APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:18-cv-2916-WFJ-SPF

JORGE MARC GONZALEZ-BETANCOURT

Petitioner,

v.

SECRETARY, Department of Corrections,
Respondent.
_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Jorge Marc Gonzalez-Betancourt petitions for the writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 7) and challenges the validity of his state convictions for trafficking in oxycodone (16 counts), conspiracy to traffic in oxycodone (10 counts), actual or constructive possession of a place or structure with knowledge that it would be used for trafficking in illegal drugs (1 count), and participation in an enterprise through a pattern of racketeering activity (1 count), for which convictions Mr. Betancourt serves thirty years' imprisonment. The Respondent admits the petition's timeliness. (Doc. 14).

Background and Procedural History[1]

Mr. Betancourt and his wife formed 1st Medical Group, a pain management clinic. Mr. Betancourt and two co-defendants, including his wife, Michelle Gonzalez, were eventually charged with eighty-six offenses relating to the distribution of oxycodone at the clinic.[2] A jury convicted Mr. Betancourt of thirty-one charges.[3] After considering Mr. Betancourt's post-trial motion for judgment of acquittal, new trial, and arrest of judgment, the trial court vacated two of the convictions and arrested judgment on one count. (Doc. 11-10, vol. 22 at 4244– 4254). Mr. Betancourt stands convicted of the twenty-eight remaining charges and serves thirty years' imprisonment. The state appellate court affirmed Mr. Betancourt's convictions and sentences on direct appeal in a *per curiam* decision without elaboration. (Doc. 11-29, Ex. 16).

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[1] This factual summary derives from Mr. Betancourt's brief on direct appeal and the record. (Docs. 11-2 through 11-29). For citations to Exhibit 1 of docket entry 11, this Order refers to the page numbers stamped in the lower right-hand corner of each page in volumes 1–117.

[2] Before the criminal charges were filed, Mr. Betancourt was the subject of a civil forfeiture complaint brought under the Florida Contraband Forfeiture Act. Property and currency related to the clinic were seized. Following an adversarial probable cause hearing, the state court found no probable cause to support the seizure. *See In re Forfeiture of: $221, 898 in U.S. Currency*, 106 So. 3d 47 (2013).

[3] The trial court entered a judgment of acquittal on fifty-five of the eighty-six charges. (Doc. 11-5 at 1877–1878).

Standard of Review

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs Mr. Betancourt's petition. *Wilcox v. Florida Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998). Section 2254(d), which creates a highly deferential standard for federal court review of a state court adjudication, states in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000), the Supreme Court interpreted this deferential standard:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on

> the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States" or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

"The focus . . . is on whether the state court's application of clearly established federal law is objectively unreasonable, . . . an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 693 (2002). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

Harrington v. Richter, 562 U.S. 86, 103 (2011); *see White v. Woodall*, 572 U.S. 415, 427 (2014) ("The critical point is that relief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question . . . .") (quoting *Richter*); *Woods v. Donald*, 575 U.S. 312, 316 (2015) ("And an 'unreasonable application of' those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (quoting *Woodall*, 572 U.S. at 419); *accord Brown v. Head*, 272 F.3d 1308, 1313 (11th Cir. 2001) ("It is the objective reasonableness, not the correctness *per se*, of the state court decision that we are to decide."). The phrase "clearly established Federal law" encompasses only the holdings of the United States Supreme Court "as of the time of the relevant state court decision." *Williams*, 529 U.S. at 412.

The purpose of federal review is not to re-try the state case. "The [AEDPA] modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 535 U.S. at 694. A federal court must afford due deference to a state court's decision. "AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("This is a 'difficult to meet,' . . . and

'highly deferential standard for evaluating state court rulings, which demands that state court decisions be given the benefit of the doubt' . . . .") (citations omitted). When the last state court to decide a federal claim explains its decision in a reasoned opinion, a federal habeas court reviews the specific reasons as stated in the opinion and defers to those reasons if they are reasonable. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("[A] federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable."). When the relevant state-court decision is not accompanied with reasons for the decision, the federal court "should 'look through' the unexplained decision to the last related state court decision that does provide a relevant rationale [and] presume that the unexplained decision adopted the same reasoning." *Id.* "[T]he State may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision . . . ." *Id.*

As *Pinholster* explains, review of the state court decision is limited to the record that was before the state court:

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward looking language requires an

> examination of the state court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time, *i.e.*, the record before the state court.

563 U.S. at 181–82. Mr. Betancourt bears the burden of overcoming by clear and convincing evidence a state court factual determination. "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to a finding of fact but not to a mixed determination of law and fact. *Parker v. Head*, 244 F.3d 831, 836 (11th Cir.), *cert. denied*, 534 U.S. 1046 (2001). The state court's rejection of Mr. Betancourt's post-conviction claims warrants deference in this case.

Ground One

Mr. Betancourt contends that the State presented insufficient evidence that he "had a conscious intent that the crime of trafficking in illegal drugs be committed [and] did something through word or act which caused or incited the offense to be committed." (Doc. 7 at 5). He argues that no witness testified that he "aided or abetted any unlawful activity" and that the "record is devoid of evidence that [he] had any agreement with any member of any of the charged conspiracy groups."

(Id.). Mr. Betancourt alleges that "[i]n the absence of any evidence of [his] criminal liability as a principal or as a co-conspirator, there is no evidentiary underpinning to support criminal liability for the 'drug house' count or the RICO count, and no reasonable juror could return a verdict of guilty beyond a reasonable doubt." (Id.).

The Respondent opposes this ground as unexhausted because Mr. Betancourt neither preserved a federal constitutional claim at trial nor presented a federal constitutional claim to the state court on direct appeal. (Doc. 11 at 7). Mr. Betancourt replies that "[e]ven if [he] did not specifically argue to the state courts that his convictions violated her [*sic*] federally guaranteed right to due process of law, he exhausted that claim because his 'primary contention in the state court proceedings was that [his] conviction[s] w[ere] based on insufficient evidence." (Doc. 15 at 15). He further alleges that "the assertion of the fact that there . . . was no evidence at all presented against [him] evokes the constitutionally protected right articulated by *Jackson* [*v. Virginia*, 443 U.S. 307 (1979)]." (Id. at 16).

Mr. Betancourt asserts in his memorandum that he exhausted his insufficiency of the evidence claim by raising it in the state courts in his Motion for Judgment of Acquittal (Doc. 11-10, Ex. 1, vol. 21 at 4105–4131), his Motion for New Trial, Judgment of Acquittal and in Arrest of Judgment (Doc. 11-10, Ex. 1, vol. 21 at 4142–4150), his Supplement to Motion for New Trial, Judgment of Acquittal, and in Arrest of Judgment (Doc. 11-10, Ex. 1, vol.

21 at 4157–4229), and his direct appeal brief (Doc. 11-29, Ex. 8 at 91–98). The Respondent argues that this ground is unexhausted because Mr. Betancourt did not present a federal sufficiency of the evidence claim in the state court.

Before a federal court can grant habeas relief, a petitioner must exhaust every available state court remedy for challenging his conviction, either on direct appeal or in a state post-conviction motion. 28 U.S.C. § 2254(b)(1)(A), (C). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *see also Henderson v. Brewster*, 353 F.3d 880, 891 (11th Cir. 2003) ("A state prisoner seeking federal habeas relief cannot raise a federal constitutional claim in federal court unless he first properly raised the issue in the state courts.") (citations omitted). To exhaust a claim, a petitioner must present the state court with both the particular legal basis for relief and the facts supporting the claim. *See Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) ("Exhaustion of state remedies requires that the state prisoner 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'") (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). As *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), explains, a petitioner must alert the state court that he is raising a federal claim and not just a state law claim:

A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal."

As a consequence, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

"If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). To establish cause for a procedural default, a petitioner "must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). To show prejudice, a petitioner must demonstrate not only that an error at the trial created the possibility of prejudice, but that the error worked to his actual and substantial disadvantage and infected the entire trial with "error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). In other words, a petitioner must show at least a reasonable probability of a different outcome. *Henderson*, 353 F.3d at 892.

Absent a showing of cause and prejudice, a petitioner may obtain federal habeas review of a procedurally defaulted claim only if review is necessary to correct a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). A fundamental miscarriage of justice occurs if a constitutional violation has probably resulted in the conviction of someone who is "actually innocent." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Johnson v. Alabama*, 256 F.3d 1156, 1171 (11th Cir. 2001). To meet the "fundamental miscarriage of justice" exception, a petitioner must show constitutional error coupled with "new reliable evidence—whether . . . exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

A review of the record shows that although Mr. Betancourt raised this ground in the state courts, he argued only a violation of state law and did not assert a federal constitutional violation. He did not cite a federal constitutional amendment or federal constitutional law nor did he label the ground "federal." Consequently, Mr. Betancourt did not "fairly present" a federal constitutional violation to the state court. *See Baldwin*, 541 U.S. at 27; *Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1352 (11th Cir. 2012) ("In other words, 'to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues.'") (quoting

Jimenez v. Fla. Dep't of Corr., 481 F.3d 1337, 1342 (11th Cir. 2007)); *Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 458 (11th Cir. 2015) (finding that *Baldwin* and *Lucas* "stand for the proposition that a petitioner with a claim that could arise under either state or federal law must clearly indicate to the state courts that he intends to bring a federal claim").

Mr. Betancourt's failure to present his federal insufficiency of the evidence claim to the state court deprived the state court of a "full and fair opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Boerckel*, 526 U.S. at 845. *See also Preston*, 785 F.3d at 460 (noting that "simply mentioning a phrase common to both state and federal law . . . cannot constitute fairly presenting a federal claim to the state courts"). Consequently, Ground One is unexhausted. State procedural rules preclude Mr. Betancourt from returning to state court to present his federal claim in either a second direct appeal or other collateral motion for post-conviction relief. Mr. Betancourt's failure to properly exhaust his federal claim in the state court results in a procedural default.

Mr. Betancourt fails to demonstrate cause for the default of his federal claim because he fails to show that some "external factor" prevented him from raising the claim in state court. *Wright*, 169 F.3d at 703. He cannot meet the "fundamental miscarriage of justice" exception because he presents no "new reliable evidence" that

he is actually innocent. *Schlup*, 513 U.S. at 327. Because Mr. Betancourt satisfies neither exception to procedural default, Ground One is procedurally barred from federal review.

Ground Two

Mr. Betancourt contends that the doctrine of collateral estoppel should have barred his prosecution for criminal charges. Mr. Betancourt alleges (Doc. 7 at 7):

> On July 26, 2010, before Petitioner was charged with a crime, the City of Tampa brought a civil forfeiture action against Petitioner and codefendants under Florida's Contraband Forfeiture Act. An adversarial probable cause hearing was held on August 27, 2010. At the hearing, the City of Tampa argued that currency which it seized was used to commit, or it was proceeds of, the identical crimes that were the subject of the criminal case against the Petitioner, and the factual evidence presented was identical to the evidence presented by the State in the criminal case against Petitioner. The trial judge found that there was no probable cause that any crime was committed. The binding judgment entered by the trial court in the forfeiture action was affirmed on appeal, thus resolving all ultimate facts in favor of Petitioner under a very low "probable cause" standard.

Citing *Ashe v. Swenson*, 397 U.S. 436 (1970), Mr. Betancourt argues in his memorandum that "[c]ollateral estoppel is a federal constitutional principle embodied in the double jeopardy clause of the Fifth Amendment to bar relitigation between the same parties in a future lawsuit when an issue of ultimate fact has been determined by a valid and final judgment." (Doc. 7-1 at 12).

Mr. Betancourt alleges that he exhausted this ground in the state court by (1) adopting his co-defendant's pretrial "Motion to Collaterally Estop State from Presenting Facts Contrary to the Facts Determined by Prior Final Judgment and which are Essential Elements of Any Crime Presently Charged (Doc. 11-10, Ex. 1, vol. 20 at 3875), (2) moving to adopt his co-defendant's direct appeal brief, (Doc. 11-29, Ex. 13), and (3) presenting the ground to the United States Supreme Court in a petition for writ of certiorari (Doc. 7-3). The Respondent argues that Mr. Betancourt did not exhaust this ground as a federal claim and that he did not litigate this ground on direct appeal because the ground was raised only in the co-defendant's brief. (Doc. 11 at 12).

The record shows that the state appellate court denied Mr. Betancourt's motion to adopt his co-defendant's appellate brief. (Doc. 11-29, Ex. 15). He did not raise this ground in his own direct appeal brief. Mr. Betancourt's presentation of this ground to the United States Supreme Court in his petition for writ of certiorari does not satisfy 28 U.S.C. §2254 (b)(1)(A), which requires a petitioner to exhaust the remedies available in the state courts. *See, e.g.,*

White v. Klitzkie, 281 F.3d 920, 924 (9th Cir. 2002) (noting that "[a] petition for a writ of certiorari to the United States Supreme Court is simply not an application for state review"). Consequently, because Mr. Betancourt did not present his federal claim to the state court, Ground Two is unexhausted. State procedural rules preclude Mr. Betancourt from returning to state court to present his federal claim in either a second direct appeal or other collateral motion for post-conviction relief. Mr. Betancourt's failure to properly exhaust his federal claim in the state court results in a procedural default.

In his reply Mr. Betancourt does not challenge the Respondent's assertion of procedural default. Moreover, Mr. Betancourt fails to satisfy the cause and prejudice exception to overcome the default. He cannot meet the "fundamental miscarriage of justice" exception because he presents no "new reliable evidence" that he is actually innocent. *Schlup*, 513 U.S. at 327. Because Mr. Betancourt satisfies neither exception to procedural default, Ground Two is procedurally barred from federal review.

Ground Three

Mr. Betancourt contends that the trial judge improperly excluded statements from Dr. Kimberly Daffern and Dr. Marina Kulick, two of the doctors employed by 1st Medical Group, who both gave sworn statements to the State before the criminal trial. Mr. Betancourt alleges that both doctors

"detailed the methodologies by which they diagnosed and treated 1st Medical patients, which established their exercise of independent judgment, and that their medical decisions were entirely uninfluenced by Petitioner." (Doc. 7 at 8). Mr. Betancourt argues that the trial judge's alleged error violated his "due process right to a fair trial." (Id.).

Mr. Betancourt asserts that he exhausted this ground in the state court by moving to adopt the appellate brief of co-defendant Michelle Gonzalez "which expressly raised the issue of the unconstitutional exclusion of exculpatory evidence." (Doc. 7-1 at 19). The Respondent argues that this ground is unexhausted and procedurally barred because Mr. Betancourt did not raise this ground as a federal issue at trial and did not litigate this ground on direct appeal. (Doc. 11 at 18).

Mr. Betancourt failed to present this ground to the state court in his direct appeal brief and his attempt to adopt the co-defendant's appellate brief was unsuccessful. Consequently, he did not exhaust his federal claim in the state courts and cannot return to state court to present his federal claim in either a second direct appeal or other collateral motion for post-conviction relief. Mr. Betancourt's failure to properly exhaust his federal claim in the state court results in a procedural default.

In his reply Mr. Betancourt does not challenge the Respondent's assertion of procedural default. Mr. Betancourt fails to satisfy the cause

and prejudice exception to overcome the default and cannot meet the "fundamental miscarriage of justice" exception because he presents no "new reliable evidence" that he is actually innocent. *Schlup*, 513 U.S. at 327. Because Mr. Betancourt satisfies neither exception to procedural default, Ground Three is procedurally barred from federal review.

Ground Four

Mr. Betancourt contends that the trial judge violated his Sixth Amendment right to confront adverse witnesses by denying his motion to strike hearsay statements of the co-conspirators. Mr. Betancourt argues in his memorandum that the trial judge "improperly admitted co-conspirator statements time and again . . . in reliance on the hearsay exception set forth at Florida Statute §90.803(18)(e)" and that "[t]hese evidentiary rulings of the trial court are not only unsupportable under Florida Statute; they also violate [Mr. Betancourt]'s Sixth Amendment right to confront adverse witnesses and are contrary to the Supreme Court's decision in *Crawford v. Washington*, [541 U.S. 36, (2004)]." (Doc. 7-1 at 20).

Mr. Betancourt alleges that he exhausted this ground by "carr[ying] his numerous trial objections through one round of direct appeal." (Doc. 7-1 at 21). The Respondent argues that this ground was not exhausted as a federal question because, although Mr. Betancourt challenged the admissibility of the co-conspirator's statements in

his direct appeal, "[n]either *Crawford* nor any federal case is ever cited in relation to confrontation issues." (Doc. 11 at 22). In his reply Mr. Betancourt does not challenge the Respondent's assertion of procedural default. The record shows that although Mr. Betancourt challenged on direct appeal the trial judge's allegedly erroneous admission of hearsay statements, he argued only a violation of state law and did not assert a federal constitutional violation. (Doc. 11-29, Ex. 8 at 79–91). He neither alleged a federal constitutional claim, nor cited *Crawford* or *Hutchins* or a federal constitutional amendment, nor did he label the claim "federal." Consequently, Mr. Betancourt did not "fairly present" to the state court a Sixth Amendment Confrontation Clause claim. *See Baldwin*, 541 U.S. at 27; *Lucas,* 682 F.3d at 1352; *Preston*, 785 F.3d at 458.

Mr. Betancourt's failure to present his federal Confrontation Clause claim to the state court deprived the state court of a "full and fair opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Boerckel*, 526 U.S. at 845. Consequently, Ground Four is unexhausted and procedurally defaulted because state procedural rules preclude Mr. Betancourt from returning to state court to present his federal claim in either a second direct appeal or other collateral motion for post-conviction relief.

Mr. Betancourt fails to satisfy the cause and prejudice exception to overcome the default and cannot meet the "fundamental miscarriage of

justice" exception because he presents no "new reliable evidence" that he is actually innocent. *Schlup*, 513 U.S. at 327. Because Mr. Betancourt satisfies neither exception to procedural default, Ground Four is procedurally barred from federal review.

Ground Five

Mr. Betancourt contends that "[t]he trial court improperly admitted evidence of collateral crimes, bad acts, and guilt-by-association evidence, in violation of [his] constitutional right to a fair trial and right to a presumption of innocence." (Doc. 7 at 12). He argues that the State presented multiple witnesses who did not know him or have knowledge of the crimes charged "to create a cumulative effect which bolstered the misimpression that every pain center should be presumed to traffic unlawfully in oxycodone and that every person associated with a pain center is engaging in criminal conduct." (Id.). Mr. Betancourt further alleges that "[t]he trial court abandoned its gatekeeping function with regard to the admissibility of expert testimony from persons who could not reasonably be regarded to satisfy the *Daubert* standard which is required by Florida law." (Id.). Mr. Betancourt asserts that "the trial court allowed cumulative prejudicial testimony from experts who offered no scientific basis for their opinions" and that the "State's experts admitted to having no personal knowledge with respect to any of the allegedly unlawful methodologies of 1st

Medical Group." (Id.). In his supporting memorandum Mr. Betancourt asserts as the constitutional bases for this ground the following cases: *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *Taylor v. Kentucky*, 436 U.S. 478 (1978); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Kyles v. Whitley*, 514 U.S. 419 (1995). (Doc. 7-1 at 22).

Mr. Betancourt alleges that he exhausted this ground by presenting it to the state court in his direct appeal brief. The Respondent argues that a claim of cumulative error is unexhausted and procedurally barred because Mr. Betancourt did not raise such a claim in his direct appeal. (Doc. 11 at 25). In his reply Mr. Betancourt does not challenge the Respondent's assertion of procedural default.

The record shows that in his direct appeal brief Mr. Betancourt challenged the trial judge's admission of testimony by expert witnesses under state law. (Doc. 11-29, Ex. 8 at 70–79). He did not present a federal constitutional challenge to the admission of the testimony, nor did he raise a cumulative error claim in the state court, nor did he cite as a basis for relief any of the federal cases he now cites in his federal petition. Consequently, Mr. Betancourt did not "fairly present" a federal constitutional violation to the state court, rendering his cumulative error claim unexhausted. *See Baldwin*, 541 U.S. at 27; *Lucas*, 682 F.3d at 1352. The failure to properly exhaust the federal claim in the state court results in a procedural default. Mr. Betancourt fails to satisfy the cause and prejudice

exception to overcome the default to demonstrate cause and prejudice to overcome the default and cannot meet the "fundamental miscarriage of justice" exception because he presents no "new reliable evidence" that he is actually innocent. *Schlup*, 513 U.S. at 327. Because Mr. Betancourt satisfies neither exception to procedural default, Ground Five is procedurally barred from federal review.

Ground Six

Mr. Betancourt contends that he "is actually innocent of all charges" and that "a review on the merits is necessary to prevent a fundamental miscarriage of justice." (Doc. 7 at 13). Citing *McQuiggin v. Perkins*, 569 U.S. 383 (2013), Mr. Betancourt argues in his memorandum that his is an "extraordinary case" in which he is entitled to a merits review of his procedurally defaulted grounds because "[n]ot only was the evidence grossly insufficient to prove guilt beyond a reasonable doubt for any charge for which [he] was convicted, the evidence actually proved his innocence." (Doc. 15 at 18). The Respondent argues that Mr. Betancourt "appears to be asserting a technical or legal innocence, not actual innocence" and that "by simply re-hashing all his other claims, Petitioner fails to specifically cite or set forth any new, reliable evidence demonstrating his actual innocence." (Doc. 11 at 26–27). The Respondent further argues that this "conclusory

claim amounts to another cumulative error claim." (Id. at 27).

A "fundamental miscarriage of justice" occurs in an extraordinary case, where a constitutional violation has resulted in the conviction of someone who is "actually innocent." *See Henderson*, 353 F.3d at 892. Actual innocence is not an independent claim; rather, it is the "gateway" through which a petitioner must pass before a court may consider a defaulted constitutional claim. *Schlup*, 513 U.S. at 315. If a petitioner cannot show cause and actual prejudice to overcome the procedural default of a federal claim, he may still be able to circumvent the default if he can demonstrate that the failure to consider the merits of the claim would work a fundamental miscarriage of justice, resulting in the continued incarceration of one who is actually innocent. *See McQuiggin*, 569 U.S. at 387; *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010). To qualify under this exception, a petitioner must show that, in light of new evidence, no reasonable juror would have convicted him. *See McQuiggin*, 569 U.S. at 385 (quoting *Schlup*, 513 U.S. at 327). "Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation" will not allow a federal court to review the procedurally defaulted claim under the fundamental miscarriage of justice exception. *Schlup*, 513 U.S. at 316. This exception requires a petitioner to demonstrate actual innocence, not just legal innocence. *See Rozzelle v. Sec'y, Fla. Dep't of*

Corr., 672 F.3d 1000, 1013 (11th Cir. 2012) (*per curiam*).

Mr. Betancourt has not offered any new, reliable evidence showing his actual innocence and the trial record shows otherwise. Accordingly, he has not established that the fundamental miscarriage of justice exception applies to excuse the default of the federal claims raised in Grounds One through Five of his federal petition. Because Mr. Betancourt has not shown that the procedural default should be excused, each ground in his federal petition is barred from federal habeas review.

Accordingly, Mr. Betancourt's amended petition for the writ of habeas corpus (Doc. 7) is **DENIED**. The Clerk must enter a judgment against Mr. Betancourt and **CLOSE** this case.

DENIAL OF BOTH A CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS

Mr. Betancourt is not entitled to a certificate of appealability ("COA"). Under Section 2253(c)(1), a prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. Rather, a district court must first issue a COA. Section 2253(c)(2) permits issuing a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a COA, Mr. Betancourt must show that reasonable jurists would find debatable both the merits of the underlying claims and the procedural

issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because he fails to show that reasonable jurists would debate either the merits of the claims or the procedural issues, Mr. Betancourt is entitled to neither a COA nor leave to appeal *in forma pauperis*.

A certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Mr. Betancourt must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE and ORDERED at Tampa, Florida, on March 31, 2022.

WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11428-A

JORGE MARC GONZALEZ-BETANCOURT,
Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Opinion Filed: August 15, 2022

Jorge Gonzalez-Betancourt moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2254 petition. To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Gonzalez-Betancourt has failed to make the requisite showing, his motion for a COA is DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11428-A

JORGE MARC GONZALEZ-BETANCOURT,
Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
Respondents-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

Opinion Filed: September 21, 2022

Before: WILSON and LUCK, Circuit Judges.

BY THE COURT:

Jorge Gonzalez-Betancourt has filed a motion for reconsideration of this Court's August 15, 2022, order denying him a certificate of appealability on appeal from the denial of his 28 U.S.C. § 2254 petition. Upon review, Gonzalez-Betancourt's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO: 22-11428-A

JORGE MARC GONZALEZ-BETANCOURT,
Petitioner-Appellant,
Vs.
SEC'Y, FLORIDA DEPT. OF CORRECTIONS,
Respondent-Appellee.

PETITION FOR PANEL'S RECONSIDERATION

Petitioner-Appellant, Jorge Gonzalez-Betancourt, Pro Se pursuant to Eleventh Circuit Rule 35(a) respectfully petitions the Court for Reconsideration, and in support of thereof states as follows:

With respect, the panel's August 15, 2022 decision incorrectly concluded that Jorge Gonzalez-Betancourt was not entitled to the issuance of a Certificate of Appealability (Hereinafter "COA") presumably, because he failed to *"show that reasonable jurist would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise."*

Jorge Gonzalez-Betancourt respectfully submits that jurists of reason would find it debatable whether his petition states valid claims of the denial

of constitutional rights and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress' requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the "substantial showing" standard provided in *Barefoot v Estelle*, 103 S Ct 3383 (2000). *See Slack v. McDaniel*, 120S.Ct. 1595 (2000)

PETITION FOR PANEL RECONSIDERATION

Importantly, the panel overlooked or misapprehended the vital role the writ of habeas corpus plays in protecting constitutional rights, which is why Congress set forth preconditions for issuance of a COA under § 2253(c) without expressing any intention to allow "procedural errors" to bar vindication of substantial constitutional rights on appeal.

The panel's decision to deny Mr. Gonzalez-Betancourt a Certificate of Appealability overlooked controlling points of law outlined in *Slack v. McDaniel*. Id. Indeed, in *Slack*, the Supreme Court rejected the State's argument that *"... [n]o appeal can be taken if the District Court relies on procedural grounds to dismiss the petition...and that only constitutional rulings may be appealed" Slack v. McDaniel*, 120 S.Ct. at 1603. The Court concluded that, *"[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that*

jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 1603.

Additionally, the panel overlooked the Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct 1309 (2000), where the Court concluded that "initial-review collateral proceedings are the equivalent of a prisoner's direct appeal." Consequently, an attorney's errors during an appeal on direct review may provide cause to excuse procedural default; for if the attorney is ineffective, the prisoner has been denied fair process and the opportunity to comply [even] with the State's procedures and obtain an adjudication on the merits of his claims. The district court acknowledged that appellate counsel failed to ground his claims in federal law, thereby "defaulting" on the claims Mr. Gonzalez-Betancourt presented in his habeas petition. In *Powell v. Alabama*, 53 S. Ct. 55, (1932), the Supreme Court opined that, "[the defendant requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Therefore, because the state collateral proceeding was the first place to challenge his conviction on grounds asserted in his habeas petition, Mr. Gonzalez Betancourt contends that the panel overlooked or misapprehended that he has a constitutional right to an effective attorney in the collateral proceeding.

WHY PANEL SHOULD RECONSIDER

In *Slack v. McDaniel*, 120 S.Ct. 1595 (2000), the United STATES SUPREME COURT MADE CLEAR THAT, WHEN THE DISTRICT COURT DENIES A HABEAS PETITION ON PROCEDURAL GROUNDS WITHOUT REACHING THE PRISONER'S UNDERLINYING CONSTITUTIONAL CLAIMS, A COA SHOULD ISSUE (AND AN APPEAL OF THE DISTRICT COURT'S ORDER MAY BE TAKEN) IF THE PRISONER SHOWS, AT LEAST, THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE PETITION STATES A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT, AND THAT JURISTS OF REASON WOULD FIND IT DEBATABLE WHETHER THE DISTRICT COURT WAS CORRECT IN ITS PROCEDURAL RULING.

DISTRICT COURT ERRED WHEN IT CONCLUDED THAT IT WAS PROCEDURALLY BARRED FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIMS

The panel overlooked or misapprehended the "fundamental" issue presented on appeal: What standard is to be applied in a federal habeas corpus proceeding when the claim is made that a prisoner has been convicted in a state court upon insufficient evidence?

In the case of *In re Winship*, 90 S Ct 1068 (1970), the Supreme Court made clear that "[T]he Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." Moreover, in *Jackson v. Virgina*, 99 S.Ct. 2781

(1979), the Supreme Court that (1) "...[a] challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a constitutional claim"; and (2), "...convictions based on evidence insufficient to satisfy an element of a crime under state law raises a federal constitutional issue cognizable by habeas."

The district court erred when it concluded that it was prohibited from considering the merits of Mr. Gonzalez-Betancourt's claims, because he had procedurally defaulted. Under 28 USC § 2254, a federal court must entertain a claim by a state prisoner that he or she is being held in "custody in violation of the Constitution or laws or treaties of the United States." Under the *Winship* decision, collateral estoppel in cases is applicable to the states through the Fifth and Fourteenth Amendments.

Respectfully, the panel has overlooked the fact that Mr. Gonzalez-Betancourt has demonstrated in each of claims presented in habeas petition an entitlement to federal review regarding the constitutionality of his detention. Indeed, the undisputed testimony from each relevant witness during Gonzalez-Betancourt's trial only served to confirm that not only was he "actually innocent", but factually.

Here, the record is undisputed. Each witness that took the witness stand testified that Gonzalez-Betancourt

never did anything to aid, abet, or assist them by word or act to commit any trafficking offense for which he was convicted and sentenced. This case truly represents the quintessential epitome of a Miscarriage of justice.

CONCLUSION

WHEREFORE, Mr. Gonzalez-Betancourt respectfully requests that the panel grant Reconsideration to Review its previous Judgment and order the Respondent to certify the cause of Mr. Gonzalez-Betancourt's detention. The panel overlooked and misapprehended controlling points of law relevant to this case.

Dated: September 1, 2022.

Respectfully submitted,
/s/ Jorge Gonzalez-Betancourt
DC #486637
DeSoto Correctional Institution Annex
13617 Southeast Highway 70
Arcadia, Florida 34266-7800

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Motion has been furnished to: Sonya Roebuck Horbelt & Peter Nicholas Koclanes, Office of the Attorney General, 3507 E. Frontage Rd., Ste 200, Tampa., Florida 33607-7013 by enclosing said document in an envelope with proper postage affixed, and placing the aforesaid in the hands of DeSoto C. I. Annex's Officials for mailing this 1st day of September 2022.

APPENDIX E

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,
Vs.
MICHELLE GONZALEZ, MAUREEN ALTMAN, JORGE MARC GONZALEZ, ET AL.,
Defendants.

CASE NO: 2010-CF-019740
COURTROOM 1, TAMPA, FLORIDA
MARCH 20, 2014

TRIAL PROCEEDINGS BEFORE THE HONORABLE CAROLINE TESCHE, HILLSBOROUGH COUNTY CIRCUIT JUDGE

* * *

MR. DIRKS: Well, my proposal, Your Honor, is to essentially refer to Florida statute 893.05, repeat that sentence.

THE COURT: Which is?

MR. DIRKS: That is, a practitioner, in good faith and in the course of his or her professional practice only, may prescribe a controlled – we didn't put it in the other part – controlled substance, or the practitioner may cause the same – I don't know if we need that or not – to be administered by a licensed nurse or intern practitioner may cause the same – I don't know if we need that or not – to be administered by a licensed nurse or intern practitioner under his or her direction or supervision only. Then as –

THE COURT: And that is on page 21, to replace those two paragraphs; is that your suggestion or request?

MR. DIRKS: Well, that would be the first sentence.

THE COURT: Okay.

MR. DIRKS: The next sentence would be if the defendants want that good faith definition that they want, then we put that in. And then, after that, you describe the objective standard in the course of professional practice because if we don't do that, it is not an objective standard.

THE COURT: And what is the objective standard?

MR. DIRKS: Well, the language is that – I don't have a quote on it now. That level of care that – I mean, it's – I don't have it with me right now, Judge.

THE COURT: Okay. I understand. See, the problem here is that – the problem is, is that you all have been litigating extremely vigorously, particularly today, but this whole week. And we are at this last moment of making a determination and everyone's extremely tired, but there still is a lot more to do and these instructions, they need to be right.

I want to give – and I don't want to just go back and sort of piecemeal because of fatigue, pull out things that we have previously discussed. However, I don't want to get into a lot of re-litigation or spend a lot of energy in a manner that is not particularly effective. So I had expected that you all could stipulate, but that's okay if you can't. But I want to manage this in a way – and I want any objections to be preserved, but I want to manage this in a way that

gives me a coherent decision to make in order to deal with both of these instructions. All right? My suggestion is we can do it a couple of ways We can reconvene first thing in the morning a little bit earlier tomorrow morning and I can hear the State's proposal for these two pages and the defense's proposal for these two pages and we can go through and I'll make determinations and give what I think is the right thing to give. Okay? Or there can be a stipulation. But right now, we're kind of now expanding this charge conference outside of – you know, beyond where we were when the Court believed we had an understanding about where we were. So, you know, that's the Court's concerns.

We're getting back into the objective/subjective issue. We're kind of re-litigating. We're going over ground that we've already covered. But I agree that we want the instructions to be correct. So the best I can offer right now is more time for you all to come to me with your proposals to clarify this language, or the other alternative is me just to go through with the court reporter and figure out what my previous rulings were on all of it, which is the other option. So, you know, I'll take suggestions from you at this time, but I want to instruct the jury tomorrow.

MR. DIRKS: Judge, if I can – if you give me this afternoon and first thing tomorrow morning, I'll have my suggested language.

THE COURT: Okay.

MR. SISCO: Judge, I will – go ahead. I'll let you finish.

MR. DIRKS: And I'll communicate with Mr. Sisco.

THE COURT: All right. Mr. Sisco, what?

MR. SISCO: Well, Judge, I'm looking at the *Tobin* case and the *Tobin* case considered various precedent from around the Eleventh Circuit. And the issue became the defense in that case requested that a subjective analysis be applied to the statement in the usual – for legitimate medical purpose in the usual course of professional practice. That a subjective standard be applied to the whole.

The Eleventh Circuit rejected that, but said, as we have said, the CSA, the Controlled Substance Act, authorizes the distribution of controlled substances by a practitioner so long as the prescription is issued for a legitimate medical purpose and in the usual course of the practitioner's professional practice. And it cites to the 21 Code of Federal Regulations 1306.14.

Because the Controlled Substance Act prohibits the distribution of prescription drugs that is not authorized, a distribution is unlawful if:

1. Prescription was not for a legitimate medical purpose in the usual course of professional practice; or
2. The prescription was not made in the usual course of professional practice.

...

Our decisions in *Williams* and *Merrill* follow this framework. In both cases, the defendants argued that whether a prescription is made in the usual course of professional practice must be evaluated from the subjective point of view... a jury must determine from an objective standpoint whether a prescription is made in the usual course of professional practice. * * *

APPENDIX F

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,
Vs.

MICHELLE GONZALEZ, MAUREEN ALTMAN, JORGE MARC GONZALEZ, ET AL.,
Defendants.

CASE NO: 2010-CF-019740
COURTROOM 1
TAMPA, FLORIDA
MARCH 21, 2014

TRIAL PROCEEDINGS BEFORE THE HONORABLE CAROLINE TESCHE, HILLSBOROUGH COUNTY CIRCUIT JUDGE and JURY

* * *

THE COURT: The Court is adopting the State's argument on the issue of subjective/objective. I do not find the federal that applies in this matter requires a subjective instruction to be provided to the jury under the case law, and that is consistent with what I had ruled previously.

The Court is therefore adopting the State's language to be inserted as it was or is currently written, and it's the language that was previously provided will be replaced with the State's language.

...

THE COURT: But I am going to eliminate "Good faith in this context means good intentions and the honest exercise of professional judgment as to the patient needs, means that the defendant acted in accordance with what we he or she reasonably believed to be proper medical practice." That sentence is omitted. The Court does not believe that that is an accurate reflection of the law and will not therefore read it.

...

THE COURT: Okay. The current paragraph, "If a physician prescribes," and ending in "medical practice," that is going to be eliminated and the State's language is going to be inserted. The only change to the State's language will be, "A physician in good faith and in the course of professional practice only may prescribe a controlled substance."

"The term in good faith and in the course of professional practice is an objective standard applicable to all doctors." That is going to be what will be read in that section. And I understand that is over the objection of the defense; however, that is the Court's determination on the law based on the review of the federal cases and in considering the argument of the attorneys and counsel.

MR. SISCO: Judge, I renew all previous objections and move for a mistrial based upon that. These instructions were accepted by the State. The record demonstrated that they were accepted by the State, and we did closing arguments to this jury based upon those instructions. And so, to change those instructions now after the defense has argued is

irreparably prejudicial to my client and I move for a mistrial on that basis.

THE COURT: What says the State?

MR. DIRKS: Judge, we argued this at length at the beginning of the week. We had a lengthy discussion regarding that. My understanding of the discussion was that the Court determined that it was an objective standard. Mr. Sisco wanted language regarding good faith, as is retained in there. The Court – the jury may consider the good faith, but it was **not going to be a part of the legal standard** that was involved.

...

[THE COURT is now instructing the jury]

THE COURT: If a defendant helps another person or persons commit a crime, then the defendant is a principal and must be treated as if he or she had done all the things the other person did if:

1. The defendant had a conscious intent that the criminal act be done; and

2. The defendant did some act or said some word which was intended to an which did incite, cause, encourage, or advise the other person or persons to actually commit the crime. To be a principal, a defendant does not have to be present when the crime is committed.

...

The defendants have raised the claim of the practitioner's privilege in issuing prescriptions involved in this case. It is not necessary for the State to negative any exemption of exception set forth in this chapter and any information, and the burden of going forward with the evidence with respect to any

exemption or exception is upon the person claiming the benefit of the exemption or exception. A practitioner cannot prescription controlled III, IV, or V narcotic controlled substance for the use in maintenance or detoxification treatment without first being registered as a qualifying physician and notifying the Secretary of Health and Human Services of the practitioner's intent to prescribe controlled III, IV, or V narcotic controlled substances for the use in maintenance or detoxification treatment.

...

There are no specific guidelines concerning what is required to support a conclusion that a physician acted outside the usual course of professional practice and for other than a legitimate medical purpose. In making a medical judgment concerning the right treatment... physicians have discretion... Therefore, in determining whether a physician acted without a legitimate medical purpose, you should examine all of a physician's actions and the circumstances surrounding the same. If a doctor **dispenses** a drug in good faith...then that doctor has...a legitimate medical purpose....You must determine that the State has proven beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice...Put another way, the State must prove as to each count beyond a reasonable doubt that the doctor prescribed the specific controlled substance other than for a legitimate medical purpose, and not within the bounds of professional medical practice. A physician's own methods do not themselves establish what constitutes medical practice. In determining

whether the doctor's conduct was within the bounds of professional practice, you should... consider the testimony of her relating to what has been characterized during the trial as the norms of professional practice. You should also consider the extent to which, if at all, any violations of professional norms your find to have been committed by the doctors interfered with their treatment of patients and contributed to an over-prescription and/or excessive dispensation of controlled substances. You should consider the doctors' actions as a whole and the circumstances surrounding them. A physician's conduct may constitute a violation of applicable professional regulations as well as applicable criminal statutes.

...

In this case, you have heard evidence that these defendants were principals to drug trafficking through prescriptions for controlled substances issued by physicians who held a valid license, medical license, and valid federal controlled substances registration numbers. The defendants have raised as a defense the practitioner's privilege. [They] are not practitioners. None of them are accused of writing any prescriptions in this matter.

In determining whether any particular prescription was illegally written, you may consider the following statements from the Florida Administrative Code regarding standards for the use of controlled substances for the treatment of pain.

...

A physical, in good faith and in the course of professional practice only, may prescribe a controlled

substance. [This is] an objective standard that is applicable to all doctors. That is, the prescription has been prescribed lawfully. Good faith in this context means good intentions and the honest exercise of professional judgment as to the patient's needs. It means the physician acted in accordance with what he or she reasonably believed to be proper medical practice. In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of options. Thus, it would not be legally sufficient to prove a criminal prescription for the State to show that the prescribing physician's conduct constituted medical practice or that they acted negligently. ... If, however, you find that the defense has not proved by a preponderance of the evidence that any of the prescriptions issued in the remaining counts were not criminal, then you must next determine whether the defendants acted as a principal to the issue of that criminal prescription.

* * *

APPENDIX G

Fifth Amendment to United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence 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.

* * *

APPENDIX H

Fourteenth Amendment to the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

APPENDIX I

21 U.S. CODE §841(a) Unlawful acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

APPENDIX J

Fla. Stat. §893.135 Trafficking; mandatory sentences; suspension or reduction of sentences; conspiracy to engage in trafficking.

(1) Except as authorized in this chapter or in chapter 499 and notwithstanding the provisions of s. 893.13:

(c)2. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of hydrocodone, as described in s. 893.03(2)(a)1.k., codeine, as described in s. 893.03(2)(a)1.g., or any salt thereof, or 28 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in hydrocodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 28 grams or more, but less than 50 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 50 grams or more, but less than 100 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of $100,000.

c. Is 100 grams or more, but less than 300 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $500,000.

d. Is 300 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory

minimum term of imprisonment of 25 years and shall be ordered to pay a fine of $750,000.

3. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 7 grams or more of oxycodone, as described in s. 893.03(2)(a)1.q., or any salt thereof, or 7 grams or more of any mixture containing any such substance, commits a felony of the first degree, which felony shall be known as "trafficking in oxycodone," punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

a. Is 7 grams or more, but less than 14 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years and shall be ordered to pay a fine of $50,000.

b. Is 14 grams or more, but less than 25 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years and shall be ordered to pay a fine of $100,000.

c. Is 25 grams or more, but less than 100 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall be ordered to pay a fine of $500,000.

d. Is 100 grams or more, but less than 30 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 25 years and shall be ordered to pay a fine of $750,000.

...

(2) A person acts knowingly under subsection (1) if that person intends to sell, purchase, manufacture, deliver, or bring into this state, or to actually or constructively possess, any of the controlled

substances listed in subsection (1), regardless of which controlled substance listed in subsection (1) is in fact sold, purchased, manufactured, delivered, or brought into this state, or actually or constructively possessed.

...

(5) Any person who agrees, conspires, combines, or confederates with another person to commit any act prohibited by subsection (1) commits a felony of the first degree and is punishable as if he or she had actually committed such prohibited act. Nothing in this subsection shall be construed to prohibit separate convictions and sentences for a violation of this subsection and any violation of subsection (1).

(6) A mixture, as defined in s. 893.02, containing any controlled substance described in this section includes, but is not limited to, a solution or a dosage unit, including but not limited to, a gelatin capsule, pill, or tablet, containing a controlled substance. For the purpose of clarifying legislative intent regarding the weighing of a mixture containing a controlled substance described in this section, the weight of the controlled substance is the total weight of the mixture, including the controlled substance and any other substance in the mixture. If there is more than one mixture containing the same controlled substance, the weight of the controlled substance is calculated by aggregating the total weight of each mixture.

* * *

APPENDIX K

21 CFR §1306.04(a) Purpose of issue of prescription.

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

* * *