRODUCTION

On July 14th , 2020, pursuant to 28 U.S.C. § 2253, Rule 22 (b) (2) FRAP, and Eleventh Circuit Rule 22-1, Petitioner, Cash Wallace Pawley, Sr. (hereafter "Petitioner") moved the 11th Cir. Court for the issuance of a Certificate of Appealabilty ("COA"), following denial of a COA request to the district Court. [Appendix D]

On March 30th, 2020, district judge K. Michael Moore, entered an order ADOPT[ING], in part, the Magistrate Judge's Report and Recommendation, DENY[ING] the petition for writ of habeas corpus, and stated that "no certificate of appealability shall issue", citing an obscure Northern District of Florida Case[22] "where the petition was mooted after the Petitioners release from custody."[23] The district judge also instructed the Clerk of Court to CLOSE [the] case, and denied several pending motions as moot (Motion For Summary Judgment, Motion For Mandatory Evidentiary Hearing and Motion For Bail on Own Recognizance). (DE# 81). The reasons for denial included claims by the magistrate that seventeen (17) claims for relief were "unexhausted, others are procedurally barred, and the remaining claims [are] meritless." See, generally, DE# 81.

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22 *Brown v. Sec'y, Fla. Dep't. of Corr.*, No. 5:17-CV-29-MCR-GRJ, 2018 WL 1802567, at * 1-2 (N.D. Fla. Mar. 19, 2018), rather than *Slack v. McDaniel,* 529 U.S. 473, 483 (2000). [App. E].

23 Here, the case is not mooted, nor has Petitioner been released from custody.

On April 14th, 2020 (docketed on April 17th, 2020), Petitioner filed a timely, Notice of Appeal, from the judgment of denial (DE # 82).

On May 4th, 2020, Petitioner filed a Motion for Extension of Time to File Certificate of Appealability Application, which he stated was forthcoming in his Notice of Appeal, since the district judge's order denying his petition for writ of habeas corpus ("petition") included a denial of the issuance of a COA by the district court. However, pursuant to FRAP 23(b)(3), [24] Petitioner's had filed a Motion to Hear and Rule on his "Second" [25] Motion For Release on Bail on Personal Recognizance (which both were subsequently denied by the district Court).

Petitioner had clearly demonstrated in his Traverse (Reply), Objections, (and then in his Application for a COA to the Eleventh Circuit Court of Appeals), that reasonable jurists could differ regarding the rectitude of the district Court's dismissal [26] on the basis of alleged unexhausted, procedurally barred, uncognizable and/or meritless claims presented in his petition, in accordance with *Slack v. McDaniel,* 529 U.S. 473, 483 (2000). (see, DE# 50, pgs. 1-24 , and DE# 77, *passim*).

The Application for COA to the 11th Circuit timely followed on July 14th, 2020, enumerating, in great detail, how jurists of reason could debate the district

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24 and *Stein v. Wood,* 127 F. 3d 1187, 1189 (9th Cir., 1997); *Workman v. Tate,* 958 F. 2d 164, 167 (6th Cir., 1992); and *Johnson v. Nelson,* 877 F. Supp. 596 (D. Kan. 1995).

25 The "first" one was never ruled upon.

26 And/or "denial".

Court's procedural bars and denials on the merits, and **easily** demonstrating a substantial showing of the denial of constitutional rights.

On January 21st, 2020 (6 months after filing his COA Application), judge Elizabeth L. Branch, DENIED Petitioner's Application for COA – on his 27 claims – with one sentence: "Because he has failed to make the requisite showing, the motion for a certificate of Appealability is DENIED", citing **only** *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01 (2000)("must show that reasonable jurists would find debatable both: (1) the merits of an underlying claim, and 92) the procedural issues that he seeks to raise").

ARGUMENT

Firstly, it appears that judge Branch's analysis was a truncated version of the proper analysis necessary to be undertaken in a case such as the instant one, as her opinion makes no mention of the **only** demonstration necessary, under *Miller-El v. Cockrell,* 123 S. Ct. 1029 (2003); or the *Lambright* test in *Lambright v. Stewart*, 220 F. 3d 1020, 1025 (9th Cir. 2002) (en banc). See also, *Hightower,* 215 F. 3d at 1199 (11th Cir. 2000)*; Rutland* 2018 U.S. App. LEXIS 29312 (11th Cir. 2000).

LEGAL STANDARD FOR ISSUANCE OF COA

In the U.S. Supreme Court decision in *Miller-El v. Cockrell,* 123 S. Ct. (2003), shortly after this Court released *Slack*, this Court **clarified** the standard for issuance of a COA:

> ...A prisoner seeking a COA **need only** demonstrate a "substantial showing of the denial of a constitutional aright". A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district Court's resolution of his constitutional claims **or** that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Id., 123 S. Ct. at 1034, citing *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595 (2000).

Reduced to its essential, **the test is met** where the petitioner makes a showing that "the petition should have been resolved in a different manner **or** that the issues presented 'were adequate to deserve encouragement to proceed further'". Id., at 1039, citing *Barefoot v. Estelle,* 463 U.S. 880 (1983). This means that *the petitioner does not have to prove that the district Court was necessarily "wrong " – just that* its resolution of the constitutional claims is "debatable":

> We **do not require** petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA had been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack,* where a district Court has rejected the constitutional claims on the merits, [27] the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the constitutional claims debatable **or** wrong.

Applying the above standard for granting a COA, federal courts, including the Eleventh Circuit, have acknowledged that **the standard is "relatively low"**, *Jennings v. Woodford,* 290 F. 3d 1006, 1010 (9th Cir. 2002)[citing *Slack* at 483]. Moreover, because the COA ruling is not an adjudication of the merits of the appeal, it **does not require** a showing that the appeal will succeed. *Miller-El v. Cockrell,* supra, 537 U.S. at 337.

Secondly, it appears that judge Branch's unelaborated one sentence opinion would have, by proxy, [28] extended the **fundamentally wrong** standard the district Court used in determining whether the constitutional claims component has been satisfied in a case such as this one, where the district Court has dismissed seventeen (17) claims, [29] **solely** on procedural grounds (un-exhaustion).[30] In such circumstances, the Courts **look solely to** whether, for each claim, the

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27 The district Court only ruled on the merits of claims 1, 18, 22, 23, 24, 26 and 27. Claims 2-17 and 19 were ruled as "unexhausted" and 20, 21 and 25 were ruled as procedurally barred.

28 as she makes no mention at all of the *Lambright* test, or *Miller-El v. Cockrell,* supra.

29 Claims 2-17 and 19.

30 In fact, the district court never even addressed the underlying constitutional claims for grounds 2-17 and 19 at all in its denial (DE# 81, pgs. 3-6) nor did the Magistrate either in her R & R (DE# 68, pgs. 18-21).

petitioner/appellant has "**facially alleged** the denial of a constitutional right." See, e.g., *Lambright v. Stewart*, 220 F. 3d 1022, 1026 (9th Cir 2000) [emphasis added]. By failing to apply this **required** test on either COA (District Court or Appellate Court), the district court and appellate court have clearly erred in finding that each of the claims set forth (#'s 2-17 & 19) in the Amended Petition and Traverse (DE #'s 12 & 50) failed to satisfy the constitutional claims component of *Slack*, and consequently, although Petitioner specifically requested an Evidentiary Hearing in the district court (see, *generally*, DE#'s 38, 63 and 77, pgs. 1 and 30) the claims were not examined in the context of an evidentiary hearing. Thus, the instant case presents the precise issue addressed for the first time in the 9th Circuit in *Lambright v. Stewart*, supra:

> Frequently, as in this case, the district court has dismissed a claim on a procedural ground without providing the petitioner an opportunity to develop its factual or legal basis through full briefing **and an evidentiary hearing**. In such cases, we need not remand for full briefing to determine whether a COA can issue. Rather, as two other Circuits have recently held, we will simply take a "quick look" at the face of the complaint to determine whether the petitioner has "**facially alleged** the denial of a constitutional right", and assuming the district court's procedural ruling is debatable, we will grant a COA.

Lambright, supra, at 1026 [emphasis added].

> Furthermore, the *Lambright* Court goes on to state that: When a claim is denied on a procedural ground, all of the inferences that govern a Rule 12(b)(6)motion apply to this situation. Thus, we take the petitioner's facial allegations as true to the benefit of all reasonable inferences.

Id, FN5 [emphasis added].

> "Because all three claims **"facially allege"** violations of constitutional rights, the substantive component of Slack is clearly satisfied." *Valerio v. Crawford*, 306 F. 3d 742 (9th Cir. 2002) (a carefully reasoned *en banc* decision which similarly considered a district court's dismissal of a habeas petition on procedural grounds – similarly found the procedural determination sufficiently debatable among reasonable jurists to satisfy the procedural component of *Slack*, and similarly addressed the constitutional rights component[31] of the *Slack* test by "Simply tak[ing] a "quick look" **at the face of** the complaint to determine whether the petitioner has **facially alleged** violations of constitutional rights.").[32] *Valerio*, supra, at 767, 768. See also, *Petrocelli v. Angelone*, 248 F. 3d 877 (9th Cir. 2001) at 885.

Applying that rule to the instant case, it is apparent that all twenty (20) claims (#'s 2-17 and 19; 20, 21, 25; DE #'s 12, 50; COA Brief to the 11th Circuit, pgs. 26-35) satisfy the **constitutional** component of *Slack*.

As for the **procedural** component: First of all, the district court did not make a finding of whether or not "reasonable jurists could find it debatable whether [the district court] was correct in its procedural ruling dismissing claims 2-17 and 19 of Petitioner's Amended Petition for Writ of Habeas Corpus (DE #'s 12, 50) as unexhausted."

However, Petitioner **has** clearly shown that reasonable jurists could debate as to the procedural ruling denying claims 2-17 and 19, as unexhausted, on pages 14-23 of his COA Brief to the 11th Circuit Court; specifically using his own Southern District Court's reasoning in *Scott v. Dugger*, 686 F. Supp. 1488 (S.D.

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[31] Which Circuit Judge Branch does not even address; nor did the district court.

[32] Which the Petitioner clearly did in his COA Brief – pgs. 14-35; 36-46 (Claims 2-17, 19, 20, 21 and 25). [App. D]

Fla. 1988), aff'd 891 F.2d 800 (11th Cir. 1989), cert. denied, 498 U.S. 881, 111 S. Ct. 224 (1990), stating the following:

> The Eleventh circuit concluded that "where the petitioner calls the State Court's attention to ineffective assistance problems[33] and the Court examines the crucial aspect of Counsel's Representation[34]...the petitioner may relitigate the constitutional claim in federal court." *Francis*, 720 F. 2d at 1193.

Id., at `1499, 1500

> The original petition raised 29 discrete issues and the recent amendment added two others. The respondent had moved to dismiss the amended petition on the grounds that it presented a mixed petition containing both exhausted and unexhausted claims under *Rose v. Lundy*, 455 U.S. 509 (1982). **The Court rejected this motion** on August 29, 1993, *holding that Scott* ***had*** *exhausted all claims raised in his amended petition*, **including certain claims which he had raised in his Florida habeas petition as forming the basis of his claim of ineffective assistance of appellate counsel.**[35]

Id., at 1499, 1500

Exhaustion presents a mixed question of law and fact that should have been reviewed by the Eleventh Circuit ***de novo***.

Those **underlying** claims [36] (that the district court claimed were unexhausted) are then "exhausted" for purposes of federal review, and can be raised as *independent claims* in federal court, with[37] the Ineffective Assistance of Appellate Counsel claims that were raised on State Habeas being the "cause" for

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33 As the petitioner specifically did in 25 claims to the 3rd D.C.A. on his State Habeas Corpus Petition (9.141 claiming ineffective assistance of appellate counsel)

34 Which the 3rd DCA in Florida is presumed to have done, as this is the very purpose of a Rule 9.141 filing.

35 Which is the EXACT scenario that occurred in the instant case.

36 Claims 2-17 and 19

37 Or without

procedural default.[38] *Murray v. Carrier*, 477 U.S. at 487; *Carpenter*, 529 U.S. at 452 (an ineffective assistance of Counsel claim must generally be presented to the State Courts **as an independent claim** (as Claims 2-17 and 19 were) before it can be used to establish cause for a procedural default).

Contrary to the district Judge's wording, the claims (2-17 & 19) **were not** just "*referenced*" in a postconviction [Rule 9.141 habeas corpus] motion alleging that Petitioner's counsel was ineffective because he failed to raise these claims on direct appeal"; they were **fully briefed** on the merits of these **underlying** constitutional violation claims in an 89-page State Habeas Corpus Petition (DE# 34; 87, 88).

The Magistrate and District Judge completely disregarded the fact that "cause **and** prejudice" for the "allegedly" defaulted predicate claims to the ineffective appellate counsel claims) was asserted (DE# 50, pgs. 1-24), and did not apply this analysis in denying claims 2-17 & 19 as "unexhausted". See further argument at "Objections" (DE#77, pgs. 5, 12-16) [App. F].

Reasonable jurists would find debatable the district Court's denial of claims 2-17 & 19 as "unexhausted", as, notwithstanding the *Lambright* test; the Petitioner

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[38] It must be noted that the state Habeas Court asserted no procedural bars and "*per curium* denied" the habeas petition (a ruling on the merits of the 25 raised claims). Neither did the Attorney General assert any procedural bars in the State Court proceedings, as none existed.

has met both the procedural and constitutional claims components of *Slack*.[39] See, *generally*, COA Brief, pgs. 14-35. [App. D].

"When a district Court denies a habeas petition on procedural grounds without reaching the prisoners underlying constitutional claim, **a COA should issue** (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find debatable whether the petition [on its face] states a valid claim of the denial of a constitutional right, and that jurists of reason would find it *debatable* whether the district Court was correct in its procedural ruling." *Slack*, 529 U.S. 473, at 478.

Thirdly, it is quite possible, based upon the unelaborated denial by Circuit Judge Elizabeth L. Branch, that she inadvertently ruled simply on the "Notice of Appeal", *and completely overlooked the entire Brief filed on or about July 14th, 2020*, which goes into great detail about how each claims denial by the District Court *is easily debatable* and how each claim raised – **on its face alone** – *is a Constitutional violation.*

Fourthly, as for the Seven (7) out of twenty-seven (27) claims that the district Court ruled upon the merits (claims 1, 18, 22, 23, 24, 26 and 27), *Slack* requires **only** that "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The

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39 Although the 11th Cir. in its denial of COA makes no mention of the Constitutional Component at all.

petitioner must demonstrate that reasonable jurists would find the district Courts assessment of the constitutional claims debatable ***or*** wrong." Id., at 484.

Spencer v. United States, 773 F. 3d 1132, 1138 (11th Cir. 2014) provides **the low standard is simply** that a COA "must specify what issues jurists of reason would find debatable. Even when a prisoner seeks to appeal a procedural error, the certificate of Appealability [application] must specify the underlying constitutional issue".[40] See also, *Hittion v. GDCP Warden*, 759 F. 3d 1210, 1269-70 (11th Cir. 2014).

The Petitioner here, has clearly met **the low standard** required to receive a Certificate of Appealabilty on ***all*** of his claims, but a denial of a Certificate **on every single claim is unreasonable**, and a miscarriage of justice, considering the constitutional magnitude of many of the claims, and the fact that his claims involve "actual innocence". A COA should issue on all claims – but **at least** to the most egregious constitutional violations (Claims 1, 2, 3, 7, 8, 9, 11, 12, 14, 17, 18, 22, 23, 25, 26 and 27) that shows an egregious pattern of constitutional abuses designed to deny the Petitioner a fair trial.

Fifthly, it should be noted that although 11th Cir. local Rule 22-1(c) allows an application for COA to the Court of Appeals to be heard by a single circuit

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[40] Which the Petitioner clearly and precisely laid out in his 130-page Brief of the 27 claims. See, COA, specifically pgs. 47-82. (**36-pages** of specific and precise argument showing the constitutionality of the claims **and** how the district Court's ruling on these claims is debatable).

Judge, Petitioner's COA was **specifically** addressed to "The Panel". Therefore, ***the panel*** should have heard this particular motion.

"I would add that the whole purpose of federal habeas review is to make an exception to finality. Indeed, in this context, our duty to search for constitutional error is at its apex." *Haynes v. Davis*, 733 Fed. Appx. 766, 776, 2015 U.S. App. LEXIS 11955 (5th Cir. 2018), quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987) ("our duty to search for constitutional error [is] with painstaking care").

Finally, "Doubts about the propriety of a COA **must be resolved in the petitioner's favor.**" *Lambright v. Stewart*, 220 F. 3d 1020, 1025 (9th Cir. 2002) [en banc].

CONCLUSION

The Petition for Writ of Habeas Corpus should issue, as the 11th Circuit has clearly erred by denying a Certificate of Appealability on a case involving "ACTUAL INNOCENCE", where the Petitioner/Appellant CLEARLY met the **low standard** necessary to receive a COA under *Miller-El v. Cockrell*, supra; *Slack v. McDaniel*, supra; and the *Lambright* test.

Respectfully Submitted,

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