No. _____

In the Supreme Court of the United States

LUTHER MCKIVER,

Petitioner,

Versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RACHAEL E. REESE, ESQUIRE
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD REESE, P.A.
511 West Bay Street, Suite 330
Tampa, Florida 33606
(813) 228-6989
rer@markjobrien.com

QUESTION PRESENTED

1. Whether the Eleventh Circuit entered a decision that misapplies the precedent of this Court and as a result, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Luther McKiver respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on March 25, 2021, affirming the judgment of the United States District Court for Middle District of Florida, Ocala Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published and appears at _. It is attached as **Appendix A.**

The judgment of the United States District Court for the Middle District of Florida, Ocala Division, is unpublished and is attached at **Appendix C.**

JURISDICTION

The court of appeals entered its order on March 25, 2021. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on April 21, 2021. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on May 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment of the United States Constitution which provides in relevant part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Luther McKiver, was serving a sentence imposed by the State of Florida when he filed a Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254, which provides the district court with the authority to vacate state convictions in certain circumstances. The district court entered judgment on March 20, 2019. Mr. McKiver filed a timely notice of appeal thereafter. The Eleventh Circuit exercised jurisdiction over Mr. McKiver's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts.

This case concerns a violation of the most basic and fundamental constitutional rights defined by the United States Constitution. The Eleventh Circuit, in denying Mr. McKiver relief, shifted the burden of proof onto Mr. McKiver and in the process, issued an opinion that not only is contrary to the Fourteenth Amendment of the United States Constitution, but also misapplies the law established by this Court in In re Winship, 397 U.S. 358 (1970).

The opinion issued by the Eleventh Circuit in the instant case reveals an issue that will continue to occur, resulting in additional constitutional violations, unless this Court remedies the issue swiftly. We respectfully submit that accepting the instant case and resolving this issue will provide clarity for future defendants, and reinstate public confidence in the federal judiciary.

B. Factual Background.

Mr. McKiver became addicted to prescription opioids prescribed for him after he had knee surgery during his high school years. In 2008, shortly after graduating from high school, Mr. McKiver lived with his grandparents across the street from Mr. Sneed. In December of that year, Mr. Sneed filled three prescriptions for opioids, including a bottle of 120 oxycodone pills. Mr. Sneed says he took only six to eight pills per day for personal use. Then, two days after Mr. Sneed filled that oxycodone prescription, Mr. McKiver broke into Mr. Sneed's home, already intoxicated, stole that bottle, and swallowed whatever pills were in it. The police never recovered the bottle or the pills.

At trial, Mr. McKiver confessed to taking the bottle, but testified that he could not recall how many pills were in it because he was high at the time. Mr. Sneed testified that he had only taken out six to eight pills, meaning that there would have been over 100 pills remaining in the bottle. The State never offered any evidence of the contrary and the inference was that Mr. McKiver ingested over 100 oxycodone pills in a 48-hour period. In light of Mr. McKiver's confession to taking the pills, the only dispute of fact was the quantity of pills that were actually taken. Under Florida's statutory scheme, a person's guilt or innocence of a drug trafficking crime is determined strictly by the weight of the drug attributed to them. In order for Mr. McKiver to have been found guilty as charged, the State was required to prove that he took at least 53 oxycodone pills (meeting the 28 grams set by Florida's drug trafficking statute). The jury ultimately found Mr. McKiver guilty as charged and

he was sentenced, per the statutory structure, to a mandatory term of twenty-five years imprisonment.

In preparing for trial on this lone issue, Mr. McKiver told his attorney, Michael Lamberti, about several people who would testify (generally) that Mr. Sneed regularly sold the oxycodone Sneed kept in his house and (specifically) that Sneed even sold pills from the very bottle Mr. McKiver took before Mr. McKiver took it. Despite the obvious effect this testimony would have in undermining the government's claim that Mr. McKiver took at least 53 pills from Mr. Sneed, Mr. Lamberti never even attempted to contact any of the witnesses Mr. McKiver identified.

C. Procedural History.

On July 15, 2015, Mr. McKiver timely filed a Petition for Writ of Habeas Corpus pursuant to Title 28, United States Code, Section 2254, with the district court. (Doc. 1). Therein, Mr. McKiver argued twelve separate allegations surrounding constitutional violations, including the issue of whether counsel failed to investigate and call numerous witnesses. The district court ultimately denied the petition and found that the state appellate court was not unreasonable in rejecting Mr. McKiver's witness-testimony claim. (Doc. 47).

Thereafter, this Court granted a certificate of appealability on two issues, only one of which is relevant to the instant motion: whether the district court erred in determining that the state appellate court's rejection of the witness-testimony claim was not contrary to, or an unreasonable application of, Strickland. After the parties

submitted briefings on the issue, this Court entertained the matter at an oral argument. On March 25, 2021, a published opinion was issued affirming the district court's denial. The Honorable Judge Brasher wrote the majority opinion, and made the following relevant findings for the instant motion:

> [W]e cannot say that the state appellate court's ruling was a summary or unexplained disposition of the claim. Under Strickland, a petitioner making an ineffective-assistance-of-counsel claim must show both that (1) his counsel performed deficiently and (2) the deficient performance prejudiced his defense. See 466 U.S. at 687. Unlike a summary disposition, which gives no reason for a decision, the state appellate court explained why it reversed the postconviction court's order: McKiver had not met his burden of proof under either prong of the relevant test. In applying AEDPA, we must determine whether any fairminded jurist could agree with that assessment. See Wilson v. Sellers, 138 S.Ct. 1188, 1192 (2018) (stating that when a state court explains its decision, "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable").

Pet. App. A12.

> We cannot say that the state appellate court was unreasonable in concluding that McKiver failed to carry his evidentiary burden to establish prejudice. At his evidentiary hearing before the postconviction court, McKiver—who was represented by counsel—did not call or submit written testimony from any of the witnesses who he argues that Lamberti should have investigated and called at trial. The only evidence before the state appellate court was McKiver's own conclusory testimony about what the witnesses would have said and whether they would have been available and willing to testify. This testimony is precisely the kind of evidence that we—and other courts—have held to be "simply inadequate to undermine confidence in the outcome" of the proceeding. Sanders, 875 F.2d at 210 (internal quotation marks omitted) (quoting Strickland, 466 U.S. at 694).
>
> Especially considering the particular facts of this case, a reasonable jurist could conclude that McKiver's testimony alone failed to establish prejudice. McKiver's testimony at the evidentiary hearing was inconsistent with what he had said on the record at the motion-in-limine hearing—that he was satisfied with his counsel's decision not to present evidence about Sneed's alleged criminal conduct. And, because

> the state needed to prove only that McKiver stole 53 of Sneed's original 120 pills, the missing witnesses had to account for at least half of the bottle's contents to have affected the result. But, for all the state courts knew, McKiver's witnesses might have testified to seeing a high enough number of pills to support the state's case, not undermine it. For example, McKiver said one witness would "testify as to how many pills or approximately how many pills were actually in that oxycodone bottle," but McKiver never said what he expected that number of pills to be. Because these witnesses never testified, the state court did not know what they would have said about the only issue at trial. Under AEDPA, we cannot fault the state appellate court for rejecting McKiver's witness-testimony claim for failing to meet his burden of proof.

Pet. App. A14.

> [O]ur dissenting colleague asserts that the state postconviction court found McKiver's testimony to be credible and that the state appellate court adopted that finding. But the state postconviction court never made a credibility determination of any kind and expressly relied on the lawyer's testimony, not McKiver's. See Doc. 10-6 at 46 ("Mr. Lamberti testified that although Defendant provided the names of witnesses and their expected testimony he did not investigate or interview the witnesses or seek a continuance to investigate."). For its part, the state appellate court did not adopt—implicitly or expressly—anything that the state postconviction court said or did. The state appealed on the grounds that McKiver had not proven his claims by substantial evidence, and the appellate court reversed because it concluded that McKiver "failed to meet his burden."
>
> Third, our dissenting colleague makes much of the implausibility of McKiver "ingest[ing] over 100 oxycodone pills in a 48-hour period and somehow surviv[ing]." But nothing in the state-court record—not even his own testimony at trial or the post-conviction hearing—suggests that McKiver consumed the stolen pills in two days. The police interviewed McKiver ten days after the burglary, at which point he said that he had ingested the pills. Our dissenting colleague's only support for this assertion is a sentence in McKiver's federal habeas petition, which is not evidence of anything and was not before the state courts in any event.

Pet. App. A18.

The Honorable Judge Martin offered a different perspective in the dissenting opinion:[1]

> The majority opinion takes the position that we may not look to the decision made by the state postconviction court who heard Mr. McKiver's postconviction claims. In support of this position, the majority relies on cases in which this Court vacated its own panel decision or recognized generally that a vacation of a judgment by a federal appellate court divests the lower court's earlier judgment of its binding effect. Maj. Op. at 17.
>
> The majority's reliance on those cases doesn't work here, however, because we look to Florida law to determine what (if any) aspects of a Florida state court decision survives state appellate review. This question is not simply resolved by asking whether the state postconviction court's judgment was vacated, but instead, on what grounds. And, under Florida law, a postconviction court's factual findings are deferred to as long as they "are supported by competent, substantial evidence," whereas legal conclusions are reviewed de novo. Brown v. State, 304 So.3d 243, 257 (Fla. 2020). I do not look to the postconviction court's legal conclusions here. I look only to its findings of fact. Given that this state appellate court offered no analysis of the postconviction court's factual findings, I don't think it proper to presume that it had "substitute[d] its judgment for that of the trial court on questions of fact," especially in the face of conflicting testimony. Lowe v. State, 2 So. 3d. 21, 29–30 (Fla. 2008) (quotation marks omitted).
>
> Notably, the Florida Supreme Court has made clear that it is especially reluctant to displace the postconviction court's findings as to "the credibility of the witnesses as well as the weight to be given the evidence." Id. at 30 (quotation marks omitted).

Pet. App. A36-37.

> The majority reasons that the state appellate court's ruling that Mr. McKiver was not prejudiced could not be unreasonable. This is so, according to the majority, because even if all that testimony had been admitted, and even if the jury believed that Mr. Sneed did sell a number of pills from that bottle, the jury could still believe that at least 53 pills remained. Maj. Op. at 16. But this argument improperly places the burden on Mr. McKiver to prove that he did not meet the trafficking

[1] Judge Martin offered an opinion that concurred in part and dissented in part. However, only the dissenting opinion is relevant to the issues being raised in the instant motion.

> amount. It is Florida's burden to prove, beyond a reasonable doubt, that Mr. McKiver took at least 53 pills and not one fewer. See In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072 (1970) (the government must prove "beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged") (quotation marks omitted).
>
> ...
>
> Once Mr. McKiver introduced evidence that several people knew some unspecified number of pills had been taken from the bottle, he would have established that *no one knew for certain how many remained.* It was Florida's burden to show it was all but certain that Mr. McKiver took at least 53 pills. Had the witnesses Mr. McKiver identified testified, I am not convinced Florida could have carried its burden. I certainly think that Mr. McKiver has raised a "reasonable . . . probability sufficient to undermine confidence in the outcome." King, 748 F.2d at 1463 (quotation marks omitted). Therefore, the state appellate court's decision improperly placed the burden on Mr. McKiver to prove he was innocent. This was an objectively unreasonable application of Strickland, which entitles Mr. McKiver to relief.

Pet. App. A37-39. (Emphasis in original).

Mr. McKiver sought a petition for rehearing and petition for rehearing *en banc*. However, his petition was ultimately denied because "no judge in regular active service on the Court [had] requested that the Court be polled on rehearing en banc." Pet. App. A42.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Majority Opinion's Decision Holding Squarely Contravenes this Court's Precedent, as well as the Due Process Clause of the United States Constitution.

The Eleventh Circuit Court of Appeal's decision violates this Court's axiomatic holding in Winship, 397 U.S. at 364: "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." At stake in this case are the "constitutional protections of surpassing importance" discussed in Apprendi v. New Jersey, 530 U.S. 466, 476-477 (2000): the Fourteenth Amendment's proscription of any deprivation of liberty without due process of law, and the Sixth Amendment's guarantee that in criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." These constitutional rights "indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Id. (citations, quotations, ellipses omitted).

"The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." Winship, 397 U.S. at 361. In Winship, the Court discussed the importance of the burden of proof.

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

Id. at 363-64.

Under Florida law, a defendant may be charged and convicted of trafficking in various controlled substances and the amount that he allegedly trafficked is what controls his ultimate potential sentence. For example, in the instant case, Mr. McKiver was charged with a violation of Florida Statute Section 893.135 and specifically was charged with trafficking more than 28 grams but less than 300 kilograms of oxycodone. This "amount" charged by the State of Florida changed the potential mandatory minimum sentence that Mr. McKiver faced.[2] As a result, pursuant to the precedent of this country and this Court, the State of Florida was required to prove beyond a reasonable doubt that the number of pills allegedly trafficked by Mr. McKiver fell within that range.

The issue considered by the Eleventh Circuit was whether trial counsel for Mr. McKiver was deficient for failing to investigate and call witnesses who could have provided reasonable doubt as to the number of pills that were taken by Mr. McKiver. Mr. McKiver actually admitted to taking the pills, and as a result, the only material issue in dispute was the number/weight that would ultimately affect his sentence.

The majority opinion issued by the Eleventh Circuit in the instant case violates this Court's decision in Winship. The majority opinion found that the state appellate

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[2] Pursuant to Florida Statute Section 893.135(1)(c)(3), a person who is caught trafficking in Oxycodone faces a spectrum of minimum penalties, depending on how much oxycodone they were allegedly trafficking, such as a 3 year minimum sentence when they are alleged to have trafficked between 7 to 14 grams of Oxycodone or a 7 year minimum sentence when they are alleged to have trafficked between 14 to 25 grams.

court's ruling that Mr. McKiver was not prejudiced could not be reasonable because even if all that testimony had been admitted, and even if the jury believed that Mr. Sneed did sell a number of pills from that bottle, the jury could still believe that at least 53 pills remained. Pet. App. A16. This argument improperly places the burden on Mr. McKiver to prove that he did not meet the trafficking amount. It is Florida's burden to prove, beyond a reasonable doubt, that Mr. McKiver took at least 53 pills and not one fewer. Once Mr. McKiver introduced evidence that several people knew some unspecified number of pills had been taken from the bottle, he would have established that no one knew for certain how many remained. It was Florida's burden to show it was all but certain that Mr. McKiver took at least 53 pills. The Eleventh Circuit's findings and opinion misapply the most basic law established by this Court when it shifted the burden of proof onto Mr. McKiver, rather than the appropriate party.

II. It is Vital That This Court Correct the Eleventh Circuit Court of Appeal's Error.

One of the reasons that federal habeas corpus relief exists is to ensure that the states are complying with the laws of this Court and the United States Constitution. The Eleventh Circuit in the instant case failed to act as this safeguard and instead, caused further damage to Mr. McKiver. The question of who has the burden of proof, whether it be at the trial level or postconviction phase, is a recurring issue of criminal procedure and is also a question of fundamental importance. As this Court put it in In re Winship, the requirement that the prosecution prove all elements of a crime beyond a reasonable doubt "is a prime instrument for reducing the risk of convictions

resting on factual error." 397 U.S. 358, 363 (1970); see also Hankerson v. North Carolina, 432 U.S. 233, 242 (1977) (Winship rule is "designed to diminish the probability that an innocent person would be convicted"). Accordingly, so long as the Eleventh Circuit is allowed to issue opinions that misapply this rule and improperly shift the burden onto defendants, the risk of wrongful convictions is unacceptably higher.

That risk is plainly obvious in the instant case because as pointed out in the dissenting opinion below,

> [h]ad the witnesses Mr. McKiver identified testified, I am not convinced Florida could have carried its burden. I certainly think that Mr. McKiver has raised a "reasonable . . . probability sufficient to undermine confidence in the outcome." King, 748 F.2d at 1463 (quotation marks omitted). Therefore, the state appellate court's decision improperly placed the burden on Mr. McKiver to prove he was innocent. This was an objectively unreasonable application of Strickland, which entitles Mr. McKiver to relief.

Pet. App. A39. The only way to ensure that Mr. McKiver and other future defendants who may fall before the same panel receive the same constitutional guarantees as all other defendants is for this Court to exercise its discretion and grant the instant petition.

CONCLUSION

For the reasons stated above, Luther McKiver, respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Luther McKiver, Petitioner

Date: August 24, 2021

RACHAEL E. REESE, ESQUIRE
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD REESE, P.A.
511 West Bay Street
Suite 330
Tampa, Florida 33606
(813) 228-6989
rer@markjobrien.com