21-8090

DOCKET NO. _____

IN THE UNITED STATES
SUPREME COURT

ANGELO C. PEARSON, II
Petitioner-Appellant,

V.

RICKY DIXON - SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellees.

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

PETITION FOR WRIT OF CERTIORARI

ANGELO C. PEARSON, II
Wakulla C.I. Main Unit
110 Melaleuca Drive
Crawfordville, FL. 32327

QUESTIONS PRESENTED

The Federal Court system provides the "plain error" rule to its prisoners as a means to litigate – and obtain meaningful merits review of – certain constitutional errors that are otherwise procedurally defaulted. This rarely-needed rule is, by necessity, a very tough standard for a prisoner to meet. But, when that strict standard can be met, a federal prisoner will enjoy a realistic and meaningful opportunity to litigate his defaulted claim.

There is no comparable constitutional safeguard available to a Florida prisoner. Hence, no realistic or meaningful opportunity to obtain merits review – much less any relief – on any defaulted constitutional violation... even if the prisoner's issue meets the federal "plain error" standard. Presuming that Petitioner Pearson can thoroughly demonstrate this claimed inadequacy to the Court, such circumstances give rise to the following two-part question:

1) Considering that federal habeas courts maintain their power to fashion equitable remedies that allow for review and correction of otherwise barred constitutional claims under extraordinary circumstances, are "extraordinary circumstances" present when: (a) the face of a state prisoner's record shows a constitutional error that meets the federal "plain error" standard; and (b) he has no realistic means to even obtain a merits review in the state courts because they do not employ any comparable constitutional safeguard for overcoming applicable default rules? And, if so;

2) Is equitable tolling available as a gateway for federal review of an otherwise time-barred constitutional claim that meets the federal "plain error" standard?

Although these issues have been exhausted throughout the state and federal court systems, no court has yet commented directly on them. Pearson prays that this Court will expressly resolve the matter.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

- Berger, Wendy W., Former Judge, Fifth District Court of Appeal;
- Blechman, Mark S., Judge, Ninth Judicial Circuit Court;
- Branch, Judge, Eleventh Circuit Court of Appeal;
- Calderon, Luis F., Judge, Ninth Judicial Circuit Court;
- Cohen, Jay P., Judge, Fifth District Court of Appeal;
- Fitzgibbons, Mary Elizabeth, Attorney;
- Harris, Jenifer M., Judge, Ninth Judicial Circuit Court;
- Harris, John M., Judge, Fifth District Court of Appeal;
- Kidd, Embry J., U.S. Magistrate Judge;
- Lambert, Brian D., Judge, Fifth District Court of Appeal;
- McDonald, Roger J., Judge, Ninth Judicial Circuit Court;
- McGuigan, Rebecca, Assistant Attorney General;
- Mihok, A. Thomas, Former Judge, Ninth Judicial Circuit;
- Moody, Ashley B. , Attorney General, State of Florida;
- Munyon, Lisa Taylor, Judge, Ninth Judicial Circuit Court;
- Murphy, Mike, Judge, Ninth Judicial Circuit Court;
- Newsome, Judge, Eleventh Circuit Court of Appeals;
- Nunnelley, Kenneth, Assistant State Attorney;
- O'Kane, Julie H, Judge, Ninth Judicial Circuit Court;
- Orfinger, Richard B. Former Judge, Fifth District Court of Appeal;
- Pearson, II, Angelo C., Petitioner/Defendant;

- Presnell, Gregory A, Senior U.S. District Court Judge;
- Quinn, Daniel J., Attorney;
- Silvers, Marcia J., Attorney;

I hereby certify that no publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Angelo C Pearson II
Angelo C. Pearson, II

PROCEEDINGS BELOW

Trial – Court: Ninth Judicial Circuit Court, Orange County, Florida
Case No.: CR98-12664B
Date of Judgment: January 21, 2000
Citation: *State v. Pearson*, no published opinion to cite

Post-Trial Motion – Court: Ninth Judicial Circuit Court, Orange County, Florida
Case No.: CR98-12664B
Date of Judgment: April 11, 2000
Citation: *Pearson v. State*, no published opinion to cite

Direct Appeal – Court: Fifth District Court of Appeal, Florida
Case No.: 5D00-1221
Date of Judgment: December 12, 2000
Citation: *Pearson v. State*, 774 So. 2d 708 (Fla. 5th DCA 2000)

State-Habeas Petition – Court: Ninth Judicial Circuit Court, Orange County,Florida
Case No.: CR98-12664B
Date of Judgment: December 21, 2018
Citation: *Pearson v. State*, no published opinion to cite

Appeal of State Habeas Petition – Court: Fifth District Court of Appeal
Case No.: 5D19-1689
Date of Judgment: June 18, 2019
Citation: *Pearson v. State*, no citation

Federal Habeas Petition – Court: U.S. District Court, Middle District of Florida, Orlando Florida
Case No.: 6:20-cv-45-GAP-EJK
Date of Judgment: May 21, 2021
Citation: *Pearson v. Sec'y, Fla. Dep't of Corr.*, no citation

Appeal of Federal Habeas Petition – Court: Eleventh Circuit Court of Appeals
Case No.: 21-12046-E
Date of Judgment: January 14, 2022
Citation: *Pearson v. Secretary, Fla. Dep't of Corr.*, no citation

Motion for Rehearing – Court: Eleventh Circuit Court of Appeals
Case No.: 21-12046-E
Date of Judgment: March 14, 2022
Citation: *Pearson v. Secretary, Fla. Dep't of Corr.*, no citation

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➢ Each sub-appendix includes all relevant State Court pleadings and orders. Petitioner's Habeas Appendix contains all materials pertinent to the underlying constitutional claim. Although the Court is not asked to resolve the constitutional error, reference to some of the substantive material is necessary for a complete understanding of the procedural issue raised herein. Petitioner's Equitable Tolling Appendix contains all the material necessary to resolve the procedural questions now before the Court.

TABLE OF CITED AUTHORITIES

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JURISDICTIONAL STATEMENT

Pearson seeks review of a judgment entered by the Eleventh Circuit Court of Appeals. The nature of the judgment is a final order denying a Certificate of Appealability upon the denial of a 28 U.S.C. §2254 petition in the U.S. District Court. The order was entered on January 14, 2022. However, a Motion for Reconsideration was thereafter timely filed. The Eleventh Circuit proceedings came to an end on March 14, 2022, when it issued an order denying the Reconsideration Motion. Thus, the instant petition is filed within the 90 day period allotted to seek certiorari review in this Court. See *Supreme Court Rules*, Rule 13 (1)-(3); 28 U.S.C. §2101(c).

Furthermore, the Court has jurisdiction to review the judgments of a United States Court of Appeals stemming from habeas cases. See 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amend. V, U.S. Const. –

> ... nor shall any person be... deprived of life, liberty, or property, without due process of law...

Amend. VI, U.S. Const. –

> In all criminal prosecutions, the accused shall... be informed of the nature and cause of the accusation...

Amend. XIV, U.S. Const. –

> No State shall... deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On January 21, 2000, a jury found Pearson guilty of one count of first-degree felony-murder; one count of attempted armed robbery; and one count of armed burglary. *Verdict Form (Petitioner's Habeas Appx. E, p. 1-4)*

Ten days later, Pearson filed a Motion for Arrest of Judgment arguing that his Count I conviction must be vacated due to an inconsistent verdict. He claimed that the jury's failure to find him guilty of the predicate underlying felony alleged in the indictment - the felony upon which his felony-murder charge was based - meant that a "necessary element" of the offense had evaporated.[1] See *Motion for Arrest of Judgment (Pet's. Habeas Appx. F, p. 1-2)* The trial court denied the motion; finding no inconsistency in the verdicts. See *Order (Pet's. Habeas Appx. G, p. 1-2)* On appeal, an *Anders* brief was filed, which was denied without any written opinion. *Pearson v. State*, 774 So. 2d 708 (Fla. 5th DCA 2000).

Two motions for postconviction relief were subsequently filed in the trial court; both of which were summarily denied; and the judgments were affirmed without written opinion. *Pearson v. State,* 873 So. 2d 998 (Fla. 5th DCA 2003).

On June 7, 2019, Pearson filed a "Common Law Petition for Writ of Habeas Corpus to Correct a Manifest Injustice" in the state appellate court. See *Petition (Pet's. Equitable Tolling, Appx. A).* The Petition was denied without a written opinion on June 18, 2019. See *Order (Pet.'s Equitable Tolling, Appx. B).*

F.N. #1 Florida's felony murder statute substantially differs from many jurisdictions, in that, a specific enumerated predicate felony must be alleged in the Indictment, and proven at trial. See *Arguments*, sec. I (A)(2), infra.

On December 30, 2019, Pearson filed a petition for writ of habeas corpus in the United States District Court, raising only one claim for relief:

> **A MANIFEST INJUSTICE OCCURRED WHEN MR. PEARSON WAS CONVICTED OF FELONY-MURDER, EVEN THOUGH THE JURY RENDERED TRULY INCONSISTENT VERDICTS EXPRESSLY INDICATING THAT THE STATE FAILED TO PROVE ONE OF THE ESSENTIAL ELEMENTS OF THAT OFFENSE BEYOND A REASONABLE DOUBT.**

Petition (Appx. IV(B) at 8-12) Pearson simultaneously filed a "Memorandum in Support of Habeas Petition", and an "Appendix in Support of Habeas Petition". *(Appx. IV(B))* In section H of the petition, he acknowledged that the petition was untimely filed, but claimed that equitable tolling is warranted on the basis of an inadequate state corrective process. *(Habeas Petition 1 at 14)* In support of his equitable tolling claim, Pearson also filed a "Brief Concerning Whether Equitable Tolling Should Apply", along with an "Appendix in Support of Equitable Tolling." *(Appx. IV(B)).*

The District Court ultimately dismissed the case with prejudice for untimeliness. *(Appx. II)* No Certificate of Appealability (COA) was issued. Pearson appealed, and filed a COA motion with the Eleventh Circuit Court on September 29, 2021. It was denied on January 12, 2022 *(Appx. I(A))* Reconsideration Motion was filed on January 23, 2022; the Eleventh Circuit Court deemed it on March 14, 2022 *(Appx. III).*

STATEMENT OF RELEVANT FACTS

The Constitutional Error:

In Count One of the indictment, the grand jury charged Pearson with felony murder. The indictment alleged that the victim's death occurred "in the course of committing the *armed robbery*," and that it was "a consequence of the *armed robbery*." The indictment did not allege any predicate qualifying offense other than "armed robbery." Specifically, Count 1 contains no allegation of the enumerated offense of an "attempt." See *Indictment* (Appx. A: 1)

Count 2 charged Pearson with Armed Robbery – the qualifying predicate felony for Count 1. See *Indictment* (Appx. A: 1-2)

During a mid-trial jury charge conference, defense counsel objected to the State's proposed felony murder instruction because it altered the indictment verbiage to read that victim's death occurred while Pearson "was *attempting* to commit armed robbery."

Concerning this objection, the following discussion took place between trial counsel and the Court:

> **Mrs. Munyan**: Your Honor, my objection to that would be that this is not a lesser included offense. This is actually the offense that he was indicted on by the grand jury. That indictment cannot be changed except by a grand jury reconvening.
>
> **The Court**: Well, that's true. The indictment as drafted does not have attempt in there. So I'll go ahead and strike that verbiage. So it will read was engaged in the commission of armed robbery or was escaping from the immediate scene of the armed robbery. That makes it consistent with the indictment.

Transcript (Appx. B: 2-3).

The trial judge later clarified that, "[i]n fact, if they find him not guilty of the armed robbery, the felony murder goes down." (Appx. B: 4) Before deliberation, the jury was instructed that:

> Before you can find the defendant guilty of first degree felony murder, the State *must prove the following three elements beyond a reasonable doubt:* one; Roscoe Pugh is dead; *two, the death occurred as a consequence of and while Angelo Pearson was engaged in the commissions of armed robbery...*

(Appx. D) (emphasis added). The Jury was not given the option of finding the second essential element to be proven by a determination of an attempted armed robbery. *Id.*

The Jury ultimately found Pearson guilty of Count 1 felony murder charge. See *Count 1 Verdict* (Appx. E: 1-2). However, as for the Count 2 armed robbery charge – the predicate offense for Count 1 – the jury did not find that a completed armed robbery was proven; rather, the jury found that an *attempted* armed robbery was proved beyond a reasonable doubt. See *Count 2 Verdict* (Appx. E: 3-4). Thus, the jury made an express finding in Count 2 that negated the second essential element of Count 1. Compare *Count 1 Jury Instruction – element two* (Appx. D) with *Count 2 Verdict* (Appx. E: 3-4). While the jury's guilty verdict on Count 2 is for a crime that is listed as one of the enumerated qualifying offenses, see §782.04(1)(a)2 d., Fla. Stat., that crime is a different and independent offense from the specific qualifying felony alleged as an essential element of count 1. See *Indictment – Count 1* (Appx. A:1).

State Court Proceedings:

Pearson's 2019 State Habeas Petition opened with an acknowledgment of threshold issues – timeliness and successiveness bars that could potentially prohibit a merits review. *State Petition* (*Pet's. Equitable Tolling Appx. A, p. 1-4*) He followed, however, with a demonstration that Florida caselaw provides prisoners access to the State Writ "as a means to correct manifest injustices... when all other remedies have been EXHAUSTED." (*Id.*, at 15) He further demonstrated how a showing of "manifest injustice" would allow him to overcome the timeliness and successiveness doctrines that stand in his way. (*Id.*, at 6-8)

The discussion then turned to the "standard" for proving a "manifest injustice." First, Pearson illuminated the fact that there was only one case in the entire history of Florida law to ever establish a definition and objective test for demonstrating a "manifest injustice"; that being *Perez v. State, 2012 Fla.App.LEXIS 20051. Perez* is an unpublished case[2] that directly quoted the four-prong "manifest injustice" standard set forth by the Eleventh Circuit Court in *United States v. Quintana*, 300 F.3d 1127 (11th Cir. 2002). However, because the *Perez* opinion was withdrawn – leaving no standard in the Florida courts – Pearson argued that the federal test should be applied in his "manifest injustice" analysis. (*Id.*, at 11-13).

Turning back to his underlying constitutional claim, Pearson argued that he was denied due process under the 14th Amendment when he was convicted of felony-murder even though the verdict form shows that the jury DID NOT find one of the

F.N. #2 The *Perez* decision was withdrawn and later replace with an opinion that omitted any discussion of a standard for proving a "manifest injustice", thus leaving no standard at all. See *Perez v. State*, 118 So. 3d 298 (Fla. 3d DCA 2013).

essential elements to have been proven beyond a reasonable doubt. (*Id.*, at 16-27) He concluded that claim by demonstrating how his record facts meet the four-prong *Quintana* test for "manifest injustice." (*Id.*, at 27-31)

As a subsidiary matter, the court was presented with the following request for written opinion:

> GIVEN THE APPELLATE COURT'S ROLE AS DEVELOPER OF THE LAW, IT WOULD GREATLY ENHANCE THE INTEGRITY OF FLORIDA'S POSTCONVICTION CORRECTIVE PROCESS IF THIS COURT WOULD UNDERTAKE THE TEST OF SETTING JUDICIAL PRECEDENT TO FILL A LONG-STANDING VOID IN THE LAW WHERE FLORIDA JURISPRUDENCE LACKS (1) ANY FIXED DEFINITION FOR THE TERM "MANIFEST INJUSTICE"; AND (2) ANY FUNCTIONAL ANALYTICAL TEST FOR CONSISTENT DETERMINATION OF WHETHER A "MANIFEST INJUSTICE" IS DEMONSTRATED BY THE ESTABLISHED FACTS IN ANY GIVEN CASE.

(*Id.*, at 32-3) Pearson illustrated the vital importance of the "manifest injustice" doctrine by pointing out that it is the only remedy still available for a Florida inmate who discovers an otherwise procedurally barred constitutional claim involving prejudicial violations of basic personal rights (i.e. plain error). (*Id.*, at 33-35). Then, through a historical recount of opinion discussing the doctrine, he was able to show that no definition or objective test had ever been established in Florida. (*Id.*, at 35-39). Based on those points, he argued that Florida's current postconviction procedures are "inadequate" to vindicate substantive rights once any state default rule attaches. He did clarify, though, that Florida procedures are not "inadequate" in every context; but rather, they are "inadequate" **only** in the extremely rare situation where the constitutional error: (1) is fully developed, and plain, on the face of the record; and (2) can meet the stringent federal test for "plain error/manifest injustice."

(*Id.*, at 39-42). The petition ended with discussion on potential ramifications of the deficient state process. Of particular relevance here, Pearson suggested that a good argument could be made that the "inadequacy" might serve as grounds for equitable tolling in the federal courts – prospectively allowing belated filing of federal habeas petitions for Florida prisoners negatively impacted by Florida's procedural deficiency. (*Id.*, at 42-49). Without any written opinion, the state appellate court denied the petition a mere eight days after receiving it. See *Order* (*Pet's. Equitable Tollling Appx. B*).

Federal Habeas Proceedings:

Because the District Court ultimately dismissed the petition as untimely, no further discussion is warranted on Pearson's underlying constitutional claim; focus will, instead, be on the resolution of his equitable tolling claim.

As stated earlier, Pearson acknowledged the untimely filing of his petition, but relied on equitable tolling to overcome that limitation. He referred the court to his "Brief Concerning Whether Equitable Tolling Should Apply" for the details. *(Habeas Petition at 14).*

The following question was posed on the face of his brief:

> *Whether equitable tolling can be applied as a "safety-valve" to allow federal review of otherwise time-barred constitutional claims if the state prisoner's claim meets the federal standard of "plain error", but the state courts nevertheless summarily disposed of that same claim with no review on the merits?*

Equitable Tolling Brief, cover page. The core of Pearson's equitable tolling argument can be summarized as follows:

In the federal courts, the "plain error" doctrine expresses a universal recognition that judicially-created default rules should give way if necessary to correct clear violations of basic rights. The doctrine enforces a policy that "plain errors" should not even occur in the first instance; and in the rare case that one inadvertently slips by the courts, it should be corrected whenever it does surface – irrespective of whatever default rules might preclude review on the merits. Unfortunately, this vital constitutional safeguard is available **only** for federal prisoners.

Florida courts utilize the "manifest injustice" doctrine, purportedly, for the same reason that the federal courts have the "plain error" doctrine. But, unlike a federal prisoner reliant upon the objective federal standard, a Florida prisoner can never show entitlement to a merits review. This is because the purely conceptual, non-defined, and subjective Florida standard means that a "manifest injustice" cannot be legally **proven** – leaving the prisoner's only opportunity subject solely to the sheer **mercy** of a Florida judge – no matter how clear the constitutional error.

Although it would be quite rare that any prisoner would be entitled to relief under either doctrine, federal prisoners at least have an "adequate" remedy available if a "plain error" does surface. This is not so for a Florida prisoner. The absence of this important constitutional safeguard renders Florida's postconviction procedures fundamentally "inadequate" to vindicate the same defaulted errors that could be remedied for a federal prisoner under the "plain error" doctrine.

Equity principles would dictate that some form of federal review should be available for state prisoners that find themselves trapped in this procedural

nightmare. In essence, if federal prisoners enjoy this constitutional safeguard, while Florida prisoners do not, then how can that disparity be brought back into balance? The answer is equitable tolling; it is the only post – AEDPA remedy remaining. While no federal court has ever applied the equitable tolling doctrine in this suggested context, there is nothing in the federal law that prohibits such application. The District Court was asked to do so. See *Brief, generally.*

The District Court declined, finding that the petition was untimely. (*Appx. II, Order at pg. 15*). Although Pearson's argument proposed an entirely new exception for equitable tolling – separate and distinct from the two standards established in *Holland v. Florida and McQuiggins v. Perkins* – the District Court nevertheless found that he failed to meet either prong of the *Holland* test. *(Order at pg 6-7).* The court dismissed the petition and denied COA. *(Order at 7-9).*

On September 29, 2021, Pearson filed a Motion for Certificate of Appealability with the Eleventh Circuit Court. That motion was denied, as well as the subsequent Motion for Reconsideration. Neither order commented upon whether Florida's postconviction proceedings are adequate to correct constitutional errors that meet the federal "plain error" standard. *Appx's I & III.*

ARGUMENTS

PEARSON'S FELONY-MURDER CONVICTION VIOLATES THE FOURTEENTH AMENDMENT BECAUSE HIS VERDICT FORM REFLECTS THAT THE JURY DID NOT FIND THE SECOND ESSENTIAL ELEMENT OF THAT OFFENSE TO HAVE BEEN PROVEN "BEYOND A REASONABLE DOUBT."

A. Guiding Legal Principles:

1. The Due Process Clause's "beyond a reasonable doubt" requirement.

One of the subcomponents of the Due Process Clause is the accused's right to notice of the accusations against him. Due Process of law, therefore, requires the government to allege *every* essential element of a charged crime within the indictment in order to provide sufficient notice of the facts so that a defendant can determine how to defend himself. See generally *Amend. V, XIV, U.S. Const.* The Due Process Clause also prescribes exactly what the fact finder must determine to render a verdict of guilty: it is the prosecution that bears the burden of proving *all elements* of the offense charged. See *Patterson v. New York,* 432 U.S. 197, 210 (1977). The prosecution must convince the fact finder of "*every fact* necessary to constitute the crime alleged beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). This "beyond a reasonable doubt" requirement applies to the States under the Fourteenth Amendment. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

This standard protects three interest. First, it protects the liberty interests of the accused. *Winship*, 397 U.S., at 363. Second, it protects the accused from the stigma of conviction. *Id.* Third, it encourages community confidence in criminal law

by giving "concrete substance" to the presumption of innocence. *Id.* The government's failure to meet its burden of proof results in the defendant's acquittal at trial or reversal of the conviction on appeal. *Id.*

2. *Under Florida's felony-murder statute, the specific predicate felony(s) alleged in the indictment necessarily becomes an essential element of the offense.*

In regard to felony murder theory, many jurisdictions – including the federal system – require only that the jury find some type of predicate felony or attempted felony as a prerequisite to a valid conviction. In other words, the government in those jurisdictions need not allege, nor prove, any specific felony or attempted felony to obtain a valid felony murder conviction; proof of any unspecified felony offense will suffice. However, this is not so in the Florida Courts.

In stark contrast to most jurisdictions, Florida's felony murder statute contains an enumerated list of predicate offenses that qualify as a basis for a felony murder conviction. §782.04(1)(a)2, Fla. Stat. As a result, the State must allege within the indictment which specific qualifying offense(s) it intends to prove at trial. Among the list of qualifying offenses is an "attempt" to commit any of the other enumerated offenses. §782.04(1)(a)2, Fla. Stat. Thus, in Florida, a felony murder conviction **may** be based on any of the enumerated felonies or the enumerated attempt to commit one of those felonies. See *Astrop v. State*, 682 So.2d 1153, 1154-55 (Fla. 5th DCA 1996) (recognizing that "an attempted felony *can* also be a predicate for felony murder") (emphasis added). However, this concept does not establish an absolute rule that a jury finding of an "attempted" felony will always validate a felony murder conviction. There is an important prerequisite: Because an "attempt" is a separate, independent

criminal offense listed as one of the enumerated qualifying felonies, that "attempt" must be alleged in the indictment before it *can* support a felony murder conviction. These concepts, although foreign to the federal courts, are best explained by the *Astrop* court:

> The Florida felony murder statute includes in the list of qualifying felonies the attempt to commit those felonies... Since the attempt to commit any of these felonies is itself a separate, independent criminal offense (section 777.04 Florida Statutes), known as "criminal attempt", does not the felony murder statute merely add all of these attempts as additional qualifying felonies? In other words, *if the qualifying felony alleged in the indictment is robbery, do you not have to prove robbery in order to sustain the felony murder just as you would have to prove attempted robbery if that were the alleged qualifying felony?*

Astrop, 682 So.2d at 1155 (emphasis added). In essence, whatever specific enumerated qualifying offense or offenses alleged in the indictment as the predicate for a felony murder charge, by necessity, becomes an essential element that must be proved beyond a reasonable doubt. *Accord.*, *Winship*. While the State has the power to allege in an indictment both an underlying qualifying felony and an "attempt" to commit that same felony, there is nothing in Florida jurisprudence to suggest that an allegation of a qualifying offense automatically or inherently encompasses an allegation of "attempt" to commit that offense. To do so would nullify or give no effect to the Florida lawmakers' decision to list "attempt" as one of the seperately enumerated qualifying offenses.

B. Analysis:

In analyzing whether a constitutional violation took place here, a couple of key points must be emphasized. First, there is no precedent in Florida to support an

argument that an allegation of armed robbery as the predicate offense necessarily or inherently includes an implied allegation of an attempted armed robbery as an essential element of felony murder. Indeed, if Florida lawmakers intended for an "attempt" to be automatically appended to every qualifying enumerated felony offense, it would have said so in the statute itself. Instead, the legislature chose to include an "attempt" as one of the enumerated offenses. If the Florida lawmakers chose to make the State allege a specific enumerated offense – or offenses – in a felony murder indictment, it naturally follows then that the State must also allege an attempt (under §782.04(1)(a)2. d., Fla. Stat.) if it is seeking to prove an attempt as an alternative theory of conviction. This logic harmonizes the *Astrop* decision with the fact that §782.04, Fla. Stat. lists an "attempt" as its own enumerated qualifying offense. Any other reasoning renders subsection (1)(a)2 d's. "Attempt" redundant and obsolete. Rules of statutory construction prohibit any interpretation that renders any statutory language of no effect.

The second point requiring emphasis is that Florida's felony murder theory differs from that of the federal courts: The federal courts do not require the specific predicate offense to be alleged as an essential element, whereas the Florida courts do. This distinction is vitally important for the simple reason that if Pearson's felony murder conviction occurred in another jurisdiction, he might have no constitutional claim at all. Other jurisdictions will sustain a felony murder conviction if the jury finds *any* predicate felony proved, irrespective of whether the prosecution previously identified a specific offense it intended to prove as the predicate for felony murder. In other words, the specific felony offense need not be alleged as an essential element in

a federal felony murder case. Unlike the federal system, Florida law requires the specific qualifying offense(s) to be alleged in an indictment, and be proved to the jury beyond a reasonable doubt.

Without recognition of these two concepts – concepts that are perhaps foreign to federal courts – this Court might easily conclude that the jury's finding of an "attempted" armed robbery is sufficient to support Pearson's felony murder conviction. However, keeping these points in mind, the record in this case clearly shows that the jury did not find the second essential element of Count 1 to have been proven beyond a reasonable doubt. As a consequence Pearson's Count 1 felony murder conviction violates the Due Process Clause and the Sixth Amendment. *Accord., Winship;* and *Sullivan.*

POINT II

THE CONSTITUTIONAL ERROR PRESENT IN PEARSON'S CASE MEETS THE FEDERAL "PLAIN ERROR/MANIFEST INJUSTICE" STANDARD.

> Based on the Court's decision in *United States v. Olano*, 507 U.S. 725 (1993), the Eleventh Circuit Court articulates the "manifest injustice" test as follows: To demonstrate a manifest injustice, a petitioner must demonstrate: (1) there was error; (2) that is was plain; (3) that if affected his substantial rights; and (4) that it affected the fundamental fairness of the proceedings.

United States v. Quintana, 300 F.3d 1227 (11th Cir. 2002) "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). Unless the explicit language of a statute or rule resolves an issue, there can be no "plain" error where there is no precedent from a controlling court directly resolving the issue. *United States v. Rozier*, 685 Fed. Appx. 847, 851 (11th Cir. 2017). To show that the error affected the prisoner's substantial rights, he must

show that there is a reasonable probability of a different outcome (i.e. actual prejudice). *Id.*, at 850-51. A "plain error" requires remand if the error "affected the fairness, integrity, and public reputation of judicial proceedings." *United States v. Perez*, 661 F.3d 568, 586 (11th Cir. 2011). "Plain Error" and "manifest injustice" are two different terms for the same principle. *Rosier*, at 851.

A. The "Error" Is Shown By Comparing Pearson's Indictment With his Verdict Form:

In the indictment, Count I alleges only a completed armed robbery as the underlying predicate felony for felony murder – neither an "attempt", nor any other enumerated felony, was alleged. See *Indictment* (*Pet's Habeas Appx. A, p. 1*). The "error" occurred when the jury found him guilty of "attempted armed robbery" on Count II, thus indicating that they did not find a completed armed robbery to have been proven for establishing the second essential element of Count I. See *Verdict Form* (*Pet's Habeas Appx. E, p. 3-4*).

B. The "Error" Is Plain:

The constitutional principles at stake here are squarely resolved by the Court and our Nation's Constitution; see *Estelle v. McGuire*, 502 U.S. 62, 69 (1991) ("The prosecution must prove **all** elements of a criminal offense to a jury, beyond a reasonable doubt, before a valid conviction can be had."); and the Due Process Clause's right to notice of accusations. *Amends. V, XIV, U.S. Const.*

The state rule dictating that the specific enumerated predicate felony(s) for felony-murder must be alleged in the indictment – and proven at trial – is first mandated by the felony-murder statute itself. See *§782.04(1)(a)2, Fla. Stat., (prescribing an enumerated list of felonies – including a separately enumerate*

"attempt" – that qualify as a predicate felony for felony-murder). And the Fifth District Court of Appeals – the district with original jurisdiction over Pearson's case – has explained that an "attempt" to commit a felony must be alleged in the indictment, and proven beyond a reasonable doubt, to sustain a felony-murder conviction based on an attempted felony. See *Astrop*, supra at 1154-55. Accordingly, the "error" is "plain."

C. Pearson's "Substantial Rights Were Affected" Because He Now Serves A Life Sentence For The Felony-Murder Conviction Only:

Prejudice from the error is manifest on the face of the record. Pearson's *Sentencing Transcript* and his *Written Sentence/Judgment* reflect that the trial court imposed a life sentence on the felony-murder charge only. Had a post-verdict Judgment of Acquittal been issued on Count I, he would now only be sentenced to a specified number of years. See *Sentence.*

D. The "Fundamental Fairness Of The Proceedings Were Affected" Where, During Trial, The Judge Expressly Acknowledged That A Felony-Murder Conviction Will Not Be Sustained If The Jury Does Not Find The Specific Alleged Predicate Felony To Be Proven, But Later Reversed His Position When The Jury Returned A Verdict Contrary To That Principle:

During trial, the judge expressly recognized that an "attempt" was not alleged in the felony-murder count as a predicate felony. *Transcript* (*Appx. B at 2-3*). The judge further expressed recognition of the legal principle prohibiting a felony-murder conviction if the specifically alleged predicate felony is not proven to the jury. *Transcript* (*Appx. B at 4*). ("[I]n fact, if they find him not guilty of the armed robbery, the felony murder goes down.") The judge even made sure that the jury did not receive an erroneous instruction that would have inappropriately allowed the jury to

convict for felony-murder based on an "attempted" armed robbery. See *Transcript* (*Appx. B at 2-3*); *Transcript* (*Appx. D*).

Despite recognition of these concepts, the same judge made a complete reversal from that position once the jury found that the charged predicate offense of completed armed robbery was not proven. See *Order on Motion for Arrest of Judgment* (*Appx. G at 1-2*) (*finding no inconsistency in the verdicts*). It is fundamentally unfair that the trial judge abandoned previously recognized legal principles just to sustain the conviction. Had the judge gave any indication that he was not going to honor those principles, Pearson would have employed another mode of defense[3]: Challenging the "cause of death" on grounds of gross medical negligence/medical malpractice for the hospital staff performing surgery before stabilizing the victim – the medical examiner even testified at trial that the gunshot wound was not fatal under normal circumstances.

Because Pearson has met all four prongs of *Quintana*, he has **proven** a "plain error/manifest injustice" under the federal standard.

F.N. #3: Pearson does not raise this as a new claim for relief. Rather, he states it as a fact to illustrate the unfairness of the position that the trial judge put him in.

POINT III

EVEN THOUGHT THE "PLAIN ERROR" DOCTRINE WOULD HAVE PROVIDED PEARSON A MEANINGFUL REVIEW HAD THE ERROR OCCURRED IN A FEDERAL COURT, THE SAME REMEDY WAS NOT AVAILABLE TO HIM IN THE STATE COURT BECAUSE THE SUPPOSEDLY EQUIVALENT DOCTRINE IS INADEQUATE TO SERVE AS A CONSTITUTIONAL SAFEGUARD.

A. Theoretical Counterparts: Parity Between The Federal "Plain Error/Manifest Injustice" Standard And Florida's "Manifest Injustice" Standard:

As this Court is probably well-aware, the primary context in which the plain error doctrine applies is when determining whether an unpreserved error may be raised on direct appeal. A deeper look will reveal, however, that the doctrine extends to other types of default. Rather than catalogue every context, Pearson will jump to the best illustration: *United States Supreme Court Rule 24* (directing that, irrespective of the Court's other preclusionary rules, a plain error may be considered and corrected if it appears on the face of the record).

Sup. Ct. Rule 24 indicates a policy that correction of plain errors is so important that this very Court is willing to relax their own procedural rules to do so. This policy reflects a notion that courts should not allow plain errors to occur; and if they do occur, they should be immediately corrected upon discovery – irrespective or procedural default rules. Given this concept, it stands to reason that timeliness and successiveness bars would have to give way in the federal courts to correct a plain error. If this is so, then the plain error/manifest injustice that Pearson has suffered would have been meaningfully reviewed on the merits... had he only been a federal prisoner.

In Florida, the writ of habeas corpus is no longer available to challenge the validity of a conviction UNLESS a petitioner can demonstrate a "manifest injustice." See *Baker v. State*, 878 So.2d 1236, 1246 (Fla. 2004) (C.J. Anstead, specially concurring) (the writ of habeas corpus will remain available as a means to correct a manifest injustice when all other remedies are exhausted). "Manifest Injustice" will overcome time bars, see *Wiggins v. State*, 141 So. 3d 621 (Fla. 3rd DCA 2014), and overcome successiveness bars, see *Martinez v. State*, 935 So. 2d 28 (Fla. 3rd DCA 2006).

While the Florida standard **appears** to offer the equivalent – or perhaps even greater – safeguards as its federal counterpart, it is a false and superficial appearance.

B. Vital Differences That Render Florida's Standard "Inadequate" For Post-Default Vindication Of Substantial Rights Violations:

Assuming that Pearson's record shows a plain error/manifest injustice, given the aforementioned benefits afforded under Florida's manifest injustice doctrine, it would appear that he had an adequate state remedy available to him. This is not so, however, because there is no such thing as the manifest injustice *standard* in Florida – it is only conceptual.

In the entire history of Florida law there has been only one decision where a test has been articulated:

> "To demonstrate manifest injustice, a petitioner must demonstrate (1) that there was error; (2) that was plain; (3) that affected his substantial rights; and (4) that it affected the fundamental fairness of the proceedings. "*United States v. Quintana*, 300 F.3d 1227, 1232 (11th Cir. 2002). Nonetheless, as recognized, in *Lago v. State*, 975 So. 2d 613,

614 (Fla. 3rd DCA 2008), where a "manifest injustice has occurred it is the responsibility of the court to correct that injustice, if it can."

Perez v. State, 2012 Fla. App. Lexis 20051. This decision tends to validate Pearson's position that Florida's manifest injustice doctrine is the equivalent of the federal manifest injustice/plain error doctrine. Unfortunately though, this decision never became binding authority... because it was never published. This opinion was immediately withdrawn upon the filing of a motion for rehearing by the State, and replaced with a substitute opinion that was actually published. See *Perez v. State*, 118 So. 3d 298 (Fla. 3rd DCA 2013). The two opinions were the same in result, but differed in that the substitute opinion omitted any standard for proving a manifest injustice. Compare *Perez*, 2012 Fla. App. Lexis 20051 with *Perez*, 118 So. 3d 298. On appeal to the Florida Supreme Court, the appellate court certified the following question as one of great public importance:

HOW SHOULD MANIFEST INJUSTICE BE DEFINED FOR PURPOSES OF A CLAIM OF NEWLY DISCOVERED EVIDENCE AFTER A GUILTY PLEA?

Perez v. State, 122 So. 3d 425 (Fla. 3rd DCA 2013). The Florida Supreme Court originally accepted jurisdiction of the case, but later dismissed the case without resolving the issue. *State v. Perez*, 149 So. 3d 680 (Fla. 2014).

As it stands this very day, Florida has no established objective test for proving manifest injustice. The state cannot provide, nor will this Court be able to find, any authority to the contrary.

Based on these facts, Pearson can articulate at least four distinguishing characteristics that render Florida's standard "inadequate" to provide the constitutional safeguards created by the federal standards:

1. The federal standard is both codified and well-defined in caselaw; Florida's standard is merely conceptual as its courts have never even defined the term – much less establish any test for ***proving*** *it.*

2. A federal prisoner can expect a meaningful merits review of his defaulted claim if he can meet the objective federal test; a Florida prisoner has no such expectation because of the lack of objective test means that he can never legally ***prove*** *a "manifest injustice."*

3. A federal ruling on "plain error" is bound to the record facts and application of well-settled legal principles; a Florida ruling on "manifest injustice" is purely subjective – one that can be severely polluted by reviewing judges' feelings, whims, nuances, biases and political agendas.

4. A "plain error" ruling is subject to meaningful review by a higher court as both the analytical process and the test's results are measurable; the lack of standard for proving a "manifest injustice" in the Florida courts means that there is no measuring stick for evaluating a judge's decision-making process on the matter.

C. The Federal Standard Is An "Adequate" Constitutional Safeguard Because It Is Well-Established, Consistently Applied, And Produces Verifiable Results; The Florida Standard Is "Inadequate" Because It Completely Lacks All Of Those Characteristics.

No matter what context the federal courts define "adequacy" of a rule, three common threads emerge: (1) the courts must be consistent in their application of the rule; (2) the analytical standards must be established to the point of universal recognition; and (3) the rule must provide measurable results in order to provide meaningful appellate review. While the federal "plain error/manifest injustice" rule

easily meets this criteria, the Florida standard satisfies none. Thus, Florida law is devoid of the constitutional safeguard provided to federal prisoners through the federal "plain error" doctrine/rule.

In conclusion, the Court is requested to grant a writ of certiorari to resolve whether a federal remedy should be available to a state prisoner that can meet the plain error standard, but the respective state's courts have no meaningful procedure to overcome procedural default.

Respectfully Submitted,

/s/Angelo C. Pearson, II

Angelo C. Pearson, II DC# E04666

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was placed into the hands of prison officials for purposes of pre-paid First Class U.S. Mailing to: Office of Attorney General, located at 444 Seabreeze Blvd., Ste. 500, Daytona Beach, Fla. 32118, on this 3rd day of June, 2022.

/s/Angelo C. Pearson, II

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