No. 22-5844

IN THE

SUPREME COURT OF THE UNITED STATES

BENJEE NICOLAS - PETITIONER
(Your Name)

vs.

STATE OF FLORIDA - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
(Name of Court that last Ruled on Merits of Your Case)

PETITION FOR WRIT OF CERTIORARI

Benjee Nicolas
(Your Name)

3420 N.E. 168th Street
(Address)

Okeechobee, FL, 34972-4824
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

IF PROCEDURE HAD BEEN FOLLOWED, WOULD THE ALLEGATIONS HAVE RENDERED THE JUDGMENT VULNERABLE TO COLLATERAL ATTACK?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- *Nordelo v. State,* No.3D09-1269, Third District Court of Appeal of Florida. Judgment entered November 18, 2010
- *Nordelo v. State,* No. SC11-23, Supreme Court of Florida. Judgment entered June 7, 2012
- *Jaimes v. State,* No. 2D09-2482, Second District Court of Appeal of Florida. Judgment entered August 12, 2009
- *Jaimes v. State,* No. SC09-1694, Supreme Court of Florida. Judgment entered December 9, 2010

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OTHER

IN THE

SUPREME COURT OF THE UNTIED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

☒ For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____;or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition

and is

☐ reported at _____;or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☒ For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

☐ reported at _____;or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Eleventh Judicial Circuit court to review the merits appears at Appendix B to the petition and is

☐ reported at _____;or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was April 27, 2022.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 14, 2022, and a copy of the order denying rehearing appears at Appendix E.

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

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1),

☐ For cases from **state courts:**

The date on which highest state court decided my case was _____.A copy of that decision appears at Appendix ___.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix ___.

☐ 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),

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, U.S.C. – Right to effective assistance of counsel

for his defense

Fourteenth Amendment, U.S.C. – Due Process Clause of equal protection

of the law

Fifth Amendment, U.S.C. – Right to a fair trial in a fair tribunal

STATEMENT OF THE CASE

Before addressing whether petitioner is entitled to newly discovered evidence based on ineffective assistance of trial counsel, his claim's essential elements must be identified. See *United States v. Armstrong,* 517 U.S. 456, 468, 116 S. Ct 1480, 1488, 134 L. Ed. 2d 687 (1996). The Fourteenth Amendment U.S.C. established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See *Aetna Life Ins. Co. v. Lavoie,* 475 U.S., at 821-822, 106 S. Ct., at 1585-1586 (1986); *Tumey v. Ohio,* 273 U.S., at 523, 47 S. Ct., at 441 (1927).

On February 12, 2004 petitioner's motion to recuse met the technical requirements to be legally sufficient, that it be in writing, allege the facts and reasons relied on to show the grounds for disqualification, including a sworn affidavit, and filed by the tenth day following discovery of the information providing grounds for recusal. Fla. R. Jud. Admin. 2.330 (formerly Fla. R. Jud. Admin. 2.160). App. 46, Lines 16-19.

Regardless of those facts, on two separate occasion (one being a month after the recusal hearing and the other during the commencement of trial with the same bias judge), inquiring the decision of the Third District Court, defense counsel Mr.

O'Donnell, misled petitioner that the motion to recuse was denied. App. 59, Tr. Trans., lines 13-17.

Three years ago, petitioner filed a post-conviction motion, pursuant to Fla. R. Crim. P. 3.850, newly discovered evidence claim based on ineffective assistance of trial counsel. The lower court factual findings were 'not fairly supported by the record.' Also, abused its discretion in that its findings were without support in logic or reason, and having found that the lower court applied the wrong rules of law, the Third District Court and the United States District Court had full power to proceed to a complete disposition of the case. See *Realty Acceptance Corp., v. Montgomery,* 284 U.S. 547, 76 L. Ed 476, 52 S. Ct. 215 (1932); *Cole v. Ralph,* 252 U.S. 286, 64 L. Ed. 567, 40 S. Ct. 321 (1920).

On a Fla. R. Crim. P. 3.850 motion, an evidentiary hearing was required on petitioner's claim of newly discovered evidence because the factual allegations in his motion asserted a complete denial of the assistance of counsel on appeal is presumed to result in prejudice and can never be considered harmless error, and should have been tried and tested in an evidentiary hearing where it were subject to credibility determinations. This procedure is similar to federal rules dealing with post-conviction motion. Fla. R. Crim. P. 3.850(b)(1)(f)(8)(A) (formerly Fla. R. Crim. P. 3.850(b)(1)(d)).

The newly discovered claim remains to be tested in an evidentiary hearing to

determine whether the petitioner has demonstrated that the motion has been filed within the time limit for when the statement was or could have been discovered through the exercise of due diligence.

APPLICATION OF THE JONES STANDARD

All newly discovered evidence claims should be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850. To prevail on a claim of newly discovered evidence, a movant must show the following: (1) the evidence was unknown to movant and could not have been uncovered by due diligence at the time of trial; and (2) the evidence is such that it would probably produce an acquittal on retrial. See *Jones v. State,* 591 So.2d 911, 915 (Fla. 1991).

The motion to recuse is considered the main focal point of petitioner's newly discovered evidence claim. An attempt to investigate the contents as to the denial expressed by trial counsel, Appellate counsel, Ms. Maria E. Lauredo, was not given the opportunity to process litigation to a just and equitable conclusion, after not receiving the transcripts and record on appeal, attempting to raise the conflict of interest issue (App. 64, second paragraph) and to retrieve the motion to recuse. App. 65. See *ITT Community Development Corp., v. Barton,* 569 F.2d 1351, 1359 (5th Cir. 1978).

The State improperly influence an unfair hampering presentation of petitioner's defense on direct appeal by replacing appellate counsel in her attempt

of retrieving motion to recuse, without petitioner's knowledge. As not the case here, appellate counsel, Manuel Alvarez, only came in contact with petitioner when relief was denied and his deficient performance in raising a claim much weaker than the one desired. See *Smith v. Robbins,* 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Equally similar to appellate counsel, Ms. Lauredo, petitioner was denied the free transcripts of records after the conclusion of direct appeal and the motion to recuse, in which the clerk was unable to locate. App. 68-69.

Petitioner simultaneously filed motions for access copies of document records to the Circuit Court and Third District Court. App. 71-74. The discovery sought demonstrated two outcomes: (1) That the Circuit Court in any event had no intention to relinquish any documents in regards to February 12, 2004. App. 76, even after petitioner's motion accompanying withdrawal from trust fund account App. 78-83, thereafter petitioner's dissatisfaction of clerk's failure to accept payment from family members App. 85-90; and (2) Records Specialist letters reduced petitioner in search of something tangible to mount some type of defense. App. 92-93, inviting Clerk for the Third District Court to clarify written response on NOTICE OF APPEAL case no. 04-1307 along with petitioner's motion App. 95-100, inwhich initiated petitioner's newly discovered evidence claim App. 102-116 disclosing the fact that trial counsel statement during 2004 hearing was met to

mislead. App. 48, Lines 20-23.

APPLICATION OF THE *STRICKLAND* STANDARD

The United States Court of Appeals for the Eleventh Circuit denied petitioner's motion stating, 'he has not made a substantial showing of the denial of a constitutional right.' App. 2.

The test enunciated in *Strickland v. Washington,* 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), is the proper standard for evaluating ineffective assistance of counsel claims alleging that counsel failed to file writ of prohibition to disqualify the presiding judge.

The Sixth Amendment U.S.C. right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The United States Supreme Court has established a two-prong standard for determining whether counsel provided ineffective assistance warranting post-conviction relief: (1) deficient performance by trial counsel; and (2) prejudice to defendant as a result of that deficient performance.

First, to establish the deficiency prong of *Strickland,* defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Trial counsel's failure to file a writ of

prohibition, after stating he would, to disqualify constituted deficient performance. App. 48, Lines 20-23. See *Strickland v. Washington,* 466 U.S., at 687-88 (1984).

The basis for disqualification had been established, the motion to recuse was facially sufficient and that the judge should have been legally required to disqualify himself. Florida law support petitioner's conclusion. The Florida Rules of Judicial Administration provide for the disqualification of a judge on the ground "that the party fears that he will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.330(e)(1) (formerly Fla. R. Jud. Admin. 2.160(d)(1). Furthermore, the legal sufficiency of a motion to disqualify depends on "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." On the motion to recuse, the same judge who allegedly is biased was the one who ruled on the motion. App. 48, Lines 17-18. Thus, that ruling should be immediately reviewable because it was erroneously denied in numerous situations in which a trial by that biased judge should have been avoided altogether. Trial counsel was well aware, that the filing of a writ of prohibition is clearly recognized as the proper avenue for immediate review, both an appropriate and necessary remedy. Notwithstanding that a petition for writ of prohibition is technically an original proceeding, *Fla. R. App. P.* 9.030(b)(3), its function is to seek review of the action by the lower court to ensure that the lower court is not acting without

jurisdiction or has not erroneously denied a motion to disqualify. A petition for writ of prohibition is technically sought to prevent the judge from proceeding further in the action, rather than to correct legal error, due to its status as an original proceeding. Although this distinction is correct in a formalistic sense, from a functional perspective, this writ provides the opportunity for review of the allegedly erroneous action of the lower court. Thus, although the mechanics may differ, the two avenues of review by direct appeal and discretionary review by petition for writ of prohibition may operate in functionally the same manner.

The absence of a reasonable tactical decision not to file a writ of prohibition, thereafter misleading petitioner as to the decision of the Third District, it constitutes ineffective assistance not to seek disqualification on the grounds revealed in this case[1], which plainly show a reasonable fear of judicial bias. The appropriate standard under *Strickland* was whether the result of the proceeding had been rendered unreliable by counsel's deficiency. Deficient performance was clearly shown as Fla. R. Jud. Admin. 2.330(e)(1). As a matter of right, Article V, section 4(b)(1) of the Florida Constitution concluded that this provision is a

[1] *Harris v. Nelson,* 394 U.S., at 300, 89 S. Ct., at 1091 (1969). In *Harris*, we stated that "were specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." The lower court refuses to relinquish the motion to recuse and transcripts for the proceedings of February 2, 2004, Judge Reyes disclosing the fact he was once a former detective alongside the detectives currently of petitioner's case of Miami-Dade Homicide Department.

constitutional protection of the right to appeal, a lawyer who fails to do so, without more, ineffective for constitutional purposes. See *Strickland v. Washington,* 466 U.S. 688, 104 S. Ct. 2052 (1984).

Second prong, to demonstrate prejudice, a defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. The findings of prejudice under *Strickland* turns on whether disqualification would have been required. See *Strickland v. Washington,* 466 U.S. 687 (1984). In defining the prejudice prong of the standard, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance not to file writ of prohibition, Judge Reyes would not have been able to exercise his discretionary rulings that were actual bias against the petitioner and to influence the interest in the outcome of petitioner's particular case. Counsel's deficient performance prejudiced the defense, allowing the same bias judge to set in motion some unconscionable scheme after observing petitioner on the stand during his Motion to Suppress hearing. (See *Certified Records of Motion to Suppress Hearing,* pgs. 316-457). See *Strickland v. Washington,* 466 U.S. 687 (1984). Two state witnesses prejudiced the defense, in regard to the bias intent of the judge and the deficient performance of counsel which prejudiced petitioner of a fair trial, a trial whose result remains unreliable: One, Michael Collier, fingerprint expert, was the end result of petitioner's suppression hearing, committing perjury

under oath, in which counsel knew that no such evidence existed before the hearing. App. Tr. Tran. 118-121; Two, Detective Parr, is considered the main reason the conflict of interest issue to recuse was filed and his actions on the stand shows the protection to commit perjury, for reason being the motion to suppress would have never been granted. App. 123-126, Lines 9 – Line 14.

The United States Supreme Court's explanation of the prejudice standard in *Strickland*, that this standard requires a demonstration that the result of the proceeding has been rendered unreliable, and the confidence in the outcome has been undermined by counsel's deficiency.

REASONS FOR GRANTING THE WRIT

The lower court decision is based on a departure from the essential requirements of law, cognizable in post-conviction proceedings that have been decided in the Florida Supreme Court. A departure from the essential requirements of law is not mere legal error, but instead, involves a gross miscarriage of justice. The lower court merely signed an order drafted by the State without revision of a single word. The process raises serious doubts as to whether the judge even read, much less carefully considered, evaluating petitioner's motion in the light of the trial court record to determine whether or not the claim is refuted by the record.

During petitioner's pending motion for rehearing, a Notice of Supplemental Authority was filed with the decision in *Nordelo v. State,* 93 So.3d 178 (Fla. 2012). App. 134-141. The same process was repeated, since *Nordelo* is familiar with the Third District Court, after the lower court's denial on rehearing.

The national importance of having the Supreme Court to decide the question involved, reflects on the fact that the Third District Court decided that its decision, along with the lower court, would conflict with the decisions of the Second District Court in *Jaimes v. State,* 51 So.3d 445, 446 (2010) and *Nordelo* within its own Third District. App. 22. As stated in the denial, an 'Opinion' was never filed, which hindered petitioner from judicial review as in *Jaimes* and *Nordelo* from the Florida Supreme Court. App. 151-152.

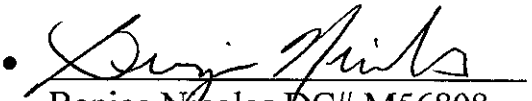
The Reason for Granting the Petition is to allow the lower court to address the allegations for the purpose of determining whether the alleged facts, if true would render the judgment vulnerable to collateral attack. An evidentiary hearing on the newly discovered evidence claim involving trial counsel's testimony under oath why he misled the defendant to the filing and decision of writ of prohibition.

The importance of the case not only to petitioner but to others similarly situated is, while the judiciary (lower court, district court, and United States District Court) cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

The Sixth Amendment's requirement that "the accused shall enjoy the right to have the Assistance of Counsel for his defense" is made obligatory on the States by the Fourteenth Amendment.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

- Respectfully Submitted,
- 
  Benjee Nicolas DC# M56808
- Date: October 4th, 2022