No. 21-7178

IN THE
SUPREME COURT OF THE UNITED STATES

AMADEO VALLS, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

on

PETITION FOR A WRIT OF CERTIORARI

to

THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

AMADEO VALLS F.D.O.C. # M83689
BLACKWATER RIVER CORRECTIONAL FACILITY
5914 JEFF ATES ROAD
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QUESTIONS PRESENTED

I. WHETHER SUMMARY ORDERS REJECTING FEDERALIZED CLAIMS HAVE BECOME CONSTITUTIONALLY INTOLERABLE POST-AEDPA BECAUSE STATE CONVICTIONS ARE NOW UPHELD UNDER A REASONABLE PROBABILITY OF SYSTEMIC INATTENTIVENESS BY CHRONICALLY OVERWORKED STATE APPELLATE COURTS.

II. WHETHER, COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE CONTEMPTUOUS FALLOUT OF PERSONAL ATTACKS BUILDING UP BEHIND MULTIPLE ATTEMPTS TO DISQUALFY THE JUDGE DEVOLVED THE PROCEEDINGS TO A POINT WHERE THE JUDGE NECESSARILY SATISFIED THE POSSIBLE TEMPTATION TEST FOR GENERAL CONTEMPTUOUS CONDUCT CREATING AN UNCONSTITUTIONAL LIKIHOOD OF BIAS.

III. WHETHER COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, FLORIDA DECISIONAL LAW ON CRIMINAL INTENT OVERLOOKS PROOF OF THAT ESSENTIAL ELEMENT WHEN CONDONING ITS UNCONDITIONAL SUBSTITUTION WITH MATERIAL VARIANCES AND UNCHARGED THEORIES DESPITE A SPECIFIC INTENT CHARGE

IV. WHETHER COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE LACK OF ANY ABNEY RULE PROCEDURES IN FLORIDA ALLOWS STATE COURTS UNAUTHORIZED LEEWAY TO OVERLOOK A NULLITY TRAP SINCE A LACK OF JURISDICTION WILL OCCUR UPON DISREGARDING IMMEDIATE COLLATERAL REVIEW OF A PRETRIAL DENIAL OF COLORABLE DOUBLE JEOPARDY CLAIMS.

V. WHETHER COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE DOUBLE JEOPARDY CLAUSE IS ABRIDGED BY CUMMULATIVE PREJUDICIAL EFFECT OF ERROR FACTORING: (1) OVERREACHING INDUCED MISTRIALS WHERE NO DEFENSE MOTION FOR MISTRIAL EXISTS AS DISTINGUISHABLE FROM THE *KENNEDY* STANDARD WHICH NARROWED ITS OVERREACHING EXCEPTION TO GOADING DEFENDANTS INTO MOVING FOR MISTRIALS (2) THE INCREMENTAL EVILS OF TRIAL HONING IN A PROSCUTION FRIENDLY TRIAL COURT DURING A TRIAL BY ATTRITION SCENARIO OF ONE OR MORE MISTRIALS AND (3) A CAUSALLY RELATED MISTRIAL CONNECTION BETWEEN ONE OF MORE JURIES DELIBERATIONS HAVING BEEN PROMOTED INTO

DEADLOCKING VIA CASUAL RELATIONSHIPS BETWEEN ACTS OF OVERREACHING AND ITS DEADLOCK PROMOTION NEXUS SO THAT AS INDIVIDUAL AND CUMULATIVE ABRIDGEMENT(S) SUCH SITUATIONS BAR RETRIAL.

LIST OF PARTIES

[x] 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. A list of parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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Statutes

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that the Court grant a writ of certiorari to review the adjudication below:

OPINIONS BELOW

For cases from **State Courts:**

The opinion of the highest State Court to review the merits appears at Appendix H to the petition is unpublished.

The opinion of the same State Court (originally deciding) the merits of same case appears at Appendix I to the petition and is reported at 159 So. 3d 234 (Fla. 3d DCA 2015).

JURISDICTION

For cases from State Courts:

The date on which the highest State Court decided the instant case was October 14, 2021. A copy of that decision appears at Appendix H.

A timely motion for rehearing was thereafter denied on the following date: October 20, 2021, a copy of the order denying rehearing appears at Appendix J.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

[x] For cases from **State Courts:**

The date on which the highest State Court decided my case was October 14, 2021. A copy of that decision appears at Appendix H.

A timely petition for rehearing was thereafter denied on the following date: October 20, 2021, a copy of the order denying rehearing appears at Appendix J.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT FIVE
Criminal Actions Provisions Concerning Due Process of Law and Just Compensation Clauses.

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 subjected 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 due process of law nor shall private property be taken for public use, without just compensation.

AMENDMENT SIX
Rights of the Accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy 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 witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

AMENDMENT FOURTEEN

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

1. On September 7, 2009, the Petitioner (hereinafter "Valls") committed a (contested) justifiable homicide during a domestic firefight. Valls, the subject of a self-help eviction ploy the day before, was discovered committing a midnight retaliatory prank on the driveway of his sublet. Valls was caught, by a house guest ('Decedent'), in the act of draining the motor oil from the Decedent's parked vehicle. The Decedent, in his fury, discharged a deadly missile at Valls. Valls left wrist was struck and seriously injured. Valls returned fire. The Decedent was fatally struck in the chest. Valls fled in a state of panic.

2. Subsequently, a police A-form was filed alleging first degree premeditated murder. The grand jury returned a 'No True Bill.' The State, on September 29, 2009, filed an information charging second degree murder (App. B: R. 40-43). Valls was later indicted on February 15, 2012, for felony murder based on a separate count of armed burglary (App. B: R.46-47). The nature of offenses involved: Count One, First Degree (felony) Murder, and Count Two, Armed Burglary. The State now alleging that Valls abandoned his sublet. Valls plead not guilty. Valls retorted that he was the subject of a self-help eviction by his cotenant / ex-girlfriend, to make room for the Decedent. Valls also asserted self-defense. Valls was found guilty as charged at the original trial.

3. That original 2012 trial was reversed and remanded because an affirmative defense instruction was omitted. *Valls v. State,* 159 So. 3d 234, 238 (Fla. 3d DCA 2015). The second and third trials resulted in hung-jury mistrials, establishing that this was a very close case. Valls testified at his second and fourth trials. The fourth trial resulted, on January 26, 2018, in the underlying judgment of conviction under attack. The length of sentence(s) was life, *i.e.,* Count One, life, Count Two, life.

4. Valls again appealed to Florida Third District Court of Appeal. That appeal was per curiam affirmed (PCA) without an opinion. *Valls v. State,* 2020 Fla. App. LEXIS 4348 (Fla. 3d DCA), *cert. denied, Valls v. Florida,* 141 S. Ct. 563 (2020). This Court denied the direct appeal's certiorari petition on October 13, 2020.

5. Valls filed a 9.141(d) ineffective assistance of appellate counsel petition, 3D21-1288, on June 8, 2021, in the same Third District Court. Valls raised nine ineffective assistance of appellate counsel grounds: (I.) biased judge, (II.) prosecutorial misconduct, (III.) totally insufficient evidence, (IV.) material variances, (V.) law of the case violation, (VI.) trial nullity, (VII.) double

jeopardy, (VIII.) motion in limine, and (IX.) deprivation of defense theory. (Appx. K: Pet.); (Appx. M: Reply); (Appx. N: Rehearing).

6. On October 14, 2021, the above-styled petition was denied without an opinion. On October 20, 2021, the motion for rehearing and motion for written opinion were also denied. The above-styled summary order(s) is the subject of this petition, and is timely filed.

REASONS FOR GRANTING THE WRIT

7. (I.) **GROUND ONE:** WHETHER SUMMARY ORDERS REJECTING FEDERALIZED CLAIMS HAVE BECOME CONSTITUTIONALLY INTOLERABLE POST-AEDPA[1] BECAUSE STATE CONVICTIONS ARE NOW BEING UPHELD UNDER A REASONABLE PROBABILITY OF SYSTEMATIC INATTENTIVENESS BY CHRONICALLY OVERWORKED STATE APPELLATE COURTS.

8. Federal habeas oversight of state adjudications is premised on intercepting "extreme malfunctions."[2] A bedrock premise. And yet, the root cause behind such malfunction lies in how it manages to slip past the whole state justice system. Why these 'slipups' slip past 'the system' remains ignored. And therein lies shifting sands. It is a rare review judge who publishes a written opinion (in)advertently upholding some error or injustice, be it borderline harmless, plain or outlandish. Where else do (ordinary to extreme) malfunctions take root except within the blank recesses of uninformative silences peculiar to summary orders. How else can these malfunctions avoid scrutiny? And so, this summary order question, although recently touched upon by the Court,[3] still suffers from an unanalyzed, post-AEDPA, malfunction component.

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[1] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

[2] *Woods v. Donald,* 575 U.S. 312, 319 (2015); *Burt v. Titlow,* 571 U.S. 12, 19 (2013).

[3] *Harrington v. Richter,* 562 U.S. 86, 99-100, 102, 108-09 (2011), partially overruled on other grounds by *Wilson v. Sellers,* 138 S. Ct. 1188, 1192; 200 L. Ed. 530 (2018).

9. Overreliance on summary dispositions keeps today's chronically overworked state appellate courts afloat. And overly reliant summary decision-making has its valid uses.[4] That is, as long as it does ***not*** implicate AEDPA. For such over reliance contains a major flaw. A fault line amplified by review panels neglecting to read the record and trial transcripts.[5] Such neglected reading breeds malfunctions. This is because in order to dutifully deny an accused relief unless absolutely necessary,[6] chronically time constrained review panels are highly susceptible to cosigning whatever negating reasonings spew out of state response briefs. Pressured for time, panelists are unusually prone to adopting questionable (state law focused) arguments from response writers whom, in turn, are pressured to emulate an obscurantist's tact for misrepresenting facts and issues.[7] Under these unknown variables of today's summary disposition business, the unprovable premise that increasingly workload-overburdened state appellate courts diligently review "federal claims" becomes correspondingly suspect. Adopting conclusions from response briefs cannot equate to due diligence. It is just too easy to overlook or misapprehend issues. Instantly bury blunders or inconveniences. Since summary orders are the likely means by which injustice ordinarily slips through state systems, it

[4] Valid for non-2254 destinations like civil, probate, juvenile, family and administrative reviews.
[5] *Baldwin v. Reese,* 541 U.S. 27, 31 (2004); *Wilson v. Sellers,* 200 L. Ed. At 544 (Gorsuch, J., dissenting).
[6] Section 924.33 Florida Statutes (2009-21) ("No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of appellant.")
[7] Rarely does the author of a state response concede to fatal error. And then only when it is blatant.

exposes the necessarily systemic nature behind root causes of this faulty premise.

10. *State review panels are not obligated to read the record. Nor write* (unpublished) *opinions on federal claims. Neither do they have to reach the merits.*[8]

11. To base a state windfall on the above paragraph's unknown dangers is unconstitutional. Besides, no supposition should be treated as axiomatic. Federal habeas review is already undermined enough as it is.[9] So, the above-styled malfunction potential begs for a balancing precedence. It is needed to correct a faulty post-AEDPA supposition allowing for a modern day systemic injustice -- when "federalized claims" are allegedly reviewed, today's overburdened state appellate courts do ***not*** invoke the full appellate process. They simply cannot.[10] Instead, panels more than likely adopt inadequate conclusions from questionable sources. *i.e.*, "state law" based response briefs, to summarily order no relief. No one can prove it otherwise. Yet these

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[8] *Merkison v. State,* 1 So. 3d 137 (Fla. 3d DCA 2009) (summary disposition does not establish whether a specific issue was or was not decided on the merits); *Clark v. State,* 102 SO. 3d 763, 765 (Fla. 4th DCA 2012) (affirmance without a written opinion does not reveal whether the reviewing court did not find (plain) fundamental error).

[9] *AEDPA's Wrecks: Comity, Finality, and Federalism,* 82 Tul. L. Rev. 443 (2007); *Running in Place: The paradox of Expanding Rights and Restricting Remedies,* 5 U. Ill. L. Rev. 1199 (2006); *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights,* 54 Wash. And Lee L. Rev. 1 (1997); *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996,* 41 Harv. C.R. – C.L.L. Ret. 299 (summary 2006).

[10] The Georgia Supreme Court recently acknowledged its struggles with its own review limitations. *Redmon v. Johnson,* 302 Ga. 763 n.3 (2018).

unexplainable orders still come clothed in extreme deference. It is unconstitutional to condone artificial deference[11] to such a reckless windfall supposition while 'state law response' centric reviews, skirting federalized claims, bury possible relief within an unexplored norm of summary dispositions prone to systematical inattentiveness.

12. The logical means of guaranteeing constitutional rebalancing on this instant case is for a precedence making it the supreme law that, *upon request,* state appellate courts shall write unpublished opinions on federalized claims. That empowers an accused with a rule moving review panels to provide unpublished disclosure. That is, disclosure without precedential effect. [12] Empowered with this option to obtain an unpublished opinion,[13] means there is exposure of faulty to unreasonable negating reasonings on review of federalized claims at the state level -- exactly when it matters most, where precise retorts on rehearing and certiorari can prevail under due (and subdued) deference. Before possibly having to whittle down claims heading into federal habeas mode, but, at least with negations no longer undisclosed.[14] A sorely needed solution. This is because as this unforeseen variable coalesces on top of

[11] "[F]ormulary order are not meant to convey anything as to the reason for the decision. Attributing a reason is therefore both difficult and artificial." *Ylst. V. Nunnemaker,* 501 U.S. 797, 803 (1991).

[12] Tellingly, the separate states do not have an equivalent unpublished opinions repository like the Federal Appendix Series.

[13] It would never consist of telling state courts how they must write their opinions. *Coleman v. Thompson,* 501 U.S. 722, 739 (1991).

[14] *Equitable Gateways: Toward Expanded Federal Habeas Corpus Review of State-court Criminal Convictions,* 61 Ariz. L. Rev. 291 (2019).

AEDPA's nearly insurmountable hurdles it even further disenfranchises defendants[15] attempting to navigate towards ***equitable*** relief. Subtracting from AEDPA's already known overreaching,[16] makes the above option a just resolution.

13. The knee jerk counter is a cry of "disrespect." But the unnoticed cry of concern is that, after AEDPA, ignoring just how easily state appellate courts can avoid time consuming *de novo* review of "federalized claims" has incredibly prejudicial consequences -- meritorious claims are rendered unconstitutionally diminished[17] come time for federal habeas review under extreme deference.

14. Exposing the totally illogical rashness of this requestioned supposition advances the realization that a systematic injustice proliferates when summary orders bury meritorious federalized claims as uninformative silence. Silently remissing harmful misapprehensions or overlooked blunders.[18] Burying inconveniences too via the human factor. For example, since trial preservation failures are so widely prevalent, easily identified grounds

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[15] *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism,* 1998 U. Chi. Legal F. 315; *The Not So Great Writ: The European Court of Human Rights Finds Habeas Corpus an Inadequate Remedy: Should American Courts Reexamine the Writ?,* 56 Cath. U. L. Rev. 47 (2006).

[16] *The Demise of Habeas Corpus and the Rise of Qualified Immunity; the Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences,* 113 Mich. L. Rev. 1219 (2015); *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents,* 14 Lewis and Clark L. Rev. 741 (2010).

[17] *The Great Writ Diminished,* 35 New. Eng. J. on Criminal and Civil Confinement 3 (2009).

[18] *Furney v. State,* 115 So. 3d 1095 (2013) (redesignated a post conviction appeal as a belated direct appeal, superseding its summary disposition, based on an overlooked fundamental error).

upholding future collateral relief are purposely buried. So, summary orders are a go to means for concealing all kinds of inconveniences, federalized or not.[19] It fits the bill, nailing down questionable convictions without addressing ornery issues or pointing out collateral relief.

15. Today's packed dockets are being cleared way too expeditiously after AEDPA. Review panels are quite apt to embrace response arguments that support convictions. But, panelists are far less inclined to pour over transcripts in order to spot check facts and all relevant law, then the other way around. That is, panelists are more and more prone to automatically accept a state response's cherry picked facts and misrepresented law than take a petitioner's claim as true and correct until *truly* proven otherwise. Meantime, state windfalls multiple. And no court is immune with regard to leaning into state windfalls.[20] So it has become more and more reckless to continue to premise due diligence with regard to reaching the merits of federalized claims when the mechanics of the states' overtaxed summary order supposition lacks necessary

[19] *Johnson v. Williams,* 133 S. Ct. 1088 (2013) (when state court rules against defendant but does not expressly address the claim as a federal, the habeas court must presume that the federal claim was adjudicated on the merits).

[20] Even "[t]he Court's aversion to windfalls seems to disappear, however, when the state is the favored recipient." *Lockhart v. Fretwell,* 506 U.S. 364, 376 (1993) (Stevens, J., dissenting).

accountability.[21] It is just not sound after AEDPA. Nor lawful.[22] The inexorable pressures of overfilled workloads is just too great of a stressor, begging the cutting of corners when juggling deadlines. Swamped by floods of appeals,[23] even the best intentions by the best judges fail. Ultimately, there exists no failsafe in serious cases when unfettered state courts can hide a lack of due diligence behind summary orders, and then, bank on extreme (artificial) deference to insulate the deed. Such artificial deference[24] unjustly rewards the recipient state actor whom irreparably harmed the now severely disenfranchised accused. This is not due process as envisioned by the drafters of the Due Process Clause. It is a boon for injustice.

16. Today, pursuant to AEDPA's backdoor usurpation of the Supremacy Clause, [25] state agents are taking even bolder advantages of the fact that, as long as malfunctioning summary orders prevail, no effective relief exists as federal

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[21] State review systems (especially in the South) are designed to make convictions stick. To deny relief unless absolutely necessary, such systems grant trial courts the widest discretion possible, grant carpet deferences, excuse misconduct and overreaching if not preserved with demanding specificity, place all the burdens of catching harmful error on trial counsel, find fault in that counsel then excuse it on collateral, and a whole lot more. And not necessarily observing federal rights while paying lip service at the altar of comity. Capped off with silent, uninformative summary orders. Thus, finalizing, then upholding, all possible state convictions in like manner brings summary decision-making gamesmanship in full circle.

[22] *Proving AEDPA Unlawful: The Several Constitutional Defects of Section* 2254(d)(1), 54 Williamette L. Rev. 1 (2017).

[23] *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So. 2d 1130, 1132-33 (Fla. 1990) ("[T]he problem of the criminal workload within the judicial system of the State of Florida is a problem of volume that cannot be regulated, but must be dealt with as it occurs. Not only does the problem exist now in ***crisis proportions,*** but it appears that the workload in regard to all parts of the criminal justice system is ***likely to increase***... The only difference... is that the backlog is even larger, developing into a crisis situation of constitutional dimensions...") (emphasis added).

[24] *Deference Mistakes,* 82 U. Chi. L. Rev. 643 (2015).

[25] *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts --- Opposition, Agreement, and Hierarchy, 86 Geo. L. J. 2445 (1998).*

district courts are indirectly stripped of their "original" Article III powers,[26] to say what the law is, to determine what the facts are, upon having their *de novo* review powers severely curtailed. [27] The Supremacy and Due Process Clauses[28] are sidelined for the sake of comity, to the tune of further disenfranchising state prisoners. As of 1996, the old South has arisen.[29]

17. On that coin's flip side, federal magistrates, although now reciting *Wilson v. Sellers* to justify use of the "look through" presumption[30], never follow through with its actual steps. That is, never locating that *idealized* related case dealing with "federalized" issues at hand, which have reached the case specific merits. Inspection of magistrate reports reveals that magistrates ***never*** cite the actual "last related state case" (which allegedly deals with the federalization of that issue) being used in alleged support of that artificial presumption. Paying homage to *Wilson v. Sellers,* magistrates then take a (blind) leap and presume that the state court reached the merits via some unidentified related state case. Thus, only by some phantom act of conjuring do they reach that unearned deference. Granted, what magistrates are asked to do here is nearly

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[26] *"Some Effectual Power": The Quantity and Quality of Decision making Required of Article III Courts,* 98 Colum. L. Rev. 696 (1998).
[27] *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction,* 86 Geo. L. J. 2481 (1998).
[28] *Don't Forget Due Process: The Path Not (Yet) Taken in* [section] *2254* [sic] *Habeas Corpus Adjudication,* 62 Hastings L. J. 1 (2010).
[29] The separate states warehouse more prisoners and "lifers" than the whole world combined. *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases,* 41 Harv. C.R. – C.L.L. Rev. 339 (2006) *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners,* 70 Tul. L. Rev. 1 (1995).
[30] *Wilson v. Sellers,* 584 U.S. ___, 138 S. Ct. 1188, 1192, 200 L. Ed. 530 (2018).

impossible. Still, naming a process, then assuming its fulfillment in order to reach yet another assumption is akin to staking inferences. That lacks of due process. Such incompleteness on the face of those reports demonstrates unworkability. Implementing said presumption in realtime cases is unfeasible.

18. Today's "look through decision is but a stopgap measure. A field patch to fix what Congress broke. Federal reviewers, stripped of *de novo* review powers should now, instead, be "looking into," the reasoned (unpublished) opinions of (disclosure mandated) state decisions when it comes to federalized claims after AEDPA. One looks into uniqueness. To allow otherwise totally devalues the federal rights of an accused's ***unique*** trial experiences under a difficult and artificial deference scheme. Unpublished opinions will revalue those rights. Options can be built in. If a state court wants that mighty AEDPA deference then it would opt to produce an unpublished opinion on federalized merits.[31] Otherwise ignore that option and, secure in its decision, accept *de novo* review as justified process. Nothing drastic but due.[32] And nothing new. That is, federal *de novo* review of state proceedings has not altogether vanished.[33]

[31] Such change will work both ways. Written opinions will more often clarify state reasonings that petitioners might now be getting away with. Such change is limited. The majority of state appeals and collateral attacks focus on state law.

[32] If the states want first crack at federalized claims then let them bear the, in depth, responsibility that comes with it, *i.e.,* put in the careful opinionated work like the reports by federal magistrates.

[33] *Davis v. Sec. DOC,* 341 F. 3d 1310, 1313 (11th Cir. 2003) (deference under 28 U.S.C. 2254(d)(1) not required if state court failed to address the merits of the claim).

19. In this instant case, the Florida justice system repeatedly failed Valls. *De Novo* review of the record and transcripts would uncover that, if not corrected, an extreme malfunction would occur. In his prayer, Valls incorporated into his motion for rehearing and "motion for written opinion" a relevant question. He asked the Third District Court of Appeal:

> WHETHER, COACHED [sic] IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE LACK OF A WRITTEN OPINION AS TO HOW THE COURT REJECTED COLORABLE FEDERAL GROUNDS ON A SERIOUS STATE CASE IRREPARABLY HARMS THE ACCUSED IN HIS STYMIED CAPACITY TO FORWARD HIS FEDERAL CLAIMS WHILE, BECAUSE OF A DISFUNCTION [sic] IN THE OVERWHELMED STATE APPELLATE PROCESS, UNCONSTUTIONALLY RELEGATES HIS CLAIMS TO THE OVERLY DIFFICULT STANDARDS OF THE CURRENTLY GREAT (UNOBTAINABLE) WRIT WHEREAS THE STATE OPERATIVES RESPONSIBLE FOR CAUSING THE ACCUSED'S CLAIMS ENJOY THEIR WINDFALLS UNDER THE COVER OF COMITY.

That unartful *pro se* question went unanswered. (Appx. N: Rehearing 13-14).

20. Two days after docketing Valls' *pro se* motion, the review panel (again) denied the pleading without an opinion. Valls alleges that the panel persistently embraced its adoption of the misrepresenting (state law focused) arguments of the intentionally obscure state response. It shut him out. It most certainly did not read the record and trial transcripts. Nor the supplemented transcripts. It then denied Valls' serious criminal case the courtesy of citations to ***related cases*** outlining how rejection occurred, let alone giving a comprehensive explanation of how the panel rejected his federalized claims. Not even for the benefit of bench or bar. Yet in doing so, that panel repeated what over ninety-

nine percent of defendants filing for relief on serious criminal cases receive --- cold, uninformative silence. But blank silent denial, *implying consent*, in the face of meritorious federalized claims is abuse of process post-AEDPA.

21. The instant appellate court, remaining silent in the face of a set of compelling federalized arguments for relief on a serious state case, clothed itself with automatic *double deferential* treatment with regard to the nine *Strickland* based ineffective assistance of appellate counsel claims buried in the instant summary disposition. Subsequently, if the one year deadline does not crush Valls' relief hopes, then the federal courts might be obligated to deny relief when the matter had more than ample merit at the much more viable state level *but* the state appellate court declined carrying out that charge, and instead, buried Valls' federalized claims within a questionable summary order quagmire. So that this case becomes another one of Florida's dirty little secrets. But, also, an inexcusable case where both prosecutorial and judicial overreaching devolved the unfair proceedings into a (four) trial-by-attrition conviction.

22. Valls' convoluted denials of appellate relief began with a counterintuitive grant of relief, but, on a misapprehension of an "unusual record." *Valls v. State,* 159 So. 3d 234, 238 (Fla. 3d DCA 2015). That is, although a new trial was mandated on direct appeal, it was mandated for the wrong reason. The original

trial judge, now appeal judge, correctly assessed that Valls' renter claim challenged burglary's ownership element (*3D13-106, T. 1599-1602, T. 1610*). That judge erred in providing no defense. *Wolf v. State,* 117 So. 3d 1203, 1208-13 (Fla. 2d DCA 2013) (concurring and dissenting). That review panel erred by ignoring that purposeful lack of entitled defense. That is because, since the state alleged Valls abandoned his tenancy (burglary's ownership element), it was plain error to deny an entitled special instruction on tenancy to rebut the questionable abandon (exposed as self-help eviction) allegation. The original review panel unjustly discarded that pertinent issue. *See Valls,* 159 So. 3d at 237. It chose, instead, to address omission of a non-element, *i.e.,* a default affirmative defense instruction. *Valls, id.* at 238. Thus, forcing Valls into an inferior instruction for invitees and licensees when he was a sublessee. But at least an opinion existed to discern, unraveling that panel's thought processes, albeit a tipsy coachman result.

23. The aegis for the instant extreme malfunction(s) began with the state overreaching in a favorable new trial court. That is, right after the jury was sworn in the second trial, the prosecution began its advantage taking. It took it upon itself to tactically inject an eleventh hour theory (*i.e.* – a second burglary within a burglary crime) based on adding an ***uncharged*** conveyance burglary accusation. But it did it at a trial ambush (*R.* 1287-1309)[34] granted

[34] *Smith v. Lopez,* 731 F. 3d 859 (9th Cir. 2013) (State may not ambush the defense with a new or alternative theory of culpability without notice).

by the judge at an *ex parte* "conversation" (R. 1294-95). The prosecution then began perfecting that tactical advantage over three retrials while reaping the fruits of an unfair balancing of rulings. Cumulating with a special (uncharged) instruction on that added burglary. (Appx. A: T.3430 ln. 21-24). Contemporaneously, the prosecution incrementally negated the (previously omitted) mandated affirmative defense instruction (*i.e.* -- the one forcing subtenant Valls into an inferior instruction for invitees and licensees) by first incorporating a prejudicial special instruction on presumptive ownership inferences (Appx. A: T.3432 ln. 15-20) against Valls. And then, by adding a confusing and negating alternative set of inapplicable burglary instructions which also tactically introduced five uncharged criminal intent theories into the mix (Appx. D: SR. 3-20); *cf.* (Appx. C: SR. 3-8); *see also* (Appx. M: Reply 7-13). Yet the case was so weak that two hung juries still rejected all the combined overreaching (R.139, R.163). But not before those confused juries were equally misled by one core aspect of that multifaceted overreaching, as was demonstrated by the five causally related jury queries on uncharged conveyance, which then causally promoted both deadlocks in a double jeopardy repeat violation. (Appx. M: Reply 21-25).

24. However, aside from double jeopardy implications of two promoted deadlocks behind intentionally misleading (jury) confusion caused by the second (uncharged) burglary, a key, reoccurring theme here is that Valls' conduct

never constituted a burglary as charged in Count Two because that count's underlying crimes of criminal mischief and trespass never occurred. Valls never damaged what he was accused of damaging. Nor was damage apt to occur later. (Appx. K: Pet. 16-21). And Valls never abandoned what he was accused of abandoning. (Appx. K: Pet. 42-48). Nor could Valls then ***willfully*** trespass into what he reasonably believed was his sublet's driveway. The state gamely manufactured a curtilage (driveway) burglary to originally frustrate a *prima facie* self-defense claim. And then, upon facing a new trial(s), manufactured yet a second (nested) ***uncharged*** burglary to further frustrate self-defense. But, it is an extreme malfunction to not opinion on appeal and collateral attack regarding a situation where, because Valls defended against underlying crimes that never occurred, the state engaged in extensive advantage taking, ratcheting its overreaching throughout three retrials in order to force a conviction. Ultimately, all the three trial, incremental jury instruction "tweaks" strove to pull the jury's attention away from a singular pivotal question of fact – did Valls abandon his tenancy or was he being wrongfully evicted as demonstrated by the State's own evidence. Likewise, the crucial question of *mens rea* regarding a subtenant entering his sublet's driveway was oppressed. The summary order silence covers up more than just a blunder. Sacrificing Valls to keep it buried.

25. The extreme malfunction lying behind the direct appeal's set of unaddressed, federalized errors is exactly what a mandated unpublished opinion would immediately expose. *Cf. Valls v. Florida,* 141 S. Ct. 563 (2020). Either directly via unpublished opinion on federalized merits exposing plain error. Or indirectly via exposure of unreasonable twisting of facts and law necessarily required to uphold such plain errors on direct appeal in case no. *3D18-272*. Whereby due diligence, under opined scrutiny, would then come full circle. Likewise, a second extreme malfunction occurred behind the instant state habeas petition. That set of unaddressed, federalized errors would have also been exposed via an unpublished opinion. Instead, that panel summarily denied Valls' state habeas petition on ineffective assistance of appellate counsel in case no. 3D21-1288. (Appx. H: summary denial).

26. Meantime, the task of reading the trial transcripts was not undertaken by the chronically overworked review panels. This is because, had the panelists read all the transcripts, they would have uncovered three fundamentally unfair retrials. The uninformed panels must have adopted faulty conclusions drawn from the response briefs' misrepresentations. It makes sense. The time constrained panels were not diligent. No one can prove it otherwise. Yet the state collects all the windfalls and imprisons Valls for life. And so, but for a cause that, if having been fairly retried, there is a reasonable probability (under fair dealings) that, in a very close case exemplified by two prior hung-

juries, at least one juror would have again harbored a reasonable doubt as to Valls' guilt. Thus, exemplifying the need for ***deference accountability*** at the state level via, upon request, unpublished opinion regarding all facially sufficient federalized claims. Otherwise, there is an unconstitutional disconnect between the federal habeas process, after AEDPA, and the *Due Process Clause*. That process and the *Clause* should be reconciled via an unpublished opinion guarantee respectfully prayed for herein.

27. (II.) **GROUND TWO**: WHETHER, COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE CONTEMPTUOUS FALLOUT OF PERSONAL ATTACKS BUILDING UP BEHIND MULTIPLE ATTEMPTS TO DISQUALIFY THE JUDGE DEVELOPED THE PROCEEDINGS TO A POINT WHERE THE JUDGE NECESSARILY SATISFIED THE POSSIBLE TEMPTATION TEST FOR GENERAL CONTEMPTUOUS CONDUCT CREATING AN UNCONSTITUTIONAL LIKELIHOOD OF BIAS.

28. The constitutional question here is --- has the Court, in the dicta of *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) admitted to a recusal generalization moving outwards from the specific precendent(s) of *Offutt v. U.S.*,348 U.S. 11, 17 (1954); *Mayberry v. Penn,* 400 U.S. 455, 465 (1971);and *Taylor v. Hayes,* 418 U.S. 488, 501 (1974); with regard to the precedential "possible-temptation test to contemptuous conduct creating an unconstitutional likelihood of bias." *Railey v. Webb,* 540 F. 3d 393, 398-413 (CA 6 2008).[35] That is, generalizing outwards from possible temptation situations where a judge, upon being embroiled within a running bitter controversy is determined to be too tempted not to stay

[35] *N. Mariana Is. V. Kaipat,* 94 F. 3d 574, 579-80 (CA 9 1996) (summarizing cases in which the supreme court has employed the "possible temptation principle").

impartial, and thus, *per se* disqualified from presiding over a contemnor's contempt trial. Thereby requiring a new contempt trial before a new judge. This is because "'Supreme Court precedent reveals [a] circumstance[] in which an appearance of bias -- as opposed to evidence of actual bias -- necessitates recusal' [of] a judge who 'becomes embroiled in a running, bitter controversy with one of the litigants.'" *Crater v. Galaza,* 491 F. 3d 1119, 1130 (CA 9 2007) (quoting *Mayberry,* 400 U.S. at 465).

29. The *Withrow* dicta appears to have clarified the possible temptation test to also involve cases in which the judge suffers a severe personal insult or attack from general contemnor situations. If the possible-temptation test was generalized as such, then such holding should apply to certain contentious situations regarding motions to disqualify judge. That is, situations where trial judges are deemed likewise tempted by being embroiled in running controversies stemming from the fallout of personal attacks generated by the contentious interactions inherent to moving forward on multiple recusal attempts. Therefore, devolving proceedings to a point where personal attacks behind multiple recusal attempts trigger possible temptation testing too, under equally unconstitutional likelihoods of bias. Thus, giving equivalent cause to prohibit a headstrong judge from insisting on presiding over a recusal movant's trial just like embittered situations involving the temptations of a contemnor's contempt trial. Thereby requiring a new trial before a new judge.

30. The logical answer is that expansion of the equally prejudicial temptation testing posed above should apply. That is, it also applies because circumstances leading up to the contempt trial basing the *Offutt* ruling did lend itself to doing just that, *i.e.*, it too required a new trial before a new judge for the client of that allegedly contemptuous counsel. *Peckham v. U.S.*, 210 F. 2d 693 (D.C. Cir. 1953).

31. The instant transcripts reveal an embroiled judge enrolled within a running controversy. One reaching a flash point upon being disrespectfully outed (R.1712-16) for alleged favoritism for once again subtly helping to prop up a weak state case at a pretrial hearing (R.1599-1711) while heading into a fourth trial. (Appx. K: Pet 2-14); (Appx. M: Reply 2-6); (Appx. N: Rehearing 1-2). That subsequent retrial's one-sided rulings then augment (repeat) judicial favoritism which spanned over three retrials. Thus, adding to the weight towards requiring recusal. Review of the previous two mistrials reveals trial honing examples within state friendly trial-by-attrition scenarios, challenged via repeated recusal attempts[36], directly showcasing the evils of prosecuting an accused through multiple trials as alluded to by the Court in *Green v. U.S.*,

[36] Two prior retrial defense teams were confronted with the new judge facilitating an unsustainable conviction. The judge felt comfortable denying recusal attempts by yet another team frustrated by that subtleness.

355 U.S. 184, 187-88 (1957).[37] After multiple attempts, Valls was eventually forced into an ***unsustainable*** conviction by a biased court.[38]

32. Appellate Counsel was prejudicially deficient for failing to advance a claim so serious that Counsel was not functioning as the "counsel" guaranteed Valls by the *Sixth Amendment*. Such deficient performance prejudiced Valls so serious as to deprive him of a direct appeal whose result is reliable. Thus, meeting the two pronged standard of *Strickland v. Washington,* 466 U.S. 668 (1984). This is because advancement of such claim would have apprised the review panel of structural and/or plain error requiring a new trial. If not for such omission the appeal's outcome would have been different.[39] Alternatively, this matter involves structural error and/or plain error, violating Valls' federal rights and due process which is cognizable on collateral attack.

33. (III.) **GROUND THREE**: WHETHER, COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, FLORIDA DECISIONAL LAW ON CRIMINAL INTENT OVERLOOKS PROOF OF THAT ESSENTIAL ELEMENT WHEN CONDONING ITS UNCONSTITUTIONAL SUBSTITUTION WITH MATERIAL VARIANCES AND UNCHARGED THEORIES DESPITE A SPECIFIC INTENT CHARGE.

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[37] *Casey v. U.S.,* 392 F. 2d 810, 813-14 (D.C. Cir. 1967). *See also, U.S. ex. Rel. Hetenyi v. Wilkins,* 348 F. 2d 844, 866-67 (CA2 (NY) 1965), *cert. denied, sub nom., Mancusi v. Hetenyi,* 383 U.S. 913 (1966).

[38] A forced conviction by a biased court appeasing an overreaching prosecution was *per se* unsustainable under a nondysfunctionoal review process. Yet a summary denial turned it into an extreme malfunction capable of slipping past all reviewers under AEDPA's hardships.

[39] Instead of having to later suffer a double deference scenario upon submittal of (what should have been an unnecessary) 2254 petition.

34. The constitutional question here is --- is the Court obligated to strike or reclarify Florida's decisional law(s) which (apparently) excuses state attorneys pursuit of material variances and uncharged theories regarding a crime's intent when a specific intent is charged. Florida already excuses limited amending of indictments as was indirectly exposed by three justices' dissent in the kidnapping case of *Tingley v. State,* 549 So. 2d 649, 651-52 (Fla. 1989). See also *Crain v. State,* 894 SO. 2d 59 (Fla. 2004) (majority opinion excusing, in a bad case making for bad law, the amending of the indictment upon adding an uncharged kidnapping intent via unconventional us of the felony murder doctrine). At issue is that Florida disregards *Winship,*[40] and also, amends burglary indictments contrary to *Stirone v. U.S.,* 361 U.S. 212, 217 (1960); regarding the essential element of criminal intent when an accusatory writ already charges a specific intent. Indictments are not amendable, so pursing burglary prosecutions via material variances and uncharged theories regarding intent is especially untenable when an indictment already spells out a specific intent. As per indictment "the state must be held to its choice." *Schad v. Arizona,* 501 U.S. 624, 657-58 (1991) (dissent).[41]

35. The instant felony murder indictment (Appx. B: R. 46-47) charged a predicate felony burglary in Count Two with the specific intent of criminal mischief

[40] *In re Winship,* 397 U.S. 358 (1970).

[41] Ultimately, "the Due Process Clause places limits on a State's capacity to define different courses of conduct." *Schad,* 501 U.S. at 632.

(Appx. B: R. 47). Under *Winship*, proof of that instant burglary (aside from an alternative stealth inference route particular to Florida) required proof of criminal mischief or its intent. That is, such specified proof burden could not be substituted or diluted by use of other (uncharged) intents.[42] However, the instant appellate court overlooked how material variances featured and argued as a package of five (uncharged) intents where included in an inapplicable paragraph of an alternative 'remaining therein' burglary instruction. In Count One (Appx. A: T. 3428 ln. 11-25, T. 3429 ln. 1-7) and in Count Two (Appx A: T.3431 ln. 13-25, T.3432 ln. 1-8). The state's use of the five uncharged intents of theft, burglary to conveyance, first degree murder and the lesser included offenses of second degree murder and manslaughter impermissibly broadened the state's prosecution to the point where it is reasonable to conclude that constitutional error in the resulting uncharged jury instructions substantially misled the jury. Thus, requiring a new trial.

36. The instant appellate court overlooked how Florida's decisional interpretation of burglary law does not comport to *Winship* or *Stirone*. This divergence came about in a short spurt of rulings after the Florida Supreme Court analyzed an alternative statutory means for reaching burglary's essential element of criminal intent via a new stealth inference found in section 810.07 Fla. Stat. (2021). See *State v. Waters*, 436 So. 2d 66 (Fla. 1983). The ruling in *Waters* also

[42] Nevertheless, "no person may be punished criminally save upon of some ***specific*** illegal conduct." *Schad,* 501 U.S. at 633 (emphasis added).

held a new interpretation of the statutory language "offense" -- the term basing burglary's underlying criminal intent finding that it need not be specified (*e.g.* theft) any longer because the alternative stealth means "will be legally sufficient proof of intent to support a verdict." *Id.* at 70. Thus, stating "offense" as a generalized term on the accusatory writ would now suffice (*i.e.* -- regarding what had been a specific criminal intent) because the stealth alternative need not rely on any given intent.[43]

37. However, Florida's appellate courts would then overlook that the *Waters* holding also "expect[ed] that the traditional practice of specifying the [intent] offense will continue." *Id.* at 68-69. This is because such practice would keep prosecutors honest when not using the alternative stealth inference. *Waters* noted further limitations upon citing to *McNair v. State,* 61 Fla. 35, 55 So. 401 (1911). That is because *McNair* stated how "[t]his intent is the gist of this offense." *Id.* at 403. Thus, with intent being the gist of burglary (aside from the alternative stealth inference route) without evidence of (specific) intent burglary fails.[44]

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[43] The Florida legislature likely overreached *Winship* by instituting a vague stealth inference which allegedly substitutes itself for proof of what is an essential element of burglary. However, decisional law, on top of the legislature, improperly redefined the intent offense of burglary "in such a way as to exclude some particular fact from those to be proved beyond a reasonable doubt." *Schad,* 501 U.S. at 637; *i.e.,* the particular (specific) intent behind burglary.

[44] The crime of trespass is an unauthorized entry lacking any criminal intent whatsoever. Meantime, burglary is a compound crime which combines that trespass with a requisite criminal intent. The fact that proof of that criminal intent underlying burglary is now being indirectly inferred (via stealth), in order to constitute the crime of burglary, violates *Winship*. This is because "the Court also has made clear that having set forth the elements of a crime, a State is ***not*** free to remove the burden of proving one of those elements from the prosecution." *Schad,* 501 U.S. at 657 (emphasis added).

38. Then came the case of *L.S. v. State,* 446 So. 2d 1148 (Fla. 3d DCA 1984). The instant appellate court ruled therein that "insofar as [*Waters*] held that specification of the offense intended is not essential, we find that its inclusion in the charging document is surplusage and need not be proven." *Id.* at 1149. That bold ruling was capable of abridging *Winship* whenever the state did not avail itself of (also) using the stealth alternative. That court did quantify its ruling by stating that "[w]e hold, therefore, that when the state charges that the defendant did intend to commit a specific offense after breaking and entering, it may avail itself of section 810.07." *Id.* Subsequently, the Florida Supreme Court, in a conflict of decisions ruling, approved of the L.S. holding. *See L.S. v. State,* 464 So. 2d 1195, 1196 (Fla. 1985) (holding "that the exact nature of the [intent] offense alleged is surplusage so long as the essential element of intent to commit an offense is alleged and subsequently proven.").

39. And then came the ruling in *Toole v. State,* 472 So. 2d 1174 (Fla. 1985). Toole held that the requirement of proving intent to commit a specified crime to the exclusion of all others was no longer necessary. Therefore, the Florida Supreme Court, in another conflict of decisions ruling in *Toole,* disapproved of two district courts holdings that "if the state charges a defendant did intend to commit a specific offense... then the state must prove that the defendant did in fact intend to commit this offense." *Id. at 1175.* But this ruling was

borderline constitutional only if the alternative stealth inference route was (also) unused. However, this ambiguous means of alternatively proving a burglary intent, and its decisional history, in ***no way condoned the added use of material variances and uncharged theories*** when a specific intent is charged. That violates due process. How the state leaped to this construal defies logic and disrespects constitutional law.

40. The state response purposely ignored Valls' entreaties toward violations of *Winship* and *Stirone*. Instead, it ***blatantly*** concluded that "[t]he State properly adduced evidence at trial that the Petitioner committed burglary by intending to commit offenses other than the criminal mischief specified in the indictment." (**Appx. L: Response at 21**). This incredibly reckless counterclaim was adopted by the review panel – and extreme malfunction. And yet, but for the five uncharged burglary intent theories unconstitutionally broadening the state's weak (driveway) burglary allegation (against a subtenant), there is a reasonable probability, in this very close case exemplified by two hung-juries, that at least one juror would have again harbored a reasonable doubt as to Valls' guilt.

41. Valls incorporates and adopts by reference **paragraph 32** as though it was fully herein.

42. (IV.) **GROUND FOUR**: WHETHER, COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE LACK OF ANY *ABNEY* RULE PROCEDURES IN FLORIDA ALLOWS STATE COURTS UNAUTHORIZED LEEWAY TO OVERLOOK A NULLITY TRAP SINCE A LOST OF JURISDICTION WILL OCCUR UPON DISREGARDING IMMEDIATE COLLATERAL REVIEW OF A PRETRIAL DENIAL OF COLORABLE DOUBLE JEOPARDY CLAIMS.

43. The constitutional question here is --- is the Court obligated to impose the *Abney* rule on the separate states, particularly Florida. That is, forcing the states into instituting procedures necessary to uphold the *Abney* rule. And, if not, does such lack of state procedural protections necessarily overstep a substantial guarantee under constitutional law as determined in *Abney v. U.S.*, 431 U.S. 651, 659-62 (1977).

44. A review of Florida decisional law reveals that *Abney* is only referenced in but a couple of cases regarding an unrelated issue.[45] And so, *Abney* is fully ignored with regard to the jurisdictional implications of the rule's pretrial double jeopardy guarantees. Thus, a significant jurisdictional rule established almost a half century ago is still not found within a state justice system's consideration. This inconsideration harms a special case of litigants whom have been guaranteed the ultimate security of not having to endure the rigor, expense, hardships and uncertainty of (another) trial proceedings.

[45] *State v. Gurican,* 576 So. 2d 709, 711 n.2 (Fla. 1991) (holding that there is no federal constitutional right to an appeal).

45. Florida has an obligation to incorporate the *Abney* rule. Although a denial of a Fla. R. Crim. P. 3.190(c)(2) motion to dismiss on double jeopardy grounds does lend itself to a petition for a writ of prohibition, an accused is not guaranteed a necessary 'stay of trial' unless and when a higher court issues a show cause order. The mechanics of that all-important 'stay of trial' protection can take weeks to arrive, if ever. And yet, that collaterally attacked trial can commence in the meantime. This is unacceptable because the rule's purpose is to make sure that an interlocutory appeal exhausts itself pretrial. That is, "[a]llowing an interlocutory appeal in that pretrial situation protects against all the harms that flow from the prolongation of a case that should never have been brought." *Class v. U.S.*, 200 L. Ed. 37, 52 (2018) (dissent). Florida lacks that crucial protection. It does so by ignoring *Abney*.

46. Valls filed a pretrial double jeopardy claim. The court denied the claim. Valls gave notice of appeal and moved to stay the trial. The trial court denied the stay of trial motion. The appellate also denied a stay of trial. Both courts overlooked the jurisdictional effect of the *prima facie* existence of a nonfrivilous double jeopardy claim based on federal constitutional grounds. A trial nullity then occurred since the *Abney* rule divested the trial court of jurisdiction. (Appx. K: Pet. 30-35); (Appx. M: Reply 19-21); (Appx. N: Rehearing 7-10).

47. In regard to *Abney* as a matter of first impression, the instant appellate court declined considering adoption of the holding of a procedurally indistinguishable case by the Fifth Circuit Court of Appeal. *See U.S. v. Dunbar,* 611 F. 2d 985 (5th Cir. 1980) (*en banc*).

48. In *Dunbar*, the *en banc* court, establishing its own procedural rule under *Abney*, held:

> "[I]n any denial of a double jeopardy motion, [the trial court] should make written findings determining whether the motion is frivolous or nonfrivolous. If the claim is found to be frivolous, the filing of a notice of appeal by the defendant shall not divest [the trial court] of jurisdiction over the case. If nonfrivolous, of course, the *trial cannot proceed* until a determination is made of the merits of an appeal."

Id. At 988 (emphasis added).

49. In that regard, pretrial and collateral denial on the merits does not necessarily mean, however, that the claim is frivolous. It may be colorable and still lack sufficient merit. For "[a]though we have rejected Farmer's double jeopardy claims in this opinion, this does not necessarily mean that Farmer's double jeopardy arguments were frivolous." *U.S. v. Farmer,* 923 F. 2d 1557, 1565 (11th Cir. 1991). This too bears on the trial nullity situation.

50. The instant double jeopardy grounds were tenable on bare inspection of the record (Appx. B: R. 139, 163) (Appx. G: SR. 3, 19-20, 23); (Appx. E: SR. 3, 5); (Appx. F: SR. 11). *See also* (Pet. 38-41); (Reply 21-25). Cf. (R.1287 – 1309) to

(Pet. 25-29); (Reply 16-19); *Valls, id.* at 238. Thus, testing for frivolity would fail. However, in conjunction with erring upon denying Valls' motion to stay the trial, trial court jurisdictionally erred upon denying Valls' double jeopardy claim without inspecting the record at its disposal.

51. Thus, the trial court ruled without first "mak[ing] written findings determining whether the motion is frivolous or nonfrivolous." *Dunbar,* 611 F. 2d at 988. Because the record of the two mistrials established a pretrial, colorable double jeopardy claim on federal grounds, it triggered the superseding procedures of the *Abney* rule divesting trial court or jurisdiction. And so a trial nullity occurred upon the commencement of an unauthorized retrial.

52. The instant appellate court likely rejected Valls' claim based on Florida's double jeopardy law. What that court could not do, however, was find, given the record, that the facts were frivolous. Nor could that court find that there was no reasonable probability that a federal district court would not consider the claim frivolous too after pretrial exhaustion of state remedies. Nor find that that federal court, upon pretrial 2241 habeas review, would not grant relief under the *Downum* reasonable doubt precedent. *Downum v. U.S.,* 372 U.S. 734, 738 (1963). The state's infringement of Valls' federal procedural guarantees being forwarded by his colorable, double jeopardy based, habeas

petition divested the trial court of jurisdiction under *Abney,* 431 U.S. at 659-62. To allow otherwise irreparably harms Valls' claim upon its unnecessarily delayed consideration under post-trial 2254 habeas review deferences. Thus, a structural nullity occurred. One which requires a new trial to restart the Abney procedures again in order to reopen the pretrial state review process until its exhaustion, to then possibly allow that substantial right to be pursued under a section 2241 habeas review via the proper de novo standard. If not discharged beforehand. The above replay, processed correctly, would have created a reasonable probability of a different outcome.

53. Valls incorporates and adopts by reference **paragraph 32** as though it was stated fully herein.

54. (V.) GROUND FIVE: WHETHER, COUCHED IN AN INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM, THE DOUBLE JEOPARDY CLAUSE IS ABRIDGED BY CUMULATIVE PREJUDICAL EFFECT OF ERROR FACTORING: (1) OVERREACHING INDUCED MISTRIALS WHERE NO DEFENSE MOTION FOR MISTRIAL EXISTS AS DISTINGUISHING FROM THE *KENNEDY*[46] STANDARD WHICH NARROWED ITS OVERREACHING EXCEPTION TO GOADING DEFENDANTS INTO MOVING FOR MISTRIALS; (2) THE INCREMENTAL EVILS OF TRIAL HONING IN A PROSECUTION FRIENDLY TRIAL COURT DURING A TRIAL BY ATTRITION SCENARIO OF ONE OR MORE MISTRIALS; AND (3) A CAUSALLY RELATED MISTRIAL CONNECTION BETWEEN ONE OR MORE JURIES DELIBERATIONS HAVING BEEN PROMOTED INTO DEADLOCKING VIA CAUSAL RELATIONSHIPS BETWEEN ACTS OF OVERREACHING AND ITS DEADLOCK

[46] *Oregon v. Kennedy,* 456 U.S. 667 (1982) (plurality decision narrowing the standard enunciated in *U.S. v. Dinitz,* 424 U.S. 600 (1976), which allowed accused to escape retrial where prosecutorial "overreaching" implicated constitutional rights protected under *Double Jeopardy Clause*).

PROMOTION NEXUS; SO THAT AS INDIVIDUAL AND CUMULATIVE ABRIDGEMENT(S) SUCH SITUATIONS BAR RETRIAL.

55. Initially, the three fold constitutional questions herein are: (1) why has the incompleteness of the narrow holding on goading defendants into moving for mistrials, under the *Kennedy* exception, not been readdressed from distinguishable *Dintz* scenarios[47] of unconstitutional overreaching where an accused does ***not*** move for the resulting mistrial. (2) When does incremental tactical advantage taking and trial honing within a prosecution friendly state court reach a constitutionally intolerable retrial situation harboring a trial by attrition scenario of multiple retrials. (3) When do close case situations where juries are being unnecessarily promoted into deadlocking become unconstitutional because a causal relationship exists between the overreaching and the deadlock so that a hung-jury promotion nexus exists. Ultimately, what good are the guarantees of the Double Jeopardy Clause if not to include prejudicial cumulative effect of error calculations regarding any of the above-styled questions in a realtime case.

56. The separate states are using the narrow aspects of the *Kennedy* exception to unconstitutionally deny scores of highly distinguishable, yet viable, double

[47] *U.S. v. Dinitz*, 424 U.S. 600 (1976).

jeopardy mistrial situations where there is no defense motion for mistrial. [48] The states are thus denying situations not encompassed by manifest necessity scenarios envisioned by *Perez*[49] but, instead ignoring situations encompassing the *(un)sound discretion* exception within the exception aspect of *Perez*. And so, *Kennedy* cannot hold undue precedent with regard to the double jeopardy implications of distinguishable overreaching scenarios where an accused does not move for the resulting, overreaching induced mistrial. This must be clarified.

57. There was no deliberate election on Valls' part to forgo his valued right to have his guilt or innocence determined before both the second and third triers of fact. Yet the record shows clear intent on a part of the state to subvert the attrition protections afforded by the *Double Jeopardy Clause*. The prosecutor engaged in an *ex parte* "conversation" (Appx. B: R.1294) in order to advance a trial ambush (R.1287-1306) regarding introduction of second (uncharged) burglary. The confusion of that ambush caused twin hung-juries. (Appx. K: Pet. 35-42); (Appx. M: Reply 21-25); (Appx. N: Rehearing 10-12); (Appx. B: R.268-315); (Appx. G: SR. 3); (Appx. E: SR. 3,5); (Appx. G: SR. 19-20, 23); (Appx. F: SR. 11). The state intentionally engaged in misrepresentations in order to introduce further burglary instructions on an inapplicable alternative that was

[48] *Robinson v. Wade*, 686 F. 2d 298 (5th Cir. 1982) (in depth analysis of overreaching ranging outside of the narrowness of the Kennedy exception).

[49] *U.S. v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824) (establishing retrials under manifest necessity).

confusing, misleading and negated Valls' default affirmative defense instruction mandated by the appellate court. *See* (Appx. D: SR. 3-20). *Cf.* (Appx. C: SR. 3-8).

58. The evils of a trial by attrition scenario of prosecutorial trial honing is exactly that which completely defiles the logical protections[50] basing the *Double Jeopardy Clause*. The Court has yet to address when retrial is barred to stymie the evils of trial by attrition. Until it does, *the separate* states keep abusing their multiple trial advantages in lockstep to the hardships envisioned by the Court in *Green v. U.S.*, 355 U.S. at 187-88. Thus, *Green* is unenforceable.

59. The instant (unsustainable) overreaching by the state, with trial court's blessings, inadvertently ***promoted*** two unnecessary hung-jury mistrials. Thus, prosecutorial overreaching and judicial favoritism twice caused the juries' inability to reach a verdict. (Appx. M: Reply 21-25). Such twin cause and effect scenarios abridged Valls' protected interests so that as a whole it barred retrial. This is because when it comes to questions regarding breaches of the *Double Jeopardy Clause* the federal Constitution demands that any reasonable doubts must be resolved in favor of the accused. *Downum v. U.S.*, 372 U.S. at 738. Those doubts were ignored by Florida.

[50] *State v. Garrigues,* 2 N.C. 241 (1795) (holding that the state's mere ability to tactically hone its reprosecution necessarily bars the state from retrying accused).

60. Valls incorporates and adopts by reference ***paragraph 32*** as though it was stated fully herein.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ _____
Amadeo Valls, *pro se*

Date: January 12, 2022

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AMADEO VALLS, PETITIONER

VS.

STATE OF FLORIDA, RESPONDENT(S)

PROOF OF SERVICE

I, AMADEO VALLS, *pro se*, do swear or declare that on this date, January, 12 2022, as required by the Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or the party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail, under the Mailbox Rule, properly addressed to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

Office of the Attorney General of Florida
One S.E. Third Avenue, Suite 900
Miami, Florida 33131

I DECLARE under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on January 12, 2022.

/s/ _____
Amadeo Valls, *pro se*