NO: 23-6752

IN THE SUPREME COURT OF THE UNITED STATES

PATRICT W. WHAREN SR.

PETITIONER

VS.

STATE OF FLORIDA

RESPONDENT

PROVIDED TO TOMOKA CORRECTIONAL INSTITUTION ON 06/06/2024 FOR MAILING BY

MOTION FOR REHEARING

Comes Now The Petitioner, Patrick Wharen, in proper person, pro se, and pursuant to Supreme Court Rule 44, and respectfully moves this Honorable Court to enter an Order in the above-styled cause to Rehear its denial of Petitioners Certiorari Petition, and in support hereof, would show this Honorable Court the following:

FACTS

1). Petitioner filed a Petition for Writ of Certiorari in the above-styled cause arguing that the Eleventh Circuit Court of Appeals erred as a matter of law when it denied his Application for Certificate of Appealability, where the Judges denial not only conflicted with decisions rendered by this Court, but prior Panel decisions of the same Court, to which entitled Petitioner to the grant of a COA under Eleventh Circuit Local Rule 35.

2). Furthermore, because the Eleventh Circuit Court of Appeals actually reached the Merits of the underlying claims when denying Petitioners Request for COA, such act clearly contrived the dictates of **28 U.S.C. §2253**, as well as this Courts decision in *Buck v. Davis* 137 S. Ct 759 (2017)

3). Notwithstanding, the Circuit Judge of the Eleventh Circuit violated the Courts own Local Rules governing review of a Motion for Reconsideration regarding the denial of a COA by a [Single Judge] where the Rule specifically requires that [A Panel of the Court] resolve the issue as to whether the denial of a COA by a Single Judge was correct or not, to which further violated

RECEIVED
JUN 13 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petitioners right to procedural due process of law under the Fourteenth Amendment of the U.S. Constitution.

4). Consequently, On April 15th 2024, this Court denied Petitioners request for Certiorari Review of the Eleventh Circuit Courts Order denying his request for COA, thus, this Motion for Rehearing is timely filed and ensues on the following facts, argument and citations of authoritie

STANDARD OF REVIEW

As a general matter, "it is not appropriate for this Court to expend its scarce resources crafting opinions that correct "technical error's" in cases of only local importance, where correction in no way promotes the development of the law." See *Dobbs v. Zant* 113 S. Ct 835 (1993)(citing *Anderson v. Harless* 103 S, Ct 276 (1982))

Moreover, "to remain effective, the supreme court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." See *Board of Ed. of Rogers v. McCluskey* 102 s. ct 3469 (1982)

However, exceptions are made from the General Rule even in Non-Capitol Cases when there is a Realistic Likelihood that the "technical error" affected the conviction or sentence and would constitute a manifest injustice not to gratnt Certiorari Review and Correct it. *Dobbs. I.d. At 113 S. Ct 835-37.*

Thus it is within this framework that Petitioner moves this Honorable Court to Rehear the instant Claims and Grant Certiorari Review based upon the following Points of Law.

ARGUMENT

POINT I.

THE GRANT OF CERTIORARI REVIEW IS WARRANTED WHERE THE ELEVENTH CIRCUIT COURT OF APPEAL ERRED AS A MATTER OF FEDERAL LAW WHEN REACHING MERITS OF APPEAL AND THEN JUSTIFYING DENIAL OF COA ON MERITS DETERMINATION, CONTRARY TO THE JURISDICTIONAL PREQUISITES OF 28 U.S.C. §2253 AND THIS COURTS HOLDING IN *BUCK V. DAVIS* 137 S.CT 759 (2017)

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.

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

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."**

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.

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.**

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 particular rationale and wording applied by the Eleventh Circuit Court of Appeals when denying Petitioners request for COA, it cannot be said that a Merits determination was not rendered on these Constitutional claims, where it is abundantly clear that the Court gave full consideration of the factual or legal basis adduced in support thereof, and then denied Petitioners request for COA on that basis.

As such, because the Court sidestepped the Threshold Inquiry of **28 U.S.C. §2253** and in essence decided the Appeal without Jurisdiction, it cannot be said that Petitioner is not entitled to Certiorari Review of such Order based upon the expressed holding in *Buck v. Davis* 137 S, Ct 759 (2017) where this Court specifically held.

> A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal. Federal law requires that he first obtain a COA from a circuit justice or judge. **28 U.S.C. §2253(c)(1)**. A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."**§2253(c)(2).**
>
> Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case. *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003). The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown 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." *Miller-El., I.d. at 123 S. Ct. 1029.*
>
> This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." ***"When a Court of Appeals sidesteps [the COA] 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."*** *Id., at 123 S. Ct. 1029.*
>
> Here, the Fifth Circuit phrased its determination in proper terms when denying COA—that jurist of reason would not debate that *Buck* should be denied relief, but it reached that conclusion only after essentially deciding the case on the merits. As the court put it in the second sentence of its opinion:
>
> > "Because [Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA."
>
> The balance of the Fifth Circuit's opinion reflects the same approach. The change in law effected by Martinez and Trevino, the panel wrote,

"Was not an extraordinary circumstance." .... Even if Texas initially indicated to *Buck* that he would be Resentenced, its "decision not to follow through" was "not extraordinary." Ibid. *Buck* "ha[d] not shown why" the State's alleged broken promise "would justify relief from the judgment." Ibid.

But the question for the Fifth Circuit was not whether *Buck* had "shown extraordinary circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment." ***Those are ultimate merits determinations the panel should not have reached.***

A "Court of Appeals should [limit] its examination [at the COA stage] to a [threshold inquiry] into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller-El*, 123 S. Ct. 1029.

The dissent does not accept this **established rule**, arguing that a reviewing court that deems a claim nondebatable "must necessarily conclude that the claim is meritless."

Of course when a Court of Appeals properly applies the COA Standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious.

But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.

Thus, when a reviewing court (like the Fifth Circuit here) ***inverts the statutory order of operations*** and ***"First decid[es] the merits of an appeal, . . . then justif[ies] its denial of a COA based on its adjudication of the actual merits," ..... it has placed too heavy a burden on the prisoner at the COA stage.*** *Miller-El*, 123 S. Ct. 1029. *Miller-El* flatly prohibits such a departure from the procedure prescribed by §2253.

The State defends the Fifth Circuit's approach by arguing that the court's consideration of an application for a COA is often quite thorough. The court "occasionally hears oral argument when considering whether to grant a COA."

But this hurts rather than helps the State's case. "[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." *Miller-El*, *I.d. at 123 S. Ct. 1029.*

The statute sets forth a Two-Step Process: ... "An initial determination whether a claim is reasonably debatable, and then-if it is-an Appeal in the normal course.

We do not mean to specify what procedures may be appropriate in every case. But whatever procedures are employed at the COA stage should be consonant with the [limited nature] of the inquiry.

Like *Buck* supra, the facts of the instant case clearly demonstrate that while the Eleventh Circuit Court of Appeal phrased its determination in properly terms, ***i.e. "That Jurist of Reason would not debate the issue, ..."*** The Court ultimately reached a Merits determination on each Claim Raised in Petitioners request for COA, thus, sidestepping the threshold inquiry of **§2253** and in essence, decided the Appeal without Jurisdiction, warranting Certiorari Review in the instant case.

In further support of this factual and legal proposition, Petitioner would show that this Honorable Court granted Certiorari Review in **Two-2 Case(s)** based on the same identical facts found in Petitioners case and reversed and remanded the denial of their COA for further consideration.

More specifically. In *Tharpe v. Sellers* 138 S. Ct 545 (2018) this Court reversed the denial of COA by the Eleventh Circuit Court of Appeal based upon the following facts:

The Eleventh Circuit denied *Tharpes* request for COA on the contention that Barney Gatties behavior .... ***("did not have a substantial and injurious effect or influence in determining the juries verdict")***

The question of prejudice... the ground on which the Eleventh Circuit choose to dispose of *Tharpes* Application was improper.

The Court of Appeals was only required to determine whether the District Court abused its discretion in denying *Tharpes* Motion, ... not whether it was indisputable among reasonable Jurist the Gatties service on the jury did not prejudice *Tharpe*.

Therefore, We grant the Petition for Certiorari and Remand the case for further consideration on the question whether *Tharpe* is entitled to a COA.

Like *Tharpe*, the Eleventh Circuit Court of Appeal stated when denying Petitioners request for COA on **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")***

Furthermore, in *Miller-El v. Cockrell* 123 S. Ct 1029 (2003) This Court reversed the denial of a COA based upon the following facts:

> Appellate Court erred in its Merits determination when it **merged** the independent requirement of **§2254(d)(2) and (e)(1)** and denied COA on the basis that *Miller-El* did not prove .... ***("that the State Courts decision was objectively unreasonable by clear and convincing evidence").***

Again, like *Miller-El*, the facts of Petitioners case show that the Eleventh Circuit denied **Ground 5** on the following basis:

> 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").***

Petitioner would contend that the question for the Court of Appeals related to **Ground 1**. was not whether the error was harmless and did not have a ***"Substantial and Injurious effect or influence in determining the jury's verdict,"*** ... ***(A Merits determination),*** but whether Jurist of Reason could debate such issue under the decision rendered by this Court in *Chambers v. Mississippi* 93 S. Ct 1038 (1973)

Furthermore, as to **Ground 2**, the question for the Court of Appeals was not whether the evidence was sufficient to support ***Premeditation***, to which its— **[Example]** ... ***(Amounted to a Merits determination)***, but whether Jurist of Reason could debate the issue of ***Premeditation*** under the principles applied by this Court in *Jackson v. Virginia* 99 S. Ct 2781 (1979)

Notwithstanding, as to the Claim raised in **Ground 5.**, the question for the Court of Appeals was not whether ***Clear and Convincing Evidence*** was offered to Rebut the Trial Courts finding on Petitioners Claim of Ineffective Assistance of Counsel, ***(A Merits determination—that Merged the independent requirements of §2254(e)(1))***, but whether Jurist of Reason could debate the issue of Counsels Ineffectiveness under the Standard articulated in *Strickland v. Washington* 104 S. Ct 2052 (1984)

Thus, based upon the aforementioned facts, it cannot be said that the Eleventh Circuit Court of Appeals decision denying Petitioners request for COA on these Constitutional Claims did not ultimately rest upon a Merits determination that not only sidestepped the threshold inquiry of **§2253**, but in essence decided the Appeal without Jurisdiction, thus, warranting Certiorari review in the instant case.

Petitioner would contend that while this Court has repeatedly held that the threshold inquiry under §2253 is an **[Established Rule of Law]** that requires an **[Overview]** of the Claims raised and a **[General Assessment]** of their Merits, this Court has never attempted to elaborate further on these definitions, or attempted to explain the **[Limits]** of a **[General Assessment]** in relation to the **[Overview]** requirement, to which has not only left the Federal Appellate Courts without proper guidance on how to apply this Courts **[Established Rule of Law],** but as a result thereof, error has consistently occurred in the COA determination by such Courts, thus, warranting further review by this Court to establish better guidelines governing the COA Analysis.

In support of this factual proposition, Petitioner would show that the definitional phrase(s) **[Overview]** and **[General Assessment]** are comprised of **Competing Definitions,** which lends to confusing Concepts and by logical extension, allows for the **Misapplication / Departure** from this Courts **[Established Rule]** governing COA Review.

Consequently, the problem at bar is that this Court has never clarified or established guidelines specifying just where the **[Dividing Line]** lies between the **[Limited Merits Assessment]** and what has been deemed **[Full consideration of the factual or legal basis]** adduced in support of the Claim raised.

More specifically, while this Court has required an **[Overview]** of the Claim, ***i.e. [A Broad Survey],*** it never established within this **[Broad Survey]** just where the **[Assessment of the Merits]** should end without crossing **[The Line]** and exceeding the **[Limited Scope]** of the Rule itself. ***See Buck supra,...(Miller-El flatly prohibits such departure from the procedure prescribed by §2253)***

As such, Petitioner would aver that the grant of Certiorari Review in the instant case is warranted to further develop the law regarding the COA Analysis to help define just where the [Merits Assessment] of the Claims should begin and end to eliminate the issue of [Erroneous Assessments], ***i.e. Ones in which a Merits Ruling becomes the Basis in which the COA is denied,*** violating the Jurisdictional prerequisites of **28 U.S.C. §2253**. *See McGee v. McFadden* 139 S. Ct 2608 (2019) where **Justice Sotomayor** had the following to say:

> The federal courts handle thousands of non-capital habeas petitions each year, only a tiny fraction of which ultimately yield relief.
>
> While the volume is high, the stakes are as well. Federal judges grow accustomed to reviewing convictions with sentences measured in lifetimes, and any given filing though it may feel routine to the judge who plucks it from the top of a large stack-could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence.

Sifting through the haystack of often uncounseled filings is an unglamorous but vitally important task. COA inquiries play an important role in the winnowing process. The percentage of COA requests granted is not high, **See N. King, Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis, 24 Fed. Sentencing Reporter 308, (2012)(study finding that "more than 92 percent of all COA rulings were denials"), but once that hurdle is cleared, a nontrivial fraction of COAs lead to relief on the merits, see id., at 309 (Table 2) (approximately 6%).**

Unless judges take care to carry out the limited COA review with the requisite open mind, the process breaks down. A court of appeals might inappropriately decide the merits of an appeal, and in doing so overstep the bounds of its jurisdiction. *See Buck, at 137 S. Ct. 759; Miller-El, at 1029.*

A District Court might fail to recognize that reasonable minds could differ. Or, worse, the large volume of COA requests, the small chance that any particular petition will lead to further review, and the press of competing priorities may turn the circumscribed COA standard of review into a **[Rubber Stamp]**, especially for pro se litigants.

We have periodically had to remind lower courts not to unduly restrict this pathway to appellate review. See, e.g., *Tharpe v. Sellers* 138 S. Ct. 545 (2018); *Buck* 137 S. Ct. 759; *Tennard v. Dretke* 124 S. Ct. 2562 (2004).

This case provides an illustration of what can be lost when COA review becomes hasty. The weighty question whether *McGee* is "in custody in violation of the Constitution," **§2254(a)**, appears to have gotten short shrift here. With a lifetime of lost liberty hanging in the balance, this claim was ill suited to snap judgment. Thus, Certiorari Review should be granted.

Based upon the aforementioned facts, argument and principles applied by this Court in prior cases, Petitioner would contend that Certiorari Review is certainly warranted in the case at bar, where not only is Review necessary to further develop the law governing the COA Analysis, but failure to grant Review will result in a Manifest Injustice. *See Haager v. State* 36 So. 3d 883 (Fla. 2nd DCA 2010) where the Florida Court held:

We recognized that to give relief to one defendant but not the other under virtually identical circumstances was **"a manifest injustice that does not promote--in fact, it corrodes--uniformity in the decisions of this court."**

In rare circumstances, this court has exercised its inherent authority to grant a writ of habeas corpus to avoid incongruous and manifestly unfair results. We do so here and Reverse.

POINT II.

PETITIONER WAS DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW WHEN [SINGLE JUDGE], WHO ORIGINALLY DENIED REQUEST FOR COA, FAILED TO HAVE MOTION FOR RECONSIDERATION HEARD BY FULL PANEL OF ELEVENTH CIRCUIT COURT AS REQURED BY LOCAL RULE.

In the case at bar, Petitioner raised a Claim in Ground Two that the trial court erred when failing to grant Motion for Judgment nof Acquittal, where evidence was insufficient to support Premeditation based upon the fact that the state had failed to rebut his reasonable hypothesis that the crimes occurred in the heat of passion as required by State Law and this Courts holding in *Jackson v. Virginia* 99 S. Ct 2781 (1979)

When denying C.O.A. On this Claim a ["Single Judge"] 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.**

When Petitioner filed his Motion for Reconsideration, he specifically argued that under the Courts [Prior Precedent Rule] this particular issue must be heard by a Full Panel of the Court as required by *Grizzell v. Wainwright*, 692 F.2d 722, (11th Cir. 1982) where the Court there held:

> 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.

***See United State v. Archer* 531 F. 3d 1347 (11th Cir. 2008)("A Prior Panels holding is binding on all subsequent Panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc")**

Petitioner further supported his request for Plenary Review of this issue, by filing a Motion in conjunction with his Motion for Reconsideration, **Titled: ["Motion For Plenary Review By Panel Court"]. See Exhibit (A) of Appendix Attached hereto.**

Consequently however, rather than forwarding Petitioners Motion For Reconsideration to a Panel of the Court to properly resolve the issue as to whether a COA should issue on the Insufficiency of the Evidence Claim, the **[Single Judge]** just had **One-1 Additional Judge Sign Off**

on his Original Denial, to which, as a result thereof, not only violated the Courts Own Local Rules, but also operated to deprive Petitioner of his Right to Procedural Due Process of Law in violation of the Fourteenth Amendment.

In support of this factual proposition, Petitioner would show that under Eleventh Circuit **Local Rule 22-1(c)** governing the issue of a Certificate of Appealability, the Rule states in pertinent part:

> An Application to the Court of Appeals for a COA may be considered by a Single Circuit Judge,.... The denial of a COA, whether by a Single Circuit Judge [or] by a Panel, may be the subject of a Motion for Reconsideration, ... **"but may not be the subject of a Petition for Panel Rehearing [or] a Petitioner for Rehearing En Banc."**

However, the Eleventh Circuit has included an exception to this Rule under its **Local I.O.P. Rule 22.1,** that also provides:

> **Certificate of Appealability—Consistent With FRAP 2.**, The Court may suspend the provisions of **11th Cir. R. 22-1(c)** and Order proceedings in accordance with the Courts direction.
>
> **Notwithstanding, FRAP 2., Titled—["Suspension of Rules"]; also provides:**
>
> On its Own [or] **"A Party's Motion,"** A Court of Appeals may, for good cause shown—Suspend any Provision of these Rules in a particular case and Order proceedings as it directs, except as otherwise provided in Rule 26(b).

Thus, not only did Petitioner have the right to have the provisions of **Local Rule 22-1(c)** Suspended to allow his Motion For Reconsideration to be heard by a Panel of the Court, but Eleventh Circuit **Local Rule 27-1(d), Titled: ["Motions Acted Upon By A Single Judge"]:** absolutely required such Panel Review, where the Rule states:

> **Without limiting this Authority, A [Single Judge] is Authorized to Act,... ["Subject to Review By The Court"],... On the following Motion(s):**
>
> **(2). For Certificates of Appealability under FRAP 22(b) and ["28 U.S.C. §2254"]**

Accordingly, when Petitioner filed his Motuion for Reconsideration from the denial of his request for COA by a [Single Judge]. Not only was Petitioner entitled to Panel Review by [The Court] as to whether the denial was proper, but based upon the particular nature of the Claim raised. ***i.e. (The sufficiency of the evidence),*** Eleventh Circuit **Local Rule 35-1** further Authorized Full Panel Rehearing, where the Rule likewise provides:

(2). Alleged Error's in the Panels determination of State Law or in the facts of the case ***(Including Sufficiency of the Evidence)*** or Errors asserted in the ***(Panels Misapplication of Correct Precedent)*** to the facts of the case, ***"Are Matters for Rehearing before the Panel,"*** but not for En Banc consideration.

Consequently however, when Petitioner filed his Motion for Reconsideration, along with his **Request for Plenary Review** of the ***(Insufficiency of the Evidence Claim),*** the **[Single Judge]** who Originally Denied COA, disregarded the Courts Own Local Rules requiring **Full Panel Review** and just had **One-1** Other Circuit Court Judge Sign Off on his Denial, which further violated Eleventh Circuit **Local Rule 27-1(e). Titled: ["Two-Judge Motion Panels"]** which provides:

> **Specified Motions as determined by the Court, may be Acted upon by a Panel of Two Judges.**

The problem in the case at bar is the fact that **Eleventh Circuit Local Rule(s) 22-1(c): 27-1(d): Nor Rule(s) 35 & 40 Governing Panel Rehearing / Rehearing En Banc,** ... Provide any provisions specifying that these Particular Motions, ***i.e. [COA]; [Motion For Reconsideration]; [Request For Panel Rehearing / Rehearing En Banc] Can be Resolved by ..... ["A Two-Judge Panel"].***

Thus, based upon the aforementioned facts, because Petitioners Request for COA was denied by Two-Judge's, rather than by a Full Panel of the Court, ***i.e. Three or More***, it cannot be said that Petitioner was not deprived of his right to procedural due process of law, nor can it be said that this procedural error was harmless beyond a reasonable doubt.

In support, Petitioner would show that this Honorable Court held in *Colemen v. Johnson* 132 S. Ct 2060 (2012) that:

> 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).**

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)*

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")***

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))**

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")

However, because the State Appellate Court refused to apply the Heightened Standard of Review to the Facts of the Case as such required by State Law, it cannot be said that the State Courts decision was not Objectively Unreasonable, where 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.

As such, had the State Appellate Court properly applied the **Heightened Standard of Review as required by State Law at the time of Petitioners conviction,** there is no doubt, based upon the facts of the case, it would have been determined that the States evidence was legally insufficient to support a Premeditated intent to kill, specifically where the evidence 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 Petitioner 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.***

CONCLUSION

Wherefore, based upon the aforementioned facts, because the denial of Petitioners Application for Certificate of Appealability Creates an Issue of Exceptional Importance, specifically where such Denial runs contrary to U.S. Supreme Court precedent on the same questions of law, Petitioner respectfully moves this Honorable Court to Rehear / Reconsider its **April 15th 2024** Order and Grant Certiorari Review in the case sub judice.

Respectfully Submitted

IS/ Patrick Wharen

Patrick Wharen, DC# C06442
Petitioner pro se.

CERTIFICATE

I Hereby Certify, that The Ground Raised within this Motion For Rehearing, is limited to Intervening Circumstances of Substantial or Controlling Effect or to Other Substantial Grounds not previously presented. Moreover, Petitioner would further Certify that this Motion For Rehearing is Presented in Good Faith and not for Delay.

I Declare Under Penalty of Perjury that the foregoing is true and correct.

Executed on June 6th, 2024.

/S/ Patrick Wharen

Patrick Wharen, DC# C06442
Tomoka Correctional Institution
3950 Tiger Bay Rd.
Daytona Beach, Fl. 32124