NO. 22-6142

IN THE SUPREME COURT OF THE UNITED STATES

TAJ COLLIER – Petitioner

vs.

RICKEY DIXON,

SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS, et al, Respondent(s)

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

AMENDED PETITION FOR REHEARING

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PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

The Petitioner in this case, Taj Collier, petitions for redress *pro se*, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter, grant him a Writ of Certiorari to review the opinion of the Eleventh Circuit Court of Appeals.

In Support of petition, Mr. Collier states the following.

STATEMENT OF FACTS

Petitioner Collier hereby restates and reincorporates the statement of facts delineated in the original petition.

REASONS MERITING REHEARING

The Eleventh Circuit's decision is clearly in conflict with *Strickland v. Washington*, 466 U. S. 668 (1984); and *Williams V. Taylor*, 529 U.S. 362 (2000).

Petitioner claims that Florida's Rules of Appellate Procedure Rule 9.141, do not provide for evidentiary hearings as do the appellate rules in both the State of Georgia and the State of Alabama when reviewing and adjudicating the deficient and prejudice inquiries of the clearly established federal law of Strickland.

This Court held that 28 U. S. C. § 2254 (d) (1)'s "contrary to" Clause Required the Refection of State Court decision which were "Substantially different from the Relevant precedent of this Court." In interpreting the language in Williams (Terry) this Court gave an example of a misinterpretation of *Strickland v. Washington*, 466 U. S. 668, 694 (1984):

> [IF] A State Court were to reject a prisoner's claim of ineffective Assistance of Counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," opposite in character or nature, "And" mutually opposed "to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "Reasonable probability that... the result of the proceeding would have been different."

Williams (Terry) v. Taylor, 529 U. S. 362, 405-406 (2000).

This Court then considered the situation in which a state court correctly identifies the applicable Supreme Court precedent and the standards contained in that precedent, but applies them unreasonably to the facts of the case. The Court held that this situation requires relief under §2254(d) (1): "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involving an unreasonable application of ... clearly established Federal law.'" *Williams (Terry) v. Taylor*, 529 U. S. 362, 407-408 (2000). The court declined to decide how the "unreasonable application" clause applies when a state court decision either extends

a legal principle from Supreme Court precedent to a new context or declines to do so.

This Court held in *Williams* (Terry) that an incorrect application of law is not the same as an unreasonable application of law. But the reasonableness of the state court decision is evaluated objectively by the reviewing court, not by any sort of "majority rule" analysis. The Court specifically rejected the standard of the Fourth Circuit, which had focused on whether "reasonable jurists" would find the state court determination to be reasonable. *Williams (Terry) v. Taylor*, 529 U. S. 362, 409-410 (2000).

While *Williams* (Terry) did not enunciate standards for the reasonableness determination, it did provide an illustration of the proper analysis when it applied the standard to the decision of the Virginia Supreme Court in Mr. Williams' case, and found that court's decision to be an unreasonable application of clearly established federal law. In reaching this conclusion, the Court examined the reasoning of the Virginia Supreme Court both as to the legal standard which it applied and as to the application of that standard to the facts of the case. The court found two aspects of the Virginia Court decision to be unreasonable: First, the Virginia Supreme Court applied the wrong legal standard when it held that the prejudice standard of *Strickland v. Washington*, 466 U. S. 668, 688 (1984) had been modified by *Lockhart v. Fretwell*, 506 U. S. 364 (1993). Second, it failed to evaluate the evidence in the case properly in accordance with the correct standard when it found that the failure of Mr. Williams' counsel to present penalty phase evidence

did not prejudice him. *Williams (Terry) v. Taylor*, 529 U. S. 362, 413-414 (2000).

Accordingly, the United States Supreme Court reversed Mr. Williams' sentence of death.

The United States Supreme Court recently expanded on its analysis of 28 U. S.C. §2254(d):

> AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Carey v. Musladin, 127 S.Ct. 649, 656... (2006) (KENNEDY, J., concurring in judgment). Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts "different from those of the case on which the principle was announced." Lockyer v. Andrade, 538 U. S. 63, 76 (2003). The statute recognizes, to the contrary, that even a general Standard may be applied in an unreasonable manner. See, e.g., Williams v. Taylor, 529 U. S. 362, (finding a state-court decision both contrary to and involving an unreasonable application of the standard set forth in Strickland v. Washington, 466 U. S. 668... (1984)).

Panetti v. Quarterman, 127 S.Ct. 2842, 2858 (2007).

In addition to the situation where a state court decision is "contrary to" or an unreasonable application of clearly established federal constitutional law, 28 U.S.C. §2254(d) (2) provides that a state court decision must be reversed, and relief must be granted when the state court proceeding "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." The application of this standard was discussed in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (Miller-El l):

> Factual determinations by state court are presumed correct absent clear and convincing evidence to the contrary, §2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding [citations omitted.] Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Citing Miller-El l, the court in *Collins v. Rice*, 365 F.3d 667, 685 (9th Cir. 2004), found the appellate court's determination that the trial judge properly accepted proffered "neutral" bases for peremptory challenges was not supported by the record, commenting,

> Contrary to the assertion in the dissent, we have not Substituted our own judgment for that of the state court. "Even in the context of federal habeas, deference does not Imply abandonment or abdication of judicial review. deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guide by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." Miller-El, 123 S.Ct. at 1041; see also Hall v. Dir. of Corrs, 343 F.3d 976, 984 n. 8 (9th Cir.2003) ("AEDPA, although emphasizing Proper and due deference to the state court's findings, did not eliminate federal habeas review. Where there are real, credible doubts about the veracity of essential evidence and the person who created it, AEDPA does not require us to turn a blind eye.")

Also applying Miller-El l, the court in *Parsad v. Greiner*, 337 F.3d 175, 180-181 (2nd Cir. 2003), found that the state court's determination that a petition was

not "in custody" for Miranda purpose was an unreasonable determination of the facts presented to the state court.

Explaining its ruling that the state court decision that the petitioner's plea agreement had not been breached was an unreasonable determination of the facts, the court in *Gunn v. Ignacio*, 263 F.3d 965, 970 (9th Cir. 2001), stated the standard as follows: "We read the 'unreasonable determination of the facts' criterion to require 'more than mere incorrectness,' such that the state court's fact finding is so 'clearly erroneous' as to leave us with a 'firm conviction' that its determination was mistaken on the evidence before it." (Citing Torres v. Prunty, 223 F.3d 1103, 1107-1108 (9th Cir.2000). See also *McClain v. Prunty*, 217 F.3d 1209, 1223 (9TH Cir. 2000) (Finding state court decision that prosecutor's "race-neutral" reasons justified peremptory strike was unreasonable determination of the facts).

When it revisited Mr. Miller-El's case, the Supreme Court found that the Texas court's determination of the facts was unreasonable under 28 U.S.C. §2254(d)(2): "The state court's conclusion that the prosecutors' strikes of Fields and Warren were not racially determined is show up as wrong to a clear and convincing degree; the state court's conclusion was unreasonable and erroneous." *Miller-El v. Dretke*, 525 U.S. 213, 266 (2005) (Miller-El ll).

Finally, if a legal issue has not been considered by the state court, this court must review it de novo. *Wiggins v. Smith*, 539 U.S. 510, 531 (2003).

The first inquiry this case presents is whether that provision applies when state-court relief is denied without an accompanying statement of reasons. If it

does, the question turns on whether the Eleventh Circuit adhered to the statutes terms, with regard to this case as it relates to ineffective assistance of appellate counsel judged by the standard set forth in *Strickland.*

To support the foregoing, Petitioner states appointed appellate counsel, Ms. Karen E. Ehrlich, A.P.D. (Ms. Ehrlich) rendered ineffective assistance when she unreasonably chose to forego exhausting the pre-trial suppression order during the initial direct review of his judgment and conviction ultimately obtained by the use of evidence and testimony gained pursuant to the unconstitutional search and seizure resulting from the illegal and unlawful investigatory stop. The Federal Court is of the opinion that under the principles of *Stone v. Powell,* 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), federal habeas review of Petitioner's illegal search and seizure claim is not cognizable in this proceeding because Petitioner had a full and fair opportunity to litigate his Fourth Amendment issue in state court. Petitioner asserts that he received ineffective assistance of appellate counsel. In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court articulated a two-pronged test for determining whether a defendant was denied constitutionally adequate assistance of counsel. "The same standard applies whether [a court is] examining the performance of counsel at the trial or appellate level." *Eagle v. Linahan,* 279 F.3d 926, 938 (11th Cir. 2001) (citing Matire v. Wainwright, 811 F.2d 1430, 1435 (11th Cir. 1987)).

To demonstrate that his appellate counsel's performance was deficient, Petitioner must show that his attorney's performance "fell below an objective

standard of reasonableness." *Strickland*, 466 U.S. at 687. "In considering the reasonableness of an attorney's decision not to raise a particular claim, [a court] must consider 'all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Eagle*, 279 F.3d at 940 (quoting Strickland, 466 U.S. at 691). "Thus, ' [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at that time.'" *Id.* (quoting Strickland, 466 U.S. at 689). The reasonableness of counsel's assistance is reviewed in light of both the facts and law that existed at the time of the challenged conduct. *Chateloin v. Singletary*, 89 F.3d 749, 753 (11th Cir. 1996); see also *Jones v. United States*, 224 F.3d 1251, 1257-58 (11th Cir. 2000) (noting that counsel's "failure to divine" a change in unsettled law did not constitute ineffective assistance of appellate counsel) (quoting Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983)).

To determine whether Petitioner was prejudiced by his attorney's failure to raise a particular issue, the Court "must decide whether the arguments the [Petitioner] alleges his counsel failed to raise were significant enough to have affected the outcome of his appeal." *United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000) (citing Miller v. Dugger, 858 F.2d 1536, 1538 (11th Cir. 1988)), cert. denied, 531 U.S. 1131, 121 S. Ct. 892, 148 L. Ed. 2d 799 (2001). "If [a court] conclude[s] that the omitted claim would have had a reasonable probability of success, then counsel's performance was necessarily prejudicial because it affected

the outcome of the appeal." *Eagle,* 279 F.3d at 943 (citing Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990)).

In this context, for example, the Florida appellate court never rendered a determination at any point in the rule 9.141 proceeding, from the time subsequent to when the court issued the order directing the office of the attorney general to show cause why the habeas petition alleging ineffective assistance of appellate counsel should not be granted.

In response to the appellate courts order, Assistant Attorney General, Ms. Melanie Surber, contended that Ms. Ehrlich omitted the suppression hearing argument because it was essentially, in her opinion, non-meritorious and she had no duty in her professional judgment to raise weaker points on appeal where the appellate court would have most likely denied the issue had it been raised. [Certiorari Appendix K]. This reasoning was advanced without any evidence or testimony that Ms. Ehrlich omitted the suppression issue based on her strategic and/or tactical professional judgment during her advocating the merits of Petitioner's direct appeal.

The federal district court relied on Ms. Surber's reasoning in response to the appellate court's show cause order construing *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984), but holding that: "[G]enerally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." "Here, the issue of the denial of the motion to suppress was

not "clearly stronger" than the arguments appellate counsel made." This was a clearly unreasonable interpretation of *Strickland.*

Although *Strickland v. Washington, supra,* cautions against judging counsel's decisions in hindsight and suggests that a presumption in favor of reasonableness is therefore appropriate, it does **not** dictate that this presumption can only be overcome by demonstrating whether the omission of the suppression issue was clearly stronger than the three issues actually briefed in determining the result of reasonable professional judgment in conjunction with the standard showing that a reasonable probability exists Ms. Erhlich's failure to couch the suppression issue affected the outcome of the appeal, specifically where no evidentiary hearing was conducted, such as is the case here.

"Appellate counsel challenged rulings made during the trial itself. The basis of Petitioner's motion to suppress in the trial court was that the police lacked a well founded, reasonable articulated suspicion to conduct an investigatory stop of his vehicle. The facts, as established at the evidentiary hearing on the motion and described in detail in the facts section above, belied this claim. It is reasonable if not certain that the Fourth DCA would have agreed with the trial court's decision to deny the motion to suppress. Counsel's performance cannot be deemed deficient for failing to raise a no-meritorious issue."

"Petitioner also fails to establish prejudice where the argument omitted by appellate counsel lacked merit. Because there is no merit to the arguments raised under claims 2 and 5, the rejection of the claim in the state forum was neither

contrary to nor an unreasonable application of Strickland and should not be disturbed here." (The Court's referenced citations have been omitted) [Appendix WW pg. 19].

Petitioner avers that this conclusion was erroneous and refuted by the State court record.

The second, and even more fundamental, is the factual determination of the rule 9.141 proceeding where the state court's fact-finding process was inadequate because the record before the state court raised conflicting inferences relative to the mixed question of law and fact in the context of Petitioner's motion to suppress, where the trial court's determination of historical facts are accorded a presumption of correctness, which the appellate court reviews under a standard of competent, substantial evidence, interpreting the evidence and reasonable inferences in a manner most favorable to sustaining the trial court's ruling. *Nelson v. State*, 850 so. 2d 514, 521 (Fla. 2003); *Pagan v. State*, 830 so. 2d 792, 806 (Fla. 2002).

Here, Ms. Surber advanced the proposition that Ms. Ehrlich had no duty to raise every non-frivolous issue in the show cause order without ever giving any deference to her completely contrary argument she presented on direct appeal.

These arguments were never substantiated by the record and were always in contravention with one another and as such clearly created a disputed issue of fact that warranted an evidentiary hearing.

Petitioner claims that Florida appellate courts do not provide evidentiary hearings in order for a litigant to offer evidence on appellate counsel's alleged

ineffectiveness in the context of a Strickland violation where counsel, as in this case, completely omitted briefing Petitioner's claim that the trial court erred in denying his motion to suppress. Had Petitioner raised this very claim in the State of Alabama or in the State of Georgia under their respective appellate rules, he would have received an evidentiary hearing and the opportunity to establish prejudice resulting from appellate counsel's alleged deficient performance.

Basically, the Eleventh Circuit reviews ineffective assistance of appellate counsel claims on a more developed plane from the Alabama and Georgia state courts as opposed from those brought before it from the Florida state courts.

Petitioner submits that providing this Court grants rehearing and reconsiders his Certiorari request he will be able to demonstrate to this Court that there is a due process/equal protection constitutional violation as to the Eleventh Circuit Court of Appeals review of Strickland appellate counsel claims between Alabama, Florida, and Georgia.

Finally, Petitioner asserts that without a judicial determination specifically assessing both the record and transcripts relied on by Ms. Surber's response in relation to the mixed questions of law and fact defining the deficient and prejudicial standards that substantiate the ineffective assistance of appellate counsel claim and the assessment actually being rendered by the Appellate Court relative to the underlying claim alleging ineffective assistance of appellate counsel, there still remains a disputed issue of fact in relation to the deficient and prejudice standards of *Strickland*, a dispute that requires an evidentiary hearing.

In the pursuit of justice on an issue that certainly reaches the level of constitutional magnitude, it is imperative that the Court grant rehearing review.

Accordingly, this Court has an ethical duty by the United States Constitution to establish the law of the land and to assure the citizens of the United States of America that the lower courts apply that law. When they do not, it is this Court's obligation to hold that Court accountable and see to it that justice is administered fairly. This Court must hear this case and hold that the Eleventh Circuit accountable for failing to properly apply the law of this Court and relief where relief is due.

This rehearing is filed in good faith and without delay.

CONCLUSION

For the reasons stated, this Court must grant rehearing of its judgment entered on **January 9, 2023**, and issue a Writ of Certiorari to hold the District and Eleventh Circuit accountable for failing to properly apply the law of this Court and grant Petitioner relief.

Respectfully submitted,

Taj Collier
FDC#447776
Cross City Correctional Inst.
568 N.E. 255th Street
Cross City, Florida 32628

NO. 22-6142

IN THE
SUPREME COURT OF THE UNITED STATES

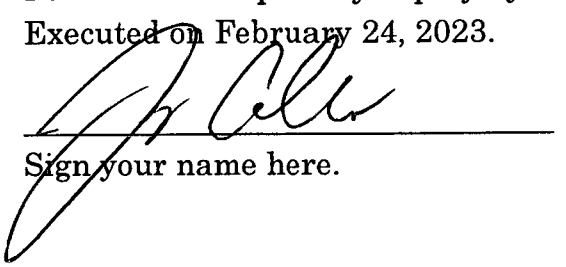
TAJ COLLIER – Petitioner

vs.

RICKY DIXON – SECRETARY
FLORIDA DEPT. CORRECTIONS – Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule, I certify that this amended petition states grounds that are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.
I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 24, 2023.



Sign your name here.

NO. 22-6142

IN THE
SUPREME COURT OF THE UNITED STATES

TAJ COLLIER – Petitioner

vs.

RICKY DIXON – SECRETARY
FLORIDA DEPT. CORRECTIONS – Respondent

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the amended petition for rehearing contains **4,140** words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 24, 2023.

Sign your name here.

IN THE SUPREME COURT OF THE UNITED STATES

TAJ COLLIER – Petitioner

vs.

RICKY DIXON,
SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS, et al, Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES

APPENDIX IN SUPPORT OF AMENDED PETITION FOR REHEARING

Attorney for Respondent
Ashley Moody
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399

Taj Collier
FDC#447776
Florida Department of Corrections
Cross City Correctional Institution
568 N.E. 255th Street
Cross City, Florida 32628

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 9, 2023

Mr. Taj Collier
Prisoner ID DC #447776
Cross City Correctional Institution
568 N.E. 255th Street
Cross City, FL 32628

Re: Taj Collier
v. Florida Department of Corrections
No. 22-6142

Dear Mr. Collier:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-14087-E

TAJ COLLIER,

Petitioner-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

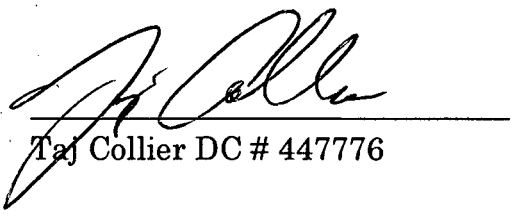
ORDER:

Taj Collier first moves to file an out-of-time motion for a certificate of appealability ("COA"). That motion is GRANTED. His next motion, dependent on the first, is for a COA to appeal the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. Collier's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

/s/ Britt C. Grant
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I placed this Amended Petition for Rehearing in the hands of prison officials for mailing to: *Supreme Court of the United States*; Office of the Clerk, Washington, DC, 20543-0001; and to *Criminal Appeals Division*, 1515 N. Flagler Dr., Ste. 900, West Palm Beach, Florida 33401, on this **24rd** day of **February**, 2023.



Taj Collier DC # 447776

IN THE SUPREME COURT OF THE UNITED STATES

TAJ COLLIER,
Petitioner,

v. Appeal No.: 22-6142

RICKY DIXON,
SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,
Respondents,
_____/

DECLARATION OF INMATE FILING

I am an inmate confined in an institution. Today, *February 24, 2023*, I am depositing the Amended Motion for Rehearing in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Taj Collier, February 24, 2023

NO. 22-6142

IN THE
SUPREME COURT OF THE UNITED STATES

TAJ COLLIER – Petitioner

vs.

RICKY DIXON – SECRETARY
FLORIDA DEPT. CORRECTIONS – Respondent

PROOF OF SERVICE

I Taj Collier, do swear or declare that on this date, February 24, 2023, as required by Supreme Court Rule 29 I have served the AMENDED MOTION 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 documents 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 served are as follows: *Attorney General of Florida Ms. Ashley Moody The Capitol Pl-01, Tallahassee, Florida 32399* and to *Office of the Attorney General for the Fourth District 1515 Flager Dr., Ste 900, West Palm Beach, Florida 33401*

I declare under penalty of perjury that the following is true and correct.

Executed on February 24, 2023.

Taj Collier