No. 22-5888

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

MANOLO MARTINEZ,
PETITIONER

vs.

RICKY D. DIXON, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Submitted by:

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QUESTION(S) PRESENTED

Whether Petitioner was denied his U.S. Constitutional rights to due process based on the Eleventh Circuit Court of Appeal decision conflicting with well established Supreme Court precedent under the facts of this case.

In sum, one question for this Court to decide is whether the state court's application of its statutes dealing with probable cause affidavits are in conflict with the well established precedent in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The next question deals with the state court making factual findings without first affording Petitioner his right to an evidentiary hearing, and then both the district court and the Eleventh Circuit Court of Appeals relying on those findings in denying federal habeas relief.

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:

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Florida Statutes

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

The opinion of the United States court of appeals 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[√] is unpublished.

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[ ] is unpublished.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 B 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[ ] is unpublished.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_____appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

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

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

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

[ ] A timely petition rehearing was denied by the United States Court of Appeals 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. §1254(1).

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

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

[ ] A timely petition 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

Fifth, Sixth and Fourteenth Amendments to the U.S Constitution regarding probable cause, due process, and a fair trial.

STATEMENT OF THE CASE

1. The Petitioner was convicted in October 2011 of one count of Conspiracy to Traffic in Cocaine (400 Grams or More, but Less Than 150 Kilograms).

2. The state trial court sentenced Petitioner to 30 years in prison.

3. After unsuccessful State collateral attacks, Petitioner timely filed a §2254 petition in the Middle District Court in Florida.

4. The State filed a Response.

5. Petitioner filed a Reply.

6. United States District Judge, Paul G. Byron entered an order on March 17, 2022, denying relief on Petitioner's §2254 petition.

7. Petitioner filed a Motion for Relief from Judgment or Order.

8. On April 6, 2022, United States District Judge, Paul G. Byron entered an order denying relief.

9. Timely Notice of Appeal was filed.

10. An application for COA was filed in the Eleventh Circuit Court of Appeals. [App-A].

11. On July 27, 2022, the Eleventh Circuit entered a detailed order denying COA. [App-B].

12. The instant petition follows.

REASONS FOR GRANTING THE PETITION

Issue One: This claim alleged entitlement to federal habeas relief based on allegations of defense counsel being ineffective for failing to investigate and file a motion to suppress wiretaps of Petitioner's incriminating phone conversations. In addressing this claim and denying relief the District Court relied on defense counsel's evidentiary hearing testimony of having reviewed the affidavits for a wiretap and not finding any grounds in support of moving for suppression.

From there the District Court found that the affidavit in support of gaining a wiretap was lengthy and detailed, and that it provided a full and complete statement of the investigative procedures tried and why they appeared unlikely to succeed, thus, according to the District Court, the affidavit was supported by probable cause.

Ultimately the District Court found that Petitioner has failed to demonstrate deficient performance or prejudice, and that the state court's decision was not contrary to, or involved an unreasonable application of clearly established federal law.

Petitioner respectfully contends the court reversibly erred in its decision when considering the record establishes that the State's case was contingent on the audio recordings obtained from the wiretaps being played for the jury where those

audio recordings corroborated the testimony of alleged co-conspirators, Claudio Padilla and Armando Crespo.

Prior to the start of the trial, Padilla had entered a plea of guilty and was sentenced to 12 years in prison for narcotics offenses. Padilla conceded at trial that in exchange for his cooperation against Martinez, he was going to seek reduction of that 12 year prison sentence. To that end, Padilla testified that he, Martinez, Armando Crespo, and others, conspired to traffic in cocaine.

The State introduced numerous recordings obtained from the wiretap to corroborate Padilla's testimony that he and Petitioner were co-conspirators in the conspiracy to traffic in cocaine. Approximately 30 audio recordings from that referenced wiretap were introduced and played for the jury. The State had Padilla explain the significance of the intercepted telephone communications played for the jury in between their respective introductions into evidence. Most, if not all of the recordings played for the jury captured a voice that Padilla claimed belonged to Petitioner.

After having Padilla testify, the State called Crespo to the stand. Crespo, like Padilla, testified that he was a co-conspirator of Petitioner and that they had agreed to traffic in kilogram quantities of cocaine.

Crespo admitted that law enforcement had found 4 kilograms of cocaine in that vehicle he was operating. Prior to trial, Crespo entered into a plea agreement

wherein he would provide cooperation in the prosecution's efforts to convict Petitioner in exchange for a 7 year sentence. The sentence Crespo received was significantly lesser than the 30 year statutory maximum, as well as the minimum mandatory sentence of 15 years imprisonment.

The State had Crespo testify to the purported significance and subject matter of various intercepted audio recordings obtained from the wiretap.

Given the circumstances, both Padilla and Crespo had significant credibility problems. Both were attempting to get a reduction of their sentence. Both were captured on recordings discussing narcotics transactions. Crespo was caught with 4 kilograms of cocaine. In sum, Padilla and Crespo, to avoid the minimum mandatory sentences and the statutory maximum of 30 years imprisonment, had ample motive to fabricate testimony.

The trial record also captures other examples of how the State's cooperating co-defendants had significant credibility challenges. For example, the following exchange occurred between defense counsel and Crespo:

> Q: Now, did you speak with DEA Agent Conlin – Bryan Conlin? Goes that ring a bell?
>
> A: I truly don't recall their names.
>
> Q: Okay. Do you remember telling him that you don't know how to open that compartment?
>
> A: Well, at that time, yes.

Q: At that time yes what?

A: At that time, yes, but today I am coming to tell the truth.

Q: So it's fair to say that you lied to an officer previously?

A: I didn't lie. I was doing my job.

Q: Okay. But this interview with the DEA agent was about a year after you were arrested, wasn't it?

A: Yes.

Q: So at that point, a year after, you were still lying; is that fair to say?

A: I wasn't lying. I was doing my job.

Q: Which is to lie to him?

A: Well, that's my job.

The audio recordings obtained from the wiretap, however, corroborated both Padilla's and Crespo's testimony. The State emphasized this to the jury during closing arguments as follows:

> In those telephone calls, the voice of Claudio Padilla, Manolo Martinez and Armando Crespo have been identified. And all of those calls relate to the sale and trafficking of kilogram quantities of cocaine, and occasionally reference marijuana. All of those calls [are] physical and direct evidence.

Without question, the audio recorded intercepted telephone calls were highly prejudicial to Petitioner. Notably, defense counsel failed to present any meaningful rebuttal to the State witnesses' testimony regarding Petitioner having

purportedly conspired to traffic in cocaine based on being heard on the wiretaps allegedly arranging narcotics transactions.

The wiretaps were obtained after Special Agent Brian Conlin, then of the Drug Enforcement Agency, submitted an affidavit in support of an order authorizing interception of Padilla's telephone number. It was this affidavit that led to the interception of the telephone calls introduced into evidence at the jury trial. Judge Marc Lubet of the Ninth Judicial Circuit ultimately approved of the wiretap applications.

Relevant to this case, the Affidavit claimed there was a "need for interception" of Padilla's telephone. The Affidavit stated that "[i]nvestigative techniques that are usually employed in an investigation of this type have been tried and have not been fully successful." The sole discernable example of this purported inability to employ investigative techniques is alleged in paragraph 182, which states:

> On March 6, 2009, at the direction of S/A Brian Conlin, CS-1 entered Uptown Classics [a business that allegedly belonged to a target of the narcotics investigation] for the purpose of identifying subjects inside the business and to gather intelligence on the drug trafficking activities of Davon Mitchell. During this visit CS-1 met Davon Mitchell and others at the business. On March 10, 2009, S/A Brian Conlin displayed a Florida Driver's License Photograph of Davon Mitchell to CS-1 who identified the photograph as that of the person he spoke to at Uptown Classics. CS-1 was able to introduce and undercover agent to Mitchell [,] however all subsequent meetings with Mitchell after March

> 6, 2009 [were] unsuccessful in obtaining a narcotics purchase.

The Affidavit, in a conclusory manner, also alleged that interviews with co-conspirators or accomplices would not produce sufficient information concerning the identities of the individuals involved in the conspiracy, and other items. The requirements for a wiretap application are stringent. As explained by the Florida Supreme Court:

> If an affidavit for search warrant contains intentional false statements or statements made with reckless disregard for the truth, the trial court must excise the false material and consider whether the affidavit's remaining content is sufficient to establish probable cause. See *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Terry v. State*, 668 So. 2d 954, 958 (Fla. 1996). This rule contains two components. First, the trial court must determine whether the affidavit contains an intentional false statement or a statement made in reckless disregard for the truth. Mere neglect or statements made by innocent mistake are insufficient. See *Franks*, 438 U.S. at 171, 98 S. Ct. 2674. Second, if the court finds the police acted deceptively, the court must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. See *Id.* at 171-72, 98 S. Ct. 2674. If the remaining statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. See *Terry*, 668 So. 2d at 958. If, however, the false statement is necessary to establish probable cause, the search warrant must be voided and the evidence seized as a result of the search excluded. See id. (citing *Franks*, 438 U.S. at 156, 98 S. Ct. 2674).

Thorp v. State, 777 So. 2d 385, 391 (Fla. 2000).

Additional requirements for a wiretap must also be satisfied. Section 934 of the Florida Statutes protects against the unauthorized interception of oral, wire, or electronic communications. Because the interception of these communications is a statutory exception to the federal and state constitutional right to privacy, these statutes must be strictly construed and narrowly limited in their application according to the statutory language. *State v. Jackson*, 650 So. 2d 24, 26-27 (Fla. 1995) (internal citation omitted). In particular, sections 934.07 and 934.09, Florida Statutes set out the strict procedures that law enforcement must follow before they may intercept wire, oral, or electronic communications. *Figueroa v. State*, 870 So. 2d 897, 900 (Fla. 5th DCA 2004).

Section 934.09, Florida Statutes sets forth the procedures for obtaining a court order authorizing such an exception. These requirements include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." §934.09(1)(c), Fla. Stat. The reviewing court must conclude that "[n]ormal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." §934.09(3)(c).

The Florida Supreme Court held that:

> [a]n order authorizing the interception of wire, oral, or electronic communication requires a judicial finding of

> probable cause for belief that an individual is committing, has committed, or is about to commit an offense listed in section 934.07, probable cause for belief that communications about the offense will be obtained through the interception, and a determination that normal investigative procedures have failed, or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Jackson, at 27.

With the foregoing in mind, the right to counsel under the Sixth Amendment to the United States Constitution provides criminal defendants with the right to the effective assistance of counsel. *Acker v. State*, 787 So. 2d 77, 82 (Fla. 2d DCA 2001), citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to prove a claim of ineffective assistance of trial counsel, a defendant must established (1) that counsel performed deficiently in that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that such deficient performance prejudiced the defendant because counsel's errors were so serious that they deprived the defendant of a fair trial whose result is reliable. *Id.* "The prejudice prong requires the defendant to 'show that there is a reasonable probability, that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* Although deference is normally afforded to tactical and/or strategic decisions intelligently and purposefully made by a defense attorney. *Strickland*, at 689, it is recognized that some acts or omissions are "so patently unreasonable that no competent attorney would have

chosen it." *Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997) (citations omitted); See also *Hinton v. Alabama*, 134 S. Ct. 1081, 1088-89 (2014)("[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.").

In the instant case, Petitioner suffered severe prejudice from his counsel's failure to move to suppress the evidence. As a preliminary matter, the record sufficiently, in fact, conclusively establishes that the inclusion of the fruits of the wiretap resulted in *Strickland* level prejudice. *Strickland*, at 695-96 ("[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture.") As detailed above, the audio recordings obtained from the wiretap were instrumental in helping the State gain a conviction. Absent those recordings, the jury would not have credited the testimony of Padilla and Crespo and ultimately concluded there was an illicit agreement between Petitioner and others to traffic in cocaine. Thus, there is a reasonable probability that, but for the inclusion of the fruits of the wiretaps, the outcome of the case would have been different. *Strickland*, at 694.

Petitioner also satisfied the deficient representation prong of *Strickland*. Given that the wiretap led to wholly prejudicial recordings being obtained by the State, any failure to submit a viable motion to suppress must be considered

deficient representation. The failure to move to suppress prejudicial evidence has long been established to be grounds for postconviction relief. See e.g. *Kimmelman v. Morrison*, 477 U.S. 365, 374-79 91986); cf. *Williams v. State*, 717 So. 2d 1066, 1066-67 (Fla. 2d DCA 1998)("[a] trial attorney's failure to investigate...a defense relying on the suppression of evidence, has long been held to constitute a facially sufficient attack upon the conviction.").

In the instant case, the Affidavit failed to comply with the requirements of section 934.09, where it failed to provide a full and complete statement of his self-serving opinions that such techniques would not be successful, as well as the bare allegations listed in paragraph 182 of the Affidavit.

Paragraph 182 simply cannot be construed to support a finding that a full and complete statement "as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," §934.09(1)(c), had been provided to the reviewing judge. For example, in said paragraph, at 5, the affiant alleged that an undercover agent attempted to meet and communicate with Davon Mitchell about what actually occurred. That paragraph is vague concerning this operative issue because it is susceptible to any number of interpretations, including that a single text message requesting a meeting did not actually result in a meeting. A vague

statement concerning a statutorily required issue is, of course, the opposite of being a "full and complete" statement.

The allegations within the four corners of the Affidavit were and are simply insufficient to support the issuance of a wiretap. Defense counsel had the option to challenge the Affidavit. The opportunity to challenge the Affidavit was stronger than a regular affidavit, because it pertained to a wiretap. Defense counsel's failure thus constituted deficient representation, as no competent attorney would have committed such an act of omission. All of this was pointed out in Petitioner's written closing arguments subsequent to the evidentiary hearing.

Nevertheless, the District Court entered its order denying habeas relief. Based on the record evidence in this case, coupled with applicable law, Petitioner filed an application for COA in the Eleventh Circuit and argued that the necessary requirements for obtaining permission to conduct a lawful wiretap were not met and thus, the lower court reversibly erred in finding there is no reasonable probability that suppression of this evidence would have been granted, either for lack of probable cause or for failing to satisfy section 934.09.

Petitioner argued that under the totality of circumstances the appropriate remedy was to find the evidence seized from the wiretaps was illegally obtained, requiring suppression, and defense counsel was ineffective for failing to move to suppress, with directions for the lower court to conduct a new trial.

The Eleventh Circuit did not agree and denied COA even in the face of this Court's well established precedent found in *Franks v. Delaware*, 438 U.S. 154, 156, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In sum, one question for this Court to decide is whether the state court's application of its statutes dealing with probable cause affidavits are in conflict with the well established precedent in *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Issue Two: This claim alleged entitlement to federal habeas relief based on allegations of defense counsel being ineffective for providing misadvice on a plea offer. In sum, the State offered a plea of 12 years in prison to resolve the case, however, defense counsel failed to advise Petitioner on the maximum possible sentence that could be received. Further, counsel failed to review the scoresheet with Petitioner or explain the lowest permissible sentence, and last, counsel failed to go over the evidence with Petitioner and explain the weight of the State's case against him.

The District Court denied relief by finding that the record refutes the claim and there is no showing of prejudice. Petitioner respectfully disagreed with this finding and argued in his application for COA that under the specific facts of this case, jurists of reason could disagree with the District Court's findings, or, jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.

This should be apparent when considering, first, that Petitioner's claim is well recognized as a legally sufficient basis for relief through the U.S. Supreme Court. *See, Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L.Ed 2d 398 (2012), and *Missouri v. Frye*, 566 U.S. 134, 132 S. Ct. 1399, 182 L.Ed. 2d 379 (2012).

Next, the findings of the record refuting this claim are wrong when considering that the record relied upon is conversation that purportedly occurred during a confidential attorney-client consultation where defense counsel misadvised Petitioner into rejecting the 12 year plea offer. In sum, there is no record establishing that counsel correctly advised Petitioner in regard to the nature and consequences of the plea nor establishing that counsel went over the voluminous quantity of the evidence with Petitioner. Simply stated, the District Court's adjudication of this claim resulted in an unreasonable determination of the facts where the findings have been made without first affording Petitioner his right to an evidentiary hearing.

Notably, the record establishes that Petitioner has continuously requested to be afforded an evidentiary hearing in this case. Petitioner has acknowledged that under federal review, movants who have failed to develop a factual basis for relief in state court face difficult barriers in obtaining an evidentiary hearing in federal court. However, "if the habeas applicant did not receive a full and fair evidentiary

hearing in a state court, either at the time of trial or in a collateral proceeding," the Supreme Court has established that a federal court "must hold an evidentiary hearing" to resolve any facts that "are in dispute." *Townsend v. Sain*, 372 U.S. 293, 312, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The Court further explained the controlling criteria by enumerating six circumstances in which such an evidentiary hearing would be required:

> (1) the merits of the factual dispute were not resolved in the state hearing;
>
> (2) the state factual determination is not fairly supported by the record as a whole;
>
> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) the material facts were not adequately developed at the state-court hearing; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id., 372 at 313, 83 S. Ct. 745. Three years later, in 1966, Congress enacted an amendment to the federal habeas statute that was an almost verbatim codification of the standards delineated in *Townsend*, supra; see also *Miller v. Fenton*, 474 U.S. 104, 111, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). That codification read in relevant part as follows:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ... of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless ... the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination is not fairly supported by the record." §2254(d).

Id. at 474 U.S. at 111, 106 S. Ct. at 450.

As is clear from the statutory text quoted above, if *any* "one of the eight enumerated exceptions applies" then "the state court's fact-finding is not presumed correct." *Jefferson v. Upton*, 560 U.S. 284, 130 S. Ct. 2217, 2220-2222, 176 L. Ed. 2d 1032 (2010) ("Under 28 U.S.C. §2254(d), state-court findings of fact 'shall be presumed to be correct' in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies"); see also 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c,pp. 915-918 (5th Ed. 2005). Petitioner contends that much of the statutory text quoted above are apparent in the instant case, thus requiring an evidentiary hearing.

In sum, the state court was required to hold an evidentiary hearing in the instant case to evaluate in totality, the facts and evidence surrounding Petitioner's claim before determining relief was not warranted. They did not. As it stands, the state court's findings constitute an unreasonable determination of the facts where evidentiary findings were made without holding a hearing and providing Petitioner an opportunity to present evidence in support of his claim. *Taylor v. Maddox*, 366 F. 3d 992 (9th Cir. 2004) set forth the following in support of Petitioner's contention:

> Closely related to cases where the state courts make factual findings infected by substantive legal error are those where the fact-finding process itself is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving Petitioner an opportunity to present evidence, such findings clearly

Further, where a movant establishes a colorable claim for relief and has never been afforded a state hearing on his claim, he should be afforded a hearing in federal court. *Earp v. Ormoski*, 431 F. 3d 1158, 1167 (9th Cir. 2005). In other words, a hearing is required if: (1) the movant has alleged facts that, if proven, would entitle him to relief, and (2) he did not receive a full and fair opportunity to develop those facts. *See, Earp*, supra; and *Williams v. Woodford*, 348 F. 3d 567, 586 (9th Cir. 2004).

In *Detrich v. Ryan*, 677 F. 3d 958, 982 (9th Cir. 2012), the court held that when a state court adjudication is based on an antecedent unreasonable determination of facts, the requirement set forth in §2254(d) is satisfied, and a petitioner's claim may be reviewed de novo. The Eleventh Circuit Court has agreed, and Petitioner has not found any case from any other circuit that holds otherwise. *Jones v. Walker*, 540 F. 3d 1277, 1288 n.5 (11th 2008)(en banc); see also *Green v. Nelson*, 595 F. 3d 1245, 1251 (11th Cir. 2010) (finding state court unreasonably determined facts under 2254(d)(2) and applying de novo review); and *Cave v. Secretary of Florida Department of Corrections*, 638 F. 3d 739, 746 (11th Cir. 2011)("When we determine that state-court fact-finding is unreasonable, ... we have an obligation to set those findings aside).

In sum, Petitioner was denied due process by the state court not holding an evidentiary hearing to allow him an opportunity to fully develop the facts of his

needs to be resolved in favor of the Ninth Circuits more lenient practice in effort to provide the reviewing courts with *factual* scenarios to decide.

CONCLUSION

WHEREFORE, Petitioner prays this Honorable Court will find grant the instant petition for writ of certiorari.

Respectfully submitted,

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