23-5563

No._____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER J. DERTING-PETITIONER

VS.

SECRETARY, DEPT. OF CORR., et., al.-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER J. DERTING, DC#121880

P.O. BOX 2000

LAWTEY, FLORIDA 32058

QUESTION PRESENTED

Can the District Court ignore the views of this Court stated in *Lovell v. Duffey* pertaining to 2254 (d) (2) claims, which should focus on what State Court knew and did at the time, and instead construe *Cullen v. Pinholster* as to prohibit actual testimony heard by the State Post-Conviction Court prior to it's ruling? Thus, preventing itself, from reviewing Petitioner's Habeas Corpus with the same set of facts and frustrating Petitioner's chance of proving *Strickland* and states duplicity, which is in direct conflict with the 2nd Circuits decision in *Heckler.*

If it is clear from the face of the record that the state Post-Conviction Court clearly believed facts which showed a deprivation of constitutional rights and awarded an Evidentiary Hearing, yet (erroneously) concluded relief be denied along with that Evidentary Hearing with no reasoning. Shouldn't the District Court "safeguard" Petitioner's due process right to a full and fair hearing as set forth by this court in the longstanding decisions in *Townsend* and *Keeney* when the merits of a factual dispute have not been addressed and is in direct conflict with the 9th Circuits ruling in Vicks v. Bunnell?

LIST OF PARTIES

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

[X] 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:

Davis, Hon. Brian J – U.S. Dist. Judge, Middle Dist. of Fl.

Derting, Christopher – Appellant

Dixon, Hon, Ricky. – Secretary, Fl. Dept. of Corrections

Duncan, Donna – Appellant's Counsel

Haddock, Hon. Lawrence P. – Cir. Court Judge, Fl. 4th Judicial Cir.

Jackson, Mark – Appellant's Counsel

Jordan, Bryan – Senior Asst. Attorney Gen., State of Fl.

Klingensmith, Jessica – State's Attorney

Kuhn, Amanda M. – Appellant's Counsel

Lance, Senovia – Appellant's Trail Counsel

Loizos, Senovia – Post-Conviction State's Attorney

McDermott, Michael – Senior Asst. Attorney, Gen. State of Fl.

Moody, Hon. Ashley B. – Attorney Gen. State of Fl.

Nelson, Hon. Melissa – State Attorney, Fl. 4th Judicial Cir.

Niemczyk, Todd – Appellant's Trial Counsel

Salvador, Hon. Tatiana – Cir. Court Judge, 4th Judaical Cir.

Schlax, Julie A. – Appellant's Post-Conviction counsel

Simak, Theresa E. – States Attorney

Wallace, Hon. Waddell A. – Cir. Court Judge, 4th Judicial Cir.

RELATED CASES

Derting v. State, 54 So. 3d 492; 2011 Fla. App. Lexis 2306. Court of Appeals of Florida, First District. Case No. 1009-5381. Opinion filed Feb 21, 2011.

Derting v. State, 108 So. 3D 1128; 2013 Fla. App. Lexis 3899, Court of Appeals of Florida, First District. Case No. 1013-0808. Opinion filed March 12, 2013.

Derting v. State, 228 So. 3D 554; 2017 Fla. App. Lexis 16185, Court of Appeals of Florida, First District. Case No. 1016-2141. Decided Oct. 16, 2017.

Derting v. Sec'y, Dep't of Corr., 2020 U.S. Dist. Levis 34395, United states District Court for the Middle District of Florida, Jacksonville Division Case No. 3:17-cv-1315-j-39mcr. Denied Feb. 27, 2020.

Derting v. Sec'y, Dep't of Corr., 2020 U.S. App. Lexis 27271 (11th Cir. Fla., Aug. 26, 2020).

Derting v. Sec'y, Dep't of Corr., 2020 U.S. App. Lexis 846, 2022 wl 104280 (11th Cir. July 6, 2022). Held Abeyance.

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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

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

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

[X] reported at 2022 U.S. App. LEXIS 846; 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

[X] reported at 2020 U.S. Dist. LEXIS 34395; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

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

[X] reported at 2017 Fla. App. LEXIS 9677; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Fourth Judicial Circuit Duval County Fla. court appears at Appendix E to the petition and is

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was JAN. 11, 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: MAY 10, 2023, and a copy of the order denying rehearing appears at Appendix A.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including SEPTEMBER 7, 2023 (date) on AUGUST 17, 2023 (date) in Application No. 23 A 141.

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

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

The date on which the highest state court decided my case was JULY 6, 2017. A copy of that decision appears at Appendix D.

[ ] 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

Griffin v. Buchanan, 852 Fed. Appx. 199 (6th Cir, 2021). Petitioner cannot just show an unreasonable determination of fact to get relief; he must show that the resulting State Court decision was based on that unreasonable determination. Additionally, showing that the state court based its decision on an unreasonable determination of fact does not by itself entitle the petitioner to relief, it merely removes AEDPA's litigation bar. Once the bar is removed, petitioner must show that he is being held in violation of federal law by identifying, and prevailing on a federal claim.....15

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28 U.S.C. § 2254 (f) if applicant challenges the sufficiency of the evidence adduced in state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.....19

28 U.S.C. § 2254 (e),(2),(A),(ii), and (B) if the applicant has failed to develop the factual basis of a claim in state court proceeding, the court shall not hold an EvidentiaryHearing on the claim unless the applicant shows that-the claim relies on-a factual predicate that could not have been previously discovered through the exercise of due diligence;-The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.....19

Williams v. Taylor, 529 U.S. 420, 432, 120, S. Ct. 1479, 146 L. Ed 2d (2000) at 437: "Diligence will require in the usual case that the prisoner, at a minimum, seek an Evidentiary Hearing in state court in the manner proscribed by state law."....20

See, Vicks v. Bunnell, 875 F. 2d 258, 259-60 (9th Cir. 1989) (Reversal of denial of Habeas Corpus relief and remand required when District Court could not properly have resolved claim presented without reviewing State Court transcripts that were not before District Court). (Emphasis added).....21

Cullen v. Pinholster, 563 U.S. 170 (2011) and limits its review to the record that was before the sate court when it rejected the post-conviction motion on its merits.....21

Lovell v. Duffey, 545 Fed Appx. 375 (U.S. Court of Appeals 6th Cir.) (October 15, 2013) Although the Pinholster U.S. Supreme Court issued this holding in the context of Habeas review under 28 U.S.C. § 2254 (d) (1), the court noted that 2254 (d) (2) provided additional clarity on the point because (d) (2) requires federal courts to review state court factual determinations in light of evidence presented in state court proceeding. Few decisions address certificates submitted under 28 U.S.C 2254 in Federal Habeas proceeding, and fewer decisions do so Post-Anti-Terrorism and Death

Penalty Act (ADEPA) or Post- Cullen v. Pinholster. Nevertheless, Pinholster made clear that Federal Habeas review of state court decisions adjudicated on the merits must be backward-looking and focused on what State Court knew and did at the time. (emphasis added).....21

Morris v. Secretary Department of Corrections, 2010 WL 533050, 7 (M.D. Fla. 2010) Thus, allegations about the testimony of a punitive witness must generally be presented in the form of actual testimony by the witness, an affidavit, or a deposition.....23

Brady v. Maryland, 373 US 83 S.Ct.1194, 10 L. Ed. 2D 215: "Separate opinion of Mr. Justice White. 1. The Maryland Court of Appeals declared, "The Suppression or withholding, <pg. 221> by the State of material evidence exculpatory to an accused is a violation of Due Process."....23

Townsend v. Sain, 372 U.S. 293, 312 (1963). "[18] if any combination of the facts alleged would prove a violation of Constitutional Rights and the issue of law of those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the State Trier involves the purest speculation. The Federal [372 @ 316] Court cannot exclude the possibility that the Trial Judge believed facts which showed a deprivation of Constitutional Rights and yet (erroneously) concluded relief should be denied. Under these circumstances it is impossible for the Federal Court to reconstruct the facts, and a hearing must be held.....25

28 U.S.C. § 2254 (d)(6) has adopted the precepts put forth in Townsend v. Sain, 372 U.S. 293, 312 (1963), which was later modified (as to due diligence), in Keeney v. Tamayo-Reyes, 501 U.S. 1, 10 (1992).....25

outcome of the proceeding would have been different absent counsel's deficient performance). When § 2254 applies to Strickland's claim, question is not whether counsel's actions were reasonable – question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard; not withstanding double deference under Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and Strickland, writ of Habeas Corpus stands as a safeguard against imprisonment of those held in violation of law; even under AEDPA, courts must be vigilant and independent in reviewing petitions for Habeas writ. Evans v. Sec'y, Dept. of Corr., 681 F. 3d 1241, 23 Fla. L. Weekly Fed C. 1064 (11th Cir) vacated, review or reh'g granted en banc. 686 F. 3d 1321.....28

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STATEMENT OF CASE

On July 25, 2008, Petitioner was at a Bar-B-Que with various friends when a Mr. Long received several calls from a Mr. Weems (Co-Defendant) telling Mr. Long to come pick up the money Mr. Weems owed Long.

Mr. Long borrowed Mr. Nelson's Chrysler 300 to meet Mr. Weems. Petitioner and Mr. Nelson rode along.

Once at the Shell gas station Mr. Nelson asked Petitioner to get out and grab an Auto Trader. Once the Auto Trader was retrieved and Petitioner was about to reenter the car Mr. Weems walked up and Mr. Long, from inside the car asked Petitioner to grab his money. Mr. Weems handed the Petitioner $49.00 and Petitioner said goodby and got in the car and gave Mr. Long his money.

Several miles down the road the vehicle was stopped and Petitioner arrested for sales of cocaine.

1. On Aug. 14, 2015 a status hearing was held to determine the outcome of Petitioner's Supplemental Motion for Post-Conviction relief filed by counsel Julie Schlax.
2. The motion is an IAC claim, "failure to prepare and call crucial defense witness at trial." Petitioner clearly stated counsel's reason for not calling witness which was, "to gain the last word in closing." The closing "sandwich" for the defense was no longer allowed by law at the time of Petitioner's trial.
3. The motion contains testimony from co-defendant Weems stating Petitioner's

innocence and that he (Weems) already had drugs in his pocket. The motion also contained testimony from Mr. Long stating Mr. Weems owed him money and had called Mr. Long to come pick up the money.

4. During the August 14, 2015 hearing, Mrs. Schlax brought to the courts attention that she had a witness (Mr. Long), who was willing to testify and Petitioner denied calling Long because of Trial Counsel's advice.

5. On August 28, 2015, the court then (struck the bell) when it initiated a colloquy with Mr. Long asking, "had he read the motion" and "was it true and correct." The court then heard (the ring of the bell) when Mr. Long testified that, "he had read the motion" and "it was in fact true."

6. On October 7, 2015 the court ruled that the Supplemental Motion was properly considered an enlargement of two grounds previously raised and states, "the court thus concludes the motion is not untimely and Defendant is entitled to an Evidentiary Hearing on the supplemental ground as well as the pending motion." The Court then goes on to say, "the court will consider the grounds stated in Defendant's Supplemental Motion for Post-Conviction relief at the Evidentiary Hearing to be scheduled at a later date.

7. On November 3, 2015 the State filed, "Response to Defendant's Motion for Post-conviction Relief" stating three reasons for denial .[1] No affidavits from Mr. Weems or Mr. Long.[2] No prejudice as to Weems and [3] Defendant can't go behind his sworn representations made to the court. These will be discussed later.

8. On February 25, 2016 the Court filed another order. This one taking back the Evidentiary Hearing it had awarded in its October 7, 2015 order. The Court states no reason for doing so only, "this Court will not hold an Evidentiary Hearing on Defendant's Supplemental Ground Twelve and denies any request for a hearing on said ground.

9. That action deprived Petitioner a full and fair hearing as provided in Townsend.

10. On April 12, 2016 the Court denied Petitioner's 3.850 Motion choosing to ignore the "closing sandwich" aspect of the claim when deciding *Strickland* and instead adopted the State's reasoning (i.e. no prejudice as to Weems and Defendant denied calling witnesses). The Court doesn't mention the lack of affidavits because it heard actual testimony from Mr. Long and had Mr. Weems' depositions.

11. On May 23, 2016, Petitioner appealed the Court's decision to the First District Court of Appeals of Florida. The Initial Brief specifically brings to the Court's attention the fact that counsel's "closing sandwich" strategy was in fact illegal at the time of Petitioner's trial, and that this claim was two claims from the same set of facts.

12. On May 4, 2016, Petitioner asked the Clerk to provide the transcripts of several hearings, of which was the August 14, 2015, and August 28, 2015 Supplemental Motion Hearings. Also, on May 19, 2016 Petitioner asked for Detective Burrough's transcripts to be added to the record per Rule 9.200(A)(1). Mr. Weems depositions are included in that set of depositions. Both of these are listed in the

index of the record but were never replied to.

13. On July 6, 2017, the First District Court of Appeals of Florida *Per Curiam* Affirmed.

14. On May 4, 2018, the Petitioner filed a Federal Habeas with the United States Court of Appeals for the Middle District of Florida.

15. On August 10, 2020, Petitioner once again tried to secure the transcripts of the Aug. 14, 2015 Hearing from Justice Administrative Commission.

16. The opening page of Claim Three (Claim Twelve in the Lower Court) is dealing with Trial Counsel's trial strategy of the first and last closing which demanded Petitioner deny calling witnesses.

17. On March 14,2019, the Respondent's reply to Petitioner's 2254 stating that "prejudice couldn't be proved because there was no affidavit from Mr. Long."

18. On April 8, 2019, Petitioner filed Document 27, "Motion Seeking Leave To Expand The Record" with the transcripts of the August 14, 2015 Supplemental Hearing in order for the District Court to read the account of the (ringing of the bell) in the Lower Court. In the same Document Petitioner sought to enter Co-Defendant Weems sworn dispositions in order to show the validity of Weems testimony in the Supplemental Motion and the need for an Evidentiary Hearing.

19. On June 7, 2019, the Respondent's replied citing *Cullen v. Pinholster*, "and limit its review to the record that was before the State Court when it rejected the Post-conviction Motion on its merits."

20. On June 18, 2019, Petitioner filed Document 31, "Motion Seeking Leave to Reply to Secretary's Response to Motion to Expand."

21. Petitioner not hearing back from the Court filed a reply July 2, 2019 (Document 32) stating why *Pinholster* does not apply in this case and that an Evidentiary Hearing is necessary to prove *Strickland* as to the Supplemental Ground.

22. The District Court denied the expansion of the record on July 10, 2019 erasing "the ringing of the bell" in State Court from history instead of applying a backward-looking approach to focus on what a "State Court knew and did at the time", which was made clear in *Pinholster.*

23. On February 28, 2020, the District Court denied Petitioner's right (according to *Townsend v. Sain)* to an Evidentiary Hearing if, "Petitioner wasn't afforded a full and fair hearing in State Court." The District Court having denied Petitioner's ability to cure the defect in Claim Three with the expansion, then denies the Claim because of the defect.

24. Petitioner is attacking the actions of both State Court and District Court's denying Petitioner's right to present evidence proving his actual innocence.

REASON FOR GRANTING THE PETITION

The function of this court is to shepherd America into a more peaceful co-existence through the implementation of laws; however, sometimes those laws need to be clarified because courts misconstrue it's meaning, and American citizens along with their due process rights are ignored and their liberty lost. This is especially true for millions of *Pro Se*, indigent inmates wading through a legal system that is as complex as calculus is to a kindergartener.

An inmate who can't afford high priced counsel due to indigency has to do his motions *Pro Se* and often encounters a system that consistently misapplies the law and it's legal standing upon them, counting on the majority of *Pro Se* litigants being illiterate in regards to the law. This system is suppose to protect against unlawful deprivation of liberty but continues to allow the duplicity of state prosecutors to go unchecked, and in this case allow one whom is actually innocent to be imprisoned.

Petitioner knows this court has more important matters to deal with than a man doing 30 years for the alleged sale of one tenth of a gram of cocaine. Although, Petitioner is certain that once this [inartfully pled] petition is reviewed the court will see Petitioner was denied the ability to present evidence by the District Court. Evidence that was heard and believed by the State Court prior to its ruling. Petitioner's one full and fair opportunity to be heard was denied by the State Court when it made an unreasonable determination of the facts. The District Court did not correct the error as proscribed in *Townsend,* where the merits of a factual dispute were not resolved in a State Hearing. A

grant, vacate and remand is in order, so as to afford Petitioner a full and fair opportunity to be heard.

28 U.C.S. §2254 (a) permits a Federal Court to entertain only those Habeas Corpus applications alleging that a person is in state custody in violation of the Constitution or laws or treaties of the United States. Section 2254(b), (c) provide that Federal Courts may not grant such applications unless with certain exceptions, the Applicant has exhausted State remedies. Petitioner has exhausted every Appellate procedure available to him prior to filing his Federal Habeas as recorded in the Appendix. If an application for Writ of Habeas Corpus includes a claim that has been adjudicated on the merits in State Court proceedings, under 28 U.C.S. §2254(d) that application shall not be granted with respect to such a claim unless the adjudication of the claim: (1) was contrary to or an unreasonable application of clearly established Federal Law, or (2) Resulted in a decision that was based on as unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. The actions of the State Court and the District Court contain both of these violations.

AEDPA LITIGATION BAR 28 U.S.C. § 2254 (d) (2)

Petitioner cannot just show an unreasonable determination of fact to get relief; he must show that the resulting State Court decision was based on that unreasonable determination. Additionally, showing that the state court based its decision on an unreasonable determination of fact does not by itself entitle the petitioner to relief, it

merely removes AEDPA's litigation bar. Once the bar is removed, petitioner must show that he is being held in violation of federal law by identifying, and prevailing on a federal claim. *Griffin v. Buchanan,* 852 Fed. Appx. 199 (6th Cir, 2021).

Post-conviction counsel, Mrs. Julie Schlax filed a Supplemental Motion for post-conviction relief raising an infective assistance of counsel claim for failure to prepare and call crucial defense witness, on August 14, 2015. (App. F) The supplemental motion alleges facts that, if proved, entitle the party to relief because **the testimony put forth in the motion states petitioner's actual innocence**. (App. F @ 2-3) During the August 14, 2015 portion "part 1" of the supplemental motion hearing, **the Court saw the need for a hearing after counsel stated "his counsel convinced him not to call those witnesses"** (App. G @ 6) and the Court states "I was just thinking of getting the same attorneys just talking about what happened at trial" (App. G @ 9), i.e. counsel convincing Petitioner to forego witnesses **in favor of first and last closing argument**.

Prejudice prong of *Strickland* **was satisfied by Mr. Long's testimony in** "part 2" of that hearing which was held on August 28, 2015 (App. G @ 9). That is why **the Court does not claim** there was no prejudice as to Mr. long in its denial. (App. E @ 18) After reviewing the supplemental motion, and hearing Mr. Long's actual testimony the court, on October 7, 2015 filed an order stating. "The court thus concludes the motion is not untimely and **Defendant is entitled to Evidentiary Hearing** on the Supplemental ground as well as the pending motion. (App. H @ 1)."

"The court will consider the grounds stated in Defendant's Supplemental Motion

for post-conviction relief at **the Evidentiary Hearing to be scheduled at a later date.**" (APP. H @ 2) That hearing was **never scheduled** or **had**, because on February 25, 2016 the court filed a separate order denying the previously awarded Evidentiary Hearing as well as the ability of the Petitioner to even ask about the hearing. The court gave no reasoning for the reversal. (App. I) An unreasonable determination of the facts occurred when the State Court determined the instant claim be denied by stating "Petitioner denied calling Mr. Long." Petitioner, **notified the Court of counsel's strategy in the Supplemental Motion which demanded Petitioner forego calling witness** (App. F @ 4). The court stated the need to hear from the attorneys (App. G @ 9) to determine if that strategy was **contrary to the law** at time of trial.

In 1992, Fla R. Crim. P., 3.250 permitted a Defendant an opportunity to gain the 'closing sandwich' if defense did not put forth any witnesses. However, in 2007 almost three years prior to Petitioner's trial, Fla. R. Crim. P. 3.381, (also Fla. § 918.19) eliminated the option for defense counsel to gain the first and last "closing sandwich." The court frustrated Petitioner's ability to prove counsel's strategy was contrary to the law when it denied the Evidentiary Hearing (App. I) it had already granted (App. H). This will be discussed in the *Townsend* portion.

Petitioner also states that action is a 2254 (d) (1) violation because the state court **failed to extend** the principles of *Keeney* and *Townsend* **to counsel's trial strategy** in the supplemental motion in order to resolve that merit which was in a factual dispute.

The Post-Conviction Court states the following in its denial: "If Weems had testified at Defendant's trial, his testimony would have been severely impeached by the statements given during his plea colloquy. Accordingly, Defendant cannot show that but for counsels failure to call Weems as a witness, he would have been acquitted." (App. E @ 18) However, looking at Mr. Weems plea colloquy (App. J @ 196) you will notice two key phrases that negate the "severe impeachment."

1. "This Defendant (Weems) contacted another individual from whom this Defendant **it is believed** obtained the cocaine."
2. "Mr. Weems, did what Mr. Boston just described, is that the incident that you are pleading guilty to?, **Yes Sir.**" (App. J @ 196)

Mr. Weems did not plea to a set of facts **stating Petitioner gave** Weems drugs, only that the State **thought** Weems got the drugs from Petitioner. The state never asked Weems if the facts were true. Weems clearly states he already had the drugs and fake drugs on him. (App. K @ 17) Also, the State couldn't be positive Weems didn't already have the drugs on him because **he was never searched prior** to being given money (App. L @ 66) and the officers don't remember if Weems went into his pocket (App. L @ 67). In fact, Weems agrees that he is guilty: "Are you pleading guilty because you are guilty?" "Yes, Sir". (App. J @ 199) See also, (App k1) The combined testimony of Mr. Weems and Mr. Long proves that Weems was the culpable one and that Petitioner is actually innocent. (App. F)

INDIGENCY/DUE DILIGENCE

28 U.S.C. § 2254(f) if applicant challenges the sufficiency of the evidence adduced in state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal Court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State Court's factual determination.

28 U.S.C. § 2254 (e),(2),(A),(ii), and (B) if the applicant has failed to develop the factual basis of a claim in state court proceeding, the court shall not hold an Evidentiary Hearing on the claim unless the applicant shows that-the claim relies on-a factual predicate that could not have been previously discovered through the exercise of due diligence; the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for Constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

Petitioner relies on the transcripts from the Supplemental Motion hearings to prove this claim. However, due to indigency throughout all court proceedings, Petitioner is unable to purchase the second part of the hearing which was held on August 28, 2015

and cost approximately $120.00. After 8 years, Petitioner has found fellow inmate "Sheldon Hutchins" willing to purchase the first part of the hearing which was held on August 14, 2015 and is in (App. G). Petitioner has been diligent in trying to obtain the transcripts, from the August 14, 2015 and August 28, 2015 hearings. See (App M) Also, Document 27 (App. N) is Petitioner trying to obtain the transcripts by expanding the record. The Justice Administration Commission denied Petitioner the transcripts. (App. M) *Williams v. Taylor,* 529 U.S. 420, 432, 120, S. Ct. 1479, 146 L. Ed 2d (2000) at 437: *"Diligence will require in the usual case that the prisoner, at a minimum, seek an Evidentiary Hearing in State Court in the manner proscribed by state law."*

Had the District Court expanded the Record to include the transcripts provided in (App. G). It would have seen that 1.) a factual dispute had been unresolved, 2.) a witness was willing and did testify proving prejudice, 3.) that an unreasonable determination had occurred because a Evidentiary Hearing was not held to resolve the factual dispute of counsel's strategy. Petitioner was awarded an Evidentiary Hearing, (App. H). Then was denied that hearing and the ability to ask about it. (App. I) Petitioner stated the need to the First District Court of Appeals of Florida. (App. O @ 16) This need was also stated to the United States District Court Middle District of Florida, Jacksonville Division in Document 27 . (App. N @ 3) Petitioner cannot prove his actual innocence without first removing the Litigation Bar [(d) (2) violation], and cannot do that without the August 28, 2015 Supplemental Motion Hearing Transcripts because neither District Court was present for the Supplemental Motion Hearing where

the State Court heard actual testimony from Mr. Long which satisfied prejudice prong in the Lower Court. Petitioners due process right to present evidence has been frustrated due to indigency.

THE UNITED STATES DISTRICT COURT'S UNREASONABLE APPLICATION OF PINHOLSTER

Petitioner sought leave to expand the record with the transcripts from the August 14, 2015 Supplemental Motion Hearing so the District Court could **read** what the Post-conviction Court **heard and believed** prior to its ruling, see Document 27 (App. N). The District Court would have seen the need to not only expand the record to include the August 28, 2015 transcripts but also, the need for an Evidentiary Hearing. See, *Vicks v. Bunnell,* 875 F. 2d 258, 259-60 (9th Cir. 1989) (Reversal of denial of Habeas Corpus relief and remand required when District Court **could not properly have resolved claim** presented without reviewing State Court transcripts that **were not before District Court**). (Emphasis added). Petitioner was not trying to enter new evidence, the August 14, 2015 and August 28, 2015 transcripts would show the actual testimony **heard by the State Court**. In Document 34 the District Court states: This court must follow the mandate of *Cullen v. Pinholster,* 563 U.S. 170 (2011) and limits its review to the record that was before the sate court when it rejected the post-conviction motion on its merits. (App. P at 1)

Lovell v. Duffey, 545 Fed Appx. 375 (U.S. Court of Appeals 6th Cir.) (October 15, 2013) although the *Pinholster* U.S. Supreme Court issued this holding in the context of Habeas review under 28 U.S.C. § 2254 (d)(1), the court noted that 2254 (d)(2) provided

additional clarity on the point because (d)(2) requires Federal Courts to review state court factual determinations in light of evidence presented in state court proceeding.

Few decisions address certificates submitted under 28 U.S.C 2254 in Federal Habeas proceeding, and fewer decisions do so Post-Anti-Terrorism and Death Penalty Act (AEDPA) or Post- *Cullen v. Pinholster.* Nevertheless, *Pinholster* made clear that Federal Habeas review of state court decisions adjudicated on the merits must be backward-looking and **focused on what State Court knew and did at the time**. (emphasis added). You cannot **UN**-ring a bell. The State, and the Court heard, actual testimony from Mr. Long at the August 28, 2015 Supplemental Motion Hearing, solidifying the testimony in the motion as truth. **(Petitioner cannot afford transcripts)**

The motion itself is part of the record (App. F) however, the transcripts from "part 2" of that hearing, which Petitioner needs to prove an unreasonable determination of the facts, as well as *Strickland's* prejudice prong, are not. The District Court could not "focus on what State Court knew and did at the time" because it did not grant the expansion of the record with the August 14, 2015 supplemental motion hearing transcripts. (App. G) That would show the need to acquire the August 28, 2015 transcripts which was not new evidence. It was actual testimony offered to the Court prior to its ruling and Petitioner explained this to the District Court. See document 32 (App. Q @ 1-2).

THE STATE'S DUPLICITY

This court needs to be aware of the states duplicity as the State Court subscribed

to it partially and the United States District Court fully subscribed to it. As mentioned earlier, the State filed a response to the Supplemental Motion. (App. J) In the response, the State [Shelia Loizos] alleges that "the Trial Court allowed the State until November 3, 2015 to respond." (App. J @ 2) Nowhere in the record can Petitioner find any such provision for the State to respond. In fact, an Evidentiary Hearing was already **granted** and awaiting **the scheduling of hearing date.** (App H @ 2) Mrs. Loizos, in her reply points out three reasons for a denial:

[1] No affidavits from Mr. Long or Mr. Weems, thus their alleged testimony is speculation. (App. J @ 5) This is true as far as no affidavits; however, Mrs. Loizos cites a District Court case: *Morris v. Secretary Department of Corrections,* 2010 WL 533050, 7 (M.D. Fla. 2010) thus, allegations about the testimony of a punitive witness must generally be presented in the form of actual testimony by the witness, an affidavit or a deposition. (App. J @ 5) Mrs. Loizos is implying that there is no independent evidence to support the August 14, 2015 Supplemental Motion, when in fact she had two:

a) Mrs. Loizos **heard actual testimony** from Mr. Long in open court on August 28, 2015 **(Petitioner cannot afford transcripts)**

b) The State participated in Mr. Weems' sworn depositions, in which Weems repeatedly states he did not purchase drugs from the Petitioner. (App. K @ 23)

Brady v. Maryland, 373 US 83 S.Ct.1194, 10 L. Ed. 2D 215: "Separate opinion of Mr. Justice White. 1. The Maryland Court of Appeals declared, "The Suppression or withholding, <pg. 221> by the State of material evidence exculpatory to an accused is a

violation of Due Process." Mrs. Loizos should have been forthcoming with the court. Her duplicity led the Court to believe there was no independent evidence to support the testimony in the Supplemental Motion stating Petitioner's actual innocence.

[2] The second reason Mrs. Loizos puts forth is, "Petitioner declined calling Mr. Long as a witness." (App. J @ 159) Petitioner's Supplemental Motion put forth Trial Counsel's strategy which was to gain the "closing sandwich". That strategy **demanded** Petitioner to forego witnesses. (App. F @ 4) As discussed earlier, the strategy was **contrary to the law** at the time of trial, and is the crux of the 2254 (d)(2) violation.

[3] Lastly, the State says: "based upon Darryl Weems' involvement in the sale of cocaine, combined with his statement when he plead, the outcome of Christopher Derting's trial would not have been different even if Darryl Weems testified because he would have been severely impeached by his sworn statements." (App. J @ 159) Mr. Weems agreed that HE was guilty of the crime . (App. J at 199) The factual reading does not **state** Mr. Weems obtained cocaine from Petitioner, only that the State **thought** or "**It is believed obtained** the cocaine..."(App. J @ 196) The fact is, Mr Weems was **never searched** prior to the alleged transaction. (App. K @ 17, 23), and was just trying to make it "look like" he bought drugs from Petitioner. (App. K @ 20), also (App. K1) Nevertheless, **the Jury** should have decided whether or not to believe Mr. Weems. It is likely they would have accepted that Mr. Weems **agreed to the factual reading** to get the five (5) year plea deal **because the State was threatening** him with 15 years or a **habitual sentence**. This is clearly stated in his sworn depositions. (App. K @ 30)

DENIED A "FULL AND FAIR' HEARING STATE COURT"

*Townsend v. Sain,*372 U.S. 293, 312 (1963). "[18] if any combination of the facts alleged would prove a violation of Constitutional Rights and the issue of law of those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the State Trier involves the purest speculation. The Federal [372 @ 316] Court cannot exclude the possibility that the Trial Judge believed facts which showed a deprivation of Constitutional Rights and yet (erroneously) concluded relief should be denied. Under these circumstances it is impossible for the Federal Court to reconstruct the facts, and a hearing must be held.

It is safe to say that after reviewing the Supplemental Motion and hearing actual testimony from Mr. Long, the Court believed facts which showed a deprivation of Constitutional Rights as evidenced by the granting of an Evidentiary Hearing. (App. H) Also, the court states the need for a hearing (App. G @ 9) This was done on October 7, 2015. Petitioner did not pursue affidavits from Mr. Long or Mr. Weems **because the Court awarded Petitioner an Evidentiary Hearing** (App. H). Then, on February 25, 2016 the Court files another order denying Petitioner an Evidentiary Hearing and denies Petitioner the ability to inquire about it. The Court provided no reasoning (App. I). Thus, depriving Petitioner's Due Process to one full and fair opportunity to present his claim. 28 U.S.C. § 2254 (d)(6) has adopted the precepts put forth in *Townsend v. Sain,* 372 U.S. 293, 312 (1963), which was later modified (as to due diligence), in *Keeney v. Tamayo-Reyes,*501 U.S. 1, 10 (1992).

1. The merits of the factual dispute were not resolved in State Hearing. Petitioner's Supplemental Motion "alleged facts which if proved would entitle him relief." The motion laid out the **trial strategy** of counsel which was to obtain the "closing sandwich" (App. F @ 4). The strategy was contrary to the law at the time of trial **and was never resolved in a State Hearing.**

Also, when reviewing the Supplemental Motion, this Court will see testimony stating Petitioner's actual innocence and the Court, through actual testimony, should have judged the credibility of Mr. Weems and Mr. Long. *Keeney v. Tamayo-Reyes,* 501 U.S. 1, 10 (1992) (State must afford the Petitioner a full and fair hearing on his Federal Claim" or else Federal Rehearing of the facts is required); *Stone v. Powell,* 428 U.S. 465, 494-95 and n. 37 (1976).

The State, as discussed earlier, **withheld exculpatory evidence** (Mr. Weems sworn statement and depositions) from the Court. That act along with the Court denying Petitioner the ability to ask about the hearing (App. I), prevented Petitioner from bringing the State's Duplicity to the Court's attention.

DISTRICT COURT

The District Court states, "Petitioner has failed to establish the need for an Evidentiary Hearing, and it is his burden. *Jones v. Sec'y, Fla. Dept. of Corr.,* 834 F. 3d 1299, 1318 (11th Cir. 2016) (Citations omitted) cert denied, 137 S. Ct. 2245 (2017)

On April 5, 2019 Petitioner filed a "Motion seeking expansion of the record", Document 27 (App. N) which would have proven that the testimony put forth in the

Supplemental Motion was not **"mere speculation".** This request was consistent with Morris v. Secretary, Department of Corrections, 2010 WL 5330505, 7 (M.D. Fla. 2010) Thus, allegations about the testimony of a punitive witness must generally be presented in the form of actual testimony by the witness, an affidavit or a deposition. (App. J @ 4).

Furthermore, Petitioner explained to the District Court, in document 32 (App. Q @ 1-2). That ***Pinholster*** was both **legally and factually different** and that the State heard actual testimony from Mr. Long and had exculpatory evidence proving Mr. Weems' proposed testimony was more than "mere speculation." (App. K). *Blackledge v. Allison*, 431 U.S. 63, 83-84 (1977) (State Prisoner is "entitled to careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts")

Under § 20.3 [b] (1) and (2) the Petitioner was and is entitled to an Evidentiary Hearing. § 20.3 [b] (1) the State Court Record as a whole is not before the Court.

In the instant claim Petitioner's counsel, Mrs. Julie Schlax filed a Supplemental Motion which this claim stems from. **That Motion is** part of the record. (App. F). However, the **transcripts** from "part 2" of the hearing (August 28, 2015), which contains actual testimony, **are not.** Once again, Petitioner is indigent and cannot afford them. See Due Diligence. These transcripts are the only way for Petitioner to lift the litigation bar (2254(d)(2)) and prove the prejudice prong of *Strickland* as it relates to Mr. Long.

§ 20.3 [b] (2) A relevant portion of the State Court record is not before the Court.

Townsend v. Sain, [14] (1) there cannot even be the semblance of a full and fair hearing unless the State Court actually reached and [372 at 314] decided the issues of fact tendered by the Defendant.

It is for this reason alone Petitioner outlined the states duplicity. The Petitioner did not seek or submit affidavits of Mr. Long or Mr. Weems because the Court had already granted an Evidentiary Hearing. (App. H @ 2) Yet, the State "alleges" the Court gave leave to respond (App. J @ 2) then, chose to withhold exculpatory evidence (App. G and K) from the Record in order to make the Record reflect the testimony in the Supplemental Motion was just "speculation".

Just so this Court is clear, the State Court knew Mr. Weems and Mr. Long's testimony in the Supplemental Motion was not "mere speculation" because it had access to actual testimony from Mr. Long (App. G and App. K).

THEREFORE, the District Court reached and decided the issues of fact based upon deception and an incomplete Record. This is not the meaning of "full and fair" hearing as described in 2254 (d)(6), *Townsend v. Sain,* 372 U.S. 293, 312 (1963), and *Keeney v. Tamayo-Reyes,* 501 U.S. 1, 10 (1992). Therefore, this case should be remanded for further proceedings, specifically an Evidentiary Hearing.

CONSTITUTIONAL VIOLATION

Stickland v. Washington, 466 U.S. 668 (1984). Specifically, in order for the Trial Court to find ineffective assistance of counsel, to wit: 1) counsel's performance was outside the wide range of reasonable professional assistance and 2) counsel's deficient

performance prejudice the defendant. (i.e. that there is no reasonable probability that the outcome of the proceeding would have been different absent counsel's deficient performance). When § 2254 applies to Strickland's claim, question is not whether counsel's actions were reasonable – question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard; not withstanding double deference under Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and *Strickland*, writ of Habeas Corpus stands as a safeguard against imprisonment of those held in violation of law; even under AEDPA, courts must be vigilant and independent in reviewing petitions for Habeas Writ. *Evans v. Sec'y, Dept. of Corr.*, 681 F. 3d 1241, 23 Fla. L. Weekly Fed C. 1064 (11th Cir) vacated, review or reh'g granted en banc. 686 F. 3d 1321.

DEFICENT PERFORMANCE

Petitioner's Supplemental Motion states reason counsel did not call witnesses, which was to obtain the first / last closing argument or, 'closing sandwich.' (App. F @ 4)

The Post-Conviction Court **did not hold** the Evidentary Hearing it had awarded (App. H) denying ability of Petitioner to address the fact counsel breached her duty to investigate current law applicable to her chosen trail strategy which the Post-Conviction Court was made aware of and **did not address.** (App. F @ 4) Petitioner appealed to Florida 1st District Court of Appeals and outlined two distinct points pertaining to this claim:

1. "In 1992, Fla. R. Crim. P., 3.250 permitted a defendant an opportunity to gain

the 'closing sandwich' if defense did not put forth any witness. However, in 2007, almost three years prior to appellant's trial, Fla. R. Crim. P., 3.381, (also Fla. § 918.19), eliminated the option for defense counsel to gain the first and last 'closing sandwich'. (App. O @ 12)

2. Petitioner made clear **this was two claims stemming** from the same **set of facts:** "The main argument is **two-pronged. First**, being, that the defendant was advised before trail by both counsel and co-counsel to not call witness because they wished to retain the last closing commonly referred to as the "sandwich". "This prong was addressed in defendant's brief."

   "The **second** prong of Defendant's argument is that even though defendant and counsel had previously agreed to secure the 'sandwich'. Once counsel heard damaging testimony from the State, testimony that could have and would have been refuted by Long..." (App O @ 16).

The 11th Circuit Court of Appeals granted a COA and appointed counsel Donna Duncan (App. R). The COA was granted for not addressing all the merits, *Clisby v. Jones* (App. U). The appeal was denied by the 11th Circuit for two reasons, 1) No affidavits from Mr. Long and Mr. Weems (App. B @ 9), and 2) Petitioner did not raise a distinct claim (App. B @ 6) as previously stated above in (1 and 2) Petitioner notified the 1st DCA of Florida. Petitioner also notified the United States District Court of the fact that it was a two-pronged claim on the opening page of claim 3 (App. V @ 1) and again on pages 7-8 of Petitioner's memorandum (App. V @ 2-3) counsel Donna Duncan

did not bring the aforementioned facts to the 11th Circuit's attention.

The 1st DCA chose to ignore Petitioner's factual allegations and affirmed without opinion (App D). Denying Petitioner a 'full, fair and adequate hearing', *Summer v. Mata*, 449 U.S. 539, 101 S. Ct. 764.

Petitioner subscribed to counsel's strategy (albeit reluctantly) (App. L @ 137), because it made sense. Counsel wanted to pit the two groups of officers against one another and counter the State's argument. The first group of officers consisted of Det. Burroughs and Det. Catir. Det. Burroughs states the truth about seeing petitioner from head to toe (App. L @ 103) and witnessed petitioner going to a newsstand, opening it up and pulling out a publication, of which he still had in his hand when he met with Mr. Weems. (App. L @ 104) Det. Catir states he saw the two individuals (Weems and petitioner) engaged in a conversation, and when asked, "Did you see any kind of hand to hand transaction?", "Not from where I was at". (App. L @ 131)

Because of the testimony above (i.e. "publication in his hand"), the hand-to-hand transaction as described by Ofc. Jones would be impossible because they didn't have a clear view. Det. Torres admits to being located across a four lane Blvd., during Friday night rush hour (aprox. 6 p.m.) while being parked behind an enclosed bus stop. (App. L @ 56), without the aid of binoculars (App L @ 62). Det. Torres admits, "I don't know what was transferred between their hands, I never saw Mr. Derting with drugs." (App. L @ 84). Petitioner only had one free hand because he had a publication (Auto Trader) in his hand which Mr. Weems admits petitioner showed him. (App. K @ 17).

This strategy would have been viable and unchallengeable except for the fact it was contrary to law at the time of trial. Two things that bolster this claim, 1) counsel, Ms. Lance did not file a witness disclosure, Petitioner's previous attorney's (Jackson and Kuhn) did. (App. J @ 168), and 2) Counsel states, "She did not intend to call Mr. Long." (App. L @ 137)

PREJUDICE PRONG

Petitioner was prejudiced when **THE JURY WAS FORECLOSED** from hearing testimony stating Petitioner's actual innocence because counsel convinced Petitioner to subscribe to the 'closing sandwich' strategy which was later discovered to be contrary to the law and thus, unobtainable. The Post-Conviction Court's denial of this claim lists only one point dealing with prejudice and that is in regards to Mr. Weem's plea colloquy which would allegedly, "severely impeach" any exculpatory testimony, **(App. E @ 18).**

The State Court denied Petitioner's 3.850 for seven reasons and are as follows:

1. "Det. Torres was an eyewitness to the transaction and testified Defendant made a hand-to-hand exchange of crack cocaine." (App. E @ 3). This is an unreasonable determination of the facts (2254 (d) (2)). Det. Torres states, "I could not see what was transferred in their hands." (App L @ 65) Det. Torres never saw Petitioner with drugs, only Weems. (App L @ 66). Det. Torres states Weems was never searched prior to insure he had no drugs. (App L @ 66). Also, she couldn't say for sure whether or not Weems went into his pocket. (App. L @ 67) **Weems admits going into his pockets and getting**

the drugs. (App. K @ 18). Weems also goes into great detail about how he makes the fake crack. (App K @ 18) **Three** pieces of crack were sold, and **only one** of them **tested positive** for cocaine, which is consistent with Weems stating he also sold them fake cocaine. (App. K @ 18) Det. Torres states, "When we field-test the drugs at the scene, we have a kit that when it comes into contact with cocaine in any form, powder cocaine crack cocaine, it turns blue. (App L @ 55) Petitioner is actually innocent of doing a hand-to-hand sale of crack cocaine, as charged by the state.

2. "Defendant knowingly waived the opportunity to call Long as a witness." (App E @ 5) This is the main unreasonable determination as discussed earlier in the petition on page 1-5.

3. "Weems responded to Torres that he did not have any crack cocaine. (App E @ 6). An audio was played for the Jury, **nowhere** can Weems "alleged" statement of, " not having any crack" be found. See (App S). Of note, **the audio** transcripts consist of 14 pages and **contain 80 inaudible portions** which the state inserts it's own narrative. This will be discussed later.

4. "The exact buy money Torres gave Weems in exchange for the crack cocaine was found in the center console." (App. E @ 7) Mr. Long states that his testimony in the Supplemental Motion is true and correct. In that motion Mr. Long states, "When law enforcement searched the car and located the money, I (Mr. Long) told law enforcement that this was my money. They took the

two twenties and gave me back $9.00. (App F @ 3)

5. "Defendant promptly acting upon Weem's request for drugs." (App E @ 9). This is another unreasonable determination of the facts. There was three adult males in the vehicle (App L @ 63). One of which was Mr. Long whom agreed his testimony was true and correct in the August 28, 2015 hearing "part 2" pertaining to his testimony in the Supplemental Motion which states Long showed up to the Shell gas station because Weems called him on his phone. (App. F @ 2) Also, Mr. Weems states he called "Randy" which is Mr. Long. See (App. K @ 19). Petitioner was just a passenger in the car.

6. "Weems used Torres's phone to call Defendant and ask for cocaine." (App. E @ 9) This too is a 2254 (d) (2) violation. See 5) above for reason. Also, see (App. T) which are the four phone calls Mr. Weems makes. Nowhere does he order drugs.

7. "How comments by Weems show evidence of Defendant's participation in the offense." (App. E @ 11) This also is an unreasonable determination of the facts and deals directly with the state and it's witness using the inaudible portions of the audio recording (App. S) to put forth their own narrative. Weems makes no statement pertaining to a type of drug, quantity of drug, or dollar amount, nor does he state any names anywhere on the audio. (App. S).

a) "How do we know this Defendant is Guilty? First, he was there in the middle of a drug deal. He came to the middle of this drug deal as a result of a phone

call or two or three or four from Weems ordering drugs." (App. L @ 147) See (App. T) which is Weems four phone calls.

b) "You heard him on the audio. He told the detectives I don't have any drugs, but I can get some and want some too." (App. L @ 150) Weems never says this, see (App. S) which is the audio of Weems and Det. Torres's interaction.

c) "Chris and I have been friends for a long time." (App. L @ 151) Weems never states Petitioner's name since he admits calling Randy. (App. K @ 19)

CONFLICT BETWEEN 11TH CIRCUIT AND 2ND CIRCUIT

The 11th Circuit chose not to issue a COA on the duplicity of the state but the 2nd Circuit has long held the importance of a complete transcript:

Rodgers v. Kijakazi, 2023 U.S. Dist. Lexis 55862 (March 30, 2023) courts have remanded cases when portions of the transcript are missing. See e.g. *Pratts v. Chater* chapter, 94 F. 3d 34, 37-38 (2nd Cir. 1998) (Finding that failure to transcribe a portion of the medical expert's testimony was ground for remand and that "[F]aced with such incomplete record...we cannot say the ALJ's decision is supported by substantial evidence."); *Mimms v. Heckler*, 750 F. 2d 180, 186 n.1 (2nd Cir. 1984) (Remanding and finding that the transcript revealed ten instances where "inaudible" was marked in the record and that this exceeded five minutes of significant testimony). In *Carrington v. Heckler*, 587 F. Supp 61 (M.D. Ga. 1984), the court found the record was incomplete because "inaudible" was found sixty-six times throughout the transcript. *Carrington*...the court noted the inaudible periods lasted up to one minute and thirty

seconds and included testimony from the applicant, his wife, and his attorney. Id at 61. The court remanded the case, finding that "[b]ecause a substantial part of the record is not before the court. Therefore, the court can reach no decision on whether the secretary's decision was supported by substantial evidence. Id at 61-62 (emphasis in original). Petitioner's Transcripts of the alleged drug transaction contains **80 INAUDBLES IN 14 PAGES**. (App. S)

Petitioner was greatly prejudiced by the state and it's witnesses using the inaudible portions of the audio (App S) to insert their own narrative in the form of hearsay. Combine that with the District Courts refusing to expand the record with evidence that was known to the Post-Conviction court prior to it's ruling by misapplying *Cullen v. Pinholster*. On top of that the State Court did not offer Petitioner one full and fair opportunity when it awarded an Evidentiary Hearing (App. H) and then denied it and Petitioner's ability to ask about it with no reasoning (App. I). Due process has not been satisfied and counsel was ineffective for not calling Weems and Long, instead persuading Petitioner to subscribe to a trial strategy that was contrary to the law. Thereby, denying liberty to a United States citizen whom is actually innocent.

CONCLUSION

PETITIONER'S DUE PROCESS RIGHTS TO PRESENT EVIDENCE

Petitioner did not seek funds from the court to hire an investigator to take affidavits from Mr. Weems and Mr. Long because the Court had awarded an Evidentiary Hearing to which actual testimony would have been heard.

However, Petitioners Due Process rights to present evidence and proffer testimony was violated when the State Court revoked the Evidentiary Hearing along with the Petitioner's ability to ask about it.

The State Court makes an unreasonable determination when it used the very facts Petitioner argues (i.e. **illegal trial strategy**) to deny the Petitioner relief.

The District Court did not safeguard Petitioner's right to one full and fair opportunity but instead misconstrued *Cullen v. Pinholster* to prevent itself and future courts from reviewing actual testimony which satisfied prejudice prong of *Strickland* in the State Court and was heard prior to its ruling. Therefore deciding a case without the same set of facts.

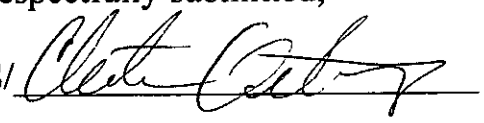
Lastly the 11th Cir. Made an unreasonable determination as to *Clisby v. Jones*. Petitioner clearly notified the State Court of counsel's trial strategy, the 1st DCA and District Court that this claim is two claims stemming from one set of facts.

However, even if Petitioner hadn't made it clear, it would not change the fact that counsel's **reason** for not calling witnesses was contrary to law.

Petitioner seeks immediate release or at the very least a grant, vacate, and remand for further proceedings.

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/S/ 

Date: 9-4-23

STATEMENT OF COMPLIANCE

The Brief is in compliance with Federal Rules of Appellate Procedure Rule 32 (a) (4) Paper Size, Line Spacing, and Margins, and (5) Typeface, (A) 14-point, and (7)(B) no more than 13,000 words. This brief is 10,632 words.

/S/ 

Christopher Derting, DC#121880