NO: 23 - 6752

PROVIDED TO TOMOKA CORRECTIONAL INSTITUTION ON 1/19/24 FOR MAILING BY

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK W. WHAREN. SR
PETITIONER

VS.

STATE OF FLORIDA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
FROM ELEVENTH CIRCUIT COURT OF APPEALS
DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY

/S/ Patrick W Wharen

PETITIONER PRO SE
PATRICT WHAREN, DC# C06442
TOMOKA CORRECTIONAL INSTITUTION
3950 TIGER BAY RD.
DAYTONA BEACH, FL. 32124.

FEDERAL QUESTION PRESENTED

I.

WHETHER ELEVENTH CIRCUIT COURT OF APPEALS MISAPPLIED FEDERAL LAW WHEN DECIDING MERITS OF FEDERAL CONSTITUTIONAL CLAIMS WITHOUT GRANTING CERTIFICATE OF APPEALABILITY FIRST WHERE SUCH DECISION NOT ONLY RAN AFOUL OF THE JURISDICTIONAL PREREQUISITES OF 28 U.S.C. §2253, BUT VIOLATED THE DICTATES OF MILLER V. COCKRELL 123 S. CT 1029 (2003) AND SLACK V. MCDANIEL 120 S. CT 1595 (2000)

II.

WHETHER ELEVENTH CIRCUIT COURT OF APPEALS SHOULD HAVE GRANTED CERTIFICATE OF APPEALABILITY AS TO THE CLAIMS RAISED WHERE PETITIONER MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A FEDERAL CONSTITUTIONAL RIGHT UNDER THE PROVISIONS OF 28 U.S.C. §2253.

LIST OF PARTIES / CORPORATE DISCLOSURE STATEMENT

United States Court **Rule 29.6** requires Petitioner to file a corporate Disclosure Statement listing all interested parties to the proceeding that do not appear in the caption on the cover page of this petition, A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

1. Archer, Phil, State Attorney
2. Berger, Wendy, U.S. District Judge.
3. Compton, Robin A., Attorney General.
4. Dalton, Roy B., U.S. District Judge.
5. Edwards, James A., Judge Fifth District Court of Appeal.
6. Eisnaugle, Eric J., Judge Fifth District Court of Appeal.
7. Evander, Kerry I., Judge Fifth District Court of Appeal.
8. Griesbaum, John M., Circuit Court Judge.
9. Hoffman, Leslie R., U.S. Magistrate Judge.
10. Jacobus, Bruce W., Judge Fifth District Court of Appeal.
11. Konieczka, Greg, State Attorney.
12. Lambert, Brian D., Judge Fifth District Court of Appeal.
13. Lanning, Public Defender.
14. Laurence, Steven. L., Criminal Conflict Counsel.
15. Lemonidis, Robin c., Circuit Court Judge.
16. McCarthy, George, Public Defender.
17. Metz, Matthew, Public Defender.
18. Moody, Ashley, Attorney General.
19. Morris, Allison L., Attorney general.
20. Orfinger, Richard, Judge Fifth District Court of Appeal.
21. Perrone, Samuel A., Attorney General.
22. Phillips, Ann M. Attorney General.
23. Sasso. Meredith L., Judge Fifth District Court of Appeal.
24. Sawaya, Thomas D., Judge Fifth District Court of Appeal.
25. Stewart, Susan, State Atorney.
26. Trettis, Blaise, Public Defender.
27. Wallis, F. Rand, Judge Fifth District Court of Appeal.
28. Wulchak, James R. Public Defender.

TABLE OF CONTENTS

OPINIONS BELOW	(1)
JURISDICTION	(2)
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	(3)
PROCEDURAL HISTORY	(3)
STATEMENT OF CASE AND FACTS	(5)
REASONS FOR GRANTING A WRIT OF CERTIORARI	(9)
STANDARD OF REVIEW	(10)
ARGUMENT IN SUPPORT	(13)
CONCLUSION	(39)

INDEX TO APPENDICES

APPENDIX (A). APPELLATE COURT ORDER DENYING C.O.A.

APPENDIX (B). ORDER DENYING FEDERAL HABEAS CORPUS.

APPENDIX (C). ORDER DENYING MOTION TO REHEAR / RECONSIDER.

APPENDIX (D). APPLICATION FOR CERTIFICATE OF APPEALABILITY.

APPENDIX (E). MOTION TO REHEAR / RECONSIDER.

APPENDIX (F). TRIAL TRANSCRIPTS

TABLE OF AUTHORITIES CITED

CASES	PAGE NO:
Barefoot v Estelle 103 S Ct 3383 (1983)	(11)
Bradley v. State 787 So. 2d 732 (Fla. 2001)	(23)
Brecht v. Abrahamson 113 S. Ct. 1710 (1993)	(17)(38)
Bush v. State 295 So. 3d 179 (Fla. 2020)	(25)
Chambers v. Mississippi 93. S. Ct 1038 (1973)	(13) (14) (17)
California v. Trombetta 104 S. Ct 2528 (1984)	(17)
Colemen v. Johnson 132 S. Ct 2060 (2012)	(21)
Cochran v. State 547 So.2d 928 (Fla. 1989)	(27)
Davis v. State 90 So. 2d 629 (1956)	(22)
Disney v. State 72 Fla. 492: 73 So. 598 (Fla. 1916)	(33)
Estelle v. McGuire 112 S. Ct. 475 (1991)	(17)
Felker v. Turpin 83 F.3d 1303 (11th Cir. 1996)	(17)
Febre v. State 158 Fla. 853, 30 So. 2d 367 (Fla. 1947)	(32)
Grizzell v. Wainwright 692 F.2d 722, (11th Cir. 1982)	(20)
Gustine v. State 86 Fla. 24, 97 So. 207, 208 (Fla. 1923)	(22)
Hansen v. State 585 S. 2d 1056 (Fla. 1st DCA 1991)	(34)
Hardwick v. Crosby 320 F.3d 1127, 1186 (11th Cir. 2003)	(38) (39)
Harrington v. Richter 131 S. Ct 770 (2011)	(21)
Hoefert v. State 617 So.2d 1046 (Fla. 1993)	(27)
Hoffman v. Jones 280 So. 2d 431 (Fla. 1973)	(26)
Hohn v United States, 118 S Ct 1969 (1998)	(11)
Holland v. United States 75 S. Ct 127 (1954)	(23)
Holton v. State 573 So. 2d 284 (Fla. 1990)	(24)
Horton v. Zant 941 F. 2d 1449 (11th Cir. 1991)	(39)
In re Standard Jury Instr. In Crim. Cases 431 So. 2d 594 (1981)	(23)
In re Winship, 90 S. Ct. 1068 (1970)	(21)
Jackson v. Virginia 99 S. Ct 2781 (1979)	(13) (20) (21) (23) (29)
Junes v. Fla. Dep't of Corr., 778 F. App'x 639 (11th Cir. 2019)	(21)
Knight v. State 107 So. 2d 449 (Fla. 5th DCA 2013)	(25)
Lamore v. State 86 So. 3d 546 (Fla. 2nd DCA 2012)	(26)
Lisenba v. California 62 S. Ct. 280(1941)	(17)
Martinez v. Ryan 132 S. Ct 1309 (2012)	(14) (18)

McArthur v. State 351 So.2d 972 (Fla. 1977) (22)
Melendez v. State 498 So. 2d 1258, 1261 (Fla.1986) (23)
Miller v. Cockrell 123 s. Ct 1029 (2003) (3) (9) (10) (13) (20) (30)
Miller v. State 770 So. 2d 1144 (Fla. 2000) (23)
Pagan v. State 830 So. 2d 792 (Fla. 2002) (24)
Paz v. State 777 So. 2d 983 (Fla. 3d DCA 2000) (33)
Ramsey v. State 114 Fla. 766, 154 So. 855 (Fla. 1934) (33)
Rivers v. State 75 Fla. 401, 78 So. 343 (1918) (32)
Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000) (39)
Roger's v. State 285 So. 3d 872 (Fla. 2019) (23)
Slack v. McDaniel 120 S. Ct 1595 (2000) (3) (9) (13) (19)
State v. Kelly 999 So. 2d 1029 (Fla. 2008) (23)
State v. Law 559 So. 2d 187 (Fla. 1989) (23)
Strachan v. State 279 So.3d 1231 (Fla. 4th DCA 2019) (15)
Strickland v. Washington 104 S. Ct 2052 (1984) (13) (18) (30) (31)
Ulster County Court v. Allen 99 S. Ct 2213 (1979) (29)
United States v. Perry 379 Fed. Appx. 888 (11th Cir. 2010) (17)
United States v. Scheffer 118 S. Ct 1261 (1998) (17)
Villella v. State 833 So.2d 192 (Fla. 5th DCA 2002) (15) (16) (22) (32)
Walker v. State 957 So. 2d 560 (Fla. 2007) (24)
Wheeler v. State 344 So. 2d 244 (Fla. 1977) (26)
Whidden v. State 64 Fla. 165, 59 So. 561 (Fla. 1912) (22) (32)
Williamson v. Fla. Dept. of Corr. 805 F.3d 1009 (11th Cir. 2015) (39)
Wilson v. Sellers 138 S. Ct 1188 (2018) (21) (26)
Wilson v. State 493 So. 2d 1019 (Fla. 1986) (24)
Wolcott v. State 774 So.2d 954 (Fla. 5th DCA 2001) (16)
Wright v. State 221 So. 3d 512 (Fla 2017) (25)
Young v. Zant 677 F. 2d 792 (11th Cir. 1982) (39)

OTHER CITATIONS

28 U.S.C. §2253 (10) (18) (19) (30) (31)
28 U.S.C. §2254 (12) (21) (26) (30)

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 (A) to the Petition and is:

[X] Reported at **Wharen v. Sec'y Dep't. Of Corr. 2023 U.S. App. Lexis 21336 (11th Cir. 15/2023);** 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 (B) to the Petition and is:

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from State Courts:

The Opinion of the Highest State Court to review the merits appears at to the Petition and is: **N/A**

[ ] reported at _____; or,

[ ] has been designated for Publication but is not yet reported; or,

[ ] is unpublished.

The Opinion of the Lower Court appears at Appendix **N/A** to the Petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **Federal Courts**:

The date on which the United States Court of Appeals decided my case was. August 15th 2023:

[ ] 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, October 24th 2023 and a copy of the Order denying Rehearing appears at Appendix (C).

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. **N/A**.

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

[ ] For Cases From State Courts:

The date on which the highest state court decided my case was. **N/A**

A Copy of that Decision appears at. **N/A**

[ ] A timely petition for rehearing was thereafter denied on the following date: and a copy of the order denying rehearing appears at Appendix **N/A.**

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. **N/A .**

The Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this Petition concern the **Jurisdictional Prerequisites** set forth by Federal Law in **28 U.S.C. §2253**, as defined by this Court in **Miller v. Cockrell** 123 s. Ct 1029 (2003) and **Slack v. Mcdaniel** 120 S. Ct 1595 (2000).

28 U.S.C. §2253

(a) In a Habeas Corpus proceeding or a proceeding under §2255 before a District Judge, the final order shall be subject to review, on Appeal, by the Court of Appeals for the Circuit in which the proceeding is held.

(c)(1). Unless a Circuit Justice, or Judge issues a Certificate of Appealability, an Appeal may not be taken to the Court of Appeals from--

(A). The final Order in a Habeas Corpus proceeding in which the detention complained of arises out of the process issued by a State Court.

(2). A Certificate of Appealability may issue under paragraph (1) only if the Applicant has made a Substantial Showing of the Denial of a Constitutional Right.

(3). The Certificate of Appealability under paragraph (1) shall indicate which specific issue or issues satisfy the Showing required by paragraph (2).

PROCEDURAL HISTORY

1). On April 29th 2008, Petitioner was charged with Two-2 Counts of First Degree Murder, a Jury found Appellant guilty as charged, and the Trial Court sentenced Petitioner to Consecutive terms of life imprisonment.

2). Petitioner Appealed to the Fifth District Court of Appeal raising Eight (8) Ground(s) for Relief, the Fifth DCA (Affirmed) on May 5th 2014. See Wharen v. State 138 So.2d 469 (Fla. 5th DCA 2014)

3). On April 16th 2015, Petitioner filed a Habeas Corpus Petition alleging Ineffective Assistance of Appellate Counsel with the Fifth DCA, to which was likewise summary denied.

4). On August 27th 2015, Petitioner filed a Rule 3.850 Motion for Post Conviction Relief raising Thirteen (13) Grounds for Relief.

5). On October 23rd 2017, The State Court denied Relief after an Evidentiary Hearing, however, never provided Petitioner with a copy of the order for purposes of Appeal.

6). On April 20th 2018, Petitioner filed a Petition with the Fifth DCA seeking Belated Appeal from the Order denying post conviction relief, the Appellate Court granted the Petition on June 1st 2018. See Wharen v. State 244 So.3d 420 (Fla. 5th DCA 2018) and subsequently Affirmed the 3.850 Appeal on June 5th 2018. See Wharen v. State 248 So.3d 1155 (Fla. 5th DCA 2018)

7). On February 7th 2018, Petitioner filed a successive Rule 3.850 Motion, to which was denied by the State Court as untimely and successive.

8). Petitioner Appealed the denial of the successive Rule 3.850 Motion to the Fifth DCA, to which was also Affirmed on July 24th 2019. See Wharen v. State 277 So.3d 598 (Fla. 5th DCA 2019)

9). On October 17th 2019, Petitioner timely sought Federal Habeas Corpus Relief from his Judgment and Convictions in the United States District Court Middle District of Florida (Orlando Division) raising **(29) Claims** for relief that were raised in his State Court proceedings, to which was denied on March 29th 2022. **See Exhibit (B) of Appendix.**

10). Petitioner Appealed the District Courts Order to the Eleventh Circuit Court of Appeal resulting in **Case No: 22-12851-A,** however, He only submitted **Six (6)** of those Grounds in his request for a **C.O.A.**. **See Exhibit (D) of Appendix.**

11). Consequently, the Eleventh Circuit Court of Appeal denied Petitioners request for **C.O.A.** On **August 15th 2023. See Exhibit (A) of Appendix.**

12). On September 8th 2023, Petitioner timely filed a Motion for Reconsideration, however, the Eleventh Circuit Court of Appeal denied this Motion as well on **October 24th 2023. See Exhibit(s) (C) & (E) of Appendix.**

13). Petitioner has no other Motions, Petitions or Appeals pending in this Court or any other Court, and the instant Petition ensues on the following facts, argument and citations of authorities.

PRELIMINARY STATEMENT

In support of the Claims made within this Petition, Petitioner has Attached Hereto as **Exhibit (F) of the Appendix,** the **[Transcript of his Trial Proceeding]** in which the below **Statement of Case and Facts** corresponds therewith.

STATEMENT OF CASE AND FACTS

The facts introduced at trial demonstrated that Petitioner and Kelly Wharen were high school sweethearts who had been married for seventeen years, with three children, Patrick, Jr. (age 16), Courtney (age 13), and Duane (age 8). **(Ex-F. TT. 176-177, 193, 222, 238, 727)**

The family lived in a trailer on Akorn Street in Merritt island. **(Ex-F. TT. 176),** Petitioner was the receiving manager for the Sears Store in Merritt Island, a job he had performed quite admirably (in fact, one of the best workers in the store, according to the store's general and operational managers) prior to three months before the killings (when the Petitioner's emotions and personality totally changed). **(Ex-F. TT. 732-737, 742-744)**

Petitioner knew the store operations very, very well, handling the scheduling, the payroll, and his people almost to perfection. He was always punctual for work and never lost his temper or cried. **(Ex-F. TT. 735-737, 744)**

For a couple of years, Petitioner and Kelly were having some marital difficulties (mainly related to parenting and finances in the beginning, but becoming more personal towards the end). **(Ex-F. TT. 177, 200, 225-226, 243)**, Petitioner was regularly seeing and phoning a **psychologist, Dr. Linda Martin,** and on occasion, Kelly would attend the counseling sessions with him as well. **(Ex-F. TT. 689-692)**

In October 2007, Kelly Wharen announced to the family that she had discovered her long-lost daughter, **(Missy)**, whom Kelly had given up for adoption when she was fifteen, living in Daytona Beach. **(Ex-F. TT. 178-179, 223-224, 242) Missy,** it seemed, had a fiance, Nineteen-year-old **Jonathon Vuick**, by whom she was pregnant with Kelly's soon-to-be twin grandchildren. **(Ex-F. TT. 179, 223-224, 235)** Kelly further declared that **Vuick** wanted to relocate to Florida to be with his fiance, and she was going to bring him to Florida. **(Ex-F. TT. 223-224)**

So Kelly drove to Virginia to pick up **Vuick**, but instead of driving him to be with **Missy** in Daytona Beach, **Vuick** moved in with Kelly and Petitioner. **(Ex-F. TT. 179-180)** Petitioner got **Vuick** a job working under his supervision on the loading dock at Sears and **Vuick** lived with

them from **October until December 2007**, when he moved into another trailer which Petitioner and Kelly owned (and had another mortgage on) catty-corner across the street. **(Ex-F. TT. 181, 225, 244)**

During this time frame, including the Thanksgiving, Christmas and New Year's holidays, **Missy** never visited and nobody ever saw her. **(Ex-F. TT. 180, 195-197) Missy,** however, allegedly did make a post on MySpace, but Patrick, Jr. later determined that the logo's for both his **Mother's** and **"Missy's"** accounts were identical. **(Ex-F. TT. 218)**

In January 2008, when their marital issues escalated, Kelly moved out of the marital home into the trailer across the street with Vuick. **(Ex-F. TT. 181, 226)** They did not make any payments in rent towards the mortgage and the Petitioners financial problems also escalated. **(Ex-F. TT. 224)** Petitioner began to suspect that **Kelly and Vuick** were having an affair and became increasingly depressed. **(Ex-F. TT. 181, 327, 330).**

When a new bed was delivered to the couples trailer in **[March]**, **Vuick** announced to the Petitioner, in the presence of his Wife and thirteen-year-old daughter, ***"Yeah, this is the bed I'm going to be fucking your wife on."*** **(Ex-F. TT. 622-624)** According to Courtney, her father reacted as if he had been punched in the stomach and, of course, became angry. **(Ex-F. TT. 624)**

The Petitioner attempted on more than one occasion to kick **Vuick** out of the trailer, but **Vuick would taunt him**, refusing to leave and saying Petitioner couldn't kick him out because he was a **guest of Kelly's**, and instead **Vuick** would order the Petitioner to leave the premises. **(Ex-F. TT. 198, 219)** During this time frame, neighbors would hear the **Petitioner grumble sometimes about killing "the little prick" (but they never took him seriously)**. **(Ex-F. TT. 226, 296-297, 314)**

Petitioner visited or called his counselor more frequently after January 2008, crying all the time and wanting to reconcile with his Wife. **(Ex-F. TT. 692-694) Dr. Martin** diagnosed him with ***Major Depressive Disorder*** and both she and his manager at Sears recommended that he take a leave of absence from his job to deal with his depression, which he did. **(Ex-F. TT. 642, 652, 695-696, 751)** His performance at work **(where Vuick still worked and where Petitioner had to see him every day)** changed drastically from what it had before his **"numbers dropped,"** he cried all the time, he was moodier and treated his people differently, his attendance suffered, and he was "very distracted."**(Ex-F. TT. 735-740, 744-751)**

When his manager attempted to speak to him about his problems, Petitioner would cry and hold his hand up as saying he could not speak about them, and he was ordered to take a leave of absence under the **Family Medical Leave Act, ...** because the previously outstanding employee could no longer perform his job anymore. **(Ex-F. TT. 745)**

Petitioner was very emotional and depressed, according to **Dr. Martin,** his condition was **"Server,"** unable to control his emotions, unable to work, not able to function or control himself well, and becoming increasingly irritable and angry. **(Ex-F. TT. 693-697)** The Doctor also recommended that the Petitioner seek a prescription of **Anti-Depressants** from his medical doctor, but the Petitioner claimed that, because Kelly had not paid the Doctor for previous services, he could not afford the Doctor and the Doctor would not see him to prescribe these medications. **(Ex-F. TT. 693)**

On **April 4th 2008,** the Petitioner was having some dinner and drinks with his friends and neighbors, **Mary and Robert Fay**. **(Ex-F. TT. 294-295, 324)** They were aware of his marital problems, knew that **Kelly and Vuick** were living together, and had heard the Petitioner grouse on several occasions about how he should go **"beat his ass" or "kill Vuick,"** but had not heard any threats recently. **(Ex-F. TT. 296, 301, 327-330)(They never took these threats seriously)**. **(Ex-F. TT. 314)**

However, on this evening, he was in a pretty good mood ("better than he had been in a long time"), at least initially. **(Ex-F. TT. 295, 325)** After dinner, Petitioners youngest son, **Dewayne,** came over to the **(Fays)** at sometime between **10:00 and 10:30 p.m.**, upset that his **Mother and Vuick** had made him leave their trailer since, they said, **"It was adult time." (Ex-F. TT. 297-298, 319-320, 325, 333)**

Upon hearing this, Petitioners demeanor immediately changed, he became agitated, but told Dewayne to "just leave it alone." **(Ex-F. TT 298, 319, 333)** He got up to leave to go "check on the kids," saying he would be back shortly, and asking Robert to fix him another drink in the meantime. **(Ex-F. TT. 299, 332)** Shortly thereafter (within five minutes, according to Robert), the Fays heard the gun shots. **(Ex-F. TT. 300, 333)**

After leaving the Fays, the Petitioner returned home, awaking Patrick, Jr. and Courtney, and asking them to go across the street and get their mother, as he wanted to talk with her. **(Ex-F. TT. 181-183, 228-229)** The Petitioner then went into his bedroom (where the gun box was later found) and joined his children outside of Kelly and Vuick's trailer. **(Ex-F. TT. 183-184, 228-229)** There, Courtney had summoned her mother and they proceeded to re-commence an

argument they had had earlier in the day, when Kelly refused to share their sunscreen with her. **(Ex-F. TT. 184, 216, 229-232)**

Courtney, during the earlier argument, had muttered then, that she did not need it anyway, ***but Vuick had told her mother instead that Courtney had said that she did not need her mother, infuriating Kelly.*** **(Ex-F. TT. 184, 216, 229-232)** With her mother yelling at her, Courtney started to cry, which greatly upset Petitioner, ***who had been standing outside the fenced area***. **(Ex-F. TT. 184, 216-218, 229-232)**

Petitioner then proceeded through the gate and accosted his wife by grabbing her hair, it was further alleged that Petitioner had pulled a gun from his pocket, and during this struggle the gun discharged and his Wife was shot in the **Right Abdomen**, (a non-life threatening injury), Patrick, Jr. then grabbed his father and threw him back away from his mother and onto the hood of the car in the driveway. **(Ex-F. TT. 184-185, 217-219, 233)**

When Patrick, Jr. had his father on the hood of the car, slamming him onto the hood several times, ***the gun went off, going through Petitioner and striking his son.*** **(Ex-F. TT. 186, 190, 216)** Patrick, Jr. pulled out his cell phone and called 911, while his father pushed past him and ran towards Kelly and Vuick's trailer. **(Ex-F. TT. 186-1867, 233-234)** During this altercation Patrict Jr. stated that ***Petitioner had a vacant look on his face, he was zoned out, watching his wife the whole time.*** **(Ex-F. TT. 185-186, 191, 216-217)**

The Petitioner approached the door to the trailer and fired multiple shots into the door. **(Ex-F. TT 117, 270, 338, 380-384)** Apparently, ***Vuick was standing just on the other side of the door and was struck by the bullets that had passed through the door.*** **(Ex-F. TT. 270-271)** The Petitioner proceeded into the trailer where he fire Two-2 additional shots at his wife while she ran down the hallway of the trailer striking her in the upper **left arm** (a non life threatening injury), and a **fatal wound** from an indeterminate range to her **right side upper back,** which perforated the middle lobe of the right lung before exiting between the rib cage. **(Ex-F. TT. 267-271, 489-495)**

However, following what was later deemed to be the fatal shot, Kelly was able to walk back to the living room couch before collapsing onto the sofa. where her body was discovered. **(Ex-F. TT. 504, 514-515)**

While Petitioner was being treated by paramedics and was asked if he was still with us, the chief crime investigator heard him reply, "Unfortunately." **(Ex-F. TT. 131)** While riding in the ambulance to the hospital, he also heard the Petitioner refer to Vuick as **"that little prick," and reiterated several times that he did not mean to kill them**. **(Ex-F. TT. 123-124)**

REASONS FOR GRANTING A WRIT OF CERTIORARI

THE UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Instant Petition for Certiorari Relief is brought pursuant to the Denial of Petitioners Request for Certificate of Appealability based upon the fact that the Court of Appeals Committed Reversal Error when it Misapplied Federal Law By Deciding the Merits of Petitioners Constitutional Claims Without Granting Certificate of Appealability First, where, when doing so, not only did such Decision Run Afoul of the Jurisdictional Prerequisites of **28 U.S.C. §2253,** but it also Violated the Dictates of *Miller v. Cockrell* 123 s. Ct 1029 (2003) and *Slack v. Mcdaniel* 120 s. Ct 1595 (2000)

More specifically, not only did the Court of Appeals give full consideration of the Factual or Legal bases adduced in support of the Claim(s) raised when Denying Petitioners Request for C.O.A., but when doing so, it Sidestep the Threshold Inquiry of **§2253**, and in Essence, Decided the Appeal Without Jurisdiction, **Thus, Warrranting Certiorari Relief.** ***See Miller-El supra,*** *(Until a COA has been issued, Federal Courts of Appeals Lack Jurisdiction to Rule on the Merits of Appeals from Habeas Petitioners).*

Furthermore, when looking to the District Court's Application of AEDPA to Petitioner's Constitutional Claims and asking whether that Resolution was Debatable Amongst Jurists of Reason, Petitioner would aver, that because the facts of his case clearly met the prerequisites of **§2253.** ***i.e. ("A Substantial Showing of the Denial of a Constitutional Right").*** Petitioner was entitled to the Grant of a C.O.A., specifically where Jurists of Reason could disagree with the District Court's resolution of his Constitutional Claims or that Jurists could conclude the issues presented were adequate to deserve encouragement to proceed further, **Thus, Warrranting Certiorari Relief**. ***See Slack, supra, 120 S Ct 1595.***

STANDARD OF REVIEW

To Obtain a Certificate of Appealability, a Habeas Corpus Petitioner must Satisfy the Legal Standard set forth in **United States Code 28 U.S.C. §2253(c)(2)** which provides:

> **(a)** In a Habeas Corpus proceeding or a proceeding under §2255 before a District Judge, the final order shall be subject to review, on Appeal, by the Court of Appeals for the Circuit in which the proceeding is held.
>
> **(c)(1).** Unless a Circuit Justice, or Judge issues a Certificate of Appealability, an Appeal may not be taken to the Court of Appeals from--
>
> **(A).** The final Order in a Habeas Corpus proceeding in which the detention complained of arises out of the process issued by a State Court.
>
> **(2).** A Certificate of Appealability may issue under paragraph (1) only if the Applicant has made a Substantial Showing of the Denial of a Constitutional Right.
>
> **(3).** The Certificate of Appealability under paragraph (1) shall indicate which specific issue or issues satisfy the Showing required by paragraph (2).

This Honorable Court Explained the ***Jurisdictional Prerequisites*** of **28 U.S.C. §2253(c)(2)** in ***Miller-El v. Cockrell*** 123 S. Ct 1029 (2003) and held:

> At issue here are the Standards AEDPA imposes before a Court of Appeals may issue a COA to review a Denial of Habeas relief in the District Court.
>
> Congress mandates that a Prisoner seeking post conviction relief under **28 USC §2254** has no automatic right to Appeal a District Court's Denial or dismissal of the Petition. Instead, Petitioner must first seek and obtain a COA.
>
> In resolving this case, We decide again that when a Habeas Applicant seeks permission to initiate Appellate Review of the Dismissal of his Petition, the Court of Appeals should Limit its Examination to a **Threshold Inquiry** into the underlying Merit of his Claims. *Slack v McDaniel*, 120 S Ct 1595 (2000).
>
> Consistent with our prior precedent and the Text of the Habeas Corpus Statute, We reiterate that a Prisoner seeking a COA need only demonstrate **"A Substantial showing of the denial of a Constitutional Right." 28 USC §2253(c)(2).**
>
> A Petitioner satisfies this Standard by demonstrating that Jurists of Reason could disagree with the District Court's resolution of his constitutional claims or that Jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. ***Slack, supra, 120 S Ct 1595.***
>
> Applying this framework to Petitioner's COA Application, the Court of Appeals concluded "that the state court's findings are not unreasonable and that ***Miller-El*** has failed to present clear and convincing evidence to the contrary." *Id., at 452.*
>
> As a consequence, the court "determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court," *ibid.*; and it denied Petitioner's request for a COA. ***We granted certiorari. 122 S Ct 981 (2002).***

As mandated by Federal Statute, a State Prisoner seeking a Writ of Habeas Corpus has no absolute entitlement to Appeal a District Court's denial of his Petition. **28 USC §2253.**

Before an Appeal may be entertained, a Prisoner who was denied Habeas Relief in the District Court must first seek and obtain a COA from a Circuit Justice or Judge.

This is a **Jurisdictional Prerequisite** because the COA Statute mandates that "[U]nless a Circuit Justice or Judge issues a Certificate of Appealability, an Appeal may not be taken to the Court of Appeals . . . ." **§2253(c)(1).**

As a result, until a COA has been issued, Federal Courts of Appeals lack Jurisdiction to Rule on the Merits of Appeals from Habeas Petitioners.

A COA will issue only if the requirements of **§2253** have been satisfied. "The COA Statute establishes Procedural Rules and requires a **Threshold Inquiry** into whether the Circuit Court may entertain an Appeal." *Slack*, 120 S Ct 1595; *Hohn v United States*, 118 S Ct 1969 (1998).

As the Court of Appeals observed in this case, **§2253(c)** permits the issuance of a COA only where a Petitioner has made a **"Substantial Showing of the Denial of a Constitutional Right."**

In ***Slack***, supra, 120 S Ct 1595, We recognized that Congress codified our standard, announced in *Barefoot v Estelle* 103 S Ct 3383 (1983), for determining what constitutes the requisite showing.

Under the controlling Standard, a Petitioner must "Sho[w] that Reasonable Jurists could Debate whether (or, for that matter, agree that) the Petition should have been resolved in a different manner or that the issues presented were 'Adequate to deserve encouragement to proceed further.'" 120 S Ct 1595 (quoting *Barefoot*, supra, at 103 S Ct 3383 n. 4).

The COA determination under §2253(c) requires an overview of the claims in the Habeas Petition and a *General Assessment* of their Merits.

We look to the District Court's application of AEDPA to Petitioner's Constitutional Claims and ask whether that Resolution was Debatable amongst Jurists of Reason.

This *Threshold Inquiry* does not require Full Consideration of the Factual or Legal bases adduced in support of the Claims. In fact, the Statute forbids it.

When a Court of Appeals Sidesteps this Process by First Deciding the Merits of an Appeal, and then Justifying its Denial of a COA based on its Adjudication of the Actual Merits, it is in Essence deciding an Appeal Without Jurisdiction.

To that end, Our Opinion in ***Slack*** held that a COA does not require a showing that the Appeal will succeed.

Accordingly, a Court of Appeals should not Decline the Application for a COA merely because it believes the Applicant will not Demonstrate an Entitlement to Relief.

The holding in ***Slack*** would mean very little if Appellate Review were denied because the Prisoner did not Convince a Judge, or, for that matter, Three Judges, that he or she would prevail.

It is consistent with **§2253** that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the Prisoner "'has already failed in that endeavor.'" *Barefoot*, supra, 103 S Ct 3383. n 4.

We do not require Petitioner to prove, before the issuance of a COA, that some Jurists would Grant the Petition for Habeas Corpus.

Indeed, a Claim can be Debatable even though Every Jurist of Reason might Agree, after the COA has been Granted and the case has received Full Consideration, that Petitioner will not prevail.

As we stated in *Slack*, "[w]here a District Court has rejected the Constitutional Claims on the Merits, the Showing required to satisfy **§2253(c)** is straightforward: The Petitioner must Demonstrate that Reasonable Jurists would find the District Court's Assessment of the Constitutional Claims Debatable or Wrong." *120 S Ct 1595.*

In ruling that Petitioner's Claim Lacked Sufficient Merit to justify Appellate Proceedings, the Court of Appeals recited the requirements for granting a Writ under **§2254**, which it interpreted as requiring Petitioner to prove that the State Court Decision was Objectively Unreasonable by Clear and Convincing Evidence. ***This was too Demanding a Standard on More than One Level.***

It was incorrect for the Court of Appeals, ***when looking at the Merits***, **to merge** the independent requirements of **§2254(d)(2) and (e)(1).** ***AEDPA*** does not require Petitioner to prove that a Decision is Objectively Unreasonable by Clear and Convincing Evidence.

The Clear and Convincing Evidence Standard is found in **§2254(e)(1)**, but that Subsection pertains only to State-Court Determinations of Factual Issues, rather than Decisions.

Subsection(d)(2) contains the Unreasonable Requirement and Applies to the Granting of Habeas Relief, **.... *Rather than to the Granting of a COA.***

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, ***the Court of Appeals had no Jurisdiction to Resolve the Merits of Petitioner's Constitutional Claims.***

True, to the extent that the Merits of this Case will turn on the Agreement or Disagreement with a State-Court Factual finding, the Clear and Convincing Evidence and Objective Unreasonableness Standards will apply.

At the COA stage, however, a Court need not make a ***Definitive Inquiry Into This Matter.*** As We have said, a COA Determination is a ***"Separate Proceeding," "One Distinct from the Underlying Merits."*** *Slack*, 120 S Ct 1595; *Hohn*, 118 S Ct 1969.

The Court of Appeals should have Inquired whether a "Substantial Showing of the Denial of a Constitutional Right" had been proved.

"Deciding the Substance of an Appeal in what should only be a Threshold Inquiry Undermines the Concept of a COA," ... "The Question is the Debatability of the Underlying Constitutional Claim, Not the Resolution of that Debate."

The COA inquiry asks only if the District Court's decision was Debatable. Our Threshold Examination convinces Us that it was.

The Judgment of the Fifth Circuit is Reversed, and the Case is Remanded for further proceedings consistent with this Opinion.

Within this Framework, Petitioner moves this Honorable Court to Grant Certiorari Relief, and Reverse and Remand the Denial of C.O.A. for further Proceedings on the Merits.

ARGUMENT IN SUPPORT

WHETHER ELEVENTH CIRCUIT COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT MISAPPLIED FEDERAL LAW BY DECIDING MERITS OF FEDERAL CONSTITUTIONAL CLAIMS FIRST WITHOUT GRANTING CERTIFICATE OF APPEALABILITY CONTRARY TO THE JURISDICTIONAL REQUIREMENTS OF 28 U.S.C. §2253,

[AND]

WHETHER ELEVENTH CIRCUIT COURT OF APPEALS SHOULD HAVE GRANTED CERTIFICATE OF APPEALABILITY AS TO THE CLAIMS RAISED WHERE PETITIONER MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A FEDERAL CONSTITUTIONAL RIGHT UNDER THE PROVISIONS OF 28 U.S.C. §2253.

In the case at bar, Petitioner sought a **Certificate of Appealability** in the **Eleventh Circuit Court of Appeal** on **Four-4 Specific Ground(s)** that included:

Ground One: Whether the Trial Court Erred when ***Excluding Exculpatory Evidence (Text Messages) as Hearsay*** and whether the Florida Appellate Court unreasonably applied **Chambers v. Mississippi 93. S. Ct 1038 (1973)** when Affirming this Issue on Direct Appeal.

Ground Two: Whether the Trial Court Erred when Failing to Grant ***Motion for Judgment of Acquittal based upon the Insufficiency of the Evidence***, and whether the Florida Appellate Court unreasonably applied **Jackson v. Virginia 99 S. Ct 2781 (1979)** when Affirming this Issue on Direct Appeal.

Ground Twenty-Three: Whether the Post Conviction Court unreasonably applied the Standard in **Strickland v. Washington 104 S. Ct 2052 (1984)** in finding that ***Defense Counsel was not Ineffective for failing to call an Expert Witness* (Psychiatrist) *to Explain the Hypothetical's on State of Mind as it related to the Defense of [Heat of Passion]*** to Negate the State case of Premeditated Murder

Ground Twenty-Nine: Whether the Federal District Court ***Correctly Determined*** that Petitioners Successive Post Conviction Claim alleging Ineffective Assistance of Trial Counsel for Failing to Lay Proper Foundation for the Introduction of Cell Phone Text Messages ***was Procedurally Barred from Federal Review.***

Consequently however, when the Eleventh Circuit denied C.O.A. on these Particular Ground(s), not only did it actually Reach the Merit's of the Argument raised within Each, but it did so without the Issuance of a Certificate of Appealability, to which, as a result thereof, Violated the Jurisdictional Prerequisites of **28. U.S.C. §2253,** as Explained by this Court in *Miller v. Cockrell* 123 S. CT 1029 (2003) and *Slack v. McDaniel* 120 S. CT 1595 (2000), **Warranting Certiorari Relief in the case at bar.**

POINT I.

As to **Ground One**, Petitioner argued that the Trial Court Erred when ***Excluding Exculpatory Evidence (Text Messages) as Hearsay*** and that the Florida Appellate Court unreasonably applied *Chambers v. Mississippi* 93 S. Ct 1038 (1973) when Affirming this Issue on Direct Appeal.

Notwithstanding, in conjunction with the Argument made in **Ground One**, Petitioner also asserted an additional argument in relation to **Ground Twenty-Nine**, that Trial Counsel was Ineffective for Failing to Lay a Proper Foundation for the **Introduction of Cell Phone Text Messages,** and that such Claim was not barred from Federal Review under this Courts holding in *Martinez v. Ryan* 132 S. Ct 1309 (2012).

When denying Petitioners Request for C.O.A. pertaining to these Two-2 Particular Ground(s) the Appellate Court stated: See Exhibit (A) of Appendix.

1. Reasonable Jurists would not Debate the Denial of **Ground 1: *Even Assuming Arguendo***, that the Trial Court Erred in Excluding the **Text Message** from Mr. Wharen's Wife, ***Any Error Was Harmless.*** The Jury Heard Evidence of the **Text Message's** Effect on Mr. Wharen's State of Mind, and as a Result, the Courts Exclusion of the Text Message did not have a ***"Substantial and Injurious Effect or Influence in Determining the Jury's Verdict."***

6. Reasonable Jurists would not Debate the Denial of **Ground 29:** The State Court Applied an Independent and Adequate State Ground to Conclude that **Ground 29** was Procedurally Defaulted, **and Mr. Wharen Cannot Overcome That Default.**

Based upon the Response provided by the Appellate Court ***(above),*** it cannot be said that the **Merits of Ground I.** was not Reached when denying Petitioners Request for Certificate of Appealability, specifically in light of the context of the Courts Statement: ***["The Jury Heard Evidence of the Text Message's Effect on Mr. Wharen's State of Mind, and any Error involved was Harmless Beyond a Reasonable Doubt"].***

Thus, because this particular Statement could not be made without giving *Full Consideration of the Factual or Legal bases adduced in support of the Claim raised,* it cannot be said that the Appellate Court did not sidestep the Threshold Inquiry of **§2253**, and in Essence, decided the Appeal Without Jurisdiction. ***See Miller-El v. Cockrell supra,*** *(When a Court of Appeals Sidesteps this Process by First Deciding the Merits of an Appeal, and then Justifying its Denial of a COA based on its Adjudication of the Actual Merits, it is in Essence deciding an Appeal Without Jurisdiction).*

Notwithstanding, because the facts of Petitioners case clearly met the prerequisites of §2253. ***i.e. ("A Substantial showing of the Denial of a Constitutional Right").*** Petitioner was entitled to the Grant of a C.O.A., specifically where Jurists of Reason could disagree with the District Court's resolution of his Constitutional Claims or that Jurists could conclude the issues presented were adequate to deserve encouragement to proceed further.

More specifically, when Petitioners Sister **(Kim Schlough)** was testifying at trial as to the **text message** Petitioner received while he was visiting her at her place of work, **the State objected when she attempted to relay to the Jury the Nature of the Text Message, and its Author,** a side bar was held, wherein the matter was discussed what the message said, and who it was from, however, the Court sustained the States Objection, and ***(Ms. Schlough)*** was never allowed to tell the Jury what the Text Message said, ***i.e. ("I'm fucking Jon right now"),*** or **(The Message was from the Wife). See Appendix (Ex-F. T.T. Pg's. 713-716)**

Hence, while the Jury may have heard testimony that Petitioner received a **Text Message** while visiting his Sister, they never heard what the **text message said or who it was from**, thus, without the contents of the **text message** being revealed to the jury, as well as who authored it, it cannot be said that the exclusion of such evidence was not harmful, and detrimental to Petitioners theory of defense, specifically where this evidence was highly probative of the **State of Mind Element of a Heat of Passion Defense**, and the disconnect directly operated to undermine Petitionerss theory of defense. See Villella v. State 833 So.2d 192 (Fla. 5th DCA 2002)(the exclusion of any **corroborative evidence** of the existence of an alleged affair was error, as it was vital to defendants defense that he acted out of passion) and Strachan v. State 279 So.3d 1231 (Fla. 4th DCA 2019)(Trial Court erred in excluding **text message** from trial where text was highly significant **because of its close proximity in time to the incident and the texts impact was relevant to his defense**)

Petitioner would aver, that without the content and author of the text message being revealed to the jury, it held no evidentiary value at all, for example, it could have been a text message from his job, telling Petitioner the company had to let him go, thus, rendering it completely irrelevant to his Heat of Passion Defense at trial, in that without direct proof of who it was from, and what it said, the Jury was prohibited from considering it as evidence pertaining to his theory of defense, thus, it cannot be said that this error was harmless beyond a reasonable doubt.

Notwithstanding, Petitioner further demonstrated that the Prosecutor compounded the error during closing argument to the jury, where the State Attorney admitted that **Vuick had previously taunted the Petitioner with a statement that he was having sex with the Petitioners Wife on the new bed that Petitioner had seen delivered**, but, the Prosecutor **["Minimized"]** this statement as it related to the **Petitioners Heat of Passion Defense,** by stating that this **taunt** occurred at least a **couple of months prior to the killing**: **See (Ex-F. TT. 865)** where the State argued:

> She **[Courtney Wharen, the defendants daughter]** said at one point she remembers being out there with Jonathan Vuick at some point when he said, those words, **I'm doing your wife in the bed**, and what did Courtney say? He [the defendant] got upset,.....
> Did he reach out and hit Jonathan or his wife or do any physical action other than get upset at that point?.....**That might be heat of passion to grab them there when you hear those words, but that didn't happen**,.....
> He was upset, yes, it's upsetting if they're having the affair, and whether they are or not isn't relevant, its what he's thinking. He's thinking they are. So, at that time when he's confronted with that type of remark **he does nothing, nothing to Jonathan or his wife**. He walks away, he's upset,.....
> **Well, She said it was about a month. The murders occurred April 4th, about a month, three, four, or give or take a day some where in there. (TT. 865)**

However, although the Prosecutor knew about the ***much more recent text message***, but because he had successfully had it **excluded** from trial, ***he was able to mislead the Jury*** that there were no more recent pronouncements on this subject closer in time to the killings ***which would have had an even greater effect on the Petitioners state of mind and the heat of passion defense.***

Such misconduct of the Prosecutor ***compounded the error*** of the exclusion of the relevant evidence, and coupled with the erroneous exclusion, was certainly harmful and prejudicial, that operated to deprive Petitioner of a fundamentally fair trial. See Villella v. State 833 So.2d at 194-197, where the trial court excluded relevant testimony corroborating the wife's affair and the Court Reversed recognizing:

> The Prosecutor may not get evidence excluded and then use the absence of that evidence during closing argument to the jury to strength its case for guilt. The prejudice was compounded by the prosecutors improper argument to the jury that the defense failed to present any independent evidence of the affair. It is well established that it is improper for a prosecutor to comment on the defendants failure to mount a defense. See, e.g. Wolcott v. State 774 So.2d 954 (Fla. 5th DCA 2001). These comments were especially inappropriate in light of the fact that the prosecutor had successfully sought to exclude the very evidence he now complained that the defense failed to produce.

Petitioner would aver that while Errors of State law, which do not infringe upon a Constitutional Rights, do not provide a basis for Federal Habeas Corpus Relief. Questions regarding State Evidentiary Rulings may be reviewed when the alleged Errors at Trial ***"so infused the trial with unfairness as to deny due process of law."*** See Felker v. Turpin, 83 F.3d 1303 (11th Cir. 1996)(quoting Lisenba v. California 62 S. Ct. 280(1941)); see also Estelle v. McGuire 112 S. Ct. 475 (1991). ***The erroneous ruling must have "had substantial and injurious effect or influence in determining the jury's verdict."*** Brecht v. Abrahamson 113 S. Ct. 1710 (1993). ***"A denial of fundamental fairness occurs whenever the evidence excluded is material in the sense of [A] crucial, critical, highly significant factor."***

Furthermore, the Constitution irreducibly protects a criminal defendants right to ***"A meaningful opportunity to present a complete defense."*** California v. Trombetta 104 S. Ct 2528 (1984). "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendants version of facts as well as the prosecutions to the jury so it may decide where the truth lies." ***thus, when the .....Courts evidentiary ruling rise to the level of depriving the defendant of his constitutional right to present a defense, such rulings amount to constitutional error."*** *United States v. Perry 379 Fed. Appx. 888 (11th Cir. 2010)*

However, this Court stated in ***Chambers v. Mississippi*** 93 S. Ct 1038 (1973) that this does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence, ***rather, due process considerations hold sway over state evidentiary rules only when the exclusion of evidence undermines fundamental elements of the defendants defense.*** See United States v. Scheffer 118 S. Ct 1261 (1998)

Accordingly, based on the criteria enunciated by this Court above, it is abundantly clear that Petitioner was deprived of his due process right to present a **complete defense** on his behalf, where he has clearly demonstrated that not only was the exclusion of his **Sisters testimony**, as it related to the **specific content of the text message** in question ***[Material] in the Sense of being [A] Crucial, Critical or Highly Significant Factor in his Heat of Passion Defense,*** but the Exclusion of the ***Text Message and Witness Testimony*** certainly operated to Negate the only Defense Petitioner had against the States case against him, to which, as a result thereof, ***Fatally Infected the Trial so as to Deprive Petitioner of Due Process of Law.***

As such, because the Exclusion of the Evidence and Witness Testimony had a direct affect on the ***Fundamental Fairness Petitioners Trial***, it cannot be said that ***"Reasonable Jurists would not find the District Court's assessment of the Constitutional Claims Debatable or Wrong."*** To which Entitled Petitioner to the Grant of a C.O.A. under the provisions of **28 U.S.C. §2253.**

As to **Ground Twenty-Nine**, Notwithstanding the facts and argument asserted in **Ground One** above, it was Petitioners argument that Trial Counsel was ineffective for failing to **obtain Phone Records of the Text Messages sent to Him by his Wife, to lay a proper foundation for the introduction of his Sisters testimony at trial**, as to the content of the text message (**"I'm fucking Jon right now"**) and the effect it had on his State of Mind, in relation to his Heat of Passion Defense.

However, the Federal District Court determined that this Ground was procedurally barred from Federal Review where the State Court found that it was brought in an Untimely Post Conviction Motion and thus, procedurally barred as successive and untimely.

However, Petitioner argued in his Motion For Reconsideration that the District Court Erred in its procedural ruling where this Court addressed this particular issue in ***Martinez v. Ryan*** **132 S. Ct 1309 (2012)** and held:

> A prisoner may establish cause for a default of an ineffective-assistance claim in **Two circumstances.** The **First** is where the state court did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The **Second** is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of ***Strickland v. Washington*** 104 S. Ct 2052 (1984)
>
> ***However. To Overcome the Default***, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a ***Substantial One***, which is to say that the prisoner must demonstrate that the claim has ***Some Merit.***

Hence, based on the **Two (2) exceptions** enunciated by this Court in ***Martinez supra***, it is abundantly clear that Petitioners Post Conviction Claim was not barred from Federal Review, where Petitioner was pro se when he filed both his Original and Second Successive Rule 3.850 Motions for Post Conviction Relief, thus, entitling him to review of his Constitutional Claim under the ***exceptions enunciated in Martinez supra.***

Accordingly, given the Argument made in ***Ground One*** above, it certainly cannot be said that Trial Counsels performance in failing to obtain the relevant **Phone Records** of the **Text Messages** and move to admit them under the **Business Records exception to the Hearsay Rule as provided by the Evidence Code of F.S. §90.803(6) and §90.902(11),** was not **Deficient**, nor can it be said that Petitioner was not further **Prejudiced** as a result thereof, where, not only was the ***Text Message*** relevant to his theory of defense as pertaining to his ***State of Mind*** prior to the murders occurring, but because the ***State of Mind Element was a Material issue in dispute***, to which became a pivotal point of the Jury's determination as to whether to Acquit or Convict of First Degree Premeditated Murder; Second Degree Murder; or Manslaughter, it certainly cannot be said that Trial Counsels **Deficient Performance** was not harmful as a matter of law.

Based upon the aforementioned facts, and looking to the District Court's Application of AEDPA to Petitioner's Constitutional Claims and asking whether that Resolution was Debatable Amongst Jurists of Reason, Petitioner would aver, that because the facts of his case clearly met the prerequisites of **§2253**. ***i.e. ("A Substantial showing of the Denial of a Constitutional Right").*** Petitioner was entitled to the Grant of a C.O.A., specifically where Jurists of Reason could disagree with the District Court's resolution of his Constitutional Claims or that Jurists could conclude the issues presented were adequate to deserve encouragement to proceed further. ***See Slack, supra, 120 S Ct 1595.***

Notwithstanding, because Jurist of reason would find it Debatable whether the Petition stated a Valid Claim of the Denial of a Constitutional right and that Jurists of Reason would find it Debatable whether the District Court was Correct in its Procedural Ruling, it cannot be said that Petitioner was not entitled to the Grant of a C.O.A., specifically where, not only has Petitioner shown that the District Courts procedural ruling was incorrect, but because his Claim of Ineffective Assistance of Trial Counsel was a ***Substantial One, that held Merit,*** the issuance of a C.O.A. was certainly warranted in the instant case at bar. *See Slack v. McDaniel* 120 S Ct 1595 (2000)

POINT TWO

As to **Ground Two,** Petitioner originally Argued in his Application for C.O.A. that the Trial Court Erred when Failing to Grant ***Motion for Judgment of Acquittal based upon the Insufficiency of the Evidence***, and further Argued that the Florida Appellate Court Unreasonably Applied **Jackson v. Virginia 99 S. Ct 2781 (1979)** when Affirming this Issue on Direct Appeal.

When denying Petitioners Request for C.O.A. As to this Particular Ground the Appellate Court Stated:

2. Reasonable Jurists would not Debate the Denial of **Ground 2. Viewing the Evidence in the Light Most Favorable to the Prosecution**, a Rational Trier of Fact could have found that Mr. Wharen Acted with Premeditation. *See Jackson v. Virginia* 99 S. Ct 2781 (1979). **For Example, Mr. Wharen had Threatened to Kill the Victims, and He Shot and Killed the Victims after having been Restrained by his Son.**

Based upon the Response provided by the Appellate Court ***(above),*** it cannot be said that the **Merits of Ground II.** was not Reached when denying Petitioners Request for Certificate of Appealability, specifically where, the ***"Jackson Standard is a Mixed Question of Law and Fact"*** and a Federal Court has a Duty to Fully Assess the Historic Facts when it is called upon to Apply a Constitutional Standard to a Conviction Obtained in a State Court. *See Grizzell v. Wainwright,* 692 F.2d 722, (11th Cir. 1982)(The issue of whether the State Court's findings are sufficient to support a conviction under the ***Jackson Standard is a Mixed Question of Law and Fact Subject to Plenary Review)***

Thus, because the Aforementioned Statement could not be made without giving Full Consideration of the Factual or Legal bases adduced in support of the Claim Raised, it cannot be said that the Appellate Court did not Sidestep the Threshold Inquiry of **§2253**, and in Essence, decide the Appeal Without Jurisdiction. ***See Miller-El v. Cockrell supra.***

Notwithstanding, because the facts of Petitioners case clearly met the prerequisites of **§2253**. ***i.e. ("A Substantial showing of the Denial of a Constitutional Right").*** Petitioner was entitled to the Grant of a C.O.A., specifically where Jurists of Reason could disagree with the District Court's resolution of his Constitutional Claims or that Jurists could conclude the issues presented were adequate to deserve encouragement to proceed further.

More specifically, Petitioner would show that the Instant Issue before this Court involves whether the Appellate Court ***(When Denying C.O.A.)*** Departed from the Accepted and Usual Course of Judicial Proceedings when it Decided an Important Federal Question in a way that Conflicted with Decision(s) of the Florida Supreme Court on the Same Point of Law, as to call for an Exercise of this Courts Supervisory Power.

In support hereof, Petitioner would show that in order to satisfy the constitutional requirement of due process in a criminal trial, the State must prove ***beyond a reasonable doubt*** every fact that constitutes an essential element of the crime charged against the defendant. *In re Winship*, 90 S. Ct. 1068 (1970).

When considering the sufficiency of the evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt, but "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia** 99 S. Ct. 2781 (1979) *See also* *Colemen v. Johnson* 132 S. Ct 2060 (2012) where this Court held:

> While a Federal Court may not over turn a State Court Decision rejecting a sufficiency of evidence challenge because it disagrees with the State Court, **"it may do so if it finds the State Courts Decision was Objectively Unreasonable." 28 U.S.C. §2254(d).**

Deciding whether a State Court's decision involved an Unreasonable Application of Federal Law, [or] an Unreasonable Determination of the Facts in Light of the Evidence Presented, requires the Federal Habeas Court to train its attention on the particular reasons- **both legal and factual** — why the State Courts Rejected a State Prisoner's Federal Claims. *See* *Wilson v. Sellers* 138 S. Ct 1188 (2018)(The Federal Court should have asked what Arguments or Theories "could have supported" the State Courts decision) *See also* *Junes v. Fla. Dep't of Corr.*, 778 F. App'x 639 (11th Cir. 2019)("The District Court must consider the particular **factual and legal reasons** that the State Court rejected the Prisoner's Federal Claims.")

In *Harrington v. Richter*, 131 S. Ct 770 (2011) this Honorable Court held that AEDPA Deference Applies even when the State Court gives no reasons for its decision. *I.d 131 S. Ct. at 784* **("Where a State Court's decision is unaccompanied by an explanation, the Habeas**

Petitioner's burden still must be met by showing there was no reasonable basis for the State Court to deny relief."). *Richter* recognized that this "presumption may be overcome when there is reason to think some other explanation for the State Court's decision is more likely." *Id. 131 S. Ct. at 785.*

In the case at bar, it was Petitioners theory of defense that the Murders were committed in the Heat of Passion. **The "Heat of Passion Defense"** is well established in Florida as **(1)** a complete defense if the killing occurs by accident and misfortune in the heat of passion, upon any sudden sufficient provocation; **or (2) a Partial Defense, to Negate the Element of Premeditation in First-Degree Murder or the Element of Depravity in Second-Degree Murder.** *See Villella v. State* 833 So. 2d 192 (Fla. 5th DCA 2002); and *Whidden v. State*, 64 Fla. 165, 59 So. 561 (Fla. 1912). Notwithstanding, at the time of Petitioners conviction a **Special Legal Standard** also applied to **Circumstantial Evidence.**

This **Legal Standard** provided that where the proof of guilt is **Circumstantial**, no matter how strong the evidence may suggest guilt, ***A conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence.*** See McArthur v. State 351 So.2d 972 (Fla. 1977)(Reversing conviction after concluding that the state did not carry its burden of disproving appellants innocence—even though circumstantial evidence was sufficient to suggest a probability of guilt, It was not adequate to support conviction if it was likewise consistent with a reasonable hypothesis of innocence)

The Courts of Florida have further explained **that Circumstantial Evidence** is a vital evidentiary tool, and the admission of such evidence is commonly relied on by the State to establish its case-in-chief. However, **Circumstantial Evidence** is inherently different from **Direct Evidence** in a manner that warrants **Heightened Consideration on Appellate Review. "Direct Evidence** is that to which the witness testifies of his own knowledge as to the facts at issue. **Circumstantial Evidence** is proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist." "While the two types of evidence are equally probative, one requires a leap in reasoning that the other does not, and thus, they are fundamentally different." *See Davis v. State*, 90 So. 2d 629 (1956).

To that end, applying a **Heightened Standard of Review to Wholly Circumstantial Cases** is necessary to avoid what the Courts have described as: "Only by pyramiding assumption upon assumption and intent upon intent can the conclusion necessary for conviction be reached." *Gustine v. State*, 86 Fla. 24, 97 So. 207, 208 (Fla. 1923).

Although the Florida Supreme Court eliminated the Standard Criminal Jury Instruction on **Circumstantial Evidence in 1981** in the wake of *Holland v. United States* 75 S. Ct 127 (1954), *See In re Standard Jury Instr. In Crim. Cases* 431 So. 2d 594 (1981), The Court has since then expressly rejected the invitation to abandon the **Heightened Standard of Review of Sufficiency of the Evidence in Wholly Circumstantial Cases because the Standard *"guards against basing a conviction on impermissibly stacked inferences."*** *See Miller v. State*, 770 So. 2d 1144 (Fla. 2000); and *State v. Law*, 559 So. 2d 187 (Fla. 1989). "[W]hile the reasonable doubt [jury] charge and the ***Jackson v. Virginia***, 99 S. Ct. 2781 (1979)] Sufficiency Standard may be all that is Constitutionally required as a matter of Due Process, ... ***["the States are free to go above this Rudimentary Constitutional Floor in order to guard against wrongful convictions"].*** *Irene Merker Rosenberg & Yale L. Rosenberg, "Perhaps What Ye Say Is Based Only On Conjecture" Circumstantial Evidence, Then and Now, 31 Hous. L. Rev. 1371, 1421 (1995)* [1]

As the Court later observed, "We have the duty to independently examine and determine questions of State Law so long as we do not run afoul of Federal Constitutional protections or the provisions of the Florida Constitution ***that require Us to apply Federal Law in State-Law contexts***." *See State v. Kelly*, 999 So. 2d 1029 (Fla. 2008)***("In applying the Heightened Standard of Review in Wholly Circumstantial cases, this Court does neither")***

However, as noted in *Roger's v. State* 285 So. 3d 872 (Fla. 2019)(quoting *Bradley v. State* 787 So. 2d 732 (Fla. 2001)), when the evidence presented by the prosecution is not Wholly Circumstantial, **the Heightened Standard of Review does not apply** and "the concern on Appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on Appeal, there is substantial, competent evidence to support the verdict and judgment."

---

1 In **Jackson**, the United States Supreme Court held that in a federal habeas proceeding reviewing a state criminal conviction for sufficiency of the evidence, "if the settled procedural prerequisites for such a claim have otherwise been satisfied the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial **no rational trier of fact could have found proof of guilt beyond a reasonable doubt."** Florida has long applied this standard when reviewing sufficiency of the evidence in cases **not based solely on circumstantial evidence**. See, e.g., *Melendez v. State*, 498 So. 2d 1258, 1261 (Fla.1986).

Accordingly, in order to reach the merits of the instant claim, this Court will first be required to determine whether the States Case of Premeditation was based Solely on **Circumstantial Evidence, [or] Direct Evidence** in order to determine exactly what Standard of Appellate Review governed this Claim on Appeal.

In support of this determination, Petitioner will show that while the State introduced testimony from several witnesses, who specifically relayed to the Jury that he had made threats to **kill—The Little Prick—Vuick,** this fact alone did not prohibit the **Heightened Standard of Review** from being applied in Petitioners case.

More specifically, the Florida Supreme Court addressed this particular issue in *Walker v. State* 957 So. 2d 560 (Fla. 2007) where *Walker* argued that the evidence presented by the State was Circumstantial and Insufficient to rebut *Walker*'s reasonable hypothesis of innocence. The State argued that it presented direct evidence against *Walker* in the form of his confession to the murder of Hamman to Brevard County Agents, and therefore the **Special Standard of Review for Circumstantial Evidence cases** did not apply, the Court disagreed and stated the following in its opinion:

> This is not a purely circumstantial evidence case, the State presented direct evidence in the form of the defendant's confession, usually "this Court need not apply the Special Standard of Review applicable to Circumstantial evidence cases." *Conde*, 860 So. 2d at 943 (citing *Pagan v. State*, 830 So. 2d 792 (Fla. 2002)).
>
> In his statement to law enforcement officers, *Walker* confessed to killing Hamman. This confession provides ***Direct Evidence*** that he unlawfully killed Hamman, the ***actus reus***.
>
> However, in his statement, *Walker* also claims that he only meant to scare Hamman and humiliate him by driving him out to a remote location and forcing him to walk back naked. Further, *Walker* claims that he only killed Hamman after Hamman made threats to harm his family.
>
> ***Because Walker [did not admit] that he ["intended"] to kill Hamman***, the State's case as to the **Intent Element** for First-degree Premeditated Murder, ***the mens rea***, is based on ***Circumstantial Evidence, ... Thus, we apply the Special Standard of Review only to the State's Evidence establishing the Element of Premeditation.***
>
> As We recognized in *Woods*, **"Premeditation may be established by Circumstantial Evidence**." 733 So. 2d at 985 (citing *Holton v. State*, 573 So. 2d 284 (Fla. 1990); *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986)). **Premeditation is defined as**
>
> > more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Id. (quoting Wilson, 493 So. 2d at 1021). "[E]vidence of Premeditation includes 'the nature of the weapon used, **the presence or absence of adequate provocation,** previous difficulties between the parties, the manner in which the homicide was committed, **and the nature and manner of the wounds inflicted.**'" Id. (quoting Spencer v. State, 645 So. 2d 377 (Fla. 1994)).

In the case at bar, like Walker supra, testimony was given at trial that Petitioner made numerous statements to Officials following the shooting that ***"he did not mean to kill them."*** to wit: ***(Kelly Wharen and Jonathon Vuick)*** **See (Ex-F. T.T. 123-124)**

Hence, while the State presented Direct testimony of threats previously made by Petitioner, his subsequent statements that ***"he never intended to kill them"*** rendered the States Evidence **Circumstantial as a matter of law,** and thus mandated the **Heightened Standard of Review** to be applied to the facts of Petitioners case by the Appellate Court on Direct Appeal. *See* Wright v. State 221 So. 3d 512 (Fla 2017)

Where, as here, the evidence of guilt is **wholly circumstantial**, "not only must the evidence be sufficient to establish each element of the offense," it must also "be inconsistent with any reasonable hypothesis of innocence proposed by the defendant."

Consequently however, despite the fact that Petitioner was entitled to this **Heightened Standard of Review** in his case, the Fifth District Court of Appeal had taken a **different stand** on this particular **Standard of Review** at the time Petitioners Appeal was pending before the Court between **2012 and May 5th 2014** when his Direct Appeal was per curiam affirmed. *See* Wharen v. State 138 So. 3d 469 (Fla. 5th DCA 2014)

More specifically, on **January 18th 2013**, the Fifth District Court of Appeal rendered an Opinion in Knight v. State 107 So. 2d 449 (Fla. 5th DCA 2013) that totally ***Rejected the Heightened Standard of Review*** in the State of Florida and refused to apply it any further to cases pending before the Court that was not based solely upon Circumstantial Evidence, and rendered a ***Lengthy Opinion*** as to why the Florida Supreme Court should Reconsider the Standard, and eliminate it from Florida Law, to which the Florida Supreme Court eventually did, however, **not until (2020). *See* Bush v. State 295 So. 3d 179 (Fla. 2020)(We discontinue the use of the Heightened Standard of Review in light of the Opinion rendered in Knight v. State 107 So. 2d 449 (Fla. 5th DCA 2013))**

Accordingly, based upon the reasoning reached by the Fifth District Court of Appeal in *Knight supra,* which was rendered when Petitioners case was pending Direct Appeal in the Same Court, and applying this Courts holding in *Wilson v. Sellers*, ***i.e. (looking beyond the State Courts silent opinion)*** to its ***"Ultimate Conclusion"*** and ***"Determining what Arguments and Theories the State Court relied upon to reject Petitioners claim,"*** Petitioner would aver, that not only does the Opinion in ***Knight supra*** establish the basis for which the Appellate Court denied relief upon, but based upon this flawed approach, it certainly cannot be said that Petitioner has not met his burden under *Richter supra*, by rebutting the presumption of correctness with clear and convincing evidence supporting the notion that there is an adequate reason to think some other explanation for the State Courts denial is more likely. *See Richter, I.d. 131 S. Ct at 785.*

Petitioner would aver that while the Appellate Court may have disagreed with the Standard of Review in effect at the time Petitioners Appeal was pending before the Court, the Court was bound by Florida Supreme Court precedent, until changed by that Court. See *Hoffman v. Jones* 280 So. 2d 431 (Fla. 1973); *See also Lamore v. State* 86 So. 3d 546 (Fla. 2nd DCA 2012) and *Cf. Wheeler v. State* 344 So. 2d 244 (Fla. 1977)("the Decisional law in effect at the time an Appeal is decided governs the issue raised on Appeal even where there has been a change of law since the time of trial")

Thus, based upon the aforementioned facts and law, not only was the State Courts Decision based upon an Unreasonable Determination of the Facts in light of the Evidence presented in the State Court proceeding, contrary to the dictates of **28 U.S.C. §2254(d)(2)**, but as a result thereof, it certainly cannot be said that Petitioner was not entitled to the Grant of a C.O.A., where Fair Minded Jurist could Disagree with the Correctness of the State Courts decision denying Petitioners Claim in the Direct Appellate process, specifically where said decision has been shown to be Objectively Unreasonable. *See Richter 131 S. Ct at 786.*

ERROR NOT HARMLESS

Notwithstanding the fact that the State Appellate Court Misapplied State Law when deciding the Merits of Petitioner Direct Appeal. ***i.e. (Refusing to Apply the Heightened Standard of Review to the Facts of the Case),*** Petitioner would show however, that had the Court done so, it would have been determined that the Evidence of Premeditation was Legally Insufficient to support a First Degree Murder Conviction, and a New Trial would have been Granted in his case.

In support of this factual proposition, Petitioner would show that, where the ***Element of Premeditation*** is sought to be established by ***Circumstantial Evidence***, the evidence relied upon by the State must be ***inconsistent with every other reasonable inference***." *Cochran v. State* 547 So.2d 928 (Fla. 1989) "Where the States proof fails to ***exclude a reasonable hypothesis*** that the homicide occurred ***other than by Premeditated design***, a verdict of First-degree Murder cannot be sustained." *Hoefert v. State* 617 So.2d 1046 (Fla. 1993)

It was Petitioners position at trial that because the alleged murders occurred in the **heat of passion**, the states evidence was legally insufficient to support a finding that the murders were committed with a premeditated design to effect the death of either victim, to which warranted a Judgment of Acquittal on these Offense(s), and required them to be reduced to a lesser degree of homicide.

Petitioner would contend, that based upon the events established by the defense at trial, it cannot be said that the State's evidence was not legally insufficient to support Premeditation, where the facts of the case clearly demonstrated: **See Exhibit (F) of Appendix (Trial Transcripts)**

1). **On April 4th 2008**, While Petitioner was eating dinner with friends **(The Fays)** He was confronted by his **Eight (8) year old son (Dewayne)**, who told Petitioner that he was kicked out of the trailer by his **Mom and Vuick**, because they needed some ***Adult Time together.***

2). Petitioner left, went to his home to check on his children, and told them to go get their mother so he could talk to her, and simultaneously retrieved his pistol, ***and put it in his pocket*** and walked across the street to the trailer.

3). While standing on the other side of the fence that separated the yard and trailer, Petitioner **was confronted with an argument taking place between his daughter and his wife, which led to his daughter bursting into tears, all because Vuick, had lied to Kelly about a comment supposedly said by the daughter regarding her not needing her mother any more.**

4). At that time, Petitioner proceeded through the gate and accosted his Wife by grabbing her hair, while simultaneously pulling the gun from his pocket, **and during the struggle between him and his wife, the gun discharged and his wife was shot in the Right Abdomen**, (a non-life threatening injury), his son, Patrick, Jr., interceded and threw Petitioner back away from his Wife onto the hood of the car in the driveway.

5). Patrick. Jr. testified that while he was struggling with his father and slamming him onto the hood of the car, **the gun went off**, going through his father, and then striking him, and then he

called 911 while his father pushed past him and ran towards the trailer. **During this altercation, Patrict Jr. testified that his father had a vacant look, he was zoned out looking at his wife.**

6). As Petitioner approach the trailer, **he started firing his pistol blindly at the closed door,** to which, **Vuick**, **unknowingly to Petitioner**, just so happened to be standing behind, while he called 911 and as a result, was struck multiple times by bullets that passed through the closed door he hid behind. **See (Ex-F. T.T. 580)**

7). Upon entering the trailer, Petitioner again fired his pistol **two-2 more times** as his wife ran down the hallway into the **bathroom**, **striking her in the upper left arm (a non life threatening injury), and a fatal wound from an indeterminate range to her right side upper back, which perforated the middle lobe of the right lung before exiting between the rib cage. See (Ex-F. T.T. 580)**

8). Although the State sought to prove Premeditation by [Introducing] the receipt of the pistol that was bought **(40) days** prior to the crimes being committed in an effort to demonstrate that the **purchase was done-so with the aforethought of committing murder**, this evidence was equally consistent with other testimony that the gun was bought for the simple purpose of target practice with Petitioners son, where the facts at trial clearly demonstrated that ***Petitioner owned other firearms, to which, made it unnecessary to purchase the pistol if He in fact had the intent to Kill his Wife or Vuick.***

9). Furthermore, Both **Patrick Jr, and Courtney Wharen** testified at trial that they had never heard their father make any threats against their Mother **(Kelly Wharen),** more less wanting to kill her. **See (Ex-F. T.T. 198 & 243)**

10). Notwithstanding, **Mary Fay** further testified that the only time Petitioner ever made any threats in regards to **Vuick,** was only when he had been drinking. **See (Ex-F. T.T. 296)**

11). Although the evidence demonstrated that Petitioner fired **Two-2 shots** at his wife as she fled down the hallway in to the **bathroom**, **the evidence further demonstrated that not only was Kelly Wharen still alive when Petitioner exited the trailer after firing these shots,** but she was also able to walk back to the living room to the couch before dying. **See (Ex-F. TT. 504, 514-515)**

12). As such, the evidence produced at trial clearly demonstrated **Vuick** was killed as a matter of **Mishappenstance**. ***i.e. (standing behind a door)*** when the shots where fire **at the lock in the door to disengage it,** rather than as a result of **Premeditation**, specifically where no evidence was presented that Petitioner knew that **Vuick** was standing behind the door. **See (Ex-F. T.T. 580)**

13). Finally, had it been Petitioners purpose **to kill his wife** upon entering the trailer, the question must be asked why the evidence demonstrated that **she was still alive** when he exited the trailer. **See Medical Examiners Testimony at (Ex-F. TT. 504, 514-515) (Kelly was able to walk to the living room couch before collapsing onto the sofa. where her body was later discovered).**

Based upon the aforementioned facts, Petitioner would aver that the evidence presented at trial was legally insufficient to sustain a conviction for First degree Premeditated Murder, where the **inference of premeditation was to weak to justify the verdict.**

More specifically, absent some type of corroborating evidence of the circumstances, the most this Court can conclude from the bare facts, is that even though the evidence may support an inference that the murders were committed with a Premeditated design, the same evidence however, equally supports an inference that the Murders were also committed in the **Heat of Passion**, thus, negating the finding of Premeditation. *See Ulster County Court v. Allen* 99 S. Ct 2213 (1979)

Appellant would aver that based upon this rationale, such evidence is not enough to support a conviction for ***first degree murder***, as this Court made clear in ***Ulster*** supra, if the reviewing Court can only say that the ultimate fact is more likely than not to flow from the basic fact then the **Jackson v. Virginia Standard** has not been met. ***See Ulster I.d. at 2227-28 (The rationality of the inference is not judged in the abstract, but in the light of the circumstances giving rise to the inference in the particular case).***

Thus, based upon these facts, it cannot be said that the States evidence was not legally insufficient to support a Premeditated intent to kill, where the evidence at bar did not exclude ***the reasonable hypothesis that the murders in question were actually committed in the heat of passion. See Jackson supra. ("Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this Petitioners challenge to the insufficiency of the evidence be sustained").***

Thus, in accord with the criteria enunciated by this Court in ***Jackson supra,*** it cannot be said that Petitioner was not entitled to the **Grant of a C.O.A.** on this particular issue, where not only did Petiutioner make a ***"Substantial showing of the Denial of a Constitutional Right,"*** but he has also demonstrated that ***"Reasonable Jurists would find the District Court's assessment of the Constitutional Claims Debatable or Wrong." See Slack supra.***

POINT THREE

As to **Ground Twenty-Three,** Petitioner originally Argued in his Application for C.O.A. That the Trial Erred when failing to grant post conviction relief on his Claim that ***Counsel was Ineffective for failing to call an Expert Witness*** **(Psychiatrist)** ***to Explain the Hypothetical's on State of Mind as it related to the Defense of [Heat of Passion]*** to Negate the State's case of Premeditated Murder and whether the Florida Appellate Court unreasonably applied ***Strickland v. Washington*** 104 S. Ct 2052 (1984) when Affirming this Issue on Direct Appeal.

When denying Petitioners Request for C.O.A. pertaining to these Two-2 particular Ground(s) this Court stated:

5. Reasonable jurists would not debate the denial of **Ground 23**. The state court found counsel—who called a psychologist as a witness—made a strategic decision to not call a psychiatrist to testify, and **Mr. Wharen has not offered any clear and convincing evidence to rebut that finding.**

Based upon the Response provided by the Appellate Court ***(above),*** **it cannot be said that the Merits of Ground Twenty-Three** was not Reached when denying Petitioners Request for Certificate of Appealability, specifically in light of the context of the Courts Statement.

Thus, it cannot be said that the Appellate Court did not sidestep the Threshold Inquiry of **§2253**, and in Essence, decided the Appeal Without Jurisdiction. ***See Miller-El v. Cockrell supra,*** *(It was incorrect for the Court of Appeals,* ***when looking at the Merits, to merge*** *the independent requirements of* ***§2254(d)(2) and (e)(1): ... AEDPA*** *does not require Petitioner to prove that a Decision is Objectively Unreasonable* ***by Clear and Convincing Evidence.*** *).*

Notwithstanding, because the facts of Petitioners case clearly met the prerequisites of **§2253. *i.e. ("A Substantial showing of the Denial of a Constitutional Right").*** Petitioner was entitled to the Grant of a C.O.A., specifically where Jurists of Reason could disagree with the District Court's resolution of his Constitutional Claims or that Jurists could conclude the issues presented were adequate to deserve encouragement to proceed further.

More specifically, Petitioner asserted that his trial counsel was ineffective for failing to procure the assistance of an Expert Witness to assist the Defense in explaining to the Jury [Both] the Petitioners State of Mind at the time of the Crimes, and also to correctly inform the Jurors about the State of Mind element as it relates to the factual Defense of Heat of Passion.

Petitioner added that an Expert Psychiatrist was the only person qualified to explain these State of Mind issue's to the Court and Jury, to which would have aided the Jury in its fact finding mission during deliberations.

Petitioner concluded his argument with the fact that while Counsel did call **Dr. Martin,** his Psychologist and Marriage Counselor to whom he seen on the street prior to the murders, who testified as to the difficulties between Petitioner and his Wife, she was not a Psychiatrist, who was qualified as an Expert to explain the Hypothetical's of his State of Mind in relation to the Law on Heat of Passion, to which operated to deprive him of the only valid defense he had against the States case of First Degree Murder.

Consequently however, when the Trial Court denied this particular post conviction claim it stated:

> In **Ground Nine**, Defendant argues counsel was ineffective for failing to put forth an expert psychiatrist to testify as to the hypothetical's regarding state of mind and heat of passion,.....
> As **rephrased by counsel** at the hearing, and in defendants written argument, it is defendants position that counsel was ineffective for failing to call an expert "to explain the **[defendants state of mind]** at the time of the event as it related to his heat of passion defense,.....
>
> At trial, Counsel [Mr. McCarthy] called Dr. Linda Martin, who was able to testify that she had recommended Defendant for a prescription of medication,.....During the evidentiary hearing, Trial Counsel [Mr. McCarthy] acknowledged that the use of a (Psychiatrist) could be an option in a heat of passion case, ***but he believed that they were able to get what they needed in front of the jury based upon the particular facts of the case, Dr. Martin's testimony and an earlier report,.....***
>
> ***Counsel testified that this was a Classic Heat of Passion Case,.....*** Counsel did not believe that the testimony of a Psychiatrist was necessary, **this constitutes sound trial strategy, which the Court will not second guess,.....**
>
> Furthermore, the defendant has not established he was **Prejudiced** by the lack of psychiatrist testimony, thus, the defendant is not entitled to relief as to this claim.

Petitioner would contend that not only did the trial court error when failing to grant post conviction relief on this Claim, but the Florida Appellate Court Unreasonably applied *Strickland v. Washington* 104 S. Ct 2052 (1984) when affirming this issue on Direct Appeal.

As such, Petitioner would contend that he was entitled to the Grant of C.O.A. On this Claim, where such Claim met the prerequisites of **§2253.** ***i.e. (A Substantial Showing of a Denial of a Constitutional Right)***

QUESTION

WHETHER COUNSELS BELIEF THAT DR. MARTINS TESTIMONY WOULD BE SUFFICIENT TO ESTABLISH THE AFFIRMATIVE DEFENSE OF HEAT OF PASSION WAS UNREASONABLE IN LIGHT OF THE FACTS OF THE CASE

AND

WHETHHER THE STATE COURT UNREASONABLY APPLIED FEDERAL LAW WHEN DETERMINING THAT COUNSELS ACTS WERE BASED ON SOUND TRIAL STRATEGY TO WHICH WOULD NOT BE SECOND GUESSSED

In the case at bar, it was Appellants theory of defense that the murders were committed in the heat of passion. **The "Heat of Passion Defense"** is well established in Florida as **(1)** a complete defense if the killing occurs by accident and misfortune in the heat of passion, upon any sudden sufficient provocation; **or (2) a Partial Defense, to Negate the Element of Premeditation in First-Degree Murder or the Element of Depravity in Second-Degree Murder.** See Villella v. State 833 So. 2d 192 (Fla. 5th DCA 2002); and Whidden v. State, 64 Fla. 165, 59 So. 561 (Fla. 1912).

The heat of passion defense is an incomplete, or partial, defense. A killing committed in the heat of passion is not excusable or justifiable but it reduces murder to manslaughter. In *Febre v. State*, 158 Fla. 853, 30 So. 2d 367 (Fla. 1947), the court defined the heat of passion defense as follows:

> The law reduces the killing of a person in the heat of passion from murder to manslaughter out of recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject.
>
> Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.

In order for the defense of heat of passion to be available there must be "adequate provocation . . . as might obscure the reason or dominate the volition of an ordinary reasonable man." *Rivers v. State*, 75 Fla. 401, 78 So. 343 (1918). ***See also LaFave & Scott, Substantive Criminal Law, 7.10 (2d ed. 1986 & Supp.)(examples of reasonable provocation for a crime of passion).***

In *Disney v. State* 72 Fla. 492: 73 So. 598 (Fla. 1916), the Court defined the heat of passion defense somewhat differently:

> A killing in the "heat of passion" occurs when the state of mind of the slayer is necessarily different from that when the killing is done in self defense. In the heat of passion the slayer is oblivious to his real or apparent situation. Whether he believes or does not believe that he is in danger is immaterial; it has no bearing upon the question. He is intoxicated by his passion, is impelled by a blind and unreasoning fury to redress his real or imagined injury, and while in that condition of frenzy and distraction fires the fatal shot.

The heat of passion defense has had recent application in Paz v. State, 777 So. 2d 983 (Fla. 3d DCA 2000) a case which the Court called **"classic,"** the victim, who was the defendants brother-in-law, sexually assaulted the defendants wife. Moments later, the defendant confronted the victim and killed him. The defendant was convicted of Second degree murder but the Appellate Court reversed the conviction and instructed the trial court to enter judgment for manslaughter holding:

> We agree with *Paz's* contention that the trial court erred in failing to grant his motions for judgment of acquittal on the second-degree murder charge; the state failed to demonstrate that *Paz* acted with a "depraved mind regardless of human life" in killing Winton as required under section 782.04(2), Florida Statutes (1995).
>
> Here, the undisputed record evidence reveals a classic case of manslaughter based on adequate legal provocation: *Paz* killed Winton immediately upon realizing that the victim had sexually assaulted his wife.
>
> After Winton went upstairs, *Paz* followed shortly thereafter and found his wife in a state of undress, crying, and then heard his wife yell at the victim, ***"Why did you do that to me?"***
>
> As a matter of law, *Paz's* sudden act of stabbing the victim immediately after ***surmising*** that the victim had sexually assaulted his wife may not be deemed an act evincing a depraved mind regardless of human life, "but rather from the infirmity of passion to which even good men are subject." *Febre,* 30 So. 2d at 369; see *Ramsey v. State*, 114 Fla. 766, 154 So. 855 (Fla. 1934);
>
> Instead, the evidence shows a killing in the heat of passion that occurred when defendant acted in a condition of mind where "depravity which characterizes murder in the second degree [is] absent." *Disney v. State*, 72 Fla. 492, 73 So. 598 (1916).
>
> Therefore, the court should have reduced the charge to manslaughter. Accordingly, we reverse the second degree murder conviction, and remand the cause for entry of a judgment of conviction for manslaughter.

I.

WAS COUNSELS PERFORMANCE DEFICIENT

In the case at bar, Counsel for Petitioner proceeded to trial on a theory that the murders were committed in the heat of passion, the trial record reflects that Counsel elicited testimony from several of the states witnesses to establish the fact of the ongoing mental torture he suffered at the hand of his Wife's infidelity with **Jonathon Vuick.**

The record also reflects that Counsel offered just one Lay Witness, **Dr. Linda Martin** to testify on behalf of the defense as to Petitioners mental state at the time of the murders, who provided a back-ground of Petitioners martial difficulties and who also diagnosed him with **Major Depressive Disorder. See (Ex-F. T.T. 694-696)**

However, important to note, is the fact that **Dr. Martin** was not an Expert in the field of Psychiatry, nor qualified to give an opinion as to how Petitioners mental state may have resulted in the murders being committed in the heat of passion.

Although **Dr. Martin** gave testimony as to the characteristics of **Major Depressive Disorder**, and described such characteristics as: **[inability to control emotions]: [tearfulness]: [increased irritability]: and [inability to function],** true to form, She gave no testimony at all as to how these specific characteristics played a role in the murders or whether such characteristics could have lent support to the fact that the murders were committed in the heat of passion. **See (Ex-F. T.T. 694-696)**

In fact, at no point, did Counsel ever asked **Dr. Martin** to explain Petitioners Mental State of Mind, and how it could establish the affirmative defense heat of passion, Indeed, given the fact that **Dr. Martin** was not an expert, nor qualified to give an opinion on such defense, as it related to Appellants mental state at the time the crimes were committed, such testimony would have been inadmissible as a matter of law. *See Hansen v. State* 585 S. 2d 1056 (Fla. 1st DCA 1991)(Testimony presented to prove heat of passion is not limited to expert testimony, an "otherwise qualified witness who is not a medical expert can testify about a persons mental condition, provided that the testimony is based upon personal knowledge or observations, However, a lay witness may not testify to "purely legal conclusions" such as whether a defendant acted in the heat of passion)

The jury heard evidence concerning Petitioners depression, anger and how he was emotionally over-whelmed from his breakup with his wife, his counsel further argued the Heat-of-passion theory to the jury on Petitioners emotional state, however, what the jury did not hear,

due to the lack of Expert testimony at trial, was how Petitioners Mental State, in relation to what was happening to him psychologically impaired his judgment in a manner that effected his ability to act intentionally and purposely.

An expert opinion regarding whether Petitioner lacked the requisite intent to commit the crimes was crucial to the defense theory, defense counsels failure to secure an expert and present testimony on Petitioners state of mind as it related to his heat of passion defense was inexcusable, defense counsel should have known that an experts opinion on this ultimate issue was the pivotal point of the juries determination as to whether to Acquit of First & Second degree Murder and return a Verdict for Manslaughter.

Thus, establishing that Petitioner suffered from Major Depressive Disorder when he committed the crimes in question was not, in and of itself helpful, the evidence must also lead the fact-finder to an inference that such mental defect deprived the Petitioner of the ability to form intent.

Although defense counsel presented substantial testimonial evidence that Petitioner did in fact suffer a mental illness, defect, or infirmity at the time of the crime, this testimony was rendered worthless absent an experts testimony as to how such mental illness, defect, or infirmity constituted a legal excuse to the crimes.

Furthermore, not only did Dr. Martins testimony destroy any hope of a successful Heat of Passion Defense, but it also helped the prosecution to establish one of the elements of its case in chief, quite simply, the lack of expert testimony was completely devastating to the defense, and counsels decision not to present an expert on the subject at bar was objectively unreasonable to warrant a conclusion that counsels performance was constitutionally deficient.

II.
WAS PETITIONER PREJUDICED
BY COUNSELS DEFICIENT PERFORMANCE

Notwithstanding, as to the Trial Courts assertion that Petitioner suffered no **Prejudice** in relation to this Ground, rendering any error harmless, Petitioner would further show this Court that Counsel clearly testified at the evidentiary hearing that this was a ***Classic Case of Heat of Passion***, to which was Petitioners sole defense at trial.

Furthermore, as previously argued ***infra***, because the Evidence of Premeditation was wholly Circumstantial, the pivotal point for the Jury's determination all came down to one simple question,....**"Was the Homicides committed in the Heat of Passion as a result of Adequate and Legal Provocation based upon the accumulation of Acts committed by the Wife and Vuick at the time of the actual murders occurred."**

Based on the facts of the case, Defense Counsel gave the following Closing Argument: **See (Ex-F. T.T. 874-895)**

> Zoned out, vacant, not sleeping, not shaving, crying, sobbing uncontrollably, freaking out, its like he was punched in the stomach, crying all the time, a major depressive disorder, irritable , moody, can't do his job, can't deal with people.
>
> The reason I wanted to read those first, is that's who Patrict Wharen was from—in January through April 2008, you've heard all about Mr. Wharen, you've heard all about Kelly Wharen, Jonathan Vuick, all of what was going on.
>
> Lets review the evidence and look at it from where Mr. Wharen was, because that's what you need to do. There are going to be definitions. In the first degree murder definition they talk about time for **reflection. Well, there's no further definition of what reflection is.** I would suggest that you ought to consider that it is careful consideration, reflecting on something, really thinking about it, making a conscious decision.
>
> Was there sufficient time for Mr. Wharen to make a conscious decision? You may think that, but you got to put yourself there. Because that's where you have to make the decision of what was in Mr. Wharen's mind. You'll also hear a definition on the **term heat of passion,** It talks about it being a partial defense that brings it down to a lessor offense of second degree murder or even manslaughter, and you need to consider both of them.
>
> Think of the **["Mind Games"]** that were being played on him, and who knows how long this went on. Did Mr. Wharen have reason to believe that something was going on? Sure.
>
> There's a scam going on, it started out as a scam to get this young boy who is only five years older than their oldest son down here, and then it grew, they started getting all this baby stuff, it was working out pretty good, ... We don't know,... The reason that's important is because that's what's in Mr. Wharen's mind, and that's the **["Mind Games"]** that have been played on him.
>
> **Dewayne comes over and says they kicked me out, they need adult time, well the provocation, and think of the context, what did Courtney say? I was daddy's girl, she goes down there to talk to her mom, an argument occurs from a misunderstanding over suntan lotion that Jonathan lied to Kelly about, and then at the end of this argument what happened ? Daddy's Girl burst into tears.**

Now, think of Mr. Wharen, here's a guy that's been holding this in for month's. You've heard the evidence, you can think about whats going on, what his mental state was, he had not reacted in worse scenarios, at worse statements that maybe logically made more sense, ... but when daddy's little girl burst into tears, ... that's all she wrote,... that was it! .... "*Who knows what it takes to make it the straw that breaks the camels back, but that's what it was, and then it's boom, and there it goes.*"

Yeah, he had to pull the trigger each time, but think of someone in that situation, in that anger, in that rage, in that thought process are they really thinking about it **?,** Is it really **Premeditation ?,** Is it really **Reflection ?,** ..... **or is it Re-Action ?.**

There was not a huge amount of time, **we're talking seconds**, you heard what Patrick Junior said as this is going on, **he's zoned out, he's vacant, he didn't even stop to think he was shot, or that his son was shot, and after all of this, what does Courtney see?, Her father is crying, after all of this !, ... That's the mental state that he was in and that he had been brought to, and that's the heat of passion.**

In response to Counsels Closing Argument, the State Prosecutor asserted that there was no Adequate, Sudden and Sufficient Provocation. There's no Physical Violence towards Mr. Wharen at all, there's no Verbal Exchange with him. No body came at him, its not heat of passion, Read the Definition. **[Ex-F. T.T. 839. at 842-845, 847-848]**

The State further asserted during closing argument that: Depressed, Mood Disorder does not negate the specific intent of premeditated Murder.**[Ex-F. T.T. 869]**: The Defense ***"I was depressed for Three Months"*** does not apply to the facts of the case.**[Ex-F. T.T. 873]:** He gets the gun, chambered a round and goes to the house, there's no explanation for that other than first degree.**[Ex-F. T.T. 901]:** You heard **Dr. Martin** testify, and what they're trying to say is he's so depressed he's so zoned out, he's so what ever that he can't.... this has to be heat of passion, but there was no sudden provocation. **[Ex-F. T.T. 903-904]**

Had an Expert been called to give testimony at trial as to these particular findings, in regards to the nature of **Major Depressive Disorder,** to which Petitioner was suffering from at the time the crimes were committed, such testimony would have aided the jury in interpreting the surrounding circumstances that affected the mental state of the Petitioner, and could have offered a logical explanation as to how such State of Mind played a significant part of the Heat of Passion Defense.

More specifically, had Counsel procured the assistance of a Psychiatric Expert, such Expert would have found at the time of the Crime, Petitioners **Major Depressive Disorder** was

so severe that it impacted his ability to exercise judgment and decision making at the time of the Crime and would have testified at trial that:

> Petitioners State of Mind was one of being emotionally overwhelmed, angry, and mentally distraught, that resulted taking action at the target of his perceived unhappiness, (the victims in his case), his psychiatric break down and post crime commitment into a psychiatric state hospital are consistent with his state of insanity at the time of the crime, that would have supported the hypothesis that he lacked the specific mental intent to commit premeditated or deprived mind murder.

Furthermore, an Expert would have been able to explain, based on such psychotic state of mind how Petitioner could become so incensed at that particular moment in time as to qualify such acts within the scope of a heat of passion defense, rather than deliberately and with premeditation at the time of the shooting.

Counsels failure to procure the assistance of an expert to opine on the fact that Petitioners severe mental illness impacted his ability to exercise judgment and decision-making had a substantial and injurious effect or influence in determining the juries verdict. See Brecht v. Abrahamson 113 S. Ct 1710 (1993)

Thus, Counsel knew, or should have known, that an Expert in the field of **[State of Mind Issues]** as it related to the lawful elements of a Heat of Passion Defense was necessary to establish such a defense, in order to negate the Element of Premeditation and secure an Acquittal on First Degree murder, specifically where this particular defense was not one in which it could be expected that an ordinary person sitting on a Jury would be familiar with, or have an understanding of to decipher the complexities involved in such defense.

Although Defense Counsel testified at the evidentiary hearing that this was a Classic Heat of Passion Case, and Counsel did not believe that the testimony of a Psychiatrist was necessary, because he believed that they were able to get what they needed in front of the jury with **Dr. Martin's testimony** and an earlier report, it is abundantly clear, given the evidence, that Counsels performance in failing to obtain an Expert in the case at bar, to opine on the defense of heat of passion at trial, fell below an objective standard of reasonableness, thus, it cannot be said that the State Courts reliance on trial strategy to excuse Counsel's performance was not an Unreasonable application of ***Strickland***. *See* Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir.

2003)**("Attorney strategy is not a shield or panacea" for failure to provide adequate representation.).** Moreover, the Court **must consider whether that strategy was objectively reasonable. Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000).**

There appears to be portions of the record that fully supports the conclusion that Trial Counsels failure to consult with, and / or obtain an Expert to support a Heat of Passion Defense at trial was not a result of trial strategy, but rather a failure to understand the law on such defense. See *Hardwick v. Crosby* 320 F. 3d 1127 (11th Cir. 2003); *Horton v. Zant* 941 F. 2d 1449 (11th Cir. 1991): *and Young v. Zant* 677 F. 2d 792 (11th Cir. 1982)(Where Defense Counsel is so ill prepared that he fails to understand his clients factual claims [or] the legal significance of those claims, [W]e have held that Counsel fails to provide services within the range of competency expected of members of the criminal bar.)

Petitioner would contend that based on the facts of this particular claim,he has clearly demonstrated Prejudice, by showing that every fair-minded jurist would conclude that there is a reasonable probability that, but for Counsels unprofessional error's, the result of the proceeding would have been different, wherein the likelihood of a different result would have not only been substantial, and not just conceivable, but absent the errors, there was a reasonable probability that the fact finder would have had a reasonable doubt respecting guilt. See Williamson v. Fla. Dept. of Corr. 805 F.3d 1009 (11th Cir. 2015)

CONCLUSION

Wherefore, based upon the foregoing facts, argument and citation of authorities, Petitioner respectfully moves this Honorable Court to Grant Certiorari Relief, quash the Eleventh Circuit Court of Appeals Decision denying C.O.A. And Remand for further proceedings on the Merits.

Respectfully Submitted

/S/ Patrick Wharen

Patrict Wharen, DC# C06442
Tomoka Correctional Institutional
3950 Tiger Bay Road
Daytona Beach, Fl. 32124