No. 22-6387

IN THE SUPREME COURT OF THE UNITED STATES

KENAKIL GIBSON – PETITIONER

VS.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

KENAKIL GIBSON #L81359

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DEFUNIAK SPRINGS, FL 32433

850-951-6426

QUESTIONS PRESENTED

- Does state prisoner "fairly present" federal nature of his claim on direct appeal where he cites to a lone Florida Supreme Court case that cites to, and was decided on, federal grounds?
- Where state and federal claims share the same legal standard, has a federal claim been "fairly presented" when the state court necessarily rejects the federal claim in ruling on the state claim?
- Does sufficiency-of-the-evidence claim, where state and federal law share identity, "fairly present" the federal nature of a state-law claim when state court must naturally use the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979) in order to adjudicate the claim?

LIST OF PARTIES

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

RELATED CASES

Gibson v. State, No. 4D11-2418, Court of Appeal of Florida, Fourth District. Per Curiam affirmed; rehearing denied May 14, 2014. (*Direct appeal*)

Sub nomine at *Rutledge v. State*, No. 4D10-5022, Court of Appeal of Florida, Fourth District. Decision reached and remanded October 29, 2014. (*Remand for re-trial of co-defendant Rutledge*)

Gibson v. State, Case No. 2008CF000919BMB, Circuit Court of the 15th Judicial Circuit of Florida. Rehearing denied by Order entered October 17, 2018. (*Post-conviction Fl rule 3.850)*

Gibson v. State, No. 4D17-2858, Court of Appeal of Florida, Fourth District. Per Curiam affirmed; rehearing denied March 15, 2019. (*Appeal of Fl rule 3.850 denial)*

Gibson v. State, No. 4D19-0798, Court of Appeal of Florida, Fourth District. Dismissed as untimely March 29, 2019. (*Post-conviction Fla. R. App. P. 9.141)*

Gibson v. State, Case No. 2008CF000919BMB, Circuit Court of the 15th Judicial Circuit of Florida. Order entered June 18, 2019. (*Second post-conviction Fl rule 3.850)*

Gibson v. State, No. 4D19-2308, Court of Appeal of Florida, Fourth District. Per Curiam affirmed October 31, 2019. (*Appeal of second post-conviction Fl rule 3.850)*

Gibson v. Ricky Dixon, No. 19-cv-80525-DMM, U.S. District Court for the Southern District of Florida. Order entered, COA denied; Motion to amend judgment (Rule 59e) denied February 1, 2022. (*Fed. Habeas Corpus)*

Gibson v. Secretary, Florida Dept. of Corr., No. 22-10731-A, U.S. Court of Appeals for the Eleventh Circuit. Order entered, COA denied; Reconsideration denied May 20, 2022. (*Application of COA)*

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TABLE OF AUTHORITIES CITED

Cases

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 "A" to the petition and is unpublished

The opinion of the United States district court appears at Appendix "B" to the petition and is reported at 2021 U.S. Dist. LEXIS 247814 (11thcir. 2021)

The report and recommendation of the United States district court magistrate judge appears at Appendix "C" to the petition and is reported at 2021 U.S. Dist. LEXIS 220346 (11thcir. 2021)

For cases from **state courts**:

The opinion of the highest court to review the merits appears at Appendix "E" to the petition and is reported at 139 So. 3d 312 (FL 4TH DCA 2014)

JURISDICTION

The date on which the United States Court of Appeals decided this case was May 20, 2022.

A timely petition for reconsideration was denied by the United States Court of Appeals on July 12, 2022, and a copy of the order denying reconsideration appears at Appendix "K"

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- The right of a state prisoner to seek federal habeas corpus relief is guaranteed in 28 USC § 2254. The standard for relief under "AEDPA" is set for in 28 USC § 2254.

- Amendment 5 of the United States Constitution – Due process of law:

    - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without *due process of law*; nor shall private property be taken for public use, without just compensation"

- Amendment 6 of the United States Constitution – Right of the accused to be confronted with the witnesses against him:

    - "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence"

STATEMENT OF THE CASE

Petitioner was convicted by a Florida jury of: (Count 1) first-degree murder with a firearm, (Count 2) conspiracy to commit first-degree murder, and (Count 3) solicitation to commit first-degree murder. Petitioner was sentenced to two concurrent terms of thirty years of imprisonment as to Counts 2 and 3, to be followed by a consecutive lifetime term of imprisonment, without the possibility of parole, as to Count 1.

A. Petitioner's Direct Appeal:

Petitioner appealed, raising five claims of trial court error in his counseled Initial Brief: (1) improperly denying Petitioner's motion for judgment of acquittal as to each count; (2) allowing Ramon Feliciano to testify regarding co-defendant Rutledge's hearsay statements; (3) denying Petitioner's motion to suppress his in-court and out-of-court identifications; (4) admitting prior bad acts evidence; and (5) failing to conduct an adequate discovery violation hearing. Petitioner also raised a claim that trial counsel was ineffective for introducing evidence that Petitioner was in possession of firearms unrelated to the charged offenses (*see* Appendix I). The 4th District Court of Appeals for Florida *per curiam* affirmed the convictions and sentences in a decision without written opinion.

B. Post-Conviction Proceedings:

Petitioner filed his first motion for post-conviction relief, pursuant to Fla. R. Crim. P. 3.850 ("Rule 3.850 Motion"), raising multiple claims. Following the State's

response and a two-day evidentiary hearing, the trial court entered a detailed Order denying the Rule 3.850 Motion. Rehearing was denied by Order entered on October 17, 2018. Petitioner appealed. The Fourth District Court of Appeal *per curiam* affirmed the trial court's order in a decision without written opinion. Rehearing en banc was denied on March 15, 2019.

On March 14, 2019, Petitioner filed a state habeas corpus petition, pursuant to Fla. R. Crim. P. 9.141, with the Fourth District Court of Appeal arguing that appellate counsel [in the direct appeal proceedings] was ineffective for failing to challenge the court's jury instructions. On March 29, 2019, the Fourth District Court of Appeal dismissed the petition as untimely.

On April 30, 2019, Petitioner next filed a second Rule 3.850 Motion arguing that trial counsel was ineffective for failing to challenge the court's jury instructions. On June 18, 2019, the trial court entered an Order denying the second Rule 3.850 Motion, adopting the state's response thereto. On October 31, 2019, the Fourth District Court of Appeal *per curiam* affirmed the trial court's order in a decision without written opinion.

C. Federal Habeas proceedings:

On May 6, 2019, Petitioner filed his Amended Federal Habeas petition pursuant to 28 U.S.C. §2254. In his petition he raised eight claims: (1) trial court erred in denying Petitioner's motion for judgment of acquittal as to the first-degree murder with a firearm offense; (2) trial court erred in denying Petitioner's motion for

judgment of acquittal as to the solicitation to commit first degree murder offense; (3) trial court erred in denying Petitioner's motion for judgment of acquittal as to the conspiracy to commit first degree murder offense; (4) Petitioner's Confrontation rights were violated when the trial court allowed Ramon Feliciano to testify as to hearsay statements; (5) trial counsel was ineffective for introducing irrelevant collateral crimes evidence; (6) trial counsel was ineffective for failing to depose and then call co-defendant Eddie Rutledge to testify as a defense witness given his affidavit exonerating Petitioner; (7) collateral counsel was ineffective for failing to raise during the Rule 3.850 proceedings and appeal therefrom a claim that trial counsel was ineffective for failing to object to the court's principal jury instructions. On November 13, 2021, the Magistrate Judge for the Southern District of Florida then entered a "Report and Recommendation" recommending that Petitioner's Federal Habeas petition be denied, and that a certificate of appealability ("COA") also be denied[1] (*see* Appendix C). Petitioner then filed an "Objection to the Report and Recommendation" on December 27, 2021 (*see* Appendix H). On December 30, 2021 the District Judge for the Southern District of Florida entered an "Order Adopting Report and Recommendation" of Magistrate Judge (*see* Appendix B). The merits of Petitioner's claims were never reached. The claims were deemed procedurally defaulted. Petitioner then entered a "Motion to amend judgment" pursuant to Fed. R. Civ. P. 59 on January 28, 2022 (*see* Appendix G), which was

[1] due in pertinent part to the issue that Petitioner's claims 1, 2, 3, and 4 were not fairly presented as federal claims in the state forum. Claim 7 was also deemed unexhausted, the merits of the claim were never reached.

denied by order entered by the District Judge on January 31, 2008; COA denied (*see* Appendix F). Petitioner then sought a COA from the 11th Circuit Court of Appeals (*see* Appendix E). On May 20, 2022 the 11th Circuit Court of Appeals filed an order denying a COA (*see* Appendix A). Petitioner then filed a motion for reconsideration (*see* Appendix D), which was then denied by order, on July 12, 2022 (*see* Appendix K).

REASONS FOR GRANTING THE PETITION

The pertinent issues upon which this petition turns is whether the 11th Circuit is properly interpreting the decision reached by this Court in *Baldwin v. Reese*, 541 U.S. 27 (2004) to determine whether the federal nature of a claim has been fairly presented to the state court, and when the state court naturally uses the standard set forth in *Jackson v. Virginia* 443 US 307 (1979) to adjudicate a sufficiency-of-the-evidence claim has a petitioner fairly presented the federal nature of his state-law claim, where federal and state law share identity.

The Petitioner asserts that:

1) He is made to suffer the onus of a criminal conviction of: (Count 1) first-degree murder with a firearm, (Count 2) conspiracy to commit first-degree murder, and (Count 3) solicitation to commit first-degree murder without sufficient proof of *every* element of the offenses.

    a. On direct appeal, Petitioner raised his "sufficiency of the evidence claims" as "judgment of acquittal" claims in the state court, as to Counts 1, 2, and 3 (*see* Appendix I). The state and federal inquiries would be identical

    b. The Florida state appellate court would naturally use the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979) in its analysis of the claims, therefore the "federal nature" of the claim was "fairly presented" to the state court

c. The 11th District Court erred when it deemed Petitioner's claims unexhausted. The "federal nature" of the claim was fairly presented to the state court on direct appeal. The 11th District Court should have made a merits determination.

d. The 11th Circuit Court did err when it denied Petitioner a COA on this issue. Jurist of reason would find it debatable whether the district court was correct in its procedural ruling, and they would find it debatable as to whether the petition stated a valid claim of the denial of a constitutional right. This is witnessed by variations in holdings by different federal circuits dealing with the same set of legal principles.

2) His 6th Amendment right to Confrontation was violated when the trial court allowed a state witness to testify as to hearsay statements of petitioner's co-defendant without sufficient proof of a conspiracy.

a. On direct appeal Petitioner raised this as Ground 2. In his Initial Brief, he cited a lone Fl Supreme Court case in support of his claim, *Brooks v. State*, 787 So. 2d 765 (Fla. 2001)(Fl Supreme Court remanded the case for a new trial because the Court found reversible error in the admission of statements in violation of Brooks' Sixth Amendment right to confront the witnesses) (*see* Appendix J pg. 22).

b. Petitioner raised this issue as Claim 4 on his Federal Habeas petition. The 11th District Court deemed this claim unexhausted, stating that "Petitioner's argument is unavailing as the citation [to the Fl supreme

court case] alone is insufficient to alert the state court of the federal basis of the claim..." (*see* Appendix C pg. 10); the merits of the underlying constitutional claim were never reached by the District Court. This is in direct conflict with the decision reached by this Court in *Baldwin.*

c. Jurist of reason would find it debatable whether the District Court was correct in its procedural ruling, and they would find it debatable as to whether the petition stated a valid claim of the denial of a constitutional right. Thus the 11th Circuit Court did err when it denied Petitioner a COA on this issue.

The 11th Circuit Court of Appeal's decision is in direct conflict with this Honorable Court and several other Circuit Courts of Appeal on an important constitutional question.

In *Baldwin* this Honorable Court stated that "a litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief for example, by citing in conjunction with the claim the federal source of law on which he relies or *a case deciding such a claim on federal grounds*".

All circuits, except the 11th, have adopted this standard in various precedential cases:

> 1st circuit – Clements v. Maloney, 485 F.3d 158 (1st cir. 2007) (noting that "citations to state court decisions which rely on federal law or articulation of a state claim that is, 'as a practical matter, [] indistinguishable from one arising under federal law' may suffice to satisfy the exhaustion requirement.")

2nd circuit – Chrysler v. Guiney, 806 F.3d 104 (2nd cir. 2015) (citing Daye v. Attorney Gen. of New York, 696 F. 2d 186 (2nd cir. 1982)(A petitioner may satisfy the fair presentation requirement by: (a) reliance on pertinent federal cases employing constitutional analysis, (b) *reliance on state cases employing constitutional analysis in like fact situations...*)

3rd circuit – Wilkerson v. Superintendent Fayette State Corr. Inst, 871 F.3d 221 (3rd cir. 2017)(noting a prisoner can "fairly present" a federal claim to state courts in different ways: (a) reliance on pertinent federal cases employing constitutional analysis, (b) *reliance on state cases employing constitutional analysis in like fact situations...*)

4th circuit – Jones v. Sussex, 591 F.3d 707 (4th cir. 2010)(noting "the Supreme Court has held that a ""litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim . . . a *case deciding such a claim on federal grounds.*" Baldwin, 541 U.S. at 32 (emphasis added). The Court drew no distinction between citation to a state--as opposed to a federal--case, so long as the cited case rested its holding on federal law.)

5th circuit – Johnson v. Cain, 712 F.3d 227 (5th cir. 2013)(citing that: "Following *Baldwin*, we have demanded less of state habeas petitioners seeking to raise a federal claim, exemplified by *Taylor v. Cain*, 545 F.3d 327 (5th cir. 2008), where we deemed a claim fair writ and presented although the petitioner "did not label his claim as a federal constitutional one," because "his brief made the type of arguments that support a Confrontation Clause claim" and he cited two Louisiana cases mentioning the federal confrontation right. *Id.* at 333-34

6th circuit – Al-Maqabih v. Temple, 2021 U.S. App. LEXIS 6484 (6th cir. Mar. 4, 2021)("One consideration in determining whether the petitioner fairly presented his federal constitutional claim to the state courts is whether "*the petitioner relied upon state cases employing the federal constitutional analysis in question.*" quoting *Blackmon v. Booker*, 394 F.3d 399, 400 (6th cir. 2004))

7th circuit – Schmidt v. Foster, 911 F.3d 469 (7th cir. 2018)(factors to determine whether a petitioner has defaulted a claim: 1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) *whether the petitioner relied on state cases which apply a constitutional analysis to similar facts...*)

8th circuit – Turnage v. Fabian, 606 F.3d 933 (8th cir. 2010)(holding that: "[i]n order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a

particular constitutional provision, a federal constitutional case, or *a state case raising a pertinent federal constitutional issue in a claim before the state courts*")

9th circuit – Davis v. Silva, 511 F.3d 1005 (9th cir. 2007) (reverse and remanding District court because "... as Circuit precedent demands, and by checking the sources cited in the petition, as the logic of Supreme Court precedent dictates, the legal theory and factual basis of [the argument] is clear..." Finding that because the legal theory and operative facts were "fairly presented" to the California Supreme Court, the claim was exhausted)

Reasons why this Court should hold that the 11th Circuit be ordered to follow the precedent set in *Baldwin* and the majority of other federal circuits

1. The principles in *Baldwin* are "clearly established federal law", as can be witnessed by the majority of precedential cases in the other federal circuits adopting these principles
2. The 11th Circuit Court of Appeals has viewed the "dicta" of this Court as "not something to be lightly cast aside. *see Schwab v. Crosby*, 451 F.3d 1308 (11th cir. 2006)
3. The 11th Circuit Court of Appeals was in error for denying Petitioner a COA; jurist of reason would find it debatable whether Petitioner stated a valid claim of a denial of a constitutional right, and jurist of reason would debate as to whether the 11th circuit was correct in its procedural ruling.
4. The 11th Circuit Court of Appeals is arbitrary in its rulings on this same issue of law, granting relief to some while denying others under the same set of factual conditions.

5. This Court declined to decide in *Baldwin* whether, "where . . . identity exists, a petitioner need not indicate a claim's federal nature, because, by raising a state-law claim, he would necessarily 'fairly present' the corresponding federal claim." The 11th has thus determined that "it is not at all clear that a petitioner can exhaust a federal claim by raising an analogous state claim." *see Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449 (11th cir 2015)
6. This thus puts the 11th in direct conflict with other Circuit Court of Appeals on the same important constitutional question. It is the function of this Court to resolve constitutional questions.

The 11th District Court deemed Petitioner's claims as unexhausted, thereby holding that it was procedurally defaulted for lack of alerting the state court of the federal basis of the claims. The 11th circuit artfully left out of its considerations one of the manners in which *Baldwin* holds that a petitioner can fairly present the federal nature of his claim in state courts by citing a case deciding such a claim on federal grounds.

In this instant petition, Petitioner argues that he, and others so similarly situated, has exhausted his state remedies so as to be entitled to federal habeas corpus review, because, even though he did not cite the constitution or federal cases in the state court proceedings, his assertion of improper allowance of "hearsay statements" alerted the state court that he was being denied a right guaranteed by U.S. constitutional amendment 6. Moreover, Petitioner's brief on direct appeal relied upon a case in which the state's highest court analyzed contentions similar to

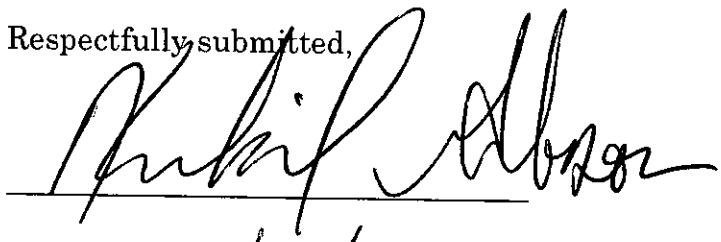
Petitioner's -- hearsay exceptions -- in constitutional terms. The courts there clearly viewed a defendant's right to confront his accusers as one of constitutional dimension as there were 9 cites to U.S. Supreme Court cases, 3 cites to federal circuit cases, and the terms "Confrontation Clause" and "hearsay exception" were used repeatedly throughout the opinion delivered by the State Supreme Court. By simply cite checking Petitioner's argument on direct appeal, the state court would have had all the facts necessary to give application to the constitutional principle. The conclusion that Petitioner failed to exhaust is plausible only if the argument made on direct appeal is construed without referring to the sources cited by the Petitioner. *Baldwin*, in fact, suggests the opposite, as it holds that a legal theory is fairly presented when a citation is provided to the relevant case law. This Court recognized that state courts are expected to refer to sources cited by the petitioner.

"Justice and fairness for all" demands that the 11th circuit be brought into compliance with *Baldwin* and the other federal circuits on the same important constitutional issue of law, so that Petitioner and others so similarly situated may get habeas relief.

CONCLUSION

Based on the foregoing, this court should grant the Petition for Writ of Certiorari and order full briefing.

Respectfully submitted,



Date: 10/7/22