

CASE NUMBER

(TO BE SUPPLIED BY THE CLERK)

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK WROTEN

PETITIONER

V.

WARDEN GORDY et....al

RESPONDENTS

ON A PETITION FOR WRIT OF CERTIORARI TO
ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

FREDERICK WROTEN

ALS #260584

Limestone Correctional Facility

28779 Nick Davis Road

Harvest, Alabama 35749

QUESTIONS PRESENTED

Does the standard used by the United States District Court for the Southern District of Alabama and the Eleventh Circuit Court of Appeals for granting a Certificate of Appealability discourage the granting of habeas relief?

LIST OF PARTIES

The following parties have an interest in the outcome of this case

1. Floyd Langford Circuit Court Judge Baldwin County Circuit Court.
2. Dixon Haley District Attorney Baldwin County Alabama
3. Granade Callie Senior Judge U.S. District Court Southern District of Alabama.
4. Jovings Sam trial counsel
5. Wayne Piggott appellate counsel
6. Scroggins James appellate counsel
7. Gordy Warden Limestone Correctional Facility Harvest Alabama.
8. Strange Luther then Attorney General for the State of Alabama
replace by Steven Marshall appointed to serve as Attorney
General for the State of Alabama.

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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

1. The decision of the United States Court of Appeals for the Eleventh Circuit Appendix #1 and is reported at Frederick Wroten v Warden, State of Alabama Eleventh Circuit Number 17-12388-D. denying Motion For Reconsideration.

2. The decision of the United States Court of Appeals for the Eleventh Circuit Appendix #2 and is reported at Frederick Wroten v Warden, State of Alabama Eleventh Circuit Number 17-12388-D denying a COA and leave to proceed on appeal IFP .

3. The decision of the United States District Court for the Southern District of Alabama Appendix #3 and is reported at Frederick Wroten v Warden Gordy and the State of Alabama Civil Action No: 16-00406-CG-C denying amended Motion For Leave To Appeal In Forma Pauperis and a COA.

4. The decision of the United States District for the Southern District of Alabama Appendix #4 and is reported at Frederick Wroten v Warden Gordy and the State of Alabama Civil Action No: 16-00406-CG-C denying Rule 59(e) Motion.

5. The decision of the United States District Court for the Southern District of Alabama Appendix #5 and is reported at Frederick Wroten v Warden Gordy and the State of Alabama Civil Action No: 16-00406-CG-C dismissing the habeas corpus petition, denying COA and leave to proceed IFP.

- * 6. The decision of the United States District Court for the Southern District of Alabama adopting the Magistrates Report and Recommendation Appendix #6 and is reported at Frederick Wroten v Warden Gordy and the State of Alabama Civil Action No: 16-00406-CG-C
7. Magistrates Report and Recommendation for the United States District Court for the Southern District of Alabama Appendix #7 and is reported at Frederick Wroten v Warden Gordy and the State of Alabama Civil Action No: CA-16-0406-CG-C.
8. The Transfer Order of the United States District Court for the Northern District of Alabama transferring the 28 U.S.C. §2241 habeas corpus petition to the United States District Court for the Southern District of Alabama Appendix #8 and is reported at Case No: 5:16-cv-00747-VEH-JHE.
9. The Alabama Supreme Court Docket Sheet order WRIT DENIED NO OPINION Appendix #9 and is reported at Ex parte Frederick F. Wroten No: 1150184.
10. The Certificate of Judgment Alabama Court of Criminal Appeals Appendix #10 and is reported at Frederick F. Wroten v State of Alabama Case No: CR-14-1038.

JURISDICTION OF THE UNITED STATES SUPREME COURT

Wroten hereby invokes the jurisdiction of the United States Supreme Court under 28 U.S.C. §§1251(b)(2); 1254(1) and 1651 (a) and (b) of the United States Code for this Court to entertain this Petition For Writ of Certiorari and the granting to him of the relief requested herein.

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STATEMENT OF THE CASE

- 1) Following a trial by jury in the Circuit Court of Baldwin County, Wroten was convicted of the following offenses; Rape First Degree a violation of Ala. Code 1975 §13A-6-61; Sexual Abuse First Degree times 2, a violation of Ala. Code 1975 §13A-6-66, on the date of May 14, 2008.
- 2) Sentencing was held on July 24, 2008 with Wroten being sentenced to a term of Life imprisonment for the offense of Rape First Degree, and two ten year sentences for the two offenses of Sexual Abuse First Degree. The two ten year sentences were ordered to run consecutive to the term of Life imprisonment.
- 3) On the date of August 22, 2008 Attorney Rusty Piggott was appointed to represent Wroten by the circuit court for purposes of appeal and on August 25, 2008 Attorney James Scroggins was retained to represent Wroten for purposes of direct appeal.
- 4) On August 26, 2008 Motion For New Trial was filed by appellate counsel(s) with a hearing date set for October 20, 2008. The Motion For New Trial was denied as a matter of law based on the 60 day time limit on October 29, 2008. With the same being dismissed on November 04, 2008.
- 5) Attorney Piggott filed Notice of Appeal in the Circuit Court of Baldwin County, subsequently assigned case number CR-07-2105 in the Alabama Court of Criminal Appeals. The Court of Criminal Appeals served a Deficiency Notice on attorney Piggott advising him that he had failed to pay the filing fee with the Alabama Court of Criminal Appeals notifying attorney Piggott that he had fourteen (14) days to correct the deficiency by paying the filing fee or Wroten's direct appeal, first appeal as of right, would be dismissed with prejudice

for failure to pay the filing fee pursuant to Ala.R.App.P. Rule 35 (A)(b).

6) On the date of November 4, 2008 Wroten's direct appeal was dismissed with prejudice pursuant to Ala.R.App.P. Rule 35 (A)(b) for the failure by attorney Piggott to pay the filing fee by the Alabama Court of Criminal Appeals with the court issuing its Certificate of Judgment on the same date.

7) Despite being aware of the dismissal with prejudice, attorney Scroggins filed a successive direct appeal to the Alabama Court of Criminal Appeals on October 13, 2009, such a filing is not contemplated nor authorized by the Alabama Rules of Appellate Procedure nor Criminal Procedure.

8) The Alabama Court of Criminal Appeals denied Application for Rehearing on January 22, 2010 issuing its Certificate of Judgment on the same date.

9) The Alabama Supreme Court denied Petition For Writ of Certiorari as filed by Attorney Scroggins in Ex parte Frederick F. Wroten 76 So.3d 877 Lexis 379 decided March 5, 2010.

11) Wroten filed his first Ala.R.Crim.P. Rule 32 post-conviction petition on March 30, 2015 in the Circuit Court of Baldwin County on March 30, 2015 raising the following issues: (a) Ineffective assistance of trial counsels; (b) Failure to predicate the tape recordings; (c) Actual innocence as to the two Sexual Abuse convictions; (d) That the offense of Rape First Degree actually constituted Rape Second Degree. Citing the holdings as established by the United States Supreme Court in Hinton v Alabama 134 S.Ct. 1081, 188 L.Ed.2d 1 2014 LEXIS 1012 82 USCL and Strickland v Washington 446 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984); U.S. v Hanif 1 F.3d

998 (5th.Cir.2009); U.S. v Howard 80 F.3d 1194 (7th.Cir.1996); U.S. v Powers 75 F.3d 335 (7th.Cir.1996); United States v Hughes 658 F.2d 317 (5th.Cir.1981); U.S. v Plunk 153 F.3d 1011 (5th.Cir.2007) and United States v Davis 780 F.2d 838,846 (10th.Cir.1985).

12. Wroten filed appeal to the Alabama Court of Criminal Appeals from the denial of his Ala.R.Crim.P. Rule 32 post-conviction petition in case no: CR-14-1038 on or about the date of May 5, 2015. Wroten raised the following issues in his appeal, (a) actual innocence of the two offense of Sexual Abuse First Degree, failure to prove beyond a reasonable doubt citing [In the matter of] Winship 397 U.S. 358, 25 L.Ed.2d (1970), the testimony of the alleged victim and the eye-witness for the State denied such ever occurred; (b) The doctrine of equitable tolling regarding an untimely filing due to extraordinary circumstances beyond his control under Knight v Schofield 292 F.3d 709,711 (1st.Cir.2002), Calderon v United States District Court 163 F.3d 530,541 (9th.Cir.1998)(en banc); that the failure of the trial court to address the violation of Wroten's substantial Due Process rights, the denial of his right to a fair trial, citing Chambers v Mississippi 410 U.S. 284, 35 L.Ed.2d 297 (1973); Washington v Davis 388 U.S. 14, 18 L.Ed.2d 1019 (1967); Davis v Alaska 415 U.S. 308, 39 L.Ed.2d 347 (1974); (c) Ineffective assistance of counsel citing Hinton v Alabama supra and Strickland v Washington supra, and the denial/abandonment of counsel as to the actions of his appellate counsels in his first appeal as of right citing Slack v McDaniel 529 U.S. at 484; Miller-El v Cockrell 537 U.S. at 327; advisory proceeding that like a trial is governed by rules Evitts v Lucey 287 U.S. 45, 77 L.Ed.2d 158 (1932), "first appeal as of right is not adjudicated in accord with due process of law ...without the effective assistance of counsel." Douglas v California 375 U.S. 353, 9 L.Ed.2d 811; prosecutorial process moves from the trial to the appellate stage. Penson v Ohio 488 U.S. 75, 102 L.Ed.2d 300 (1988).

13. Wroten filed a Rule 10(g) motion to supplement the record on appeal whereas in the Trial Transcript Order Wroten had specifically ordered that the trial transcript, the transcript of the suppression hearing held on March 19, 2007 and a copy of the State's response to his Ala.R.Crim.P. post-conviction petition referenced by the trial court in its dismissal of the Rule 32 petition, which Wroten has never received by supplied to the Alabama Court of Criminal Appeals was not in the Certified Record on Appeal.

Wroten undertook several attempts to have the record supplemented on appeal asserting, "Failure to supplement the record with these documents which are required to be a part of the permanent record inhibits and impinges Wrotens right to the appellate courts to sue for his liberty and places Wroten in a position (inhibiting) in his challenge to the State in contravention to the principles of the Fundamental Fairness Doctrine, the Equal Protection Clause and the Due Process Clause. Whereas these violations constitute a violation of his substantial, fundamental Constitutional rights of due proces of law, violating by the inhibition, abridgement of his First Amendment rightto petition for redress of grievances."

14. The Alabama Court of Criminal Appeals denied Wroten his attempts to have the record supplemented on appeal and as such Wroten was required to proceed on appeal without a full record of the proceedings which transpired in the trial court.

15. The State in its response to Wroten's appellate brief, asserted that the issues raised by Wroten in his Ala.R.Crim.P. Rule 32 petition were non-jurisdictional and that the petition was untimely filed.

16. The Alabama Court of Criminal Appeals affirmed the lower courts decision in its MEMORANDUM of October 16, 2015 agreeing with the State that the issues were precluded by Ala.Rr.Crim.P. Rule 32(c).

17. Wroten timely filed Petition For Writ of Certiorari to the Alabama Supreme Court seeking that the Standard of Review was Marbury v. Madison 2 L.ED. 1 Cranch 137, "Proceedings in nature of appeal are of various kinds according to the subject matter 3 Bl. Com. 402, It is a settled and variable principle that every right when withheld must have a remedy and every injury its proper redress."

18. Wroten submitted that in the State trial and appellate process he was denied his right to a fair trial, under Chambers v. Mississippi supra the Due Process Clause of the Fourteenth Amendment; Washington v. Texas supra the Confrontation Clause; Davis v. Alaska supra opportunity to present a complete defense; Powell v. Alabama 287 U.S. 45, 77 L.Ed. 158 (1932), Johnson v. Zerbst 304 U.S. 458, 82 L.Ed. 1461 (1938), Strickland v. Washington supra.

19. On the date of January 15, 2016 the Alabama Supreme Court denied Wroten's Petition For Writ of Certiorari, "WRIT DENIED NO OPINION" with only five of the nine Justices denying the issuance of the writ.

20. On May 3, 2016 Wroten filed his Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. §2241(c) The writ of habeas corpus shall not extend to a prisoner unless...(3) He is in custody in violation of the Constitution or laws or treaties of the United States. That 28 U.S.C. §2241 is available under escape hatch of 28 U.S.C. §2255 when petitioner makes a claim of actual innocence and (2) has not had an unobstructed shot at presenting his claim. Muth v. Fondren (2012 CA9 Mont) 676 F.3d 815.

The Northern District Court of Alabama transferred the habeas petition to the Southern District Court of Alabama on July 19, 2016 due to Wroten's conviction being in Baldwin County Alabama. The habeas corpus petition was assigned case number CA-16-04046-CG-C, assigned to Magistrate Judge William E. Cassady and Senior District Judge Callie V.S. Granade.

21. In the 28 U.S.C. §2241 (c)(3) habeas corpus petition Wrought sought that the Standard of Review would be,

"The question cannot be made to depend upon the rules of criminal evidence prevailing in the courts of the state in which the crime was committed. It must e determined with reference to the rights of the accused as secured by the Constitution of The United States. That instrument must control the action of the courts of the United States in all criminal prosecutions before them..." Motes v United States 178 U.S. 458, 44 L.Ed. 1150 (1900), and "Whenever a general rule as to property and other personal rights, or injuries to either, is established by state lefislation, its enforcement by a Federal Court in a case between proper parties is a matter of course⁴, and the jurisdiction of the court in such a case, is not subject to state limitations." Smith v Reeves 178 U.S. 436, 44 L.Ed. 1140 (1900).

22. The issues raised on appeal by Wroten in the Southern District Court of Alabama were, (1) Did the State of Alabama violate certain specific substantial fundamental United States Constitutional Rights of Wroten in obtaining the conviction and incarceration of Wroten, through the actions and deeds of State officials, agents and actors?; (1)(a) Does the holding in Motes v United States supra still control in accord with the United States Supreme Courts ruling in Smith v Reeves 44 L.Ed. 1150, 178 U.S. 458 (1900) "Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal Court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such a case, is not subject to state limitation." (1)(b) can a claim as to the ineffective assistance of counsel, a fundamental constitutional right, wherein the ineffectiveness of counsel results in the violation of substantial fundamental Constitutional rights, shown and established by the record of the trial court, be subject to state limitations." (1)(c) Can a claim of actual innocence shown by the records of the trial court, be time barred, by State limitations, which conviction was obtained by the violation of substantial fundamental Constitutional rights through the cumulative actions of State officials, agents and actors, infecting State trial by jury, prohibit Federal habeas review

by a State prisoner held in consequence thereof." (1)(d) Can a claim of violations of substantial fundamental Constitutional rights, privileges, protections and guarantees through the actions and deeds of State officials, agents and actors in a State criminal duress process, limit or deny the right to Federal habeas review of multiple convictions, actual innocence or otherwise."

23. The Magistrate Judge William Cassady issued his Report and Recommendation on September 29, 2016 wherein he held that the claim of actual innocence requires that a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of new evidence, no juror acting reasonably would have voted to find him guilty beyond a reasonable doubt, citing Schlup v. Delo 513 U.S. 298, 130 L.Ed.2d 808 (1995). Further citing Schlup that a petitioner is required to support his allegations with new reliable evidence.

The Magistrate did not address this issue as it was presented in that Wroten asserted such under the "miscarriage of justice exemption, which under Mcquiggins supra, wherein the Court cited Schlup holding that the miscarriage of justice exemption survived AEDPA's passage intact and unrestricted.

24. The Magistrate in his Report and Recommendation in order to not address the constructive denial, abandonment of appellate counsels and the claims of the denial of Wroten's substantial fundamental Constitutional Rights, focused on the limitations of the AEDPA's one year period, stating;

"Under the facts of is case, this Court need add the ninety days contemplated by Supreme Court Rule 13.1 since petitioner appealed his case to the Alabama's court of last resort on direct appeal as of right. The Alabama Supreme Court denied Wroten's petition for writ of certiorari in March 5, 2010. Petitioner had ninety days or until June 3, to petition the United States Supreme Court... Wroten's limitations period commenced on June 3, 2010 and expired on June 3, 2011."

Stating further;

"Petitioner is unable to take advantage of the tolling provision built into §2244(d), 28 U.S.C. §2244(d)(2). The time during which a properly filed application for State post-conviction or other collateral review shall not be counted toward any period of limitation in [subsection (d)], because he did not collaterally attack his convictions and sentences in the state courts of Alabama during the relevant limitations period (that is before June 3, 2011)."

25. Wroten timely filed his objection to the Magistrate's Report and Recommendation, subsequently filing a Motion To Amend Objection pointing out the errors of the Magistrate wherein he cited the errors of the Magistrate, with Wroten citing "...a litigant cannot be responsible for conduct of an attorney who is not operating in any meaningful sense of the word...", Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorney of record in fact are not representing him." "...a client cannot be charged with the acts or omissions of an attorney who has abandoned him." Maples v. Thomas 132 S.Ct. 912, 181 L.Ed.2d 807 (2012).

Wroten also cited in the Amended Objection that the claims as to counsels, regarding excuse for procedural default, equitable tolling seeking review under the holdings of Martinez v. Ryan 566 U.S. ____ 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012) and Trevino v. Thaler 569 U.S. ____ 185 L.Ed.2d 1044 (2013) "ineffective assistance of counsel on direct appellate review could amount to "cause" excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim."

26. On April 19, 2017 Senior Judge Granade of the Southern District Court of Alabama issued her ORDER adopting the Magistrate's Report and Recommendation that Wroten's habeas corpus petition filed pursuant to 28 U.S.C. §2241 be dismissed as time barred under the

Anti-Terrorism and Effective Death Penalty Act's (AEDPA) on year statute-of-limitation provision contained within 28 U.S.C. §2244(d).

Judge Granade further held regarding the actual innocence did not qualify wherein Wroten had cited that "the trial testimony of (an eyewitness) Wroten's ex-wife-as well as the trial testimony of (the victim) establish that the first degree sexual abuse offences never occurred." That such was not the type of credible evidence necessary to satisfy the McQuiggin actual innocence exception. Wherein both of these parties stated at trial that such a claim had never been made.

27. Wroten filed a Fed.R.Civ.P. Rule 59(e) Motion To Reconsider Vacate or Modify as to the validity of the proceedings in the District Court regarding his 28 U.S.C. §2241 habeas corpus petition, in that Judge Granade relied on Rozelle v. Sec'y Fla. Dep't of Corr's 672 F.3d 1000,1011 (11th.Cir.2012) in denying Wroten's 28 U.S.C. §2241 habeas corpus petition. Wroten stating that the courts of the United States are bound by the decisions, holdings of the United States Supreme Court.

"A decision is contrary to federal law if it conflicts with the governing rules set forth by the United States Supreme Court, or arrives at a different result than the United States Supreme Court when faced with materially indistinguishable facts." Pardon v. Sec'y Fla. Dept. of Corr's 607 Fed.App'x 908 at 970 (11th.Cir.2015). "...we have no authority to overrule an apparently controlling Supreme Court decisions..." Alford v. Dean Witter Reynolds Ins 905 F.2d 104 at 108. "The Supreme Court has sole authority to overrule it's own decision..." Ballew v. Continental Airlines 668 F.3d 777 at 702; Perez v Stephens 745 F.3d 174 (5th.Cir.2014)

Wroten cited that Judge Granade erred in denying the certificate of appealability before he had the opportunity to file notice of appeal, failed to respond to the constructive denial, abandonment of appellate counsels in Wroten's first appeal as of right. That such action by Judge Granade was in violation of Fed.R.App.P. Rule 22(b)

in that the rule clearly stipulates that a certificate of appealability is to be issued or denied after a petitioner files notice of appeal and seeks a certificate of appealability stating the grounds as to why he believes he is entitled to further appellate review.

28. Judge Granade of the Southern District Court issued her ORDER of June 29, 2017 as to Wroten's Fed.R.Civ.P. Rule 59(e) motion to vacate set aside and hold as naught the Court's Order adopting the report and recommendation of Magistrate Judge Cassady. Whereas Judge Granade denied the Rule 59(e) motion for the following reasons.

As to the constructive denial, abandonment of appellate counsel on direct appeal,

"He (Wroten) contends that the actions of these attorneys during his direct appeal constitute a substantial claim of ineffective assistance, which establishes cause excusing any procedural default that bars his 28 U.S.C. §2241 habeas corpus petition. The Court finds this argument barred from review."

"Except in two limited circumstances, Title 28 United States Code, Section 2244(b)(2) prohibits a state prisoner from filing a second or successive habeas corpus petition. 28 U.S.C. §2244(b)(2)(A)-(B). If one of these exceptions apply, a state prisoner must first 'obtain permission from' the Eleventh Circuit Court of Appeals before filing a second or successive petition in a district court."

"The Court has poured over Wroten's original habeas petition but cannot find that Wroten raised this argument. The Court therefore finds this new contention to be a second or successive habeas corpus petition."

"Wroten's procedural default argument based on alleged ineffective assistance of counsel is 'seemingly preemptive' and nonresponsive. The Magistrate Judge did not rely upon a procedural default by Wroten at the state level to recommend Wroten's habeas corpus petition be dismissed. And the undersigned did not adopt the Magistrate Judge's Report and Recommendation and dismiss Wroten's habeas corpus

based on a procedural default by Wroten in his state court appeal. Instead the Court dismissed Wroten's petition because he failed to file his §2241 petition within the one-year statute of limitation set forth in §2244(d)(1)(A)...because Wroten's §2241 petition was untimely, the Court could not even reach the issue argued of whether any alleged ineffective assistance of counsel established cause excusing a procedural default. Therefore Wroten is not due relief under Rule 59(e) on this point."

"Next, Wroten has not met his burden as it relates to demonstrating clear error, manifest injustice, or any other reason that justifies relief regarding the Court's conclusion on his 'actual innocence' claim and the Court sua sponte conclusion on tolling of the §2244(d)(1)(A) one-year statute of limitation."

"Additionally Wroten argues the Court should have equitably tolled the one-year statute of limitation based on his appellate counsel's actions...But this is not enough. Wroten fails to articulate his own diligent attempts to initiate a §2241 action during the relevant time period: June 3, 2010 through June 3, 2011. Without a diligent effort by Wroten during this time, he cannot equitably toll the statute of limitations."

"The Court DISMISSES Wroten's motion as a second and successive petition for habeas corpus and alternatively DENIES the motion for failure to establish a proper basis for relief under Federal Rule of Civil Procedure 59(e). DONE and ORDERED this 29th day of June 2017."

29. On May 18th, 2017 Wroten submitted his Fed.R.Civ.P. Rule 59(e) motion to the Southern District Court of Alabama, accompanied with the filing of his Notice of Appeal on the same date of May 18th, 2017, to the Eleventh Circuit Court of Appeals.

30. In June 2017 Wroten filed his "Appellant's Application/Motion For The Issuance Of A Certificate Of Appealability" to the United States Court of Appeals For The Eleventh Circuit case no:17-12388-D. Pursuant to the First and Fifth Amendment of the United States wherein he raised the following issues which he asserted entitled him to a Certificate of Appealability.

(a) That Judge Granade of the Southern District Court erred by holding that an actual innocence claim must have "new reliable evidence" wherein Wroten pled the claim under the miscarriage of justice exception. That Judge Granade relied on the contradiction between Rozelle v. Sec'y Fla. Dep't of Corrs. 672 F.3d 1000,1011 (11th.Cir.2012) and McQuiggins v. Perkins 185 L.Ed.2d 1019 (2013). Whereas McQuiggins held under Schlup that the miscarriage of justice exception survived the passage of the AEDPA intact, regarding the issue when a actual innocence claim is presented in the first habeas corpus petition that it does not require newly discovered, reliable evidence.

That the error is in the reliance by the Judge of the Southern District Court of Alabama relied on Circuit Court rulings to overcome the holding by the United States Supreme Court.

(b) That the Southern District Court erred when it failed to take notice of the actions by appellate counsels in the first appeal as of right which constituted constructive denial, abandonment of counsel. That as such the further appellate actions undertaken by the same counsel(s) and the ruling of the State courts, following dismissal with prejudice, were absent jurisdiction to do so. That pursuant to Penon v. Ohio 488 U.S. 75,102 L.Ed.2d 300 (1988) the United States Supreme Court held "...thus the judgment of a state appellate court affirming in part the conviction and sentence of a criminal defendant must be reversed."

That the application of federal law by the District Court was an unreasonable application of federal law and one that is objectively unreasonable. Further that the District Court abused its discretion wherein it relied on Williams v. McNeil 557 F.3d 1287, 1290-92 (11th.Cir.2009) which states a District Court "...does not abuse its discretion by considering an argument that was not

presented to the magistrate judge" and "has discretion to consider a party's argument when that argument was not first presented to the magistrate judge." That the facts of Williams were distinctly different from Wroten's in that in Williams the Magistrate Judge ordered the inmate petitioner to submit a response to the Respondent's filing regarding equitable tolling and the inmate did not submit a response as ordered. Whereas the distinction in Wroten's case, he was never ordered to submit a response to any claims raised by the Respondent's, due to the fact that the Respondent's in Wroten's case were never ordered to respond and never submitted any response.

(c) That the District Court erred whereas the United States Supreme Court set out the standards of review for determining whether or not a C.O.A. should be granted. Slack v. McDaniel 529 U.S. 473 (2000) and Miller-El v. Cockrell 537 U.S. 322 (2003). The C.O.A. determination under 28 U.S.C. §2253(c) requires an overview of the claims in the habeas corpus petition and a general assessment of the merits, that the threshold inquiry does not require full consideration of the factual or legal basis adduced in support of the claims. That in fact the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justify the denial of a C.O.A. based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction. Miller-El 537 U.S. 336-337.

31. The Eleventh Circuit Court of Appeals ruled in case no 17-12388-D

"To merit a COA, Wroten must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issue that he seeks to raise. See 28 U.S.C. §2253(c)(2); Slack v. McDaniel 529 U.S. 473,478 (2000). Because Wroten has failed to satisfy the first prong of Slack's test his motion for a COA is DENIED, and his motion for leave to proceed on appeal IFP is DENIED AS MOOT."

32. Wroten was served notice on September 01, 2017 that he had 21 days to file "a motion to reconsider, vacate or modify" the Eleventh Circuit Courts decision. On September 15, 2017 Wroten timely filed hi Motion To Reconsider Vacate or Modify in the Eleventh Circuit raising the following issues in support thereof;

(a) Did the District Court Judge Granade err to reversal wherein Wroten raised the actual innocence in his first habeas corpus petition, pursuant to 28 U.S.C. §2241 when the Judge held "the McQuiggins Court based its decision upon three affidavits that included statements not previously presented at trial, basing it's decision on new evidence. Wherein Wroten asserted that McQuiggins held a actual innocence claim did not have to prove due diligence to cross a federal threshold in a first federal habeas corpus petition citing miscarriage of justice.

(b) That the District Court erred as to the claim of denial of counsel, abandonment in the first appeal as of right becuase Wroten did not collaterally attack his convictions and sentences in the state courts of Alabama during the relevant limitations period. Whereas Wroten had established that the actions of appellate counsels Scroggins and Piggott by their actions, had Wrotens first appeal as of right dismissed with prejudice for failure to pay the filing fee, and deliberately withheld such information from Wroten. And that attorney Scroggins then filed a "successive direct appeal" an action not contemplated nor allowed under the Rules of Court. That these actions were undertaken in a manner that when the "successive direct appeal" had finally completed the state appellate process. Wroten was then outside the relevant limitations period to be able to file a timely collateral attack. And that this information was deliberately withheld from Wroten. Thus a substantive due process violation of a fundamental Constitutional Right.

33. The Eleventh Circuit Court of Appeals responded on October 23, 2017 ruling upon review of Wroten's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

REASONS FOR GRANTING THE PETITION

Do the standards used by the United States District Court Southern District and the Eleventh Circuit Court of Appeals for granting a Certificate of Appealability discourage the granting of habeas relief, in a case involving the violations of a petitioners substantial, fundamental Constitutional rights by State officials, agents and actors?

In Wroten's case he presented to the State of Alabama courts, at all levels of the State appellate process. The specific actions and deeds of State officials, agents and actors which violated his substantial, fundamental United States Constitutional rights. These rights being; (1) The violation of the Sixth Amendment right to confront the evidence against him; (2) His right to the assistance of counsel at critical stages of the proceedings, i.e., the first appeal as of right; (3) Substantial violations of the Due Process Clause, Fundamental Fairness Doctrine and Equal Protection of the Fourteenth Amendment; (4) The violation of Wroten's First Amendment right of access to the courts to petition for redress of grievances. Such actions have resulted in Wroten's conviction and state of imprisonment, being the consequence of a miscarriage of justice.

This Honorable Court has held;

"We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see Kuhlman v. Wilson 477 U.S. 346, 91 L.Ed.2d 364 (1986)(plurality opinion) "abusive" petitions asserting in a second petition claims that could have been raised in a first petition. see McClesky v. Zant 499 U.S. 467, 113 L.Ed.2d 517 (1997) failure to develop facts in state court. see Kenny v. Tamayo-Reyes 504 U.S. 1, 118 L.Ed.2d 318 (1992) and failure to observe state procedural rules, including filing deadlines, see Coleman v. Thompson 501 U.S. 711, 115 L.Ed.2d 640 (1991).

Wroten's being subjected to the violation of the Equal Protection Clause, the Fundamental Fairness Doctrine which violated his right to the substantial Due Process of the Fourteenth Amendment began during his trial in the Circuit Court of Baldwin County Alabama, whereas the state submitted a "tape recording" which was made by the mother of the alleged victim at the behest of Investigators for the Baldwin County Sheriff Department.

Wroten was represented by retained counsels Jovings and Messeck who had motioned for a predicate hearing to be held of which there were two predicate hearings held before trial. During the hearings, it became evident that all portions of the tape where it was being alleged that Wroten "confessed" to the alleged victim's mother that he had committed these offenses. Wroten's alleged statements were completely inaudible. However the portions of the tape where the mother is speaking the tape is perfectly clear.

Attorney's Messeck and Jovings sought for the trial judge to (a) at least listen to the tape before trial, the judge refused to do so stating that he would hear the tape for the first time when the jury heard it at trial; (b) when defense attorney's sought for the trial judge to have a transcript of the tape made before trial, he refused; (c) when the State argued to the trial judge, that the tapes were admissible under the best evidence rule, Ala.R.Evid. Rule 1002. This rule holds the opposite stating that the rule is not applicable to tape recordings. "Tape recordings are admissible unless inaudible portions are so substantial as to render untrustworthy the recording as a whole." U.S. v. Hanif 1 F.3d 998 (5th.Cir.2009); U.S. v. Howard 80 F.3d 1194 (7th.Cir.1996); U.S. v. Plunk 153 F.3d 1011 (5th.Cir.2007). Defense counsels agreed that the tapes were admissible.

When these same tapes were played at trial, the portions of the tape wherein it was alleged Wroten confessed, were wholly inaudible. This led to the point that the jury itself, interrupted the trial on

two different occasions complaining to the court that they could understand everything the mother was saying on tape, but the parts where Wroten was speaking were so inaudible that they could not understand anything he was saying. The District Attorney stated at that time, that what Wroten was saying could not be understood, defense counsels stated they could not understand anything that Wroten was saying. Even the trial court agreed over objections of the defense counsels, that even though the tape was inaudible when Wroten was speaking, that the mother could testify as what her interpretation of what Wroten was saying. The trial court also stated that it was apparent that the mother did not know how to operate the recording device.

Regarding the issue of actual innocence as presented to the State courts, as to the two offenses of Sexual Abuse First Degree. During trial the State asserted that on two occasions, once in a bedroom where Wroten was alleged to have touched the breasts of the alleged victim, and once when Wroten was alleged to have touched certain parts of the victim while attempting to wash "Magic Marker" off where the victim had drawn on herself.

During trial when the State questioned the alleged victim about these two alleged incidents, the victim repeatedly stated that these two incidents never occurred, becoming agitated with the prosecutor who kept questioning her about this. Wroten's ex-wife, who testified on behalf of the State. In regards to the bedroom incident, stated more than once that this incident never happened. Insisting that she was present in person in the bedroom at the time this alleged incident occurred and it never happened. The victim also testified that regarding the shower incident that Wroten washed off her legs and her back only.

3. Following the imposition of sentence for the offenses of Rape First Degree and the two offenses of Sexual Abuse First Degree, Wroten retained the services of Attorney Scroggins and the trial court appointed attorney Piggott as appellate counsel for purposes of first appeal as of right.

Attorney Piggott filed Wroten's appeal brief in the Alabama Court of Criminal Appeals case number CR-07-2015. The Alabama Court of Criminal Appeals served a deficiency notice on attorney Piggott whereas he had failed to pay the filing fee and that he had fourteen (14) days to correct this deficiency or Wroten's appeal would be dismissed with prejudice for failure to pay the filing fee. Attorney Piggott failed to pay the filing fee and as a result on November 4, 2008 the Alabama Court of Criminal Appeals dismissed with prejudice Wroten's appeal pursuant to Ala.R.Cpp.P. Rule 35(A)(b).

Neither attorney Piggott or Scroggins ever informed Wroten that his first appeal as of right had been dismissed with prejudice due to this failure of appellate counsel(s).

Rather, being fully aware of this, attorney Scroggins filed a successive or second direct appeal brief to the Alabama Court of Criminal Appeals on October 13, 2009, approximately eleven (11) months and two (2) days after the first appeal brief was dismissed with prejudice. This filing by attorney Scroggins was one that is neither contemplated nor allowed by the Alabama Rules of Appellate Procedure or Criminal Procedure. That as such the Alabama Court of Criminal Appeals possessed no jurisdiction to entertain nor adjudicate the merits of the issues raised therein.

However despite being absent jurisdiction, the Alabama Court of Criminal Appeals did issue an unpublished memorandum on the merits of the issues raised therein by attorney Scroggins, denying Application for Rehearing on January 22, 2010 issuing it's Certificate of Judgment on the same date.

Attorney Scroggins then filed a Petition For Writ of Certiorari to the Alabama Supreme Court which was Denied No Opinion on March 5, 2010.

4. Instead of truthfully informing Wroten as to the status of his first appeal as of right, attorney Scroggins wrote Wroten's sister a letter wherein he deliberately and knowingly misled Wroten and his family informing them that the direct appeal he was preparing for Wroten was due in the Court of Criminal Appeals by August 07, 2009 with the possibility of an extension to August 14, 2009.

Attorney Scroggins and Piggott knew that when the first appeal brief was dismissed with prejudice due to the failure to pay the filing fee, that the only recourse available to Wroten to timely challenge his conviction, was to file an Ala.R.Crim.P. Rule 32 post-conviction petition by November 4, 2009. As Alabama's Rule 32 post conviction procedure requires that a Rule 32 petition be filed after the issuance of the Certificate of Judgment, allowing only one year. Rather than doing so, when attorney Scroggins pursued a frivolous successive direct appeal brief and when the Alabama Supreme Court denied the Petition For Writ of Certiorari on March 5, 2010. Wroten was, due to the actions of attorney's Piggott and Scroggins, already four (4) months outside the one year time period of the Alabama Rule 32 post conviction procedure.

Wroten properly established in his pro se appellate actions that the "denial" or "abandonment" of counsel in the first appeal as of right, is a substantive due process violation. For as has been consistently held "...the fundamental importance of the assistance of counsel does not cease as the prosecutorial process moves from the trial to the appellate stage, the presumption of prejudice extends to the denial of counsel on appeal..." Penson v. Ohio 488 U.S. 75, 102 L.Ed.2d 300 (1988); "The Due Process Clause of the Fourteenth

Amendment guarantees a criminal defendant the effective assistance of counsel on a first appeal as of right." Douglas v. California 372 U.S. 353, 9 L.Ed.2d 811. "To prosecute an appeal as of right, a criminal defendant must face an adversary proceeding that-like a trial-is governed by rules." Evitts v. Lucey 287 U.S. 45, 77 L.Ed.2d 158 (1932). "It would strain the imagination to claim that there was some strategic tactical choice of counsel to fail to pay the filing fee for a direct appeal." "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of counsel." Douglas supra.

Wroten argued that the District Court Magistrate and Judge Granade erred in dismissing his 28 U.S.C. §2241 habeas corpus petition in that the denial and/or abandonment of counsel in the first appeal as of right is a substantial due process violation of the Sixth Amendment, the Due Process Clause of the Fourteenth Amendment. That the failure to recognize such as it has been held by the United States Supreme Court, by the State and District Courts. Consequently violated the Equal Protection and Fundamental Fairness Doctrine of the Fourteenth Amendment. That this constituted a violation of the Wroten's access to the courts pursuant to the First Amendment of the United States Constitution. That such right of access entails that Wroten is to be accorded meaningful access. That as this right is derived directly from the Bill of Rights it has long been held to be the "guardian right" of all other rights, protections and privileges accorded to all citizens, for them to be able to petition for the redress of grievances.

That the overall error of the Magistrate and Judge Granade of the Southern District Court of Alabama and the Eleventh Circuit Court of Appeals, lies in that they continued to overlook and/or ignore the consequences suffered by Wroten, which resulted in the dismissal with prejudice of his first appeal as of right. That the actions of

- his appellate counsels Piggott and Scroggins whereas the failure and refusal to pay the filing fee for his direct appeal from conviction resulted in the dismissal with prejudice. That the filing of a successive direct appeal by attorney Scroggins, which is an action that is not contemplated nor allowed by the Alabama Rules of Criminal or Appellate Procedure was as shown by the letter attorney Scroggins wrote, was a knowing and intentional false statement as to Wroten's standing in the courts.

These actions of appellate counsels not only resulted in the fact that Wroten was thus out of time for timely filing of further appellate actions following such in the first appeal as of right in the State Courts, but also from pursuing at that point a timely submission of a 28 U.S.C. §2254 habeas corpus petition in the Federal District Courts. That the successive direct appeal and then the filing of a Petition For Writ of Certiorari to the Alabama Supreme Court, resulted in Wroten being barred from filing a timely Ala.R.Crim.P. Rule 32 post-conviction petition in the State trial court. Not for any lack of diligence on Wroten's part. But only due to the intentional and deliberate actions of his appellate counsels, attorney Piggott and Scroggins to intentionally withhold and falsely inform Wroten of the true status of his first appeal as of right.

Wroten did not intentionally fail or neglect to pursue his avenues for relief. Wroten was operating under the mistaken belief that his appeal(s) were being handled properly by his attorneys, and that he could rely and trust his counsels to fulfill their duty towards him. This issue as all the issues presented by Wroten to the State and Federal appellate courts, is not his opinion, conjecture or surmise. His claims are based squarely upon the records of the State courts and the matters which transpired before them. As such his issues are and have been, substantially and evidenced by these records. Such records are not Wroten's, rather they are the very records of the lower courts.

Attorney Scroggins did raise in the successive direct appeal the issue of the inaudible tape recordings and that the mother of the alleged victim was allowed to testify to the jury as to the ultimate issue of guilt or innocence, a material fact in issue, based upon her interpretation of the wholly inaudible tape recordings as to the "statements" of Wroten, that as the trial transcript showed, no one at the trial could understand. That the testimony of the ex-wife and the alleged victim as to the two allegations of Sexual Abuse First Degree. Were that these incidents never transpired. And the testimony elicited by the State of alleged acts of other sexual impropriety by Wroten in the State of Ohio, were introduced at trial without any motion by the State regarding any intention to introduce evidence or allegations of other bad acts. That these claims were nothing more than bare allegations and that there was never any official actions undertaken by officials in the State of Ohio.

That in the application for rehearing filed by attorney Scroggins to the Alabama Court of Criminal Appeals regarding such. Attorney Scroggins did point out that contrary to the Criminal Appeals claim that these issue were not properly preserved for appellate review. Attorney Scroggins did correctly inform the court, that trial counsels properly preserve the suppression issue for appeal. By filing a timely motion in the trial court and receiving an adverse ruling. Whereas trial counsels filed a MOTION TO SUPPRESS DEFENDANTS STATEMENTS (ORAL OR RECORDED STATEMENTS MADE TO TERESE "TERRI" ALKOUALI) on July 12, 2005 and on August 04, 2005 the trial court issued an order denying the defense motion to suppress. That at trial defense counsels did properly object to the statements by the mother and their objections were overruled by the trial court.

However due to the actions of Wroten's appellate counsels failure to pay the filing fee in the first appeal as of right, and such being dismissed with prejudice pursuant to Rule 35(A) Ala.R.App.P.

Wroten argued in the Southern District Court of Alabama "Federal court jurisdiction in habeas corpus proceedings is conferred by allegations of unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings; state procedural rule must yield to this overriding federal policy." Fay v Noia 372 U.S. 391, 9 L.Ed.2d 837. Wroten also presented these same issue in the State courts, the Southern District Court and the Eleventh Circuit Court of Appeals. That due to these failures by the trial court, defense and appellate counsels in his first appeal as of right. That his custody is in violation of clearly established federal law. Citing United States v Gorel 622 F.2d 100 (5th.Cir.1979) "...independent evidence of the accuracy of the tape recordings.." where there was none; Williams v Illinois 193 L.Ed.2d 89 (2011) right to confront evidence, Confrontation Clause violation.

In order to qualify for a certificate of appealability, Wroten must show that "...reasonable jurists could debate whether (or for that matter agree that) the petition should have been resolved in a different matter or that the issues presented were adequate to deserve encouragment to proceed further." However when the State courts, the Southern District Court and the Eleventh Circuit fail or refuse to hold an evidentiary hearing to afford Wroten an opportunity to develop the relevant facts and law on record, and on denial of Wroten's habeas petition rules that he cannot show such. Then Wroten is unfairly restricted to a cold record.

Whereas in this instant case, if the State courts have made an unreasonable determination of the facts, or distorted the facts and ignored the facts of the record as in Wroten's case. And the Federal Courts failed or refused to consider these same facts of the record. Than Wroten cannot possibly meet the requirement of making a substantial showing of the denial of a constitutional right and that

reasonable jurists could debate whether the petition should have been resolved in a different manner for a COA to be granted. Nor could Wroten possibly meet the Eleventh Circuit's requirement for granting a COA which requires a different standard from the District Court, that Wroten must show that reasonable jurists would find debatable both the merits of the underlying claim, and the procedural issues that he seeks to raise.

Because the facts are what give rise to the applicable law and constitutional violations, especially in this case whereas claims of ineffective assistance of counsel, constructive denial, abandonment of counsel, are mixed questions of fact and law under Strickland v Washington 466 U.S. 668,698 (1984). When the State courts distort or ignore the issues containing the facts, then, the District Court and the Eleventh Circuit ignore this in their ruling it is certainly unfair making it impossible for Wroten to meet the differing standards for granting a COA.

"The writ of habeas corpus is a new suit brought by the petitioner to enforce a civil right, which he claims as against those who are holding him in custody. The proceeding is one instituted by himself for his liberty and not the government to punish him for his crime. The judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. It is not a proceeding in the original action." 1 Bailey, Habeas Corpus and Special Remedies (1913) §4.

CONCLUSION

The petition for writ of certiorari should be granted, counsel appointed to represent Wroten, and counsel afforded an opportunity to file a brief in this case in Wroten's behalf.

Done this 12th day of January 2018.

Respectfully submitted



Frederick Wroten

Petitioner pro se

CERTIFICATE OF SERVICE UNDER OATH

I hereby swear under penalty of perjury and certify under oath that I am on this the 12th day of January 2018 serving a copy of the foregoing upon the Clerk of the U.S. Supreme Court - 1 First Street N.E. - Washington D.C. 20543 and upon Counsel for the Respondents, Steven Marshall Alabama Attorney General - 501 Washington Avenue - P.O. Box 300152 - Montgomery Alabama 36130-0152, by placing copies of the same in the U.A. Mail, Limestone Correctional Facility Legal Mail System, properly addressed postage prepaid prior to the close of the normal business day.

Respectfully submitted



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