

IN THE SUPREME COURT OF THE UNITED STATES
NO. 17-6818

MICHAEL LOCASCIO,

Petitioner,

-v-

SECRETARY, FLORIDA DEPT.
OF CORRECTIONS.

Respondent.

**PETITION FOR THE REHEARING OF JANUARY 22, 2018, ORDER DENYING A
PETITION FOR A WRIT OF CERTIORARI**

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INMATE INITIALS

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LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page.

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SECRETARY, FLORIDA DEPT.
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Respondent.

Petitioner, Michael LoCascio, in good faith, petitions this Court to grant rehearing of this Court's order (notification attached hereto as Appendix "A") entered on January 22, 2018 (No. 17-6818).

INTERVENING EVENTS OF SUBSTANCE

[note: neither of the below items were available to LoCascio prior to his filing of his petition on November 03, 2017, and neither was known or available to LoCascio prior to January 22, 2018.]

1.) On October 30, 2017, this Court held oral arguments in the case of *Wilson v. Sellers*, (No. 16-6855). (Transcripts attached hereto as Appendix "B").

2.) On January 19, 2018, the Supreme Court of the State of Georgia published a written opinion in the case of *Redmon v. Johnson* (S16H1197) (Order attached hereto as Appendix "C").

JURISDICTION

On January 22, 2018, this Court entered an order denying Petitioner's petition for a writ of certiorari. The instant petition is timely filed pursuant to Supreme Court Rule 44.2. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) and Supreme Court Rule 44.2.

The Timeline Supporting Instant Petition for Rehearing

- October 30, 2017 - the Supreme Court of the United States hears oral argument in the case of *Wilson v. Sellers* (No. 16-6855).
- November 3, 2017 - the petitioner in this case (No. 17-6818) files a petition for a writ of certiorari seeking, inter alia, the answer to the same question posed by the petitioner in *Wilson, supra*.
- November 16, 2017 - date of docketing instant case (No. 17-6818).
- December 18, 2017 - the due date for a response (No. 17-6818). This date passes; no response or notice of waiver form is ever filed.
- January 04, 2018 - in instant case (No. 17-6818), “Distributed for Conference of 1/19/2018” appears on the record.
- January 16, 2018 - “Noting the confusion that was emerging in the federal courts,” the Supreme Court of Georgia enters an order in the case *Redman v. Johnson* (S16H1197). (Appendix C)
- January 19, 2018 - the Solicitor General of Georgia files notice (with the Clerk of the United States Supreme Court, case (No. 16-6855)) citing the Supreme Court of Georgia’s aforementioned *Redman* opinion as new, relevant authority. (Appendix D)
- January 22, 2018 - the petition in this case (No. 17-6818) is “DENIED.” (Appendix A)

POINTS WHY REHEARING SHOULD BE GRANTED¹

I. The Federal Habeas Review Applied To This Case Illustrates An Answer To A Significant Question Posed by Justice Kennedy On October 30, 2017. The *Wilson* Case Did Not.

A. *Wilson* Does Not Pass The Muster

On October 30, 2017 Justice Sotomayor observed the situation in which this Court found itself during *Richter*²: “There was no absolutely reasoned decision anywhere there. We had to do something.” (Appendix B, pg. 45). Earlier, Justice Kennedy queried: “Have there been any commentary or can the bar offer us any experience ... is there any commentary on how *Richter* has worked out?” (*Id.* pg. 25). In answer, *Wilson*’s counsel answered in the negative. *Id.*

On January 16, 2018, forty-eight (48) days after Justice Sotomayor asked the Solicitor of Georgia whether she was “disavowing the statements of a former Supreme Court Justice of a Georgia Court and all the judges that signed onto that amicus brief” (and stated “[y]ou don’t know--you don’t, they do because they actually did the work”), the Supreme Court of Georgia entered an order disavowing the statements of the Justice and all the judges. (*Id.* pg. 33; and Appendix C. Pg. 11, fn 7). In short, to address what it said “appears to be significant misunderstanding of the process by which” it renders these decisions and the import of its decisions, the Supreme Court of Georgia described its process and left no room for doubt:

Our silence does *not* imply consent to every aspect of the habeas court’s reasoning, and this Court does *not* have a ‘practice of issuing a reasoned decision denying an application for a certificate of probable cause when it disagrees with the superior court’s reasoning.’ (Appendix C. pgs. 1, 9).

¹ This Petitioner prays this Court consider the following 4 points (A-D) cumulatively, in forming its opinion on whether to grant rehearing and/or remand to the Eleventh Circuit.

² *Harrington v. Richter*, 562 U.S. 86 (2011).

B. The Focus Sought By This Petitioner, And Where It Need Be Placed, Is On The Defect Within The Eleventh Circuit's Rejection Of The Look Through Process.

Unlike the circumstances present in *Wilson*, there has been no stated confusion, dispute or uncertainty (in this case) as to the practice Florida's district courts apply in granting or denying post conviction appeal under Florida Rule of Appellate Procedure 9.141 (b)(2). The two questions posed in this petitioner's petition encompass the claim that the federal analysis, required under 28 U.S.C. §2254(d)(1) and (2), cannot be sufficiently made under the Eleventh Circuit's no-look-through (at all) rule. *See* Petition for a writ of certiorari (filed November 3, 2017) page 23. This petitioner has not sought to offer challenge to a federal habeas court's asserted authority to *create* hypotheticals; he offers and has offered specific and critical challenge to the Eleventh Circuit's process of *applying* its hypotheticals while said court simultaneously, and from the outset, treats the actual stated reason(s) for state courts earlier decisions as both something to be ignored and irrelevant. [note: the following points cumulatively reveal dysfunction when the Eleventh Circuit applies its overreaching expansion of Richter's narrow holding to cases where a reasoned state court decision exists.]

C. Missed By The Eleventh Circuit's Myopic Approach to Habeas Review -- It Imputes Reasons To The Florida Court That, By Florida Rule, Could Not Have Been The Florida Court's Reasons.

The Florida appellate court reviewed and denied Petitioner's claims³ on the merits once and only once: that was its adjudication reached during its application of Florida Rule of Appellate Procedure 9.141(b)(2)(D) process and standard of review. *See* Petition for Writ of Certiorari (filed November 3, 2017) pages 32-34, section III (B), for more details.

³ The claims referred to (herein) refers to those later raised in Petitioner's §2254 petition (i.e., those which later became the subjects of Petitioner's federal appeal to the Eleventh Circuit).

Florida's Rule of Appellate Procedure 9.141(b)(2)(D) standard: requires reversal of a trial court's denying post conviction relief without an evidentiary hearing if the order fails to comply with the applicable subsection of Florida Rule of Criminal Procedure 3.850 requiring the post conviction trial court's determination that the grounds asserted can be conclusively resolved either as a matter of law (with citations) or by reliance on records of the case (with attached copies). *Davis v. State*, 153 So.3d 399, 401 (Fla. 1st DCA 2014).

Florida Rule of Appellate Procedure 9.141 (b)(2)(A) defines the total content of *record* under review by the appellate judges in the rule 9.141 (b)(2)(D) process: the record consists of "copies of the [rule 3.850] motion, response, reply⁴, order on the motion, motion for rehearing, and attachments to any of the foregoing, together with the certified copy of the notice of appeal." Nothing more.

There is no room in Florida's Rule of Appellate Procedure 9.141 (b)(2)(D) standard to allow a Florida appellate court to silently affirm based on hypotheticals and conjecture, even if said court hypothesized the possible existence of a strategic reason and/or the possibility of a plausible excuse for a witness' out of court actions. (That is, the hypotheticals reached by the Eleventh Circuit's application of *Richter* -----minus a thorough look through analysis-----could not, were not, and are not the reasons for the state appellate court's silent denial.)⁵ Herein lies an answer to the aforementioned question Justice Kennedy put to *Wilson's* counsel; sans completing a thorough look through analysis, applying *Richter* to Florida appellate courts' denials (made in a 9.141 (b)(2)(D) forum) is tantamount to inflicting distorting tunnel vision on a reviewing federal habeas court.

⁴ There is no provision for a movant reply under Florida Rule of Criminal Procedure 3.850.

⁵ The foregoing examples of a theoretical strategic reason and theoretical use of an untested, seemingly plausible excuse are two examples of those produced by the Eleventh Circuit and used in its April 18, 2017 order as its justification for denying this Petitioner's appeal. (see pages 21-23 of Eleventh Circuit's April 18, 2017 order).

- D. A Thorough Look Through Would Also Have Compelled The Eleventh Circuit To Give Appropriate Respect To The Florida Trial Courts' Burdens Applicable To a 3.850 Motion Proceeding--A Materially Different Situation From That Presented By The Process Applied by Georgia's Supreme Court to *Wilson*, A Prisoner Who At One Time Had Been Provided An Evidentiary Hearing.

A 3.850 Proceeding is Primarily Civil in Nature

A motion filed pursuant to *Florida Rule of Criminal Procedure* 3.850 acts as a petition for writ of habeas corpus, or a writ of error *coram nobis*, both of which are civil in nature. *See Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) (post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment); *State v. Lasley*, 507 So.2d 711 (Fla. 2d DCA 1987) (like a habeas corpus proceeding, an action under Rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of Rule 3.850 within the criminal rules); *State v. White*, 470 So.2d 1377, 1378-79 (Fla. 1985) (3.850 motions and some other writs are post-conviction collateral remedies which are not steps in a criminal prosecution but are in the nature of independent collateral civil actions governed by the practice of appeals in civil actions); *State v. Weeks*, 166 So.2d 892, 895 (Fla. 1964) (post-conviction habeas corpus proceedings are not steps in a criminal prosecution. On the contrary, they are in the nature of independent, collateral civil actions which are not clothed with the aspects of a criminal prosecution).

However, a 3.850 Motion has also been held to be a collateral criminal proceeding. *Hall v. State*, 752 So.2d 575 (Fla. 2000); *Saucer v. State*, 779 So.2d (Fla. 2001). It logically follows that 3.850 motion proceedings are primarily civil in nature, with some limited criminal attributes.

In The Trial Court

Legally sufficient rule 3.850 motions can be properly be denied without an evidentiary hearing only when the trial courts attach “a copy of that portion of the files and records that CONCLUSIVELY shows that the movant is entitled to no relief.” Florida Rules of Criminal Procedure 3.850. *See Meeks v. State*, 382 So.2d 673, 676 (Fla. 1980).

The date on the records that were attached to the trial court’s order would have required the trial judge to have possessed psychic abilities, evidence of which appears nowhere on the record (i.e., in no way, shape, or form do those attached records appropriately address the claims raised for federal appellate review, let alone conclusively refute them: the complained of errors occurred long after the date on those records). *See* Petition for Writ of Certiorari. (filed November 3, 2017) page 29, for more details. But, through use of its no-look process, the Eleventh Circuit missed this too.

CONCLUSION

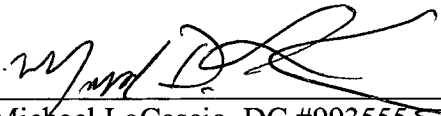
This case does what *Wilson’s* could not--illustrate certain dysfunction in Eleventh Circuit’s 2016 change to habeas review process. As shown: The state appellate court’s reasons were not, and could not have been, the reasons hypothesized through the Eleventh Circuit’s application of *Richter*. This Court should grant rehearing in order to address and rectify unworkability of applying the Eleventh Circuit’s no-look-through-required rule to Florida appellate courts’ Florida Rule of Appellate Procedure 9.141 (b)(2)(D) silent adjudications of rule 3.850 post conviction claims and to impose consistency, fairness, and reliability to federal habeas review.

RELIEF SOUGHT

WHEREFORE, Petitioner respectfully requests of this court:

- (a) grant rehearing.
- (b) vacate its January 22, 2018 order denying petition for writ of certiorari.
- (c) if briefing not ordered in this case, hold this case in abeyance pending decision in *Wilson*.
- (d) enter an order vacating Eleventh Circuit's April 18, 2017 order and remanding case to Eleventh Circuit for further review.
- (e) any and all other relief this Honorable Court deems just and proper.

Respectfully submitted this 16th day of February, 2018


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CERTIFICATION (SUPREME COURT RULE 44.2)

UNDER PENALTIES OF PERJURY, I HEREBY CERTIFY THAT THIS Petition for Rehearing is restricted to the grounds specified in Supreme Court Rule 44.2 and that it is presented in good faith and not for delay.

Date Signed: February 16, 2018

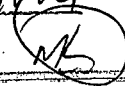


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**Additional material
from this filing is
available in the
Clerk's Office.**