IN THE
SUPREME COURT OF THE UNITED STATES

LOUIS ANGEL MERCADO – PETITIONER

vs.

RICKY D. DIXON, Secretary,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS; and
ATTORNEY GENERAL, STATE OF FLORIDA – RESPONDENTS

On Petition for Writ of Certiorari to
The United States Court of Appeals for the 11th Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

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Tel. No. : None Available

QUESTION(S) PRESENTED

Should prejudice be presumed under *United States v. Cronic* when defense counsel fails to file an appellee's brief under a state initiated appeal?

LIST OF PARTIES

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

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

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Louis Mercado v. Secr, Fla. Dept. of Corr's Appeal No. **22-11903-B**

11th Cir. R. 26.1-1(a) requires the appellant or petitioner to file a Certificate of Interested Persons and Corporate Disclosure Statement (CIP) with this Court within 14 days after the date the appeal is docketed in this court, and to include a CIP within every motion, petition, brief, answer, response, and reply filed. Also, all appellees, intervenors, respondents, and all other parties to the case or appeal must file a CIP within 28 days after the date the case or appeal is docketed in this court. **You may use this form to fulfill these requirements.** In alphabetical order, with one name per line, please list all trial judges, attorneys, persons, association of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

Berger, Hon. Wendy W.	**Direct Appeal Judge**
Brasher, Hon. Andrew	**11th Cir. Judge**
Brodersen, Daniel	**Trial Defense Counsel (1st Trial)**
Byron, Hon. Paul	**U.S. District Judge (Federal Habe)**
Chavez, Javier	**Trial Defense Counsel (2nd Trial)**
Clark, Andrew	**Trial Defense Counsel (2nd Trial)**
Davis, Hon. Jennifer	**Trial Judge (1st Trial)**
Desrochers, Christopher	**11th Cir. Appellate Counsel**
Hoffman, Hon. Leslie	**U.S. District Court Magistrate (Fed Habe)**
Koller, Pamela	**Asst. Atty Genl (Dir App, 1st Trial/Fed Habe)**
LeBlanc, Hon. Bob	**Successor Trial Judge (1st Trial)**
Megaro, Patrick	**Direct Appeal App Counsel/3.850 Counsel**
Mercado, Louis	**Defendant/Appellant/Petitioner**
Orfinger, Hon. Richard B.	**Direct Appeal Judge**
Palmer, Hon. William D.	**Direct Appeal Judge**
Pegues, Nicole	**Trial Prosecutor (Asst. State Atty) (1st Trial)**
Pryor, Hon. Jill	**11th Cir. Judge**
Pryor, Hon. William	**Chief Judge 11th Cir.**
Quarles, Christopher	**Direct Appeal App Counsel**
Quinn, Daniel	**3.850 State Attorney/Asst Atty Gen (Trial 2)**
Senninger, Lauren	**Trial Defense Counsel (2nd Trial)**
Stoumbos, Zachary	**Trial Defense Counsel (1st Trial)**
Stratis-Malak, Natalie	**Trial Prosecutor (Asst. State Atty) (2nd Trial)**
Traver, Hon. Dan	**Postconviction (3.850) Judge**
Underwood, Hon. Christi	**Trial Judge (2nd Trial)**

RELATED CASES

- *Mercado v. State of Florida*, No. 08-CF-11641, 9th Judicial Circuit Court, in and for Orange County, Florida. Trial occurred November 29-30th 2011 (resulted in a mistrial).
- *Mercado v. State of Florida*, 121 So. 3d 604, 606 (Fla. Dist. Ct. App. 2013) Case No. 5D12-2122, Fifth District Court of Appeal, Daytona Beach, Florida (State Appeal). Appellate court reversed and remanded for a re-trial.
- *Mercado v. Florida*, 137 S. Ct. 343 (2016)- The Supreme Court of the United States denied petition for writ of certiorari.
- *Mercado v. State*, 189 So. 3d 796 (Fla. 5th DCA2016)- Mercado appealed his sentence and the Fifth DCA affirmed his conviction *per curiam affirmed.*
- *Mercado v. Sec'y of Florida Department of Corrections*, 2022 U.S. Dist. LEXIS 104714 (February 7, 2022).
- *Mercado v. State*, 274 So. 3d 1096 (Fla. 5th DCA2019)- Petitioner appealed the denial of his 3.850 and the Fifth District Court of Appeals denied his motion *per curiam affirmed.*

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OPINIONS BELOW

X For cases from **Federal** courts:

The opinion of the 11th U.S. Circuit Court of Appeals appears at **Appendix N** to the petition and:

[ ] reported at.

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

[X] is unpublished.

The opinion of the United States District Court:

[ ] is reported at _____.

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

[X] is unpublished.

JURISDICTION

This Honorable Court has jurisdiction under Title 28 U.S.C. §1254(1) to rule on this petition and to review the final judgment rendered on October 21, 2024 via the Eleventh U.S. Circuit Court Order denying the Petitioner's writ of habeas corpus. U.S. Supreme Court Rule 13 holds that a petition for a writ of certiorari to review a judgment issued by a United States Court of Appeals in a criminal case is timely when filed with the Clerk within 90 days after entry of the judgment. On October 21, 2024 the Eleventh Circuit entered its judgment making this writ of certiorari timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Issue(s) Involved

The Sixth Amendment of the U.S. Constitution provides, in pertinent part, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right of effective assistance of counsel for his defense."

STATEMENT OF THE CASE

a) Mercado's First Trial

Louis A. Mercado, presently an incarcerated individual in the State of Florida, was originally charged by Information on August 8, 2008 with three counts of Capital Sexual Battery under F.S. §794.011(2) (**State Resp. Exh. A**).[1] The Information alleged that on some dates between September 1, 1992 and February 13, 1996, the Petitioner sexually assaulted C.T. involving three different acts (**State Resp. Exh. A**). On November 29, 2011, a two-day trial commenced in front of Hon. Jenifer Davis, in the Ninth Judicial Circuit Court, in and for Orange County, Florida. Lead Defense Counsel Zachary E. Stoumbos and Co-Counsel Daniel Brodersen represented the Appellant, and Assistant State Attorney Nicole Pegues represented the State.

The Appellant opines that at trial, things went very badly for the prosecution. First, the alleged victim, C.T., who was 27 years old when he took the stand, testified that much, if not all of the alleged sexual abuse allegations began when C.T. was 12 or 13 years old – not under 12 years old as required for conviction of the capital sexual battery charges. The judge reprimanded the State

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[1] The Appellant will refer to the relevant documents as contained within the State Appendix to their Response to Mercado's federal habeas corpus petition filed under 28 USC §2254.

for leading the witness at trial in an attempt to get C.T. to change his testimony to that of being under 12 years of age. The Court told the prosecutor, "I'm concerned you are testifying for (C.T.), that's my concern, because he testified very clearly, and now you are having him do it a different way.... he is pretty clear on the testimony he gave" Defense Counsel motioned the court for a Judgment of Acquittal ("JOA") as to Count II and Count III because the alleged victim had testified he was 12 or 13 and living in Lycastle when the charged offenses occurred, and that he was not under the age of twelve. The prosecutor conceded the error, stated that a JOA was proper as to Counts II and III, and the judge then granted the acquittal.

Next, the State proffered testimony outside of the jury's presence from Detective Michael Segreaves, an officer with Orange County Sheriff's Office ("OCSO") and a co-worker of the Appellant's (who was also an officer with OCSO). Segreaves testified that he first called the Appellant on the phone to talk to him about the specifics of the allegations. During the recorded controlled phone call, Mercado stated, "Mike, I don't want to talk to anybody. I just know – I know that I am going to need an attorney". A discussion and an argument was presented by both parties regarding the admissibility of Mercado invoking his right to counsel during the call and whether there was a violation of the Petitioner's Fifth Amendment right to remain silent under the Constitution. At the end of argument,

Judge Davis stated that she wanted the State to redact the recorded phone call to remove all statements regarding Mercado invoking his right to remain silent and his right to an attorney. The portion of the transcript regarding the redactions of the phone call at issue was only four pages long. Judge Davis specifically told the State, "I want lines 23 through 25 to be redacted out; 15 through 19 out; 12 and 13; and anything that says anything about an attorney, if I didn't mark anywhere else, anywhere that says I do not wish to talk to you or I just need an attorney."ASA Pegues did not ask for any clarification of the instructions or express any confusion with the judge's directions, and answered, "Will do". When the jury returned, Segreaves took the stand and almost immediately into the detective's trial testimony, the judge asked for a bench conference. Judge Davis admonished the State Attorney by stating that the prosecutor was asking broad questions in an effort to get the witness to testify to the very things that the court had just ruled inadmissible. The judge warned the State to narrow her questions down and to be more specific in her questioning of this witness. Defense Counsel was concerned with the State's trial tactics at this point, and requested that the judge give the prosecutor a moment to instruct the witness to avoid testifying to the inadmissible issues. Defense Counsel warned, "I don't want this case mistried. It's coming." The judge agreed with Defense Counsel and dismissed the jury. The judge warned the State to talk to their witness and to ensure "that he understands completely

what he can't say, because a mistrial at this point may make me think that the State's doing it on purpose" (emphasis added). The Appellant argues that rather than proceed down this dangerous path they were traveling, the State dismissed witness Segreaves and rested its case.

Next, during defense presentation of its case, several strong defense witnesses testified that the Appellant argues placed any conviction beyond a reasonable doubt on remaining Count I in jeopardy. There was a realistic chance that the State would lose this entire case.

During Closing Arguments, and after the prosecutor had been directed to redact the comments, the State played a part of Mercado's controlled phone call with police that commented on Mercado's right to remain silent. Judge Davis stopped the trial, excused the jury, and called a bench conference. Defense Counsel moved for a mistrial and dismissal of remaining Count 1 concluding, "[S]he intentionally did it, there's no other explanation." The trial court granted Defense Counsel's motion for a mistrial.

b) Defense Counsel's Motion to Bar Re-Trial

On December 12, 2011, trial counsel Zachary E. Stoumbos filed a "Motion to Bar Retrial of Defendant Based on Intentional Prosecutorial Misconduct" (**Appendix B**). The State responded and moved for the trial judge's

disqualification. The motion for disqualification was denied but the State's renewed motion for disqualification was granted.

On May 16, 2012, a hearing on the motion to bar retrial was held in front of successor Judge Hon. Bob LeBlanc, in the Ninth Judicial Circuit Court, in and for Orange County, Florida. Judge LeBlanc ruled, "I think that Judge Davis already found that the redaction that was not done, as ordered, was deemed to be intentional. And I think I'm going to rely on that finding, and find, therefore, that the new trial that was ordered was based upon a goaded or provoked motion for mistrial. And therefore, a new trial is barred. And that is my ruling. Motion to bar retrial is granted."

c) The State's Appeal of the Granting of Counsel's Motion to Bar Re-Trial

On May 23, 2012, the State filed a Notice of Appeal reflecting service on Defense Counsel Stoumbos, but not the Appellant as required by Fla.R.App.P. Rule 9.140(c)(3) (**Appendix C).** Two months later, the Appellant received his first notice of the appeal via phone call by Defense Counsel Stoumbos. Mercado informed Defense Counsel that he did not have the finances for the attorney's further representation in this case.

On July 17, 2012, Defense Counsel Stoumbos filed a Motion to Withdraw as Counsel, and a Motion to Appoint the Office of Public Defender ("PD") for appeal

purposes with the trial court. The trial court never ruled on the motions until August 27, 2013 leaving the Appellant without any representation during the appeal in violation of his Sixth and Fourteenth Amendment rights. Attorney Stoumbos remained the Attorney of Record on this appeal, but in his opinion, he was not required to, and did not file an Answer Brief or represent Mercado at all during the appeal process.

On November 5, 2012, the State filed an initial brief on appeal and served the PD Office with a copy of the brief.

On November 6, 2012, upon being informed by the PD Office that they were not appointed to represent the Appellant, Assistant Attorney General Pamela Koller e-mailed the initial brief to Attorney Stoumbos. (**Appendix D**).

On August 9, 2013, Florida's Fifth District Court of Appeal ("5th DCA") reversed the trial court's order barring a retrial (see *State v. Mercado*, 121 So.3d 604) (Fla. 5th DCA 2013) (**Appendix E**). The written opinion states "No appearance for Appellee" (Mercado).The Fifth DCA held that the sole issue on appeal was to determine whether the State's conduct was intended to provoke Mr. Mercado into requesting a mistrial. Without any answer brief ever filed, the Fifth DCA held that the trial court's findings that the prosecutor's actions were intended to goad Mercado into requesting a mistrial were not supported by the evidence and reversed for a new trial.

On August 22, 2013, Defense Counsel Stoumbos filed a "Motion for Rehearing and Motion to Withdraw Opinion" with the Fifth DCA (**State Resp. Exh. F**). Counsel argued that he never received a copy of the State's initial brief despite evidence to the contrary. Defense Counsel's motion argued that Mercado's appeal had "literally fallen between the cracks" and that "without meaningful representation of counsel, Appellee stood little chance of prevailing" (citing to *Evitts v. Lucey*, 469 U.S. 387 (1985); and *Douglas v. California*, 372 U.S. 353 (1963)). No argument in opposition to the State's initial brief requesting reversal of the trial court's motion to bar retrial was included in the rehearing motion – simply a request to appoint counsel and allow Mercado to file an answer brief in the appeal.

On August 23, 2013, the State filed its Response to the motion for rehearing. The State faulted Defense Counsel Stoumbos for failing to file an affidavit of indigency with his motion to appoint the PD Office on the appeal rendering it legally insufficient. The State provided evidence that Defense Counsel Stoumbos was served the Record on Appeal, and via e-mail, was served a copy of the State's initial brief. The State faulted Defense Counsel Stoumbos for failing to obtain an order permitting his withdrawal, and his failure to file a motion to withdraw with the Fifth DCA. The State argued that these facts amounted to a claim of ineffective assistance of counsel in not filing an answer brief that is not cognizable on direct

appeal. The State concluded that in any event, the Appellee cannot show prejudice due to his lack of representation on appeal. The State argued that because the Fifth DCA ruling was that no evidence supported the trial court's ruling that the prosecutor's actions were intended to goad Mercado into requesting a mistrial, no argument in an answer brief would change the ruling on that issue.

On August 27, 2013, the trial court granted Defense Counsel's July 17, 2012 motion to withdraw as counsel, and appointed the PD Office in Orlando (Ninth Judicial Circuit) to represent the Appellant in this appeal.

On September 3, 2013, the PD Office in Orlando (Orange County) motioned the Fifth DCA for the Regional PD Office out of Daytona Beach (Seventh Judicial Circuit) to be substituted as Mercado's Appellate Counsel.

On September 13, 2013, the Fifth DCA denied Counsel Stoumbos' motion for rehearing (**Appendix G**), and on September 30, 2013, the mandate issued (**Appendix H**).

On September 30, 2013, Assistant Public Defender Christopher S. Quarles filed a Motion to Recall Mandate, arguing the same grounds as trial counsel that Mercado's being unrepresented by counsel during this appeal required that the mandate be recalled so an answer brief could be filed by Appellate Counsel.

On October 2, 2013, the Fifth DCA denied the Motion to Recall Mandate without written reasons.

On August 4, 2017, the Appellant filed a pro se Petition for Belated Appeal with the Florida Supreme Court under Fla.R.App.P. 9.141(c) (**Appendix I**). Mercado requested that the Florida Supreme Court exercise its discretionary jurisdiction to review the August 9, 2013 Fifth DCA written opinion reversing the trial court's order barring a retrial.

On November 13, 2017, the Florida Supreme Court denied the Petition for Belated Appeal without written explanation.

d) The 9.141(d) Petition Alleging Ineffective Assistance of Appellate Counsel

On September 30, 2013, APD Christopher Quarles filed a 12-page Petition for Writ of Habeas Corpus under Fla.R.App.P. 9.141(d).The Petition argued that Appellate Counsel of Record, Attorney Zachary E. Stoumbos provided ineffective assistance of counsel resulting in Mercado's being unrepresented during the direct appeal process initiated by the State APD Quarles sought a new appellate proceeding whereby Mercado is "represented by the counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution". On December 20, 2013, the State filed its Response to Petition for Writ of Habeas Corpus .On April 30, 2014, the Fifth DCA denied the Rule 9.141(d) Petition for Writ of Habeas Corpus without written opinion.

e) Mercado's Second Trial

On February 9, 2015, a four-day trial commenced in front of Hon. Christi L. Underwood, in the Ninth Judicial Circuit Court, in and for Orange County, Florida. Assistant Public Defender ("APD") Javier Chavez and APD Lauren Senninger represented the Appellant, and Assistant State Attorney ("ASA") Natalie Stratis-Malak and ASA Courtney Richardson represented the State. On February 12, 2015, sentencing was held immediately after the jury found Mercado guilty of Count 1 Capital Sexual Battery Judge Underwood sentenced the Appellant to the mandatory statutory sentence of Life in prison.

f) The 3.850 Motion for Post-Conviction Relief

On November 22, 2017, Private Counsel Patrick M. Megaro prepared a 5-Ground Motion for Postconviction relief under Fla.R.Crim.P. 3.850 Ground One argued that "Trial Counsel was ineffective when it abandoned Mercado's case which resulted in an unchallenged default judgment in favor of the State" Postconviction counsel argued that first trial Defense Counsel Zachary E. Stoumbos was ineffective for failing to file an affidavit of indigency which precluded review of his Motion to Appoint Public Defender for appeal purposes. The 3.850 motion argued that Attorney Stoumbos failed to ensure that his motion

to withdraw, and motion to appoint appellate counsel were granted by the trial court. The motion further faulted Attorney Stoumbos for failing to file a motion to withdraw as counsel in the 5th DCA, and for failing to file an answer brief as Attorney of Record on appeal. Postconviction counsel argued that these errors left Mercado with no counsel on appeal as a matter of right, and denied the Appellant his right to due process of law in an adversarial system of justice (citing to *Strickland v. Washington*, 466 U.S. 668, 686 (1984); and *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

On November 8, 2018, postconviction judge Hon. Dan Traver issued his Order (Summarily) Denying Motion for Postconviction Relief (**Appendix J**). Judge Traver held, "Even if this Court assumes trial counsel performed ineffectively by failing to ensure Defendant had appellate counsel, it is unclear how it could craft a remedy in light of the Fifth DCA's repeated rulings on this issue". The postconviction court cited the 5th DCA September 13, 2013 order denying Counsel Stoumbos' motion for rehearing. There, Defense Counsel's motion had argued, "without meaningful representation of counsel, Appellee stood little chance of prevailing" (citing to *Evitts v. Lucey*, *id.*, and *Douglas v. California*, *id.* The postconviction court also cited the 5th DCA April 30, 2014 order denying the Rule 9.141(d) Petition Alleging Ineffective Assistance of Appellate Counsel without written opinion. There, APD Quarles argued that Appellate Counsel of

Record, Attorney Zachary E. Stoumbos provided ineffective assistance of counsel resulting in Mercado's being unrepresented during the direct appeal process initiated by the State. Judge Traver concluded, "Indeed, the plain language of the Fifth DCA's reversal (of the motion to rebar trial) grounds its decision on the evidentiary record. See Order Reversing and Remanding for New Trial ("We conclude that the trial court's findings are not supported by the evidence"). Ultimately, the Fifth DCA has twice concluded that even if trial counsel performed deficiently, Defendant suffered no prejudice, and this Court cannot and will not disturb those rulings."

On June 19, 2019, the 5th DCA per curiam affirmed the lower court's order summarily denying Ground One. (see *Mercado v. State*, 274 So.3d 1096 (Fla. 5th DCA 2019)). On July 18, 2019, the Appellate Court denied Mercado's Motion for Rehearing .On August 6, 2019, the mandate issued making this opinion final.

As described above, the constitutional issue presented in this certiorari has been fully exhausted in the State courts.

g) The Federal Petition for Writ of Habeas Corpus

On September 6, 2019, the Appellant filed his timely pro se Federal Petition for Writ of Habeas Corpus (**Appendix K**). The constitutional issue at bar was

raised as Ground Four in the Petition. Mercado presented this issue to the U.S. Middle District Court (Orlando Division) using the same arguments as stated in his State 3.850 Motion for Postconviction Relief Ground One. Specifically, that Defense Counsel Zachary E. Stoumbos made substantial errors that left Mercado with no counsel on appeal as a matter of right, and denied the Appellant his right to due process of law (6th and 14th Amendment violations). Mercado supported his request for relief with the U.S. Supreme Court cases of *Strickland v. Washington*, 466 U.S. 668, 686 (1984); and *United States v. Cronic*, 466 U.S. 648, 658 (1984)). Mercado listed the numerous specific acts and omissions by Defense Counsel that left Mercado unrepresented during the State-initiated appeal of his first trial. All parties agree that counsel's errors met the first *Strickland* prong representing conduct outside of the wide range of professionally competent assistance. In regards to *Strickland*'s second prong requiring the showing of prejudice caused by Counsel's errors, Mercado argued: (1) due to the complete denial of counsel at a critical stage of the proceedings; and (2) due to counsel's entirely failing to subject the State's appeal argument to meaningful adversarial testing; prejudice is presumed (citing to *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

On February 7, 2022, U.S. District Court Judge Hon. Paul G. Byron denied relief on the merits of this claim **(Appendix L)**. Judge Byron noted that the unredacted statements from the controlled call with police heard by the jury that

Mercado "would not like" and "[was] not gonna" were ambiguous and debatable as to the Appellant's meaning (**Order, Pages 30-31**). Opposite to the 5th DCA opinion on the State-initiated direct appeal holding otherwise, Judge Byron held that the above statements could reasonably be interpreted as meaning "that (Mercado) *would not like* to come down to the station and he *was not going to* do so" were comments relating to the Petitioner's invoking his 5th Amendment right to remain silent (**Order, Page 30**). Judge Byron agreed that Trial Counsel Zachary E. Stoumbos and Trial Judge Hon. Jennifer Davis reasonably interpreted the statements this way when proposing and granting the motion to rebar trial based on the prosecutor's "intentional error designed to goad the Petitioner into moving for a mistrial" (**Order, Page 30**). However, Hon. Judge Byron also held the opposite could be true (*i.e.,* that the prosecutor's failure to redact the statements was, "at most, negligent" and unintentional caused by the lack of more specific redaction instructions by trial Judge Davis) (**Order, Pages 30-31**). The Order by Hon. Judge Byron disagreed with the State attorneys' opinion that an answer brief could not have persuaded the 5th DCA to affirm the order barring retrial (**Order, Page 31**). Judge Byron concluded that since "fair-minded jurists could disagree about the correctness of the State courts' decision, then the State court's application of (the prejudice prong) of *Strickland* was not unreasonable, and AEDPA precludes the grant of habeas relief" (citing this Honorable Court's opinion in *Brooks v. Comm'r,*

Alabama Dep't of Corr., 719 F.3d 1292, 1300 (11th Cir. 2013)) **(Order, Page 32)**. However, Judge Byron still found it debatable as to whether prejudice needs to be shown by Mercado when the Appellant had no representation of counsel at all during the *State-initiated* appeal **(Order, Page 26)**. Judge Byron postured that while prejudice is presumed when no initial brief is filed when defense initiates the appeal, "no party cites, and the Court does not find, a Supreme Court opinion applying a presumption of prejudice to the factual circumstances presented by this case – *i.e.*, counsel's failure to file an *answer* brief to the State's appeal" **(Order, Page 26)**. Judge Byron issued a COA on the issue of "whether prejudice should be presumed when defense counsel fails to submit an appellate brief in opposition to the State's appeal" **(Order, Page 39)**.

On or about March 7, 2022, Appellant filed his Motion to Alter or Amend a Judgment pursuant to Fed.R.Civ.P. Rule 59(e) with the U.S. District Court.

On May 12, 2022, U.S. District Court Judge Hon. Paul G. Byron issued an Order denying Appellant's Motion to Alter or Amend a Judgment, and denied his request for a Certificate of Appealability ("COA") on Grounds 1, 2, and 3 of the Federal Habeas Petition.

h) The Appeal of the denial of Ground 4 of Appellant's Federal Petition

On or about June 3, 2022, Mr. Mercado filed his Notice of Appeal.

On or about June 7, 2022, this case was docketed and assigned Appeal Number 22-11903-E.

On September 22, 2022, upon leave from this Honorable Court, the Appellant filed his Application for Certificate of Appealability, seeking expansion of the COA to Grounds 1, 2, and 3 of Mercado's Federal Petition.

On May 1, 2023, this Court's Hon. Andrew L. Brasher denied any expansion of the COA to include other issues raised by the Petitioner in his 28 U.S.C. §2254 Petition. The same day, the Clerk of this Court mailed Mercado correspondence containing the published briefing schedule providing a filing date for the Appellant's initial brief on or before June 12, 2023.

On June 8, 2023 Mr. Mercado timely filed his Initial Brief to the 11th Circuit Court of Appeals. **(Appendix M)**

On October 21, 2024 the Honorable Judges Pryor, Pryor, and Brasher of the United States 11th Circuit Court of Appeals affirmed the denial of Mr. Mercado's petition for writ of habeas corpus **(Appendix N)**.

This timely filed Certiorari follows:

REASONS FOR GRANTING THE PETITION

Ground One

PREJUDICED SHOULD HAVE BEEN PRESUMED WHEN DEFENSE COUNSEL FAILED TO SUBMIT AN APPELLEE'S BRIEF IN OPPOSITION TO THE STATE'S APPEAL IN ACCORDANCE WITH *United States v. Cronic.*

In its opinion the Honorable Judge William Pryor stated that because the Supreme Court has never applied *Cronic* to counsel's failure to file an appellee's brief, and that there are grounds that could reasonably have led the state court not to extend the doctrine to this circumstance they affirmed the denial of Mercado's habeas petition.

Mr. Mercado states that prejudiced should have been presumed when defense counsel failed to submit an appellee's brief in accordance with *United States v. Cronic* and specifically *Penson v. Ohio*, 488 U.S. 75, 78 (1988)(where the state appeals court had allowed counsel to withdraw after filing a conclusory statement that the appeal had no merit and that he would not file an appellant's brief. The Supreme Court held that, by deciding the merits of Penson's appeal without appointing new counsel to represent him the state appellate court violated Penson's right to counsel). As discussed above the United States Supreme Court has never addressed an issue like Mercado's where defense counsel failed to file an appellee's brief stemming from a state

initiated appeal. However, the reasoning and purpose of this certiorari is to bring to this Honorable Court's attention an obvious violation against Mr. Mercado's Sixth Amendment right to the Constitution.

Cronic applies to Mr. Mercado's circumstance because the exceptions to the requirement to show prejudice is apparent. In limited circumstances, courts may presume that ineffective assistance of counsel prejudiced the defendant. The circumstances include (1) "the complete denial of counsel...at a critical stage," (2) "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide assistance is so small that a presumption of prejudice is appropriate. The Supreme Court later held that prejudice is presumed when an attorney fails to file an appellate brief on behalf of a criminal defendant on a first appeal as of right. *Penson*, 488 U.S. at 88.

It is undisputed that the Florida Fifth District Court of Appeal adjudicated the merits of the State's appeal in a criminal case against a defendant without representation. Despite acknowledging in its opinion that there had been no appearance for Mr. Mercado, the Florida appellate court reached the merits of the State's appeal without an opposing brief on Mercado's

behalf. This was a denial of the right to counsel in violation of the Sixth Amendment. And under *Cronic*, prejudice should have been presumed.

The Florida appellate court's adjudication of the State's appeal without an opposing brief from Mr. Mercado triggered at least one of *Cronic's* exception. It involved the complete denial of counsel at a critical stage of Mr. Mercado's criminal proceeding.

The Supreme Court had made clear in *Penson* that a criminal defendant need not show prejudice when his counsel failed to file a brief on his behalf in his appeal. Although *Penson* addressed the defendant's appeal, its reasoning supports that prejudice should be presumed when a criminal defendant's counsel failed to file a brief on his behalf in an appeal brought by the State as well.

In *Penson*, the Supreme Court observed that "a number of the Federal Courts of Appeals have reached a like conclusion when faced with similar denials of appellate counsel. The Court cited first *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988) in which the Seventh Circuit concluded that it could presume prejudice under *Cronic* when a criminal defendant's counsel failed to file a brief in response to the government's appeal. The Court's citation to *Thomas* as one of the Courts of Appeal reaching "a like conclusion" regarding the presumption of prejudice when criminal defense

counsel files no brief on appeal indicated that the Court saw no distinction when the appeal was filed by the government.

In the State's appeal, there was no adversarial testing of its argument at a critical stage that determined if Mercado would be retried. The fact that there was "No Appearance for Appellee" in the appeal should have alerted the Florida appellate court but instead they proceeded to the merits anyway. By allowing the State to proceed without any opposition whatsoever from the defense or at least an opportunity to point out the evidence that led two trial court judges to conclude that the State intentionally provoked a mistrial. The appellate court deprived Mercado and itself of the benefits of an adversary examination and presentation of the issues.

CONCLUSION

This Court should grant the instant writ of certiorari and find that prejudiced should have been presumed under *United States v. Cronic* to ensure that Mercado's Sixth Amendment right to the Constitution isn't violated.