No. 22-5645

SUPREME COURT OF THE UNITED STATES

John Gay,

Petitioner,

vs.

State of Florida,
SECRETARY DEPARTMENT of CORRECTIONS
Respondent.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeal, Atlanta Ga., Northern District of Florida, Pensacola Florida

PETITION FOR WRIT OF CERTIORARI

STATE RESENTENCE: February 23, 2018
Per GAY V. STATE 217 So.3d 1191 (1st 2017)

John Gay
DC# 120716
Sumter Correctional Institution
9544 County Road 476 B
Bushnell, Florida 33513
Pro se

John Gay

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#3) PATTERSON V. FLA. SEC'TAY 812 F.3d 885 (11TH CIR. 2016)

I. JURISDICTION

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

The date on which the United States Court of Appeals decided my case was December 3, 2021. Eleventh circuit, Atlanta

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

[X] A timely petition for rehearing was denied by the United States Courts of Appeals on the following date: April 22, 2022, and a copy of the order denying rehearing appears at Appendix A. Exhibit A

[X] An extension of time to file the petition for a writ of certiorari was granted to and including 4/22/2022 (date) on _____ (date) in Application No. ____ A _____. Extention for Rehearing due to Institutional Flooding and Return of Inmate Population Dec. 4, 2021
The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was August 19, 2022. A copy of that decision appears at Appendix B.

[ ] A timely petition for rehearing was thereafter denied on the following date: multi denials from 2016-2022, and a copy of the order denying rehearing appears at Appendix B.

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

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

MANY State motions, orders, Appeals were filed on these Issues Between 2016-2022, Green v. Fla. sec'tay Lexis 240692 were complied with (See attached Orders Exhibit B)

II. TABLE OF AUTHORITIES CITED

TABLE OF STATE AUTHORITIES CITED

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STATUTES AND RULES

III. QUESTIONS PRESENTED

Issue One:

How many State Court orders must Mr. Gay obtain after/during Resentence and new Judgment before the issues are *res judicata* and the State Courts were given "full opportunity" to correct errors before filing habeas corpus as required by Green v. Sec'try, LEXIS 240692.

(see vast array of State Court orders)

Issue Two and Three:

Does the Court still recognize "constructively amending" the charging information when the Court gives an uncharged jury instruction [T.T. pg. 382 Ln 12-17] on States' uncharged theory, when the State's closing argument connects *F.S. 800.04* element language to a capital offense [T.T. pg 416, Ln 20-24, pg. 428, Ln 19-25, pg. 428 Ln 20-24] that sexual organ or finger could be *F.S. 794.011* by "union with buttcrack." See U.S. v. Castro, 89 F.3d 1443 (11th Cir. 1996); Jacobs v. State, 184 So.2d 711 (1st 1996); Gill v. State, 586 So.2d 471 (4th 1991); Holmes v. State, 842 So.2d 187 (2d 2003). The signed statement does rise to a recantation of 1989 by former child witness/victim of events that occurred to him and he witnessed happen to his childhood friend, J. Salter, at least to warrant an evidentiary hearing. Further, it is unreasonable to claim that Mr. Gay did not show due diligence by trying to obtain such statement of a child by the prisoner serving 45 years prison sentence for offenses against that child, who is now an adult firefighter/EMT. [Such claim would open flood gate for offenders to now contact minor victims of the offenses for which they are charged.]

Issue Four:

Does 2018 Resentence, new Judgment of case # 89-5930 start timetable under Magwood (S.Ct.) Patterson (11th Cir) to address ineffectiveness of trial counsel for failing to advise of the possible sentence he faced rejecting pretrial plea [receiving a non-parolable life sentence] in which the Resentenced #89-5930 was one of seventeen all inclusive plea offer of 25 years.

Issue Five:

> Access to the Courts means more than just being able to file, it must give a meaningful review using the Standard of Law which governs the facts and matters addressed within the pleading [example, raising a search seizure issue and being denied under Roe v. Wade], that State Court used an inapplicable standard, Brooks, to address his invalid departure sentences. After correcting an original 1990 scoresheet error, the 2018 rejected its duty by asserting a non-applicable case Brooks as harmless error when the reason for departure is invalid *F.S.3.701(d)(12).*

Issue Six:

> Eleventh Circuit Justices take exception to this United States Supreme Court's decision in Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). The Eleventh Circuit under Chief Judge William H. Pryor does not accept any *pro se* pleadings as meeting the acceptable standard.

IV. CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution affords protections to a Defendant being navigated thru the criminal justice system which identifies his legal counsel as his mouth piece and thereby places his constitutional right to Life and Liberty in his counsel's hands under Strickland v. Washington, 104 S.Ct. 2052 (1984).

Further, Mr. Gay's Fifth Amendment rights were denied him when the Trial Court acknowledged it was departing from the charged Information by adding uncharged theory (*Jury Inst. 2-B*) so the State could bring in elements not part of the charged statute. The State brought *F.S. 800.04* language as part of charge *F.S. 794.011* offense.

Mr. Gay is being denied his Sixth Amendment rights when counsel failed to advise of the non-parolable Lifes he faced should he turn down the pretrial plea.

Further denial of access to access to the Court and be heard on the Standards of Law for which were raised by the facts within the pleading. He is serving non-parolable Lifes on invalid departure sentences where the Court is denying relief by using cases which clearly state (4) four times that the case does not apply to departure sentences.

Mr. Gay has no other Court to turn to hear the facts of his case and use of the proper Standard of Law.

V. REASONS FOR GRANTING THIS PETITION

Issue One:

For Mr. Gay's years of conviction, he has fought his case, he has had few successes, and mostly rejections. The Courts, regardless of fact or law, seem intent on protecting the conviction rather than legal rulings.

Mr. Gay was resentenced February 2018 on #89-5930, which lead to the issues below, which were raised after the 2016 first reversal.

Mr. Gay, should the Court see fit to grant relief, would have his whole case and sentence restructured in a meaningful way to freedom.

a). Mr. Gay was/might have been convicted of a capital offense *F.S. 794.011* under the element and language of a first degree felony, *F.S. 800.04*. Due to the Court giving an uncharged Jury Instruction which he admits [T.T. pg. 382, Ln 12-17], the State gave the wrong element of the charge and broke his promise to the Judge [T.T. pg. 381, Ln 11-13]. He connected "union with penis" one-in-the-same as

"union with object," he did not limit his closing as promised and tried to convince everyone the word "butthole" was used. [T.T. pg. 241, Ln 21-25, pg. 242 Ln 10-17 pg. 252, Ln 10-19, pg. 378, Ln 4-5, pg. 427, Ln 3-4].

b). Further, even if contact between object and anus occurred without of discomfort, or pressure, would be fondling *F.S. 800.04*, a first degree felony, not attempted sexual battery. The Court and State maintain all is well, we got the conviction. The same as going to the dentist to have a tooth pulled and leaving with only one leg. After all, SOMETHING was going to be removed.

Its cheating at a game and claiming victory which loses direction of the intent and purpose of the Courts and State prosecutors.

Mr. Gay, Justice, and the Law deserves the Jury Instructions, the State closing arguments to be vacated. Anything less would be a constitutional violation of the legal process.

Issue Two:

c.) M. Yeager deserves to be heard by the Court to hear and decide whether what he knows constitutes a recantation, and for him to learn his past statements made as a child in 1989 caused Mr. Gay to be sentenced to 45 years. Under the accepted contingency of due diligence, the Court and State is saying "It's okay for Mr. Gay to start contacting the people named in his charging information." Would the Court, even the State accept this?

M. Yeager's March 31, 2017 statement is totally consistent with two other witnesses, with claims Mr. Gay has made all along.

Issue Three:

d.) If Mr. Gay would have been fully advised to the sentences he faced if he rejected the pre-trial plea, he would have done the only smart thing and accept the plea. There is a big difference between a life sentence with parole after 25 years vs. non-parolable Life.

Issue Four:

e.) Mr. Gay brought law specific issues, Mr. Gay and the Law deserves to be heard on the legal standards that govern those facts and issues.

Mr. Gay has departure sentences [S.T. pg. 41-42] however, the Court cites Brooks v. State, which (4) four times says "except a departure," which means Brooks does not apply to departures. After correcting an error on a scoresheet "the Court must revisit his reason for departure." At that time Mr. Gay could show that the reason for departure is invalid, *F.S. Rule 3.701(d)(12)* only allows a capital conviction to be good reason for departure "if" the capital and departure convictions "are from the same criminal episode." Mr. Gay's are not. Mr. Gay asserts the Court should do the same thing it did at February 2018, and abandon departure and sentence to a mid-guideline sentence, which it did on #89-5930, Feb, 2018.

VI. STATEMENT OF THE CASE

Issue One: (See Exhibit B)

> Mr. Gay obtained a vast amount of State Court orders, in every effort to give the State a chance to correct its errors (See) Green v. Sec'y, Federal LEXIS 240692.

How many chances, pleadings, State Court orders must be filed and issued before the issue becomes *res judicata* and be able to proceed to next level court?

Under founded accepted law of:

> Green v. Sec'y, LEXIS 240692 Nov 20, 2018: The AEDPA requires that a Petitioner exhaust all State remedies before seeking relief on federal claims, see *28 U.S.C. § 2254(b)(1)(A).* To satisfy the exhaustion requirements, a Petitioner {2018 U.S. Dist. Lexis 17} must fairly present federal claims to the State Courts to give the "opportunity" to pass upon and correct alleged violations of its prisoners federal rights.

In attached Exhibit B, this Court can easily see the vast amounts of court orders on the issues raised here, all were appealed.

Under State court, rules prohibit repeated second and successive pleadings and even seek prison level punishment:

> *944.279 F.S.* and Florida Department of Corrections rules; Ponton v. Willis, 172 So.3d 574 (1st 2015) explaining that a Spencer order was not required before referring the inmate for disciplinary action based upon frivolous filing. See Carroll v. State, 192 So.3d 525, 526, 527 (1st 2016); Jefferson v. State, 159 So.3d 938 (3d 2015); Concepeion v. State, 944 So.2d 1072 (3d 2006).

Mr. Gay believed that he brought the issues, Court ruled, that order was appealed, that to bring the same issue, same topic simply under a different title would have been redundant.

> Resentence does not restart original conviction errors in State Court, this is federal court exclusive.

At some point, *res judicata*, sets in. O'Neill v. State, 6 So.3d 630 (2d 2009):

> O'Neill claimed that his *Rule 3.850* was timely because it was filed only 30 days after resentencing on count six that occurred on August 29, 2005. However, that resentencing was not the result of his direct appeal proceedings but was a result of a successful motion to correct illegal sentence, which did not effect timeliness of his Rule 3.850 motion. See Joseph v. State, 835 So.2d 1221, 1222 N. 3 (5th 2003)("the two-year limitation is not tolled by other collateral proceedings filed in the trial court, even if a corrected sentence is entered. An illegal sentence may be corrected at any time, and it would make no sense to allow a judgment to be attacked many years after the expiration of the two-year deadline simply because a sentence was corrected pursuant to a *Rule 3.800(a)* motion.

This is contrary to Magwood, and Patterson in federal system State court does not allow original trial errors to be attacked after a later resentence, however federal courts do.

> Magwood v. Patterson, U.S. 320, 332-33, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) and held that "the phase 'second or successive' must be interpreted with respect to the judgment challenged." The Court ruled that "where...there is a new judgment intervening between two habeas petitions, and application challenging the resulting new judgment is not second or successive."
>
> Patterson v. Fla. Sec'y, 812 F.3d 885 (11th. Cir 2016), Patterson here asserted claims related to his initial convictions, and did not contend that there was anything wrong with the new judgment itself.

The State Court will not accept the federal system line of thinking, the Northern District of Florida federal court adopted the State's line of thinking in its report of May 11, 2021.

Mr. Gay's hands were simply tied by State Court rules, the Eleventh Circuit somehow expected Mr. Gay to violate those rules and get by with it. To get the State rulings in Exhibit B was unexpected.

Conclusion

State Court and Federal Court timeframes concerning addressing original court errors after new resentencing are different than Federal Courts. The vast amount of orders in Exhibit B give notice to State Court to correct its errors. "Opportunity" was given in Green.

Issue Two: (See Exhibit C)

> Appellate Counsel was ineffective for failure to argue the Court constructively amending the Jury Instructions to include an uncharged crime, *2-B Florida Sentencing Instructions F.S. 794.011(2).*

Original appellate counsel fell below constitutional level of ineffectiveness by addressing and arguing valid defense preserved by defense counsel, see Strickland v. Washington, 104 S.Ct. 2052 (1984)[1], State court denial, order October 31, 2017 (Ex. B). This issue is best shown by Trial Court's own words:

[T.T. pg. 382 Ln 12-17.]

> **The Court:**...that I would then redefine sexual battery and include at that time paragraph B, but I would not be instructing on the offense as is charged.

Up to this point, Mr. Gay has been denied on this issue pretty much under the context "Jury Instructions" & "charging information aren't important," they are fundamentally given part of the trial process. Eaton v. State, 908 So.2d 1164 (1st 2005).

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[1] Strickland: A Defendant must show that counsel's actions were did not guarantee Defendant his Sixth Amendment right to competent counsel and second, Defendant must show that counsel's actions were so deficient so as to deprive Defendant the right to fair trial that renders the results unreliable.

The question; are charging informations, grand jury indictments, and jury instructions important to the criminal justice process?

Formal Charging Information

Mr. Gay was formally charged with two offenses under *F.S. 794.011,* "union with.." which is *Fla. Jury Instruction 2-A.*

To address the issue first off, this was not a penetration case.

[T.T. pg. 377, Ln 22-25, pg. 378, Ln 1]

> **The Court:** Well, quite frankly considered that based on the evidence, but that's not what it says, because it uses the word only penetration and that absolutely unequivocally stated that did not occur.
>
> [pg. 378, Ln 10-11]
>
> **The Court**: Yes, but there never was any penetration.
>
> The State also acknowledged this was not a penetration case.
> [pg. 378, Ln 10-13]
>
> **The Court:** Yes, but there never was any penetration.
>
> **The State:** That's right, but it could be attempted sexual battery.
> [pg. 379, Ln 3-5]
>
> **The State:**...I would agree with the Court that there is no evidence before this jury that indicated that there was any penetration...
>
> [T.T. pg. 381, Ln 14-19]
>
> **The Defense:** But there is no testimony about penetration. *2-B* requires—*2-B* requires the Judge to give an instruction that says the Defendant committed an act on the victim wherein his anus was penetrated. That is wrong. There was no evidence of penetration, and I object to it.

The State's argument is:

[T.T. pg. 379, Ln 7-12]

> **The State:**...they could find that the Defendant intended to attempt penetration with the finger, as opposed to the penis...

[T.T. pg. 381, Ln 5-8]

> **The State:** any other object would be a finger, would be a bar of soap...

See Roughton v. State, 92 So.3d 284 (5th 2012).

Mr. Gay further argues this in the next issue but hereby address it briefly. Holmes v. State, 842 So.2d 187 (2d 2003) failure to raise issue on appeal that jury instruction concerning attempted sexual battery was fundamental error constituted ineffective of counsel.

> In the present case, above instruction was completely erroneous since attempted union of the finger does not constitute the crime of attempted sexual battery. Also see Palazzolo v. State, 754 So.2d 731 (Fla. 2d 2000).

> Gill v. State, 586 So.2d 471 (4th 1991), the statute is not violated by proof of union with object in absence of penetration, and (2) fundamental error occurred in prosecution for sexual battery upon child where Court instructed that union in the sense of coming into contact was alternative to element of penetration of anus by object.

This part of the issue is best argued/addressed in next issue. The State however connected penis and object during closing despite his promise to the Court and never separates it as a capital or an attempt.

[T.T. pg. 381 Ln 11-13]

Promise:

> **The State:** That's the reason I ask that you give *2-B* under that instruction, then I would just deal with it in closing argument. (limiting *2-B* to an attempt)

[T.T. pg. 416, Ln 20-24]

Broken Promise:

> **The State:**...and one of them went beyond that and told you that, in fact there, was an attempt—not an attempted, but a union on one occasion of the penis with the anus of the child or by some object , and an attempt on another.

[T.T. pg. 428, Ln 17-19]

> **The State:**...that on at least two occasions there was attempted sexual battery the first time and then the second time a little bit further, and this time he had union.[2]

Also see [T.T. pg. 427, Ln 19-25]

Constructively Amending

The State and Federal Courts would not recognize that there is anything called "constructively amending," it does not exist, legally or otherwise to past courts.

Because no one could overcome the Trial Court's own acknowledgment [T.T. pg. 382, Ln 12-17] so pretend it wasn't admitted, pretend the legal violation does exist is what has happened to this point.[3]

The Florida State Courts acknowledge misuse of Jury Instructions and closing arguments as far back as 1966 in:

State:

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[2] The State falsely told the jury the child used the word butthole, the child only used the word butt crack. (no objection).

[3] Problem with Dr. Demarias' testimony see Phillips v. State, 589 So.2d 1360 (1st 1990); Turtle v. State, 600 So.2d 1214; Hopkins v. State, 632 So.2d 1372 (1st 1991) same experts.

Jacobs v. State, 184 So.2d 711 (1st 1966)...the General rule to the effect that a Defendant is entitled to have the charge against him proven substantially as alleged in the indictment or information, and cannot be prosecuted for one offense and convicted and sentenced for another, even though the offenses are of the same general character or carry with them the same penalty.

Federal:

United States v. Castro, 89 F.3d 1443 (11th Cir 1996) [19] "constructive amendment" of an indictment occurs when essential element of offense contained in indictment are altered to broaden possible basis for conviction beyond what is contained in indictment; amendment may occur as a result of erroneous jury instructions or prosecutors' statements.

[20] When constructive amendment occurs, it violates fundamental principles stemming from Fifth Amendment that Defendant can only be convicted for crime charged in the indictment.

[21-22] In determining whether an indictment was constructively amended, we must assess the prosecutor's comment and the Court's instructions "in context" to see whether the indictment was expanded either literally or in effect.

The following federal case law supports and adds to the aforementioned Castro; U.S. v. Behetly, 32 F.3d 503 (11th Cir. 1994); U.S. v. Fern, 155 F.3d 1318 (11th 1998); U.S. v. Keller, 916 F.2d 628 (11th Cir. 1990); U.S. v. Figueroa, 666 F.2d 1375 (11th Cir. 1982); U.S. v. Salinas, 654 F.2d 314 (5th Cir. 1981); United States v. Andrews, 850 F.2d 1557 (11th Cir. 1994); U.S. v. Peel, 837 F.2d 975 (11th Cir. 1988);

U.S. v. Prather, 205 F.3d 1265 (11th Cir. 2000).

Conclusion

The Trial Court, the State, and over defense objection, all parties acknowledge that the jury was going to be instructed on an uncharged offense, another way for the offense to be charged, simply to bring in "contact by another object." *Fla. Stat. 794.011(2)* is not violated by contact with other object. What everyone fails to understand, that other object contact falls to a first degree felony, not even an attempted capital.

This was/is a valid issue that has withstood the legal standard in other cases. Appellate Counsel failed to raise this valid issue and fell below the constitutional standards in Strickland.

The questions before this Court are:

1.) Was Mr. Gay's charging information specific as to "union" and not to include "penetration"?

2.) Does the Court acknowledge the Trial Court admitted it would be instructing the jury on a charge not included in the charging information?

3.) Does the Court acknowledge that the prosecutors did not separate the difference between contact union with "Penis" and/vs. "finger" during closing arguments?

4.) Does the Court acknowledge during Jury Instruction, the Court told the jury he was going to "redefine sexual battery" and not limiting it to

"attempted"?

5.) Can the Court determine if the jury found "contact" was with a "finger" or "penis"?

Mr. Gay seeks the Court to strike the sexual battery, attempted sexual battery instructions, and the prosecutor's damning connection of "penis-finger" closing argument and vacate cases 89-5930 and 89-5931 because the Court used only one instruction on both cases.

Issue Three: (See Exhibit C)

> 1990 acknowledged it was giving uncharged jury instructions so State could bring "union by object" during closing arguments, however, that is not an element of *794.011*.

Mr. Gay was charged with two cases under *794.011*, 89-5930 and 89-5931. 89-5930 was resentenced February 2018. Only one jury instruction was given on these two cases. See denial order October 31, 2017, Ex "B".

At issue is the constitutional violation of being charged with sexual battery *F.S. 794.011(2)*, "union between penis and anus". *Instr. 2-A.*

However, facts became clear there was no evidence or testimony of penetration, and the victim said it could have been a "penis" or "finger" that touched his "buttcrack" [Note: adults used "butthole"]

The State, in order to save his *794.011(2)* convictions, brought up the elements of *F.S. 800.04* as attempted *794.011(2).*

The State's theory "union" between finger, bar of soap, or anything available, would be <u>attempted</u> sexual battery. He convinced the Court to include instruction

uncharged *2-B* with the charged *2-A*, and he would "deal with it during closing," a promise broken.

State Case Law:

Gill v. State, 586 So.2d 471 (4th 1991), fundamental error occurred in prosecution for sexual battery upon child where Court instructed that union, in the sense of coming into contact, was alternative element of penetration of anus by object...no independent evidence of penetration was presented, statute was not violated by proof of anal union with object in absence of penetration...

In Gill; "...because the Court's direction to the Jury highlighted by the prosecution's statement indicting that union was an alternative to penetration, is fundamental error.

In Gill: "...conviction under this statute requires either penetration by or union with a sexual organ or penetration by object...the statute is not violated by proof of union with object in absence of penetration.

Key point of law, which up until now no officer of the Court will acknowledge:

Holmes v. State, 842 So.2d 187 (2d 2003) Trial Court committed fundamental error by allowing jury to find Defendant guilty of "attempted capital sexual battery" if it was proven that his finger "attempted to have union with the victim's vagina, constituted ineffectiveness of counsel, given that the error was compounded by Prosecutor's remarks closing argument that Defendant committed an act upon the victim to which his hand or finger "attempted to penetrate or have union with."

§794.011(1)(h) Fla. Stat. (1995). "[A] Defendant's finger is an 'other object' which must penetrate and not merely have union with the relevant part. See Richards v. State, 738 So.2d 415 (2d 1999).

F.S. 800.04(5)(a) defines Lewd or Lascivious molestation as "intentionally touch[ing] in a Lewd or Lascivious manner the breasts, genitals, genital area or buttocks.

Palazzolo v. State, 754 So.2d 731 (2d 2000)...and the prosecutor "stated that Mr. Palazzolo would be guilty of sexual battery if his finger penetrated or had union with the vagina..." There was fundamental error in this case where the instruction itself was erroneous and whether there were misleading comments made during trial."

Garcia v. State, 143 So.3d 1105 (2d 2014) where a Trial Court fails to correctly instruct on an element of the crime over which there is a dispute and that element is both pertinent and material to what the jury must consider in order to decide if the defendant is guilty of the crime charged or any lesser included offense, fundamental error occurs.

Zwick v. State, 730 So.2d 759 (5th 1999); Sanders v. State, 959 So.2d 1232 (2d 2000), Trial Court committed fundamental error when it instructed the jury on uncharged alternative theory...It was impossible to ascertain whether the jury convicted Defendant on the uncharged theory or the charged offense. Also see Jaimes v. State, 51 So.3d 445 (Fla. 2000); Deleon v. State 66 So.3d 391 (2d 2011);

Figueroa v. State, 84 So.3d 1158 (2d 2012); Eaton v. State, 908 So.2d 1164 (1st 2005); O'Bryan v. State, 692 So.2d 290 (1st 1997).

Federal Case Law

U.S. v. Castro, 89 F.3d 1443 (11th Cir. 1996) "constructively amending" of indictment occurs when essential elements of offense contained in indictment are altered to broaden possible bases for conviction beyond what is contained in indictment; amendment may occur as a result of erroneous jury instructions or prosecutor's statement. Also see U.S. v. Behetly, 32 F.3d 503 (11th Cir. 1994); U.S. v. Fern, 155 F.3d 1318 (11th 1998); U.S. v. Keller, 916 F.2d 628 (11th Cir. 1990).

Mr. Gay has/had a constitutional right for his jury to be properly instructed on the laws and statutes and the elements for those crimes he is charged, as charged.

Mr. Gay was charged and found guilty of charges involving sexual battery and attempted sexual battery of a minor under 12 years of age in violation of *F.S.794.011*, case 89-5930 and 89-5931, which, simply put, requires:

1.) Union of penis or mouth with the anus of the victim, or

2.) Penetration by sexual organ or object, of the child victim.

Mr. Gay's charging information was "union with penis and anus of the child," however the State's case was in trouble. The child used the word "buttcrack," adults used the word "butthole":

[T.T. pg. 238, Ln 24]

Child: A.) He tried to stick it in my buttcrack.

[T.T. pg. 241, Ln 21-25]

The State: Q.)...when he took his, as you described it—or let's use my term, his penis and stuck it in your buttcrack, did he attempt to stick it in your butthole? Do you recall telling me that?

[T.T. pg. 242, Ln 1]

Child: A.) No.

[T.T. pg. 252, Ln 10-14]

The State: Q.)...especially the people of the jury to know whether or not John Gay's penis ever touched your butthole?

Child: A.) No.

The child did connect "union with penis and anal" at times when adults seemed to challenge the child and the child answered only "yes", or "it did." But the child's words were buttcrack. State's solution was to change the wording of the requirements of *F.S. 794.011.* All parties agreed there was no testimony of penetration.

[T.T. pg. 357, Ln 10-18]

The State: Judge, the child's testimony, you know he testified directly that it was the penis and there was some vacillation on cross-examination and vacillation again on direct-examination...

[T.T. pg. 378, Ln 2-9]

The State: I'm talking about go ahead and edit *2-A* to fit the facts,....

[T.T. pg. 379, Ln 2-12]

The State: ...perhaps based upon Mr. Arnolds's (defense) cross-examination that a finger instead of an erect penis was used at that time...

[T.T. pg. 381, Ln 5-8]

The State: Any other object would be a finger, would be a bar of soap or anything available to the Defendant while he was in that shower, and thus would constitute an attempted sexual battery.

[T.T. pg. 381, Ln 11-17]

The State: That's the reason I ask that you give *2-B* under that instruction, and then I would, just deal with it in closing.

(State connected penis and finger other object to union as a violation of *F.S. 794.011*) See [T.T. pg. 427, Ln 18-23] At closing.

(Closing Argument)

The State: ...but he says he remembers two distinct occasions, one of which where he first said penis and later said maybe it was a finger or something that went into his crack, I think that is the term that he used, and another time actually touched (Note: State used crack, not anus).

[T.T. pg. 428, Ln 16-22]

The State: ...that on at least those two occasions there was an attempted sexual battery the first time and then the second time a little bit further, and time he had union...(Note: State does not limit as to "what" touched the child on either charge.)

The mission of the State:

A.) Is it the mission of the State to obtain a conviction at all costs?

B.) Is truth a part of the trial process?

C.) Does the correctness of law apply?

[T.T. pg. 382, Ln 14-17]

The Court:...that I redefine sexual battery and include at that time paragraph B, but I would not be instructing on the offense as is charged.

[T.T. pg. 453, Ln 20-25]

The Court:...act upon the victim in which the sex organ of the Defendant had union with the anus of the victim, or and this is different, that the Defendant committed an act upon the victim in which the anus of the victim was penetrated by an object.

Here is the Court's attempt to limit *2-B* to only attempted sexual battery.

[T.T. pg. 453, Ln 24-25, pg. 454, Ln 1-3]

The Court:...and that is the definition to be used to the attempt to determine if some act toward committing the crime went beyond thinking or talking about it and the other element that I explained to you.

A jury is a layperson at law and who would remember the first explanation of sexual battery or when the Court "redefined" what sexual battery was the second time. In conjunction with the State's union with penis or finger with buttcrack, Mr. Gay is improperly convicted as under Morgan v. State, 146 So.3d 508 (5th 2014).

Conclusion

Trial counsel properly objected to the addition of the uncharged jury instruction, [T.T. pg. 382, Ln 14-17] multiple times, the Court accepted this as an ongoing objection. [T.T. pg. 384, Ln 11-17]

The Court: "I will ask if there are any objections to the instructions as given and at that time you will not have to renew this objection that you have on the record now." (Concerning *Inst. 2-B* and union between object.)

However, trial counsel failed to object to the State prosecutor breaking his promise to the Court [T.T. pg. 381, Ln 11-13] "and I would just deal with it in closing arguments." The State prosecutor violated the fundamental fairness of trial when he broke that promise and did not make a distinctive difference between contact. [T.T. pg. 427, Ln 19-23] "...first said it was a penis and later said maybe it was a finger or something went into his crack." Then in describing sexual battery he only used the word "union" [T.T. pg. 416, Ln 19-26] "was an attempted—not an attempted, but a "union" on one occasion of penis with the anus of the child or by some object." Trial counsel should have objected when the prosecutor said "not an attempted, but a union or by some object." This does not violate *F.S. 794.011*, it is a first degree *F.S. 800.04.* Trial counsel fell below the constitutional standard of Strickland.

Further, appellate counsel fell below constitutional standards in Strickland by not addressing this issue at all. In note: bar members have (7) seven years of formal law teaching, *pro se* defendants are supposed to learn the same degree of law

in (2) years of self-teaching. The Court gave one instruction for 89-5930, and 89-5931. The instruction, State's closing on *794.011* should be vacated.

Issue Four: (See Exhibit D)

> 1.) Does the question and answer prove witness recantation?, and 2.) from what date, starts the time-limit for filing witness statements? Further, how could a defendant show due diligence in obtaining child witness statement?

Mr. Gay knew the 1989/1990 statement of child witness M. Yeager were wrong, and witnesses supported some incorrectness but the child "was" making the claims. See denial order October 31, 2017.

Mr. Gay spent funds from his father's 2016 estate to hire a private investigator to find and question three witnesses. Two refused to speak to the P.I. M. Yeager, now a firefighter/EMT spoke with Inv. Edward Parsley on March 31, 2017.

Inv. Parsley quickly concluded M. Yeager did not know his childhood statements got Mr. Gay 45 years in prison, so was careful not to taint. In 1989, M. Yeager was 8 years old, a friend/guest of J. Salter, the 8 year old son of the woman who Mr. Gay had been in a relationship with. M. Yeager never went anywhere alone, without J. Salter and Abby Salter.

The Question:

Does the question of March 31, 2017 warrant a recant or at least justify a hearing to determine what M. Yeager's remembrance is?

Q.) I don't know if you are familiar with the statutes to this kind of offense, but molesting, fondling, touching will get you fifteen years. Buttcrack handling will get you thirty years. Penetration of any sort...orifice, in the case of a girl, vaginal orifice, any penetration or attempted penetration of a child under twelve years old will get you life. From what I've read of the Court transcript, I don't see the third one happening. My question now is, had you ever seen this type of touching going on?

M. Yeager: A.) Not me personally.[4]

Questions

1.) Does the question involve touching or fondling?

2.) Does "had you ever seen this," preclude M. Yeager's answer from himself being fondled?

3.) Does the question address whether maybe he saw his host J. Salter from being touched while together in shower or lockeroom?

4.) Does the answer that he'd heard that that another friend, W.F. Biggs, was sodomized (false statement from State to families during trial) justify that the fondling/touching charges from M. Yeager are justified or is this hearsay?

[4] Mr. Gay has always claimed the children were lead by police who (lost/never recorded interviews) and hired gun psychologist same as in Phillips v. State, 589 So.2d 1360 (1st 1991), Turtle v. State, 600 So.2d 1214 (1st 1991).

5.) Was there enough information to warrant a hearing?

Timeliness

M. Yeager was 8 years old at the time of offense, only became an adult in 1999, which was well past the time for 3.850 two year limits. Mr. Gay was a prisoner from 1989 until present. M. Yeager's parents [at sentencing] wished for Mr. Gay to get Life in prison because he was "too nice." They would not have allowed Mr. Gay to have contact with M. Yeager. Further, to prevent any State claim of taint, Mr. Gay waited until he had the funds, which came from settlement of his father's estate in 2016.

1.) How could the Defendant of sexual offenses against M. Yeager personally contact him?

2.) How could Mr. Gay hire someone, without funds (until 2016)?

3.) The Court's denial failed to address how Mr. Gay could have sought due diligence? (just masters bold claim)

State Law on Filing Recent Pleadings

Williams v. State, 160 So.3d 938 (5th 2015), the evidence before the Trial Court was that the witness recanted via a statement dated October 7, 2013. The Trial Court improperly ruled that Appellant was required to bring his motion on or before November 9, 2011. Under Florida Rule of Criminal Procedure 3.850(b)(1), Appellant had until October 6, 2015 to bring a postconviction motion alleging witness recantation. The Trial Court summarily denied this claim. See Federal Law: House v. Bell 547 U.S. 518, 532, 126 S.Ct. 2064, 164 L.Ed.2d (2006); Dobbert

v. Wainwright, 539 F.Supp. 1418 (1994); Flauders v. Graves, 299 F.3d 974 (8th Cir 2002).

To prevail on assertion that recantation necessitates a new trial under Quinn standards, the movant must establish that the testimony given by material witness was false, that without the testimony given, the jury might have reached a different conclusion. Perez v. State, 118 So.3d 298 (3d 2013), in this case, because Perez alleged he pled to charges knowing he was innocent...evidentiary hearing was required where the victim recanted and the Defendant pled while "laboring under the assumption that the victim would testify that Appellant had committed the charged acts...

Supporting Witnesses

M. Yeager's 2017 recant is now in line with other witness's statements:

1.) Witness at the U.W.F. pool stated he watched Mr. Gay take photos of M. Yeager and J. Salter while showering but saw no touching;

2.) Janet Salter stated she was home when Mr. Gay returned with her son J. Salter and M. Yeager and there was no showering at her home after returning from U.W.F. pool.

Two Year Time Limit

M. Yeager's 2017 statement rose to a limit that required a hearing and Mr. Gay had 2 years to bring the recanted statement of March 31, 2017, the Trial Court denied the 3.850 motion on October 31, 2017.

This statement would subtract the charges M. Yeager and his statements concerning his host/friend J. Salter whose mother would not allow J. Salter to be interviewed.

Issue Five:

> Mr. Gay had a constitutional right of effective counsel during pre-trial plea where counsel failed to advise that non-capital life sentences were more harsh than capital life sentences.

Mr. Gay was denied his constitutional right to effective assistance of counsel during the pre-trial plea offer stage. Counsel fell below the requirements in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). (See order denial) December 2, 2014, Ex B.

Mr. Gay's Trial Court advised him pre-trial that at trial he faced, the worst, a capital, 25 year minimum before being parole eligible. Counsel never informed Mr. Gay that: 1.) a non-capital Life sentence, was worse than a capital, because non-capital Life in non-parolable, and 2.) that the Court could depart the guidelines, and 3.) that the Court could run sentences consecutive.

Mr. Gay was offered a pre-trial plea of 25 years no mandatory. What Mr. Gay ended up with was 2 capital Life sentences, 3 natural non-parolable Life sentences (one resentenced to 15 year 2018), and over 200 years of consecutive sentences. Lafler v. Cooper, 132 S.Ct. 1376 (2012), requiring not just advice of competent counsel before Defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the Defendant rejects a plea bargain, and stands

on his right to a fair trial. State Law: Cottle v. State, 733 So.2d 963 (Fla. 1999); Alcorn v State, 121 So.3d 419 (2013).

This 25 year plea offer covered: 89-5398, 89-5636, 89-5637, 89-5638, 89-5753, 89-5754, 89-5791, 89-5792, 89-5822, 89-5929, 89-5930, 89-5931, 89-5932, 89-6050, 89-6075, 89-6076, 89-6395.

In Gay v. State, 217 So.3d 1191 (1st May 5, 2017), the Court reversed case 89-5930, a Life sentence, to be resentenced within the statutory limits of 30 years.

Questions Before the Court

Does resentencing in 2018 of case 89-5930, one of the (17) seventeen cases in the all-inclusive pleas offer, activate the time limits under Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010); Patterson v. Florida Sec'try, 812 F.3d 885 (11th Cir. 2016), which both state: resentence from the original sentence constituted as resentencing that substantively changed Defendant's original sentence, and yielded a new judgment even though Defendant's term of Life in prison remained the same. Patterson here asserted claims to his initial convictions, and did not contend that there was anything wrong with his new judgment.[5]

One: Does the resentence and new judgment of case 89-5930, February 2018, open the 25 year plea offer issue on the (17) seventeen cases, which 89-5930 is one of the (17) seventeen cases?

[5] Mr. Gay did not know, nor does he still really grasp how a non-capital Life in 89-5398 (x 2 ct.) could carry a worse sentence than 89-5931, a capital Life, which is parolable, 89-5398 is not a parolable Life. Counsel had informed him, a capital Life was the worst he faced.
Not until April , 2013, when Mr. Gay saw the Parole Examiner was this explained.

Two: Does the Parole Examiner Meeting, April 2013, with Mr. Gay, and explaining the effect of the non-parolable, non-capital Life sentences and the departure consecutive sentences, invoke the date of newly discovered evidence under Florida state law: O'Bryan v. State, 765 So.2d 745 (1st 2000), the denial of his sixth claim that his plea had been involuntary entered because he had been affirmatively misadvised by the prosecutor and defense counsel of the range of possibilities available at the time...at no point during the entire plea and sentencing hearing..., did the Trial Court ever explain to Appellant the possible sentence...was a term of imprisonment not exceeding 40 years.

Hope v. State, 508 So.2d 425 (1987), Hope is not disposed of a untimely by the Bates analysis as he alleged he did not learn of the misadvise until August 2003.

Highsmith v. State, 493 So.2d 533 (2d 1986), in fact, Highsmith states he remained unaware he was serving a non-parolable sentence until the Parole Commission rejected a hearing examiner's recommended release date for that reason. If this is true and Highsmith otherwise felt he had no reason to appeal the conviction, this type of error could go undiscovered until long after the time for appeal had expired.

This is the same effect as Mr. Gay. He was told before he rejected the pre-trial plea of 25 years that he was facing 2 parolable Life sentences 89-5930 (resentenced in 2018) and 89-5931, but was never informed he faced non-parolable Life sentences or departures. Until the April 19, 2013 meeting with Parole Examiner, then Mr. Gay started filing.

Conclusion

Does learning from the Parole Examiner April 19, 2013, that Mr. Gay had (89-5398 x2 ct) non-parolable Life sentences invoke the time limits from the date of the April 19, 2013 hearing/meeting?

Issue Six: (See Exhibit E)

> After correcting an original 1990 scoresheet error, the 2018 Court rejected its duty by asserting a non-applicable case Brooks as harmless error when the reason for departure is invalid *F.S.9.701(d)(12).*

In 1990, the State Court sentenced Mr. Gay to departure sentences on a multi charged, multi case scoresheet. See order denial and May 24, 2017 and May 8, 2018 Ex. B.

February 2018 the Court corrected a 72 point 1990 scoresheet error, changing the sentencing cell. May 2018,the State Circuit Court denied claim that "since the scoresheet was corrected, law required the Court to resentence the departure sentence and that a resentenced Mr. Gay could prove that the reason for departure was invalid. The Court denied Mr. Gay's May 8, 2018, citing Brooks v. State, 969 So.2d 238 (Fla. 2007), "could have,"..."would have" resentenced to the same sentence. The Court is wrong on all aspects.

Resentence Required on Corrected Scoresheet

The Court, May 8, 2018, cited "Brooks" as a reason for denial, this is improper. (4) Four times, "Brooks" case law states "except a departure" in application of "could have" resentenced the same. "Brooks" in its own words is not the standard of law for departure sentences.

When the 2018 Court corrected a 72 point scoresheet error at resentence on case 89-5930, the Court was required by law to resentence under Garza v. State, 518 So.2d 978 (2d 1988); Davis v. State, 493 So.2d 82 (1st 1986); Rubin v. State, 697 So.2d 161 (3d 1997), "we agree with Appellant that even if the Trial Court intended to impose the maximum sentence, Appellant was entitled to an accurately prepared scoresheet from which the Trial Court could depart only if it provided a clear and convicting reason"..."a Trial Court must have the benefit of a properly prepared scoresheet before it can make a fully informed decision on whether to depart from the recommended guideline sentence."

State Standard of Law

A Court must know from what sentence guidelines it is departing. Brooks does not allow for this and Brooks clearly states it does not apply to departure sentences.

Invalid Departures

All cases involve the fact that valid reasons for departure can be applied. However, Mr. Gay's departures are invalid. See sentencing transcript pg. 41-42 and written reason for departure. The 1990 sentencing court used:

Case #89-5931 – A capital conviction (a 1988 information offense)

To depart on: Case #89-5398 2x ct 1st degree PBL (Sept 1989 information offenses).

Case #89-5930 a 1st degree (1988) resentenced 2018.

Remaining cases run consecutive as departures

Florida sentencing law *Rule 3.701(d)(12)* regarding use of capital to depart the guidelines:

> *Rule 3.701(d)(12)*: a sentence must be imposed for each offense. However, the total sentence cannot exceed the total guideline sentence unless a written reason is given. Where the offender is being sentenced for a capital felony and other non-capital felonies that arose out of the SAME criminal episode or transaction, the Court may impose any sentence authorized by law for the non-capital felonies.

All Mr. Gay's convictions are separate from capital #89-5931, hence the different case numbers. Further #89-5931, the capital, is a 1988 offense involving W.F. Biggs and 89#-5398 departure is a September 1989 case x2 ct, involving J.M. Young and J.B. Bass.

The reason for departure is invalid, which is the reason for the recent circuit court violating the law. The circuit court even went so far as to wrongly say Mr. Gay was challenging that a Life sentence for a capital offense was invalid. Mr. Gay NEVER said that, it was the Court's own effort at confusion.

On a Federal level, Mr. Gay challenges that he is denied access to the Court by being denied to be heard on the standard lay of the land for which address the issues he raised. Brooks states it does not affect departure sentences, but the oath of office is violated by not following the law.

Conclusion

Mr. Gay's capital conviction is legally and physically separate from the sentence it was used to depart, therefore *Rule 3.701(d)(12)* is invalid reason for departure.

Entering the new scoresheet after correcting 1990 72 point error, the Court is required to go back and resentence as to Garza, Davis, and Rubin. The Court

resentenced 89-5931 to a mid-guideline sentence of 15 years in 2018. He abandoned departures, so should he do so on 89-5398 x2 ct. and consecutive sentencing. Mr. Gay should be resentenced to a guideline sentence the same way the Court did February 2018, and abandoned departures.

Issue Seven:

> Eleventh Circuit Justices take exception to this United States Supreme Court's decision in Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010). The Eleventh Circuit under Chief Judge William H. Pryor does not accept any *pro se* pleadings as meeting the acceptable standard.

Mr. Gay respectfully addresses an issue which is rather unkindly; however he believes it has merit to be considered as a whole in the trier of facts. Mr. Gay fully believes he has exceeded the plenteous level of State Court orders to satisfy any requirements (See Green v. Florida Sec'try, LEXIS 240692 (Nov. 20, 2018). However, the federal courts have chosen to overlook these state court order and falsely claim Mr. Gay has not exhausted state remedies. This is totally incorrect.[6]

Judge Jill Pryor, kinswoman to the Chief Judge William H. Pryor, who was outspokenly harsh of this United States Supreme Court's ruling in Magwood, gave a vocal dissent in Patterson v. Florida Sec'try, 812 F.3d 885 (11th Cir. 2016). So.2d:

> Finally, to the extent that Judge Pryor is suggesting that we are in some way trying to undermine AEDPA, such an accusation is as disappointing as it is wrong...faithfully apply AEDPA and Magwood...we believe we have accomplished that task, Judge Pryor's protests not withstanding.
> We respect the passionate dissenting views of our colleague Judge William H. Pryor, yet we suspect that Judge Pryor's real disagreement is with Magwood and our prior decision is

[6] The State, the same Assistant Attorney General represented the State on appeal of each of these issues before the Florida First District and included the orders and pleadings in its index.

> *insignares.* Judge Pryor, for example, complains that our decision allows a state prisoner to raise, in a subsequent federal habeas petition, claims he failed to assert in his first petition. That complaint, however, should be addressed to the Supreme Court. The Justices who dissented in Magwood pointed {2016 U.S. App. LEXIS 22} out that the majority was permitting the exact same thing that Judge Pryor now bemoans.

Judge Pryor's dissent:

> The majority argues that its opinion promotes finality, federalism, and comity, majority op. at 13-14 but that's a laugher. Leaving aside the fact that the State of Florida argues for the opposite result, the majority opinion will greatly expand the opportunities for federal courts to reopen and reexamine the criminal judgments of state courts. A prisoner will be able to file another petition for a Writ of Habeas Corpus any time a state court issues an order affecting his sentence...
>
> This case is not hard and nobody should be fooled by the majority's textual decision. After seventeen {2016 U.S. App. LEXIS 51} years of repeated and often frivolous attempts to overturn his convictions, Patterson is being given another go-around...Today's decision is gimmicky that will require the State of Florida to defend a child rapist's conviction for the umpteenth time...

Those are not the words of an unbiased person, much less a Judge. Judge Pryor is passionate on this issue and is now Chief Judge. Chief Judge Pryor has much of, if not all of the Magwood, and Patterson styled cases funneled through the kinswoman, Judge Jill Pryor, who simply, no matter the issue, of the strength of the issues, denies the case before the merits can be heard.

Mr. Gay asks the Court to review the conclusive facts and matters of the case at hand. Under federal law, Mr. Gay fully asserts that State Court records show that State level courts were given every opportunity to review and correct the errors

claimed within his federal petition. Mr. Gay argues the federal courts were in error not to acknowledge the state orders as final.

Mr. Gay was resentenced on case 89-5930 in State Court February 23, 2018. Some 28 years after his original 1990 conviction.

Authority:

Mr. Gay travels under the authority of Magwood v. Patterson, 561 U.S. 320, 130 S.Ct. 2788, 177 L.Ed.2d 592 (2010) and Patterson v. Florida Sec'try, 812 F.3d 885 (11th Cir. 2016), Patterson here asserted claims related to his initial convictions, and did not contend that there was anything wrong with the new judgment itself.

Both the Northern District of Florida and Eleventh Circuit in Atlanta disagree with the reading of those cases. See Judge Pryor's dissent in Patterson.

Exhausted State Remedies: (find State Court orders make issue *res judicata*)

All issues herein were fully brought before State Courts and given fair opportunity under Federal Law, Mr. Gay argues Green v. Florida Sec'try, LEXIS 240692 (Nov. 20, 2018):

> The AEDPA requires that a Petitioner exhausted all State remedies before seeking relief on federal claim, See *28 U.S.C. §2254(b)(1)(A)*...to satisfy the exhaustion requirement, a Petitioner {2018 U.S. Dist. Lexis 17} must fairly present federal claims to the state courts to give the "opportunity" to pass upon and correct alleged violation of its prisoner's federal rights.

Conclusion

Mr. Gay believes, based upon Judge William H. Pryor's harsh dissent in Patterson v. Florida Sec'try, 812 F.3d 885 (11th Cir. 2016), that Judge Pryor is

biased and taking matters into his own hands since he cannot reverse the United States Supreme Court opinion 561 U.S. 320, 130 S.Ct. 2788, 177 L.2d 592 (2010).

Mr. Gay's beliefs are supported by the facts he pled and the Court's willingness to avoid fact and law. See vast State Court orders and Green v. Florida Sec'try, LEXIS 240692 (Nov. 20, 2018). Mr. Gay gave the State Court every opportunity without filing repeated pleadings. Mr. Gay was wrongfully denied, the Court even suggesting he should have made every effort to contact the child witnesses in his case, since he had no funds to his professionals until estate settlement in 2016.

The ruling defies law and common sense. Judge Jill Pryor is kinswoman to Judge William H. Pryor.

VII. CONCLUSION

For the foregoing reason, Mr. John Gay, Petitioner, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Florida Court of Appeals. Dated on this 22 day of August 2022.

John Gay

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