



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 REHEARING**

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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## **STATEMENT OF THE CASE**

In light of the Supreme Court of Florida controlling principle in this case, (See *Nordelo v. State*, 93 So.3d 178 (Fla. 2012), in which *Jaimes v. State*, 51 So.3d 445, 446 (Fla. 2010) *served as the starting point that anchor the court's discretion in selecting an appropriate decision*), the basic and unexceptional rule that required the courts to give effect to the clear meaning of the petitioner's substantial rights, which constituted a change in law sufficient to overcome the difference ordinarily due, as a matter of comity, the previous certification denial.

Where, however, the record is not silent as to what the Third District Court of Appeal and the District Court should have done had it considered, petitioner's filed NOTICE OF SUPPLEMENTAL AUTHORITY after the lower court's summarily denied post-conviction relief. (See *Pet. Writ. Cert., App. U*, pages 134-141).

It is apparent in this case that both court judges' did not examine the trial record and did not have the record before them when ruling on petitioner's Rule 3.850 motion. Both courts chose not to avoid unusual circumstances fraught with implications for substantial rights without first seeking guidance on potentially controlling Florida law from the Florida Supreme Court.

Both courts made factual determination based solely on the face of the motion. The determination of facial sufficiency under Rule 3.850 is one of law and

involves an evaluation of the legal sufficiency of the claim alleged. If the motion had been evaluated in light of the trial record, it would have been determined, the motion contains allegations of substantial material facts stating a claim cognizable in post-conviction proceedings. This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights. *Fiske v. Kansas*, 274 U.S. 380, 385, 71 L. Ed 1108, 1110, 47 S. Ct. 655 (1927); *Blackburn v. Alabama*, 361 U.S. 199, 4 L. Ed. 2d 242, 249, 80 S. Ct. 274 (1960). Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. See *Blackburn v. Alabama*, (US) *supra*; *Moore v. Michigan*, 355 U.S. 155, 2 L. Ed. 2d 167, 78 S. Ct. 191 (1957). The duty of the Federal District Court on habeas is no less exacting.

The history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. The Federal District Court to which the application for habeas corpus was made by the power, restrained only by its sound discretion, was to receive evidence and try the facts anew where the petitioner alleged facts which, if proved, would entitle him to relief. All the relevant facts were not presented in the state-court hearing, other than, the date in which petitioner discovered and filed a post-conviction motion, pursuant to Fla. R. Crim.3.850(b)(1)(f)(8)(A), (formerly Fla. R. Crim. P. 3.850(b)(1)(d), alleging that counsel had a constitutional imposed duty to think either that (a) a rational

defendant would have wanted to appeal, or (b) defendant reasonably demonstrated to counsel that he was interested in appealing. The fact-finding procedure there employed was not adequate for reaching reasonable correct results. A federal hearing was required, when the lower court made serious procedural errors such as the burden of proof. The decision was enough to deprive the state evidentiary hearing of its adequacy as a means of finally determining facts upon which the petitioner's Sixth and Fourteenth Amendment constitutional rights depend.

In the presence of "clear controlling precedent" in the decisions of the Supreme Court of Florida, those standards specify that the federal courts may certify dispositive questions of Florida law. Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state court of fact has after a full hearing reliably found the relevant facts.

There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the petitioner. No relevant findings could have been made unless the state court decided the Sixth and Fourteenth constitutional claims tendered by the petitioner on the merits. The decision rested on an error of law governing post-conviction proceeding under

Florida Rule of Criminal Procedure 3.850, rather than an adverse determination of the fact that counsel violated petitioner's constitutional rights, a hearing should have been compelled to ascertain the facts. *Rogers v. Richmond*, 365 U.S. 534, 5 L. Ed. 2d 760, 766, 81 S. Ct. 735 (1961). The opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See *Frank v. Mangum*, 237 U.S. 309, 59 L. Ed. 969, 987-989, 35 S. Ct. 582 (1915).

The Federal District Court should have been compelled to grant an evidentiary hearing where the petitioner's application for habeas corpus contained an allegation not frivolous or incredible, of newly discovered evidence relevant to constitutionality of his detention. Where, trial counsel misadvising as to the filing and result of writ of prohibition to disqualify the judge cannot realistically be regarded as petitioner's inexcusable default. See *Fay v. Noia*, 9 L. Ed 2d 868 (Part V) (1963).

When relevant state law is established by a decision of the state's highest court, that decision is binding on the federal courts. Although the district judge deferred to the state court's finding of fact, she should not have deferred to the findings of law. It was the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law should

not have been giving binding weight on habeas. That was settled in *Brown v. Allen*, 344 U.S. at 506 (1953).

In the instant case, the facts set forth in the motion, that counsel falsify the filing of petitioner's writ of prohibition and the results thereafter – are the type of facts, if true, would subject the judgment to a legitimate collateral challenge. When taken as true for the purposes of evaluating the legal sufficiency of the motion, the factual allegations present a legally sufficient claim triggering an evidentiary hearing and were not conclusively refuted by the record.

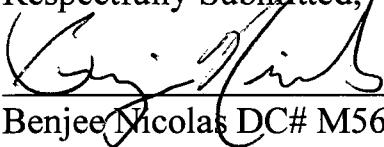
## **REASON FOR GRANTING REHEARING**

The controlling standard provided by the Supreme Court of Florida support for overruling incorrect decisions and it is vital in such circumstances that the courts act only in accord with especially clear standards.

## CONCLUSION

The Petition for Rehearing should be granted.

Respectfully Submitted,

  
\_\_\_\_\_  
Benjee Nicolas DC# M56808

Date: March 13<sup>th</sup>, 2023

No. 22-5844

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

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**BENJEE NICOLAS - PETITIONER**

**vs.**

**STATE OF FLORIDA - RESPONDENT(S)**

**PROOF OF SERVICE**

I, Benjee Nicolas, do swear or declare that on this 13<sup>th</sup> day of March 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS* and PETITION FOR REHEARING on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those are as follows:

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Executed on this 13<sup>th</sup> day of March, 2023.



Benjee Nicolas DC# M56808  
Okeechobee Correctional Institution  
3420 N.E. 168th Street  
Okeechobee, Florida, 34972