24-5583

Case No. (TBA)

IN THE

SUPREME COURT OF THE UNITED STATES

CARLOS SANCHEZ
Petitioner

vs.

RICKY DIXON, SEC., FLA.DOC
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1) Whether the law permits conflict counsel to file for continuance which in effect denied Petitioner his right to speedy trial

2) Whether the Eleventh Circuit Court of Appeals is in conflict with the Ninth Circuit Court of Appeals on the issue of when an evidentiary hearing is required to be held on a §2254 petition for writ of habeas corpus

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Sanchez v. State, 215 So. 3d 69 (Fla. 3d DCA 2016).

Sanchez v. State, 2017 WL243843 (Fla. 2017).

Sanchez v. State, 224 So. 3d 230 (Fla. 3d DCA 2017).

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TABLE OF AUTHORITIES CITED

Cases

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

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

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

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[X] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was May 2, 2024 (denial of COA); July 23, 2024 (denial of Motion to Reconsider).

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition rehearing was denied by the United States Court of Appeals; a copy of the order denying rehearing appears at Appendix Q.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth, Sixth and Fourteenth Amendment Rights to due process, speedy trial, fair trial, effective assistance of counsel, to be afforded conflict free counsel, and to be provided an evidentiary hearing

STATEMENT OF CASE

Petitioner was initially charged by Information with aggravated battery causing great bodily harm and violation of the conditions of pretrial release/domestic violence. The State filed an Amended Information charging Petitioner with the violation and attempted second-degree murder. On March 13, 2013, a jury found Petitioner guilty of attempted second-degree murder with great bodily harm, permanent disability, or permanent disfigurement. The state trial court adjudicated Petitioner guilty, found he qualified as a habitual felony offender, and sentenced him to twenty-five years in prison.

Petitioner appealed to Florida's Third District Court of Appeal wherein he raised numerous claims in his initial brief. The Third District consolidated the matters into Case Nos. 3D15-20 and 3D13-1453. On August 3, 2016, the Third District affirmed Petitioner's conviction. *Sanchez v. State*, 215 So. 3d 69 (Fla. 3d DCA 2016). From there Petitioner appealed to the Supreme Court of Florida, which denied review on June 6, 2017. *Sanchez v. State*, No. SC16-2197, 2017 WL243843 (Fla. 2017).

On or about September 21, 2016, Petitioner timely filed his first Rule 3.850 motion in the state trial court with a supporting memorandum of law raising the following claims: (1) ineffective assistance of counsel for multiple deficient acts and/or inactions of court appointed counsel that denied Petitioner of his constitutional right to effective assistance of counsel, ensuing in the denial of his right to due process and a fast and speedy trial; (2) (3) (4) (5) (6) (7) (8) (9). Appendix-B

The state trial court summarily denied relief. Petitioner appealed and argued in his Initial Brief that the state trial court erred in denying relief without an evidentiary hearing. The Third District affirmed the denial of relief without written opinion. *Sanchez v. State*, 224 So. 3d 230 (Fla. 3d DCA 2017). Mandate issued on April 27, 2017.

On May 23, 2017, Petitioner filed a second Rule 3.850 motion in the trial court alleging the State amended the Information in violation of his right to a speedy trial. On June 22, 2017, the state trial court denied the second Rule 3.850 motion. Petitioner appealed the denial to the Third District in Case No. 3D17-2195, alleging manifest injustice. The Third District affirmed the denial of relief without written opinion. *Sanchez v. State*, 238 So. 3d 787 (Fla. 3d DCA 2017). Mandate issued on January 29, 2018. Petitioner further appealed to the Supreme Court of Florida in Case No. SC18-386. On March 12, 2018, the Florida Supreme

Court dismissed the appeal for lack of jurisdiction. *Sanchez v. State*, Case No. SC18-386, 2018 WL 1273606 (Fla. 2018).

An Amended 2254 petition was timely filed on October 22, 2018. Appendix-C. United States District Judge, Kathleen M. Williams entered an order on December 29, 2020, denying relief on Petitioner's §2254 petition. Appendix-D. **A** Motion to Alter or Amend was filed. Appendix-E. The district Court denied that motion. Appendix-F. An Application for COA was filed. Appendix-G. On August 3, 2021, the Eleventh Circuit Court of Appeals issued COA on the following question:

> WHETHER THE DISTRICT COURT ERRED BY FINDING THAT PETITIONER HAD PROCEDURALLY DEFAULTED HIS CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO DISMISS THE AMENDED INFORMATION BECAUSE IT WAS FILED AFTER THE SPEEDY TRIAL PERIOD EXPIRED Appendix-H.

From there Petitioner filed his Initial Brief. Appendix-I. On July 6, 2022, the Eleventh Circuit Court of Appeals entered a written opinion finding that Petitioner had properly exhausted his claim of a speedy trial violation and reversed and remanded with instructions for the district court to address the claim on the merits. Appendix-J. The district court entered an order denying relief. Appendix-K. Petitioner filed a Motion to Alter or Amend. Appendix-L. The district court entered an order denying relief. Appendix-M.

Petitioner filed for COA. Appendix-N. On May 2, 2024, the Eleventh Circuit denied COA. Appendix-O. Petitioner timely filed a Motion to Reconsider. Appendix-P. The Eleventh Circuit denied the Motion to Reconsider on July 23, 2024. Appendix-Q.

The instant petition follows and is timely filed.

QUESTION ONE:

WHETHER THE LAW PERMITS CONFLICT COUNSEL TO FILE FOR CONTINUANCE WHICH IN EFFECT DENIED PETITIONER HIS RIGHT TO SPEEDY TRIAL

In the Amended 2254 petition under review, Petitioner alleged in Ground Six that his counsel was ineffective for failing to move to dismiss the charging Information based on a speedy trial violation. Appendix-C. In support of his claim, Petitioner alleged that he was arrested on October 10, 2010, on a domestic violence charge involving the alleged victim, Eva Alvarez. The trial court assigned the Eleventh Circuit Public Defender's Office to represent Petitioner in his case. Appendix-C. Notably, Eva Alvarez has an extensive criminal history in Miami-Dade County, Florida, with most of her charges stemming from drug and alcohol abuse. The Eleventh Circuit Public Defender's Office represented Alvarez during her criminal history, all of which occurred prior to the Petitioner being arrested. Appendix-C.

On or about November 9, 2010, Public Defender Seoane-Soler was assigned to represent Petitioner. Shortly thereafter during a conversation between the two, Petitioner informed Seoane-Soler of the conflict and requested conflict-free counsel. Appendix-C.

On or about November 22, 2010, Public Defender Jessica Garrity was substituted as counsel. Shortly thereafter in a conversation between the two, Petitioner informed her there was conflict and requested conflict-free counsel and informed her that he had already told Seoane-Soler of the conflict a week or so prior. Appendix-C. On or about January 31, 2011, Public Defender Yaminah Williams became substitute counsel for Petitioner. A motion for continuance was unlawfully filed on February 10, 2011, without Petitioner's knowledge, consent, or waiver of speedy trial rights. Appendix-C.

On or about February 22, 2011, Public Defender Myles Raucher became substitute counsel for Petitioner. On or about May 9, 2011, another unlawful motion for continuance was filed without Petitioner's consent or waiver of speedy trial rights. Petitioner also informed Public Defender Myles Raucher of the ongoing conflict and told Raucher that he had already informed previous Public Defenders who worked his case of the conflict. Appendix-C.

On or about June 3, 2011, a Motion to Withdraw & Certification of Conflict of Interest was finally filed by Public Defender Michael Mayer, and on or about

June 6, 2011, the trial court appointed Regional Conflict Counsel. However, by this time, Petitioner had already been denied his constitutional rights to a fast and speedy trial, conflict-free counsel, and right to due process as guaranteed him under the 5th, 6th, and 14th Amendments to the U.S. Constitution. Appendix-C.

As stated, the Eleventh Circuit Public Defender's Office represented the alleged victim during her extensive criminal history. Petitioner argued that the Public Defender's Office acted with total disregard and deliberate indifference by representing interests adverse to Petitioner where the Public Defender's Office knowingly and intentionally deprived Petitioner of due process where none of the Public Defenders who had direct knowledge of the conflict moved to withdraw until after his speedy trial rights passed. This deprived Petitioner of conflict free counsel from the initial stages of his case up to and including the Motion to Withdraw filed by Public Defender Michael Mayer. Appendix-C.

Notably, in the Motion to Withdraw and Certification of Conflict of Interest that was filed, Public Defender Mayer asserted that the interest of Petitioner and the Public Defender's Office were so hostile that Petitioner could not be represented by them without conflict of interest. Appendix-C.

Prior to Mayer, other Public Defenders represented Petitioner, none of which would or did certify conflict with themselves or their office. They are: Gerrado

Casal, Nathly Seoane-Soles, Yaminah Williams, Cullan Ryan, and Myles Raucher. Appendix-C.

Petitioner argued that although a substitution of counsel is sometimes appropriate, in his case it was extremely abused and disavowed considering the known conflict and severity of the charges against him. As to Public Defender Ryan, Petitioner had no personal knowledge of him representing him. According to the record, Ryan could have only represented Petitioner for approximately twenty-one days, from February 1, through February 21, 2011, which is a time frame in-between Public Defenders Williams and Raucher's representation. During this 21 day period on February 10, 2011, Public Defender Ryan accepted a joint continuance charged to the defense with no reasonable basis.

Petitioner vehemently argued that he never gave up his right to a speedy trial, nor did he request, give consent, nor was he informed about relinquishing his right to a speedy trial. Appendix-C. As shown, from the commencement of Petitioner's case there was a conflict of interest with the Public Defender's Office. The conflict was later established and brought to light and Regional Conflict Counsel was appointed, albeit, too late to protect Petitioner's constitutional right to due process and a speedy trial. Appendix-C.

Prior to appointment of conflict counsel, the Public Defender's Office had violated Petitioner's speedy trial right by using multiple continuances. The

transcripts give a false appearance as if Petitioner was present and consented to the use of the continuance. This falsehood was verified by Public Defender Ryan in his response to the Florida Bar, wherein, he asserted that he had not spoken to Petitioner and that the transcript is incomplete and incorrect. Petitioner later supplemented the record with trial transcript (393) where the trial court judge acknowledged that the defense had no obligation to obtain State's discovery, which was the very basis of her granting the continuance that violated Petitioner's speedy trial right. Appendix-C.

In sum, Petitioner believed he established a legally and facially sufficient basis for federal habeas relief. The district court did not agree and summarily denied relief by finding in pertinent part:

> The State court record demonstrates that Petitioner's counsel moved for and was granted continuances multiple times. The Office of the Public Defender initially assigned to represent Petitioner, filed two pretrial motions to continue on February 10 and May 9, 2011, because of the need to depose witnesses, including the victim. Then, the trial Court appointed the Office of Regional Counsel (or counsel) to represent Petitioner and on August 1 and December 5, 2011, Court granted further continuances. Thereafter, multiple stipulated continuances were granted by the trial Court.

Appendix-D.

Petitioner disagreed with the above findings in support of denying relief and respectfully brought it to the district court's attention through his Motion to Alter or Amend. More precisely, Petitioner pointed out that the district court's order is

insufficient to support summary denial of relief where it wholly fails to address, much less refute the factual allegations in support of relief. In sum, the district court's order mentions continuances filed by counsel but wholly fails to address the factual allegations of Petitioner having been denied his constitutional rights to a fast and speedy trial, conflict-free counsel, and right to due process as guaranteed him under the 5th, 6th, and 14th Amendments to the U.S. Constitution. In further support, Petitioner walked the district court through the foregoing history of his case with all the different conflict lawyers, which was not addressed in the district court's order denying relief. Appendix-E.

To further support his disagreement with the district court's order of denial, Petitioner asserted a defendant's right to rely on counsel as a "medium" between the defendant and the State attaches upon the initiation of formal charges. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990), *citing Maine v. Moulton*, 474 U.S. 159, 176 (1985). Also, "the right to counsel guaranteed by the Constitution contemplated the services of an attorney devoted solely to the interest of his client." *Mickens v. Saylor*, 535 U.S. 162, 183 (2002), *citing Von Molke v. Cillies*, 332 U.S. 708, 725 (1948). Appendix-E.

In Petitioner's case Judge Sanchez-Llorens failed at her solemn duty to inquire and take all steps necessary to protect Petitioner's interest in appointing conflict-free counsel. For the first eight months of the case the Public Defender's

Office did nothing of interest for Petitioner because of the already existing conflict of interest with the Public Defender's Office, which did in fact affect Petitioner's right to a speedy trial, discovery and a fair trial. Appendix-E.

The record conclusively reflects that the Public Defender's Office was in conflict with representing Petitioner, that there were several public defenders who had a hand in this case but did nothing of interest for Petitioner in the eight months of which they had responsibility of representing him, effectively depriving Petitioner of his right to speedy trial, right to conflict free counsel, right to effective assistance of counsel, and right to due process, all of which subsequently led to denial of Petitioner's right to liberty and freedom for 25 years of his life. But for counsel's known conflict and do nothing strategy and defense there is a reasonable probability the outcome of Petitioner's case would have been different. Appendix-E.

Next, in *Vermont v. Brillion*, 129 S. Ct. 1283, 1290 (2009), the Court iterated "the Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial." The speedy trial right is amorphous, slippery, and necessarily relative, citing: *Barker v. Wingo*, 407 U.S. 514, 522 (1972). It is consistent with delays and dependent upon circumstances. *Id.* Appendix-E.

The *Brillion* Court also iterated "*Barker* instructs that different weights should be assigned to different reason," *Id.* at 531, and in applying *Barker*, we have asked "whether the government or the criminal defendant is more to blame for the delay," *citing: Doggett v. United States*, 505 U.S. 647, 651 (1992). "Deliberate delay to hamper the defense weighs heavily against the prosecution." *Barker* at 531. Any inquiring into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case, *Brillion*, 129 at 1293; *Barker*, 407 at 522. Again, Petitioner had no knowledge of the speedy trial waiver and never implied or expressed that he wished to waive his right to speedy trial. There is no signed or oral waiver of speedy trial in any court as Petitioner was not present. Appendix-E.

The prejudice should be readily apparent when considering Petitioner was unwillfully deprived of his protected interest of due process, conflict free/effective assistance of counsel, and a speedy trial. Had it not been for the conflict of interest and counsel's deficient acts and/or inactions, there is a reasonable probability Petitioner would have been discharged. There was never a reasonable cause for a continuance to be used by the Public Defender if Petitioner's best interest was at heart. Appendix-E.

In the instant case, the reason for delay is the primary factor: Invalid waiver, and systematic breakdown in the Public Defender's Office (conflict of interest).

The question could be asked, "Who is more to blame for the delay, the indigent defendant or government?" The general rule attributing to the defendant delay caused by assigned counsel is not absolute. Delay resulting from a systematic breakdown in the public defender system could be charged to the State. *Brillion* at 1292, *citing Polk County v. Dodson*, 454 U.S. 312, 324-325 (1981). Delay to hamper the defense weighs heavily against the prosecutor. *Brillion* at 1286, *Barker* at 407 U.S. 531. Appendix-E.

In *Boatman v. State*, 77 So. 3d 1242, 1251 (Fla. 2011), the court iterated, "The criminal speedy trial operates to an accused with clear parameters in order to assure the protection of the Sixth Amendment right to a speedy trial, which is a crucial right that operates in criminal prosecutions. *Bulgin v. State*, 912 So. 2d 307, 309 (Fla. 2005), see also Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy trial...") In Petitioner's case he was denied counsel as guaranteed by the Sixth Amendment and denied due process as is guaranteed under the Sixth and Fourteenth Amendments, which subsequently denied him his right to speedy trial. Appendix-E.

Herein, Petitioner, whose nationality is Cuban, and who does not speak and completely comprehend English, was also denied his right to be present during the crucial pretrial proceedings in question, and his absence frustrated the fairness of the proceeding by leading to an unknowing and unauthorized continuance that

triggered the invalid waiver of his critical (fundamental) right to a speedy trial. Had Petitioner been present he would have advised counsel to charge the continuance solely to the State, as the State confirmed it was not ready for trial,[1] or Petitioner could have simply denied counsel permission to use a continuance or, voiced an open objection in court against continuance, which would have protected his speedy trial rights. Appendix-E.

"A Defendant has a constitutional right to be present at all crucial stages of his trial where his absence might frustrate the fairness of the proceedings." *Dennis v. State*, 38 Fla. L. Weekly S1, 17 (Fla. 2012), citing *Garcia v. State*, 492 So. 2d 360 (Fla. 1986).

The U.S. Supreme Court held, "In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claims waiver was knowingly and voluntarily made." *Barker*, 407 at 529. Appendix-E.

Worthy of noting, in Florida "under the speedy trial rule, the defendant, upon being arrested, has no obligation under the rule to further assert his right to be

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[1] A Public Defender may act for the State, when making hiring/firing decisions, certain administrative duties and possibly investigative functions. *Vermont v. Brillion*, 129 S. Ct. 1283, 1291 n.7.

brought to trial unless he first waives his right." *Bulgin v. State*, 912 So. 2d 307, 322 (Fla. 2005), Fla. R. Crim. P. 3.191.[2] Appendix-E.

Under the totality of the circumstances concerning Petitioner's speedy trial rights, the treatment employed was fundamentally unfair. The instant case started under harsh conflicting interests that were intentionally used to give the State a tactical advantage over Petitioner such as: concealing and manipulating discovery reports; frustrating favorable defense witnesses and the use of perjured material testimony. Appendix-E.

Last, Petitioner pointed out that the Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings. In fact, "The Due process clause...would require dismissal of an Indictment if it were shown at trial 'a' delay...caused substantial prejudice to [a defendant's] right to a fair trial and that the delay was an additional device to gain tactical advantage over the accused." *Doggett v. U.S.*, 505 U.S. 647, 665 (1992). Appendix-E.

Unpersuaded by the foregoing argument, the district court summarily denied the Motion to Alter or Amend, without addressing the specific facts or otherwise establishing why relief is not warranted on this claim. Appendix-F.

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[2] Sanchez demanded speedy trial in his statement which he signed where the Court appointed counsel from the very initial stages of his case and never knowingly, willingly or intentionally gave up his speedy trial right.

REASONS FOR GRANTING THE PETITION ON QUESTION ONE

It is a well established precedent of law that a criminal defendant has a right to effective assistance of counsel, which includes the right to conflict free counsel. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

The facts of this case establish that conflict counsel was responsible for seeking and gaining unwanted continuance(s) in this case, effectively depriving Petitioner of his right to a speedy trial. As such, this Court should grant the instant petition and, order that conflict free counsel does not have the authority to file for a continuance and effectively deprive a defendant of his right to a speedy trial, and reverse and remand with instructions to immediately release Petitioner from unlawful custody.

QUESTION TWO:

WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE NINTH CIRCUIT COURT OF APPEALS ON THE ISSUE OF WHEN AN EVIDENTIARY HEARING IS REQUIRED TO BE HELD ON A §2254 PETITION FOR WRIT OF HABEAS CORPUS

The instant question deals with an apparent conflict between the Ninth and Eleventh Circuit Courts of Appeals on the significant due process right of when an evidentiary hearing is to be held to resolve a 2254 petition for writ of habeas corpus. In sum, the Ninth Circuit has consistently held that reliance on state court's factual findings, that were made without the benefit of an evidentiary hearing,

result in an unreasonable determination of the facts in the state court proceedings, effectively establishing the right for a petitioner to be afforded an evidentiary hearing to resolve such claims in federal habeas proceedings. However, the Eleventh Circuit wholly disavows the law on this matter and it would benefit all litigants in the United States for this Court to resolve the conflict.

To lay the foundation for this issue Petitioner first needs to provide a brief summary of the claims that were raised and denied in state court without an evidentiary hearing.

In Ground One Petitioner alleged entitlement to federal habeas relief based on the state trial court committing error in denying Petitioner's pretrial Motion to Exclude Evidence . In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim, the R&R found in pertinent part that the record refutes the allegations, asserting that trial counsel filed a Motion to Compel Evidence, specifically, the victim's toxicology results, followed by a Motion to Dismiss on the same issue. The R&R further found that the state trial court dismissed the Motion because there was no evidence that the toxicology reports actually existed or that they were in the State's possession.

Last, the R&R found that the Third DCA came behind the state trial court and determined there was no evidence that the report existed, was ever in the State's possession, or that the State was aware of the results.

Petitioner moved for COA and asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering the state trial court's determination regarding the missing toxicology report is, in fact, refuted by the record. Precisely, Petitioner had filed a *pro se* Motion to Supplement the Record on Appeal on September 7, 2012, and attached a copy of the State's Amended Discovery Exhibit that specifically establishes, "a copy of the victim's toxicology report was *hand delivered* to defense counsel on 8/7/12." Appendix-G.

The victim's toxicology report, however, was never "hand delivered" to defense counsel. This proves that the State was in possession of such report at some point and it was not "hypothetical." It defies logic that the State would specifically delineate a report that purportedly never existed. Appendix-G.

Petitioner was prejudiced by the State's omission where it prevented him from arguing to the jury that the victim was twice the legal intoxication limit and was under the influence of cocaine, which led her to acquire her own injuries in a fall, aside from any of Petitioner's actions. Appendix-G.

When counsel attempted to bring those facts into evidence at trial, the State's objection was sustained on the grounds that counsel was introducing facts not in evidence, all because the report(s) had been suppressed by the State. In sum, the toxicology report was the crux of the Petitioner's defense in that the victim's

injuries were a result of her fall that occurred from her pushing Petitioner, and in turn Petitioner "admittedly" grabbing her arm in reaction, and her pulling away, tumbling and injuring herself; not from Petitioner allegedly hitting or kicking her. Appendix-G.

The fall was directly related to the victim's blood alcohol level and cocaine consumption. At most, the State could have argued for an Aggravated Battery or Attempted Manslaughter; both acts, unlike Attempted Second Degree Murder, do not require proof of a "an act imminently dangerous to another and demonstrating a depraved mind without regard for human life," as provided by Florida Statute §782.04(2). Appendix-G.

Petitioner further alleged that the testimony of Dr. Larissa Elberg lends credibility to the reasonable hypothesis of innocence theory that the most severe injuries were the result of her falling, not from an alleged attack. It is not necessary in all instances to produce original physical evidence in order to produce testimony about such, but here the defense was precluded from arguing that the victim was over twice the legal (driving impairment) limit of blood-alcohol content and was so high on cocaine that she could not even walk straight. Appendix-G.

In Ground Two of his COA Petitioner alleged entitlement to federal habeas relief based on the state trial court committing error in denying Petitioner's Motion to Suppress Evidence. In denying relief, the District Court relied on the findings in

the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that it was not properly exhausted. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented are adequate to deserve encouragement to proceed further when considering that, contrary to Respondent's assertion, the claim was fully exhausted on direct appeal in case number 3D13-1453, and alleged, in sum, that the state trial court abused its discretion, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution by denying Petitioner's Motion to Suppress the eyewitness identifications as having been impermissibly suggestive in procedure. Appendix-G.

In Ground Three of the COA Petitioner alleged entitlement to federal habeas relief based on insufficient evidence. In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that it was not properly exhausted. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering the claim was exhausted on direct appeal of the judgment and sentence. In sum, this ground alleged that in violation of the Sixth and Fourteenth Amendments, the judgment and sentence is not supported by competent, substantial evidence, and therefore must be reversed.

Specifically, that the State failed to present any physical evidence linking Petitioner to the charged offense of Attempted Second Degree Murder. Appendix-G.

In Ground Four of his COA Petitioner alleged entitlement to federal habeas relief based on a conflict of interest. In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that Petitioner did not give any indication as to what the conflict of interest may have been. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering that in effort to correct the pleading deficiency that appears to be a typing error (where the remainder of the claim was "cut off,") the Petitioner, by rule, cured the deficiency in his Traverse wherein he provided that contrary to Respondent's statement on page 64, "Even if it was adequately pled..., the state trial court's decision denying the claim was not an unreasonable determination of facts in light of the state court record. The State trial court denied the claim finding that the record refuted any claim of prejudice." The problem with the State's Response is that this is not the standard of law the federal court was to follow, rather, the court is required by law to accept as true the factual allegations that are made and supported in federal court when the state trial

court made findings against Petitioner on those same facts without first affording him his right to an evidentiary hearing, which effectively deems the state court's fact-finding procedure "unreasonable," which means that the state's factual findings are not binding in federal habeas corpus review. See *Taylor v. Maddox*, 366 F. 3d 992, 1001 (9th Cir. 2004). Appendix-G.

A Petitioner on Federal Habeas Corpus is entitled to an evidentiary hearing when he establishes merely a "colorable" claim for relief, and where he has never been afforded an evidentiary hearing in State Court. See *Earp v. Oronski*, 431 F. 3d 1148, 1167 (9th Cir. 2005). Here, although specifically requested on each of his claims, the state and federal court refused to hold an evidentiary hearing. Appendix-G.

Additionally, the state trial Court erred by only applying the *Strickland* standard to this claim rather than also applying the "conflict of interest standard" in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which only requires that Petitioner show an actual conflict of interest adversely affected counsel's performance. Petitioner must show that counsel actively represented conflicting interests. *Ferrell*, 640 F.3d at 1244. Petitioner must be able to point to specific instances in the record to suggest an actual conflict or impairment of interests. *Ferrell*, 640 F. 3d at 1244. In the instant case, Petitioner did exactly that in his motion for postconviction relief. Contrary to Respondent's assertion, Petitioner was not required to prove the facts in

his pleading, as the standard of review is the same in a state postconviction proceeding, as in Federal habeas, that the pleading's claims must be assumed to be true at the pleading stage. Petitioner must then be given an evidentiary hearing to develop these claims to the point that he can draw out and prove more germane facts through the procedures in such evidentiary hearing. Appendix-G.

Further, *Cuyler,* is not representative of all types of "conflicts of interest." A conflict can arise from an attorney's representation of a (Petitioner) whom also represented the victim in other previous criminal matters. Appendix-G.

The burden was not on Petitioner to prove these facts in his motion for postconviction relief, only to allege them. Petitioner was denied the opportunity to prove them when the state trial court, federal district court and the Eleventh Circuit Court of Appeals refused to grant him his requested evidentiary hearing.

Thus, on this claim, too, the Federal Court must grant Petitioner an evidentiary hearing to resolve the disputed facts.

Those facts (accidentally omitted by typo) are:

(1) Petitioner was arrested on October 10, 2010, for Domestic Violence charges involving the victim, Eva Alvarez. The Court assigned the Public Defender (11th Judicial Circuit) to represent Petitioner.

(2) The victim, Evan Alvarez, has an extensive criminal history in Miami-Dade County, Florida with most of her charges stemming from drug and alcohol abuse. The Public Defender for the 11th Circuit previously represented Evan Alvarez in these arrests/cases.

(3) On or about November 22, 2010, Public Defender Jessica Garrity was substituted as counsel. Petitioner told Ms. Garrity of the conflict and informed her that he had already informed his prior counsel of the conflict.

(4) On or about January 31, 2011, P.D. Yamiah Williams became substituted counsel for Petitioner. She submitted a Motion for Continuance without Petitioner's knowledge, consent or waiver of speedy trial rights.

(5) On or about February 22, 2011, Myles Raucher was substituted as defense counsel, and filed another unauthorized Motion for Continuance without Petitioner's consent, or voluntary waiver of speedy trial rights. Petitioner informed Mr. Raucher of the ongoing conflict.

(6) On or about June 3, 2011, the Public Defender's Office finally filed a "Motion to Withdraw and Certification of Conflict of Interest," and the trial Court then appointed Regional Conflict Counsel to Petitioner's case, However, by the time this occurred, Petitioner's speedy trial rights had already been violated (waived due to "conflicted" counsel's actions), and other rights were violated under the Due Process Clause, including the failure to file a multitude of pre-trial motions, conduct investigations and failure to file subpoenas.

In sum, the cumulative effect denied Petitioner the right to effective counsel, conflict free counsel, due process, and compulsory process.

In Ground Five of his COA Petitioner alleged entitlement to federal habeas relief based on trial counsel concealing evidence and permitting the State to use perjured testimony. In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that it was not properly exhausted. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve

encouragement to proceed further when considering the claim was exhausted in Petitioner's Postconviction Motion and Memorandum of Law. Appendix-G.

In sum, this is not a claim that the mysterious "other" toxicology report was never turned over to the defense, it is specific claim that Petitioner was constructively denied effective assistance of counsel when counsel concealed the "known" toxicology report, and then allowed the State to use known perjured testimony at trial, in violation of Petitioner's Sixth and Fourteenth Amendment rights. Appendix-G.

At the time of the trial Petitioner had no knowledge that defense counsel was concealing the known toxicology report from him, which would have revealed that the victim had not obtained lung damage from direct force to the chest area. Counsel knew, or should have known that Dr. Elberg was testifying falsely as to the cause of the victim's injuries. Petitioner was denied the effective assistance of counsel and due process of law and received a fundamentally unfair trial. But for counsel's deficient acts/omissions, there exists a reasonably probability the outcome of the proceedings would have resulted in an acquittal. Appendix-G.

In Ground Six of his COA Petitioner alleged entitlement to federal habeas relief based on counsel failing to move to dismiss the charging Information based on an invalid waiver of speedy trial. In denying relief the District Court relied on

the findings of the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that it was not properly exhausted. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering the claim was fully exhausted in Petitioner's Motion for Postconviction Relief. Notably, the Eleventh Circuit granted COA on this claim and followed that up by reversing and remanding for further proceedings after the briefing process. However, the district court again denied relief, without an evidentiary hearing, and the Eleventh Circuit affirmed. This was error without first affording Petitioner his right to an evidentiary hearing. Appendix-G.

In Ground Seven of his COA Petitioner alleged entitlement to federal habeas relief based on counsel failing to object to expert testimony. In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that it was not properly exhausted. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering the claim was fully exhausted in Petitioner's first Motion for Postconviction Relief, which cited federal case law

(*Strickland*) as conceded by Respondent. However, the State's assertion that the claim is then unexhausted because Petitioner did not again cite to *Strickland* in the appeal brief is ludicrous. In postconviction, Florida law does not require an Appellate Brief to be filed at all. The appellate courts are required to review the original Motion filed in the trial court to look for errors made by that court. This argument is without merit, and the claim is fully exhausted. Appendix-G.

Next, contrary to Respondent's incorrect argument that Petitioner construes the argument to be a "review (of the) State Court's admission of evidence," this claim is nothing of the sort. It is, however, in fact a due process and ineffective assistance of counsel claim regarding the requirement that all experts be qualified before they may testify as an expert. See *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147-49, 119 S. CT. 1167, 143 L. Ed. 2d 238 (1999) quoting *Daubert*, 509 U.S. at 589 ("All experts must be qualified"); see also *Myers v. Ill. Cent. R.R. Co.*, 629 F. 3d 639, 644 (7th Cir. 2010)(Outlining "three-step analysis" District Court utilizes before admitting expert testimony); *Bielskis v. Louisville Ladder, Inc.*, 663 F. 3d 887 (7th Cir. 2010). *Id.* at 893. Appendix-G.

Here, setting all other confusion aside, the important points are:

a.) The trial prosecutor told the trial court that it "did not intend to qualify or tender' the doctor as an expert before the trial. R. at 1535.

b.) The defense attorney responded, "If she is a doctor, I have no problem telling the jury what they saw (sic). I mean, she is a doctor." R. at 1536.

c.) The trial prosecutor then said that the doctor would be testifying as an expet. R. at 1536. But the trial prosecutor would not ask the Court to recognize here as an expert. R. at 1536. (This is impermissible as stated above.)

The prejudice lies in the trial court improperly admitting (without defense objection), Dr. Larissa Elberg's expert opinion without determining whether or not she qualified as an expert witness, having a prejudicial impact on the jurors determination. Dr. Elberg, who is a Neurologist, not only gave an incomplete expert opinion during trial as to the causation of the victims' lung and brain injuries, she was testifying (regarding the lung damage) as a pulmonologist, not a neurologist – for which she was not an expert (hence the reason the State did not want to "qualify" her). There are medical indicators that the victim suffered from organic brain damage, which could have occurred from her long term drug abuse, her psychotropic medications, or even respiratory arrest. Either way she suffered the brain damage from oxygen deprivation caused by any number of long-term ailments or conditions. The doctor's testimony was misleading and confusing, did not help the jury in determining the issue(s) of causation, and her opinion's probative value was substantially outweighed by the danger of unfair prejudice. Appendix-G.

In Ground Eight of his COA Petitioner alleged entitlement to federal habeas relief based on counsel failing to object to the state trial court's limitations on cross-examination. In denying relief on this claim the District Court relied on the findings in the R&R. In addressing this claim the R&R found in pertinent part that Petitioner did not identify any facts as to what kind of limitation was imposed or which witness testimony was limited. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering this claim, as conceded to by Respondent, was raised in Petitioner's Rule 3.850 Motion for Postconviction Relief and on appeal of that Motion. However, Petitioner also raised this in his Emergency Habeas Petition (State Supreme Court in case number SC17-806. Respondent also concedes that "Petitioner also filed a Memorandum in support of the (sic) and cited the Sixth Amendment, the confrontation clause, and relevant federal constitutional cases. This was adequate to alert the State postconviction court to the Federal basis of this claim." The Petitioner fully exhausted this claim. Appendix-G.

The trial court exceeded its range of latitude by placing unreasonable limits on the examination process. Counsel should have objected at the time that the court placed these restrictions to allow for an opportunity to stave off the restrictions, or

at least preserve the issue for appeal. This deficiency deprived Petitioner of his right to confrontation and a fair trial under the U.S. Constitution. Appendix-G.

In Ground Nine of his COA Petitioner alleged entitlement to federal habeas relief based on the judgment and sentence resulting in a manifest injustice. In denying relief the District Court relied on the findings in the R&R. In addressing this claim the R&R found in pertinent part that Petitioner failed to outline what the alleged bias, prejudicial acts or inactions were. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering all pleading deficiencies stated by Respondent, if true, were cured in this P's and A's on this ground in objections to the R&R. Appendix-G.

Here, Petitioner's claim is that the trial Judge, Migna Sanchez-Llorens partially acted in favor of the prosecution; that she did so knowingly and intentionally, which impaired the truth seeking process and altered the procedures of criminal law – with the assistance of the State prosecutor and defense counsel – prejudicing the Petitioner. Appendix-G.

Petitioner's case is one of domestic violence. On October 10, 2010, he was arrested and subsequently charged with Aggravated Battery with Great Bodily Harm. On or about October 11 or 12, 2010, Petitioner posted bond and was released

under a Domestic Violence Injunction – ordering him, among other things – not to have any contact with the alleged victim in the case, Eva Alvarez. Appendix-G.

Judge Sanchez-Llorens is dedicated to and specializes in the fight against Domestic Violence and belongs to or chairs such organizations as, "Florida Coalition Against Domestic Violence," the "Statewide Legal Policy Counsel," and the "Miami-Dade County Domestic Violence Oversight Board." Judge Sanchez-Llorens was also the training attorney in the Domestic Representation Unit in the Public Defender's Office for the Eleventh Judicial Circuit, which was the same Public Defender's Office she assigned to represent the Petitioner in the instant case that Petitioner claimed had a conflict. Judge Sanchez-Llorens devotes her time to addressing domestic violence issues in the community, regularly speaking on domestic violence issues, and has appeared on Spanish, English and Créole radio programs that are geared toward combating domestic violence in her Court. Although all of this "do-good" work may sound noble, and would be highly praised if undertaken by someone else, one cannot say with certainty that it does not, and did not affect her judgment in this case (or others). Appendix-G.

As discussed in the Points and Authorities, the toxicology report in question is not the "hypothetical" one, but the "actual" one that was eventually produced by the State to defense counsel, but never revealed to Petitioner. Appendix-G.

Second, after revoking Petitioner's bond when he was arrested on an unrelated charge, she refused to reinstate his bond when that case was dismissed for lack of probable cause. She only reinstated (an unreasonable bond) once the State illegally Amended the charge two years after the Speedy Trial time expired. Petitioner was unable to post this unreasonable and unwarranted additional bond, and thus remained incarcerated awaiting trial (for five months). Appendix-G.

Additionally, by viewing the accumulation of all the prejudicial errors by the Court, combined with the overbearing presence of Judge Sancnez-Llorens in a domestic-violence case, it is evident that Judge Sanchez-Llorens departed from her position of neutrality, in favor of the State. When a Judge enters into the proceedings and becomes a participant, a shadow is cast upon judicial neutrality so that disqualification was required (if not that she should not preside over any domestic violence cases). Appendix-G.

Petitioner asserted that the trial court became a State actor and/or advocate by assisting the State in (1) impermissibly excluding favorable evidence from him; (2) impermissibly waiving his right to a speedy trial; (3) repeatedly appointing counsel with conflicting interests knowing that conflict existed; and (4) denied him a bond for five months after the dismissal of the alleged new law violation and reinstated the ability eventually to post bond, but made it clearly an unreasonable amount; directly causing the Petitioner difficulty assisting his attorney(s) with preparing his

defense, causing him to lose his employment and wages, causing him to default on acquired loans and forcing his family to exhaust their savings. Appendix-G.

In Ground Ten of his COA Petitioner alleged entitlement to federal habeas relief based on him being actually innocent of the conviction. In denying relief the District Court relied on the findings in the Magistrate's R&R. In addressing this claim the R&R found in pertinent part that Petitioner failed to present any supporting facts, and that Petitioner presented a prohibited "freestanding" claim of actual innocence. Appendix-G.

Petitioner asserted that jurists of reason could disagree with these findings, or, jurists could conclude the issues presented were adequate to deserve encouragement to proceed further when considering the State was required to overcome the defense's reasonable hypothesis of innocence – not just come up with a better story. Appendix-G.

Here, the victim did not sustain a single bruise to her face or body; thus it would be virtually, if not completely impossible that the Petitioner violently punched and kicked and beat the victim in the manner described by the State, that could cause lung and brain damage. Due to this lack of bruising, it can be said to a reasonable degree of common sense and medical certainty that the victim's injuries occurred as a result of her falling, on her own, which is consistent with Petitioner's hypothesis of innocence. This was nothing more than an overblown charge (filed

over two years after Petitioner's arrest, after he refused to cop-out to a plea). Appendix-G.

REASONS FOR GRANTING THE PETITION ON THIS CLAIM

The entire basis for relief on the foregoing claims is that the Eleventh Circuit Court of Appeals' decision on whether or not to afford Petitioner his right to an evidentiary hearing is in direct conflict with the Ninth Circuits' reasoning in support. This is shown in the following.

Petitioner acknowledges that under federal review, movants who have failed to develop a factual basis for relief in state court face difficult barriers in obtaining an evidentiary hearing in federal court. However, "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding," the Supreme Court has established that a federal court "must hold an evidentiary hearing" to resolve any facts that "are in dispute." *Townsend v. Sain*, 372 U.S. 293, 312, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The Court further explained the controlling criteria by enumerating six circumstances in which such an evidentiary hearing would be required:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court

> hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id., 372 at 313, 83 S. Ct. 745. Three years later, in 1966, Congress enacted an amendment to the federal habeas statute that was an almost verbatim codification of the standards delineated in *Townsend*, supra; see also *Miller v. Fenton*, 474 U.S. 104, 111, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). That codification read in relevant part as follows:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination ... of a factual issue, made by a State court of competent jurisdiction ... shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or (7) that the applicant was otherwise denied due process of law in the State court proceeding; (8) or unless ... the Federal court on a consideration of [the relevant] part of the record as a whole concludes that such factual determination is not fairly supported by the record." §2254(d).

Id. at 474 U.S. at 111, 106 S. Ct. at 450.

As is clear from the statutory text quoted above, if *any* "one of the eight enumerated exceptions...applies" then "the state court's fact-finding is not

presumed correct." *Jefferson v. Upton*, 560 U.S. 284, 130 S. Ct. 2217, 2220-2222, 176 L. Ed. 2d 1032 (2010) ("Under 28 U.S.C. §2254(d), state-court findings of fact 'shall be presumed to be correct' in a federal habeas corpus proceeding unless one of eight enumerated exceptions applies"); see also 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c,pp. 915-918 (5th Ed. 2005). Petitioner contends that much of the statutory text quoted above are apparent in the instant case, thus requiring an evidentiary hearing.

In sum, the state court was required to hold an evidentiary hearing in the instant case to evaluate in totality, the facts and evidence surrounding Petitioner's claim before determining relief was not warranted. They did not. As it stands, the state court's findings constitute an unreasonable determination of the facts where evidentiary findings were made without holding a hearing and providing Petitioner an opportunity to present evidence in support of his claims. *Taylor v. Maddox*, 366 F. 3d 992 (9th Cir. 2004) set forth the following in support of Petitioner's contention:

> Closely related to cases where the state courts make factual findings infected by substantive legal error are those where the fact-finding process itself is defective. If, for example, a state court makes evidentiary findings without holding a hearing and giving Petitioner an opportunity to present evidence, such findings clearly result in an "unreasonable determination" of the facts. See e.g. *Weaver*, 197 F. 3d at 363; *Nunes*, 350 F. 3d at 1055; cf. *Bryan v. Mullin*, 335 F. 3d 1207, 1215-16 (10th Cir. 2003) (declining to apply presumption where state court failed to hold an evidentiary hearing). But see *Valdez*, 274 F. 3d at 948-50 (sections 2254(d)(2) and (e)(1) apply despite defects in the

> state-court hearing). Similarly, where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. See, e.g. *Wiggins*, 123 S.Ct. at 2538-39; *Hall*, 343 F. 3d at 983. And, as the Supreme Court noted in Miller-El, the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim. *Miller-El*, 537 U.S. at 346, 123 S. Ct. 1029.

Id. at 1001-1002.

Petitioner understands the concept of state court findings generally being presumed correct, unless they are rebutted by clear and convincing evidence or based on an unreasonable evidentiary foundation. *Gonzalez v. Pliler*, 341 F. 3d 897, 903 (9th Cir. 2003). Further, where a state court refuses to grant an evidentiary hearing, this Court need not defer to nor allow the State to rely the state court's factual findings where they were made without affording Petitioner the benefit of a hearing where he could adequately establish entitlement to relief. See, *Nunes*, supra, at 1055 (where trial court refused to grant evidentiary hearing, we need not of course defer to the state court's factual conclusions when they were made without such a hearing).

Further, where a movant establishes a colorable claim for relief and has never been afforded a state hearing on his claim, he should be afforded a hearing in federal court. *Earp v. Ormoski*, 431 F. 3d 1158, 1167 (9th Cir. 2005). In other words, a hearing is required if: (1) the movant has alleged facts that, if proven,

would entitle him to relief, and (2) he did not receive a full and fair opportunity to develop those facts. See, *Earp*, supra; and *Williams v. Woodford*, 348 F. 3d 567, 586 (9th Cir. 2004).

In *Detrich v. Ryan*, 677 F. 3d 958, 982 (9th Cir. 2012), the court held that when a state court adjudication is based on an antecedent unreasonable determination of facts, the requirement set forth in §2254(d) is satisfied, and a petitioner's claim may be reviewed *de novo*.

In sum, Petitioner was denied due process by the state court not holding an evidentiary hearing on the allegations in support of Ground two to allow him an opportunity to fully develop the facts of his claims and establish a lawful basis for relief. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965); see also *Fahle v. Cornyn*, 231 F. 3d 193, 196 (5th Cir. 2000).

Consequently, as the Ninth Circuit has consistently held, the state court findings were nothing more than conclusory suppositions and assumptions that should not be relied upon to either consider the claims nor deny them without first affording Petitioner his right to an evidentiary hearing.

Based on the foregoing, Petitioner asks this Court to find the Ninth Circuit's holdings are in line with constitutional requirements, and order the Eleventh Circuit to comply.

CONCLUSION

Therefore the instant petition for writ of certiorari should be granted.

Respectfully submitted,

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