No. ____________

In The
Supreme Court of the United States

KYLE RAY HIMES,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1 - *RICHTER* OR *YLST*?: On the eve of trial, Mr. Himes's neutral alibi witness disappeared. Mr. Himes moved for a continuance to locate her. The Florida trial court denied his request for one reason: the "matter ha[d] been set for trial for two months" and needed to move forward. A jury found Mr. Himes guilty. On direct appeal, Mr. Himes argued that the continuance denial violated his federal constitutional rights. The Florida appellate court affirmed in a per curiam opinion without explanation. A federal district court granted Mr. Himes's § 2254 habeas petition and the Secretary appealed. The Eleventh Circuit reversed because the district court "looked through" the silent appellate affirmance and considered the only rationale offered anywhere in the state-court record to explain the state-court decision: the trial court's ruling.

When the only stated explanation for a trial court's decision contained in a state-court record is the trial court's original ruling, should a federal habeas court "look through" a silent affirmance by a reviewing state court, as described in *Ylst v. Nunnemaker*? Or does *Harrington v. Richter* require federal habeas courts to ignore the trial court's explanation and confine its assessment to the myriad possible—but unexplained—reasons the state appellate court affirmed, as held by the Eleventh Circuit in *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016) (en banc), *cert. granted sub nom., Wilson v. Sellers*, 137 S. Ct. 1203 (2017) (No. 16-6855).

Question 2 - Deference to District Court Factual Findings: Comparison of the district court's order and the Eleventh Circuit's opinion establishes that the panel substituted its own factual findings for the district court's on two critical points. But the panel was discreet—it did not mention the district court's contrary findings or explain how they were erroneous. Instead, the panel cited Eleventh Circuit precedent for the proposition that review of a district court's grant of habeas relief pursuant to § 2254 should be conducted de novo.

Did the panel properly rely on Eleventh Circuit precedent to review the district court's factual findings de novo, or was the panel required—by Federal Rule of Civil Procedure 52(a) and this Court's decisions in *Knowles v. Mirzayance* and *Anderson v. Bessemer City*—to review for clear error?

QUESTION 3 - FAILURE TO ARGUE FACTUAL FINDINGS ARE CLEARLY ERRONEOUS: In the "Statement of Case/Procedural History" section of its principal brief to the Eleventh Circuit, the Secretary recited facts the district court specifically rejected in its order granting habeas relief. But the Secretary never argued the district court's findings were clearly erroneous. Was the Eleventh Circuit required to accept the district court's factual findings as true?

QUESTION 4 – CLEARLY ESTABLISHED LAW: The district court found the denial of Mr. Himes's continuance request was contrary to, or involved an unreasonable application of, this Court's decisions in *Ungar v. Sarafite* and *Kemna v. Lee*. The Eleventh Circuit acknowledged the factual similarities between Mr. Himes's case and *Lee*, but because the *Lee* Court did not reach the defendant's due process claim on the merits, the Eleventh Circuit determined *Lee* did "not clearly establish that the denial of a motion for continuance to secure an alibi witness amounts to a due process violation." Did the Eleventh Circuit correctly determine that *Kemna v. Lee* has no bearing whatsoever on whether federal law clearly establishes that a denial of a justifiable request for a continuance to locate an alibi witness, purely for the sake of expediting resolution of the trial, constitutes a due process violation?

PARTIES TO THE PROCEEDING

Petitioner, Kyle Ray Himes, was the appellee in the United States Court of Appeals for the Eleventh Circuit. Respondent, Secretary, Florida Department of Corrections, was the appellant.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Kyle Ray Himes, respectfully petitions this Court for a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals.

DECISIONS BELOW

Florida's First District Court of Appeal entered an unwritten per curiam affirmance on Mr. Himes's direct appeal. *Himes v. State*, 8 So.3d 1136 (Fla. 1st DCA May 14, 2009) (table); App. 165. The United States District Court for the Northern District of Florida entered an order granting Mr. Himes's § 2254 habeas petition and vacating his Florida robbery conviction on February 2, 2016. App. 84-134. The district court's order is unpublished, but available at 2016 WL 411013 (M.D. Fla. February 2, 2016). On June 5, 2017, the Eleventh Circuit issued a written opinion reversing the district court's order granting habeas relief. *Himes v. Secretary*, Fl. Dep't of Corr., 690 Fed. Appx. 640 (11th Cir. 2017). App. 144-161.

BASIS FOR JURISDICTION

On June 5, 2017, the Eleventh Circuit issued a written opinion reversing the district court's order granting habeas relief. App. 144-161. Mr. Himes timely petitioned for rehearing and rehearing en banc. The Eleventh Circuit denied Mr. Himes's petition for rehearing and rehearing on banc on December 1, 2017. App. 163-64. This timely petition follows. Jurisdiction lies in this Honorable Court. *See* 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part that "[n]o person shall" be "deprived of life, liberty, or property, without due process of law..."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to...have compulsory process for obtaining witnesses in his favor..."

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

I. Introduction

Because the trial court made no factual findings in support its denial of Mr. Himes's continuance request, and because Florida's First District Court of Appeal affirmed without opinion, the state court record does not contain any factual findings pertinent to Mr. Himes's habeas claim. As a result, to resolve the parties' factual disputes in the habeas proceedings, the district court culled the state record and made extensive factual findings. Neither the Secretary nor the Eleventh Circuit assigned error to those factual findings, so Mr. Himes relies on them in this petition.

The "State Court Proceedings" section below is reproduced verbatim from the district court's order granting Mr. Himes habeas relief. For ease of reading, Mr. Himes has omitted the district court's citations to the state court record in the reproduced version below. But it should be noted that for each assertion of fact in the order granting habeas relief, the district court painstakingly cited to the state court record. The footnotes that appear below are footnotes from the district court's order.

II. *State Court Proceedings*

In the Procedural History section of the order granting habeas relief, the district court described the relevant state-court events as follows:

> On January 25, 2007, Petitioner was charged by information with robbery. On June 14, 2007, he waived speedy trial. The defense witness list, filed November 1, 2007, included Samantha Mann, Jamie Gilbreth, and Regina Walker. With a final pre-trial scheduled for December 6, 2007, on December 5, 2007, defense counsel moved for a continuance in order to prepare for trial, including conducting depositions of witnesses that both sides were unable to locate, and to locate additional witnesses and complete depositions for those additional witnesses. The trial court, in its January 25, 2008 Trial Order, scheduled a final pretrial for February 28, 2008, and trial for March 10, 2008.
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> On February 14, 2008, Petitioner filed a Notice of Filing Original Transcripts of Witnesses. The state filed its Statement of Particulars and Demand for Notice of Intention to Claim Alibi. On February 28, 2008, Petitioner filed his First Amended Defense Witness List that again included Regina Walker. Also on that date, Petitioner filed his Notice of Alibi, stating that he was at Jaime Gilbreathe's [sic] house, and that Regina Walker, of that same address, would provide testimony to establish that

fact. The state responded by providing its List of Defense Albi Rebuttal Witnesses, including Jamie Gilbreth, Raychel [sic] Gilbreth, Sharon McLendon, Teresa Roberts, Erica Leach, and Detective King. Depositions of Samantha Manin, Jamie Gilbreth, and Regina Walker were taken on February 28, 2008.

On March 10, 2008, Petitioner filed a Motion for Continuance seeking more time to locate witness Regina Walker who relocated to Georgia. Defense counsel claims he "was notified by Regina Walker's step-father, Michael Nilio on Sunday, March 9, 2008 at approximately 2:30 p.m." of this relocation. On March 10, 2008, Robert Davis, defense counsel, advised the court of the events which prompted the filing of a motion for continuance. He explained:

> Yes, Your Honor, I filed that this morning. I made the State aware that we were told by individuals living in the area of Regina Walker on Friday that she was in the process of moving. We had hired both a processor and an investigator over the weekend. I was contacted by her stepfather Sunday between 3:30, if I'm not mistaken, and 4:00, and he advised us that she has moved to Georgia. He does not have a phone at this time and he's not sure of her address or how to get in touch with her.
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> She was Mr. Himes' notice of alibi and therein lies the problem. She was aware this was set for trial this date because when her depo was done we had an informal conversation saying that we intended for this to go forward and we would be needing her, but she was not under subpoena at that time. She was placed under subpoena mid last week and it was posted at her residence, which her father or stepfather got, and that's when he contacted us when he came back into town, and therein lies the problem, Your Honor.
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> Other than that, we are prepared and ready to go. The State is also ready, and we have been in very close contact. Everything other than Ms. Walker's testimony is ready to go.

The court asked Mr. Davis what relief he was seeking. Counsel responded:

> Your Honor, based upon the fact that I don't have my alibi witness available, we would ask for a continuance to locate her, be able to get her under subpoena and go [to] your next available trial date based on the fact that this has come up at the last minute unbeknownst to either the State or I.

The state opposed the motion for continuance:

> The case was set for trial on January 24th of 2008, and today is March 10th, 2008. It appears that this witness was attempted to have been served within only the past week. Your honor, the deposition was taken, I took – personally took the deposition of this defense witness, alibi witness approximately two and- a-half weeks ago and at that time I believe there was a conversation with her. Um, I did not place her under subpoena. She was not a State witness. Um, and I –- Mr. Davis may have spoken to her, I believe he did, about being there, but at that time I don't think she was under subpoena.
>
> Um, Your Honor, I took her deposition and she stated that the defendant may have been with her on that day, but she's not sure if he was or wasn't. And at some point in that time frame there was a barbecue at her house, but she could not be certain that this was the particular day and time the defendant was there. And I would oppose this motion, Your Honor. We have –- the State has subpoenaed eight different witnesses to come testify today. These witnesses have all been very difficult to track down and they have all taken time out of their normal schedules to be here. We have jurors here prepared to sit on this trial and have also taken time out of their schedule, and it would be a great burden upon the State if we were to have to continue this trial and reorganize all these witnesses to come testify against the defendant.

Mr. Davis addressed the relevancy and importance of Ms. Walker's testimony:

> Um, just in what Mr. Padgett [the prosecutor] has said about her testimony. She did say that it was her belief that Mr. Himes was with her on the date that the bank was robbed, at her residence for the barbecue. She wasn't sure of the exact date that the bank was robbed, but she knows that on the date of the robbery Mr. Himes was at her house for the barbecue, and also watching videos until well after dark, which would be the same time the bank was robbed.
>
> Based on that I would argue to the Court that her testimony would be critical and that it would have weight before the jury for the jury to consider whether or not this is a credible alibi witness. Your Honor, um, we attempted several times in the last ten days – we made four attempts, um, to try to personally serve her, and then that's when it was posted and her stepfather contacted us as to her unavailability.

That was beyond our control, Your Honor, which is why we're asking for the continuance to bring her or have her back before the Court so that she can provide testimony.

The court inquired as to when the witness subpoena issued. Mr. Davis said the posting was "on Thursday of last week[.]"[1] He explained that numerous attempts were made "for the ten days prior to that to actually physically serve her in person."[2] The court asked again "when was the subpoena issued for service?" Before receiving a response the court referred to the affidavit of service from C. K. Legal Support dated March 6th. Mr. Davis explained that a different process server, River City Legal Service (River City), had been unsuccessful, and that is why Mr. Davis sought out the assistance of C. K. Legal Support. He said River City unsuccessfully attempted service "approximately between February 23rd and March 1st[.]"[3] River City told Mr. Davis that the address provided did not exist, but Mr. Davis knew otherwise because the witness appeared at the deposition on Thursday, February 28, 2008, under a prior subpoena for deposition. When River City's efforts proved unsuccessful, Mr. Davis employed C. K. Legal Support to make another attempt to obtain successful service. The trial court, after hearing this explanation said: "I'm going to deny the motion for continuance. The matter has been set for trial for two months and I believe we need to move forward on the matter."

Petitioner proceeded to a jury trial on the robbery charge. The jury returned a verdict of guilty as to the charge of robbery. Petitioner filed a Motion for New Trial claiming that he was prejudiced by the denial of a continuance to produce a properly subpoenaed witness. The trial court denied the motion on March 19, 2008.

On April 17, 2008, the trial court conducted a proceeding on a pretrial for a different charge and a sentencing for the robbery conviction. During the course of the proceeding, Mr. Davis advised the court that a short recess was needed to address the matter that "there may have been perjured testimony both during depositions and during the trial[.]" The court decided to immediately address the issue and put the individual, Raychelle Leanne Gilbreth, on the stand. Ms. Gilbreth said she was not completely honest

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[1] The proceeding took place on Monday, March 10, 2008. The phrase "on Thursday of last week" apparently refers to Thursday, March 6, 2008.

[2] Ten days prior to Thursday, March 6, 2008, would be Monday, February 25, 2008. Ten days prior to March 10, 2008, would be Friday, February 29, 2008, the day after the deposition of Regina Walker.

[3] Mr. Davis referenced the period from Saturday, February 23, 2008, through Saturday, March 1, 2008.

during her deposition, but she was honest at trial about everything except the money, revising her testimony and stating she received half of the money. Mr. Davis asked Ms. Gilbreth if she was truthful when she said it was all Mr. Himes' idea. She responded that they played equal parts. She admitted that she was the one who robbed the bank. When asked if Mr. Himes planned the robbery, she responded she did not know. Mr. Davis reminded her that during the trial she said Mr. Himes planned it, wrote the note, and forced her to participate. Ms. Gilbreth testified that Mr. Himes did not force her to do anything or tell her to go in and do it.

Ms. Gilbreth stated she held back during the depositions to protect a friend and herself. She confirmed that she wrote a letter to a friend, Christopher Ensminger, about lying during the depositions and withholding information from the defense.[4] On cross, Ms. Gilbreth said her testimony at trial that Petitioner was a participant in the robbery and received money was truthful. She reiterated that Petitioner drove her to the scene of the robbery. She stated that other than her retention of half of the money, her testimony at trial was correct.

In response to her revelation of untruthfulness, the court said:

> Well, Mr. Padgett, one of my concerns is that in this letter Ms. Gilbreth states that as a result of her testimony at trial, and her statement is, yes, the trial made Kyle look very worse than it really was. I'm not sure that the outcome would be any different, but I think that there has been some showing that there may have been some prejudice. And I assume, Mr. Davis, you're moving for a new trial.

Mr. Davis agreed and orally moved for a new trial, and the court granted the motion. The court directed that Ms. Gilbreth be taken into custody and be held for her perjured statements. He also directed that no bond be set because she said [in the letter] she would not show up for a re-trial. The court said to Ms. Gilbreth: "You raise your right hand, you take an oath, you

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[4] Raychelle Gilbreth's letter to Christopher Ensminger is dated April 11, 2008. In the letter, Ms. Gilbreth mentions that she provided "another version" of what happened at Himes' trial. She states that she never wanted to hurt Himes and hates herself for what she did. She admits that she lied in the depositions. She states "the trial made Kyle [Himes] looks way worse than it really was[.]" She states that she cried when she saw him in a jumpsuit, and that is when the "truth hit" and she realized she messed up. She also said that if Himes were to get a retrial due to the inconsistencies in her "depo's & all," she would not show up. She admitted she robbed the bank, "but he was there."

> lie under oath, you reap the consequences. You have made a mockery of this system. You have wasted the time and resources of this Court."
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> On April 21, 2008, the state moved for rehearing asserting the motion for new trial was untimely and various procedural reasons for reversal of the court's decision. The trial court conducted a hearing on April 24, 2008. At this point, new counsel, Frank Tassone and Rick Sichta, represented Petitioner, and Mr. Sichta stated it was their recommendation to their client that the motion for rehearing was meritorious as the trial court was divested of jurisdiction when it ordered the new trial, and that there was no objection to the motion in that respect. The court granted the state's motion for rehearing, vacated the order for new trial, and passed the case for sentencing.
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> ...
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> Petitioner appealed the robbery conviction and sentence. In the Statement of Judicial Acts to be Reviewed, two acts are mentioned: error in denying the motion for new trial and error in denying the motion for continuance with respect to the defense procuring an alibi witness for trial. Petitioner filed an appeal brief, the state answered, and Petitioner replied. On May 14, 2009, the First District Court of Appeal affirmed per curiam. The mandate issued on June 1, 2009.

App. 88-96.

IV. *Federal Habeas Proceedings*

A. The Parties' Arguments

In his habeas petition, Mr. Himes claimed he was "deprived of his Fifth and Sixth Amendment rights to due process and a fair trial when the trial court denied a motion for continuance, preventing [Mr. Himes] from calling his sole alibi witness, Regina Walker." App. 99. Mr. Himes urged the district court "to find that the state court's failure to permit a continuance to allow the defense to locate the sole alibi witness was a decision that was contrary to or an unreasonable application of" *Lee* *v. Kemna*, 534 U.S. 362 (2002), and *Ungar v. Sarafite*, 376 U.S. 575 (1964). App. 99-100.

The district court described the parties' respective positions as follows:

> Petitioner, in his Memorandum, relates that there is striking similarity between his situation and that addressed by the Supreme Court in Lee. The similarities are described as the sudden absence of alibi witnesses, impending or active trial proceedings with limited time to address the situation, well- founded motions for continuance properly filed with the trial court, and trial court rulings based on judicial expediency.
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> Respondents, in their Response, state that this ground is without merit and is due to be denied. They contend that the decision in Lee does not constitute clearly established Supreme Court precedent because the Supreme Court simply reversed and remanded the case for consideration of the due process claim.
>
> Respondents also challenge Petitioner's reliance on Ungar, describing Ungar as setting forth "a rather vague rule[.]" Focusing on the asserted vagueness and lack of specificity of the rule in Ungar, the leeway allowed for courts to reach outcomes in case-by case determinations, the discretion of the trial court in making a continuance decision, and the required AEDPA deference, Respondents are adamant that Petitioner cannot, under these circumstances, demonstrate an unreasonable application of clearly established Supreme Court law. Instead, relying on United States v. O'Neill, 767 F.2d 780, 784 (11th Cir. 1985), they assert that Petitioner cannot show an abuse of discretion (prior due diligence to obtain the presence of the witness, demonstration of substantially favorable testimony by the witness, the availability of the witness and willingness to testify, and material prejudice).
>
> In this regard, the only spoken reason for denial of the motion for continuance by the trial court is that the matter had been set for trial for two months and the court believed it needed to move forward on the matter. Without explicit record support, the state surmises that "the state court reasonably determined that Petitioner failed to meet any of the four required elements[.]" Upon review, at most, the record demonstrates a disposition by the court that focused on expeditiousness, without relating any analysis or employment of relevant factors to deny the request for continuance.

> Petitioner, in his Reply, counters that Respondents have not adequately recognized the result in Lee, in which the Supreme Court made its decision that an adequate due process claim was properly raised, and remanded the case for the express purpose for the district court to address the due process claim. Reply at 7. "Had the constitutional right not existed, as the Respondent so asserts, the Supreme Court would not have remanded specifically for its consideration." Id. As a result, Petitioner submits that Petitioner's right to due process of law was violated when the state court denied the continuance, "which was contrary to or an unreasonable application of clear Supreme Court precedent." Id.

App. 104-5.

B. The District Court's Factual Findings

In the Findings of Fact and Conclusions of Law section of the order granting habeas relief, the district court rejected several of the Secretary's assertions of fact on important points. For instance, the district court disagreed with the Secretary's assertion that Ms. Walker's deposition testimony established she would not have been able to provide Mr. Himes with an alibi.

> Mr. Davis [trial counsel for Mr. Himes] informed the court that it was Ms. Walker's belief that Mr. Himes was with her on the date that the bank was robbed. He explained: "[s]he wasn't sure of the exact date that the bank was robbed, but she knows that on the date of the robbery Mr. Himes was at her house for the barbecue, and also watching videos until well after dark, which would be the same time the bank was robbed." Mr. Davis further advised the court that her testimony was "critical."

App. 112-113.

In response to Mr. Himes's habeas petition, the Secretary maintained, as it did during the state appellate proceedings, that Regina Walker's appearance at trial would not have been "substantially favorable" because her deposition testimony "indicated that she could not pointpoint the exact date that Petitioner was supposedly at her residence . . . . " App. 51. In a lengthy footnote, the district court carefully explained—with citations to the state-court record—the obvious reason Ms. Walker's uncertainty about the specific date was much ado about nothing: it was undisputed at trial that the barbeque and the bank robbery occurred on the same day.

> At one point during her deposition Ms. Walker firmly stated Mr. Himes was at her house on the date of the robbery, but upon additional questioning she was unsure of the date. However, Ms. Walker stated that she had written down the date of the barbecue on her Jax Navy calendar, and she might be able to find the calendar to confirm the actual date of the barbecue. Of import, at trial, Jamie Lee Gilbreth testified that on December 8, 2006, people were hanging out at their house, although he testified that Mr. Himes left the house in the afternoon. Erica Leech also testified that there was a party at Jamie Gilbreth and Regina Walker's house on December 8, 2006, and a number of people, including Mr. Himes, attended the party and were watching videos. She too testified that Mr. Himes and Raychelle Gilbreth left the house in the afternoon. In light of all of this testimony, it is quite apparent that all of those involved described the barbecue/party as taking place at Ms. Walker's house on December 8, 2006, the date of the robbery.

App. 112 n. 12.

The district court found Ms. Walker's testimony was unique, based on the following findings of fact:

> Since Ms. Walker was the sole alibi witness, her testimony was unique. In her absence, Petitioner took the stand to testify about his attendance at the barbecue, which ultimately resulted in his admission to having fourteen felony convictions. He had no other alibi witnesses to support his testimony that he attended the party and was in the house at the time of the robbery. Of further significance, Ms. Walker's boyfriend, Jamie Gilbreth, with whom she was living, testified that Mr. Himes was present at the house, but left the house prior to the robbery taking place. On cross, Mr. Gilbreth admitted that prior to the trial he had contacted Mr. Davis several times stating that he knew Mr. Himes was innocent and did not participate in the case. Also of note, Mr. Gilbreth is the brother of the co-defendant bank robber Raychelle Gilbreth. Of additional significance, prior to Mr. Himes' trial, Mr. Gilbreth was arrested and facing pending unrelated charges, and he testified that he hoped that his testimony favorable to the state in the

case would cause the state to make a favorable recommendation to the court in his sentencing.

Raychelle Gilbreth, the co-defendant, also took the stand against Petitioner. She testified that when Mr. Himes' mother had her bond revoked on a different matter two days after the bank robbery, Ms. Gilbreth denied having any knowledge of the bank robbery. Later on, she admitted to robbing the bank, and also implicated Petitioner, once Detective King told her there were ongoing domestic issues and he would go to the State Attorney's Office to help her out if she told them what they needed to know about the bank robbery.

[FN 14] Raychelle Gilbreth admitted that she lied in both the trial and her deposition. She was convicted of perjury for her dishonesty in Mr. Himes' case. See Case no. 08-CF-344. The court revoked her plea in robbery Case No. 06-CF-1220 based on her perjurious testimony in Himes' case, and she was sentenced to thirty months in jail, running concurrently with her robbery sentence. Of note, at Himes' trial, Ms. Gilbreth testified that Himes came up with the idea for the robbery, planned the robbery, told her what to wear, wrote the note, drove the car, told her where to meet afterwards, and provided her with a camouflaged hat. On April 17, 2008, she initially stated that her trial testimony was honest except with respect to who kept the money, but later on in her testimony, she retracted from that statement. She said the robbery was not just Himes' idea, and that they played equal parts. She said she did not know if Himes planned the robbery. She explained that he did not make her rob the bank or force her to rob the bank. Finally, she said she withheld information at the deposition.

The favorable tenor of Ms. Walker's testimony is quite evident. Unlike Mr. Gilbreth and Ms. Gilbreth, she was not facing pending criminal charges. She had no obvious motive to lie or stretch the truth about whether Mr. Himes was at her house on the date and time of the bank robbery.

App. 113-115.

The district court also specifically found Ms. Walker's testimony was not cumulative:

Regina Walker's testimony was certainly not cumulative, as she was the sole alibi witness. She had been deposed, and her testimony proved unique, relevant, and material to the defense. There is clear evidence that defense

> counsel made diligent and repeated efforts to attempt to find Ms. Walker as he knew her testimony would be quite favorable and not repetitive.

App. 115.

Finally, the district court found the denial of Mr. Himes's continuance request resulted in "specific substantial prejudice because Ms. Walker's testimony was vital to the defense." App. 116. In support, the district court relied on the following factual findings:

> Petitioner was not able to adduce this favorable testimony through any other witness. Ms. Walker countered the testimony of the state's primary witnesses who had reason to bend the truth or who were actually convicted of untruthfulness. Several of the state's witnesses had criminal convictions and/or were facing pending criminal charges. After the trial, Raychelle Gilbreth admitted she committed perjury and was convicted of perjury. Mr. Gilbreth, who was facing an unrelated criminal charge when he testified at Himes' trial, admitted at trial that he contacted defense counsel prior to the trial to tell him that Mr. Himes was not involved in the bank robbery, then subsequently changed his story after he was arrested and testified against Mr. Himes. Teresa Roberts admitted that she told the police in her statement that a white male was driving the car. At trial, she testified that Mr. Himes was driving the car and she simply failed to tell the police who was driving the car.
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> The importance of Ms. Walker's testimony is quite evident, as she offered "the only support for the affirmative defense of alibi." Lee v. Kemna, No. 98-0074-CV-W-HFS, 2004 WL 1575555, at *3 (W.D. Mo. July 8, 2004) (on remand from the United States Supreme Court). In Lee, the district court found not only a due process violation "on the face of things," but prejudice because confidence in the outcome was undermined by the denial of a continuance and the absence of the alibi witnesses. Id. Similarly, in the case at bar, a continuance "was required by due process," and, most significantly, "petitioner had . . . [a] generally credible [witness] for an alibi defense." Id. at *6.

App. 116-117.

Before announcing its ruling, the district court acknowledged the deference owed under AEDPA to a discretionary decision by a state court:

This Court is mindful that it must apply the deferential standard of review required by AEDPA and the requirements for review of a denial of a motion for continuance. Even doing so, the Court finds that the state court's decision was contrary to, and involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

App. 118.

The district court summarized its ruling as follows:

The state court decision was an unreasonable application of clearly established Federal law. Here, Petitioner presented material evidence that Ms. Walker would testify in his favor and would directly counter the testimony of the state's witnesses. Her sworn deposition was evidence that supported the contention that her testimony would be favorable and exculpatory to the defense. The record shows that defense counsel exercised due diligence in attempting to locate and procure the presence of Ms. Walker for trial. Also, defense counsel provided sufficient information that demonstrated there was a reasonable probability that Ms. Walker could be located as counsel had just been advised that she had moved to Georgia, and there was no evidence that Ms. Walker would change her purported favorable testimony if the trial court granted a continuance.

Under these circumstances, the state court decision is not objectively reasonable. Williams v. Taylor, 529 U.S. 362, 411 (2000). The request for a continuance amounted to a short delay, to the next available trial date. Petitioner only made one previous request for a continuance. Although there may have been some inconvenience to those involved if a continuance had been granted, the alternative was for the defense to go be forced to go to trial without its critical alibi witness.

The record demonstrates evidence of "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" which resulted in the Petitioner proceeding to trial without a critical alibi witness. Ungar, 376 U.S. at 849. The trial court's decision, as presented in the record, was based on the fact that the case had been set for trial for two months and the court believed it needed to expedite matters. Although there is no mechanical test for deciding whether this denial of a motion for continuance is so arbitrary as to violate due process, under the circumstances presented in this case, it is quite evident that Regina Walker's testimony was both significant and crucial to the defense. In balancing the competing interests, Petitioner's right to present his alibi witness "outweighed any inconvenience" that would have resulted in granting a continuance. It would not be objectively reasonable to conclude the state trial court was

> within its discretion to deny the continuance under these circumstances. In this instance, the silent affirmance of the trial court's denial of Himes' request for a continuance was both contrary to and an unreasonable application of Supreme Court precedent. Ground one of the Petition is due to be granted.

App. 119-121.

C. Eleventh Circuit Proceedings

The factual findings the district court made were critical to its disposition of Mr. Himes's habeas petition. The Secretary knew this when it appealed, because the district court rejected the Secretary's interpretation of the factual record on almost every meaningful point, painstakingly making detailed references to the record in its order.

Two factual findings made by the district court are worth emphasizing to put the Eleventh Circuit's holding into perspective. First, the district court disagreed with the State's contention that Ms. Walker's testimony would have been unhelpful because she was unable to identify the date of the barbeque with precision. In a lengthy footnote, the district court explained that Ms. Walker "firmly stated Mr. Himes was at her house on the date of the robbery." App. 112 n. 12. The district court emphasized that Ms. Walker's uncertainty about the exact date of the barbeque and robbery was meaningless because it was undisputed at trial or anywhere else in the record that both the robbery and barbeque took place on the same day, December 8, 2006.

Second, relying on the facts it carefully culled from the state record, the district court found that the "importance of Ms. Walker's [alibi] testimony is quite evident" (App. 117) and that Mr. Himes demonstrated "specific substantial prejudice" because Ms. Walker's testimony "was vital to the defense" and would have "countered the testimony of the state's primary witnesses who had reason to bend the truth or who were actually convicted of untruthfulness." (App. 116-17). As a result, the district court found that Ms. Walker's "testimony was certainly not cumulative." (App. 115). These findings were the basis for the district court's conclusion that the Florida appellate affirmance of the trial court's continuance denial was an unreasonable application of clearly established federal law.

On appeal, the Secretary contended in its principal brief that the district court erred in concluding that the Florida appellate court's affirmance involved an unreasonable application of clearly established federal law. Mr. Himes responded that the Secretary's argument failed because it relied on factual findings that lacked support in the state-court record, and were rejected by the district court.

To wit, the Secretary urged the Eleventh Circuit to overturn the district court's decision, and in so doing, presented its own lengthy recitation of the facts in the "Statement of Case/Procedural History" section of its principal brief. (Sec's Br. at 1-21). But the vast majority of the facts relied on by the Secretary in its brief were not argued to the district court as a basis for denying Mr. Himes's habeas petition. (Compare Sec's Br. at 1-21 with Doc. 13 at 13-15). And the facts the Secretary did rely on in its response to Mr. Himes's petition were expressly rejected, in detail, in the district court's order.

Yet, the Secretary did not assign error or otherwise argue in any way that the district court's factual findings were erroneous in the briefing to the Eleventh Circuit. At the same time, the Secretary acknowledged in its brief that the proper standard of review for district court findings of fact in habeas proceedings is for clear error. (Sec. Br. at 21) (citing *Bellizia v. Florida Dep't of Corr.*, 614 F.3d 1326, 1329 (11th Cir. 2010)). In his brief, Mr. Himes argued that the Secretary simply presented facts contrary to the factual findings made by the district court, but failed to argue either (1) that the district court's factual findings were incorrect, much less "clearly erroneous" or (2) that the district court somehow erred by finding Mr. Himes successfully rebutted the presumption of correctness afforded to (non-existent) state court factual findings. (Himes's Am. Br. at 17-19).

Consequently, Mr. Himes contended, despite the Secretary's lengthy recitation of the facts, it waived any argument on appeal that the district court erred by finding and relying on contradictory facts in concluding that Mr. Himes was entitled to habeas relief. (Himes's Am. Br. at 19). At the very least, the Secretary failed to establish that the district court's factual findings were "clearly erroneous." As a result, argued Mr. Himes, "this Court should not reverse the district court on the basis that its factual findings yield to those relied on by the State to argue the First DCA's affirmance was objectively reasonable." (Himes's Br. at 20).

But that is precisely what the panel did. The panel concluded that the Florida appellate court's affirmance was not an unreasonable application of *Unger* because Regina Walker's testimony at trial would not have been helpful for Mr. Himes. That conclusion was based on the Eleventh Circuit's factual finding that Ms. Walker "was not even sure about the date of the barbeque" and "could not say for certain if Petitioner was at her house on the date of the robbery." App. 159. Even if she was certain of those facts, the panel found it would not have mattered because "at least two other witnesses" testified Mr. Himes was at Regina Walker's house on the date of the robbery. *Id.* The panel did not specify who those witnesses were, but found they both testified further that Mr. Himes left with Raychelle Gilbreth before the robbery occurred.

Thus, the Eleventh Circuit found that Ms. Walker's testimony would have been "cumulative of other witness testimony." *Id.* This was in direct contradiction to the district court's finding that "Regina Walker's testimony was certainly not cumulative." App. 115. The panel also noted that while Raychelle Gilbreth later admitted she lied about "some things during her testimony at trial, she continued to maintain her testimony that Petitioner was involved in the robbery." App. 160. Based on these findings, and these findings alone, the Eleventh Circuit concluded: "Therefore, the Florida appellate court's decision affirming the denial of Petitioner's continuance motion was not objectively unreasonable." App. 160.

At no point in the opinion did the panel reference any of the exhaustive findings made by the district court. Nor did the Eleventh Circuit acknowledge that the handful of factual assertions it relied on to conclude the appellate affirmance "was not objectively unreasonable" were specifically rejected by the district court.

The opinion does not reveal, implicitly or explicitly, any level of deference afforded to the district court's findings. The panel also did not mention Mr. Himes's waiver argument. The panel simply accepted the State's statement of the facts without question and relied on them to hold the district court erred in granting Mr. Himes habeas relief.

Mr. Himes moved the Eleventh Circuit to publish the opinion. He noted that "[d]istrict courts rarely grant habeas relief in non-capital cases." *See, e.g.*, Margaret A. Upshaw, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1658 (2015) (citing Nancy J. King, *Non-capital Habeas Cases after Appellate Review: An Empirical Analysis*, 24 Fed. Sent. Rptr. 308, 310 (2012) (observing that, after both district and circuit court review, habeas relief was granted in only 0.8 percent of noncapital habeas cases). Mr. Himes maintained the opinion should be published because due to the "paucity of federal appellate decisions describing the standards of review and level of deference appropriate when a federal appellate court is asked to review the propriety of a district court's grant of habeas relief." (Mtn. for Pub. at 2). The Eleventh Circuit denied the request for publication.

Mr. Himes also petitioned for rehearing and rehearing en banc. He argued the "panel's opinion is contrary to precedent from the Supreme Court and this Court regarding the deference owed to district court factual findings in habeas proceedings." (Reh. Pet. at 10). He also noted that even the Secretary recognized in its brief that the proper standard of review for district court findings of fact in habeas proceedings is for clear error. *Id.* at 11 (citing Sec's Br. at 21). And Mr. Himes reminded the Eleventh Circuit that he took the Secretary to task for waiving any reliance on facts contrary to those found by the district court specifically because the State failed to argue the district court's findings were clearly erroneous or otherwise improper. (Reh. Pet. at 11) (citing Himes's Am. Br. at 17-20)).

Finally, Mr. Himes challenged the legal basis for the Eleventh Circuit's statement that "we review the district court's grant of a habeas corpus petition pursuant to § 2254 de novo." (Opinion at 9). As authority for that proposition, the panel cited to *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1232 (11th Cir. 2008). But Mr. Himes noted that *Fotopoulos* cites to *Sims v. Singletary*, 155 F.3d 1297, 1304 (11th Cir. 1998), and *Sims* makes clear that while the ultimate decision to grant or deny habeas relief should be reviewed de novo, "a district court's factual findings in a habeas corpus proceeding are reviewed for clear error." *Sims*, 155 F.3d at 1304. The Eleventh Circuit denied Mr. Himes's petition for rehearing and rehearing en banc without comment.

REASONS FOR GRANTING THE WRIT

This Court should exercise its supervisory power and review the Eleventh Circuit's opinion for three reasons.

I. This Court should grant Mr. Himes's petition and summarily reverse because the Eleventh Circuit impermissibly substituted its own factual findings for the district court's.

The Eleventh Circuit's subtle substitution of its own factual findings for the district court's directly contradicts Federal Rule of Civil Procedure 52(a) and this

Court's decisions in *Knowles v. Mirzayance* and *Anderson v. Bessemer City*. Summary reversal is a lofty request, but it is warranted here.

Federal Rule of Civil Procedure 52(a) requires a federal appellate court to assess a district court's factual findings under the "clearly erroneous" standard of review. Over 40 years ago, this Court explained:

> The clearly erroneous standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

The *Anderson* decision also establishes that federal appellate courts must apply the clearly erroneous standard of review "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* at 574. The *Anderson* court explained the rationale for precluding de novo review of factual findings not based on credibility determinations:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the

> accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.' " *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.

Pre-AEDPA, these principles were applied with equal force to appellate review of district court habeas rulings under § 2254. In fact, in *Amadeo v. Zant*, 486 U.S. 214, 223 (1988), this Court reversed the Eleventh Circuit based on its failure to cite or apply the correct standard of review for district court factual findings in a habeas proceeding. This Court's holding in *Amadeo v. Zant* could apply, verbatim, to this case:

> Hence, the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was adequately supported by the record. The Court of Appeals never identified the standard of review that it applied to the District Court's factual findings. It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous"...)

Id. at 223.

Post-AEDPA the appellate standard of review for district court factual findings remains just as clear. In *Knowles v. Mirzayance*, this Court reversed in a habeas case because the Ninth Circuit: (1) substituted its own factual finding for a magistrate's "[w]ithout even referring to the Magistrate Judge's finding" and (2) "failed to even mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings . . . ." 556 U.S. 111, 126 (2009).

That is precisely what the Eleventh Circuit did in this case. The panel never mentioned a deferential standard of review for factual findings. Quite the opposite—the opinion states: "We review the district court's grant of a habeas corpus petition pursuant to § 2254 de novo." (Opinion at 9). Mr. Himes challenged the legal foundation for that statement in the petition for rehearing and rehearing en banc, to no avail. In his brief, Mr. Himes perseverated over the Secretary's failure to challenge any of the district court's factual findings, to no avail. In his petition for rehearing and rehearing en banc he made the same argument he advances here, based on the same authority, to no avail. The Eleventh Circuit's failure to acknowledge the proper standard of review, despite repeated reminders, is difficult to understand. This Court should grant Mr. Himes's petition, summarily reverse, and remind the Eleventh Circuit that the district court's work was entitled to deference.

II. Granting Mr. Himes's petition and consolidating this case with *Wilson v. Sellers* would provide an opportunity for this Court to address the unique consequences the Eleventh Circuit's en banc holding has for Florida habeas petitioners.

In *Wilson v. Warden,* a slim en banc majority of the Eleventh Circuit held that this Court's decision in *Harrington v. Richter* silently abrogated the presumption set forth in *Ylst v. Nunnemaker*—that a federal habeas court should "look through" a summary state court ruling to review the last reasoned decision.

This Court accepted certiorari jurisdiction over *Wilson*. As of the time of this filing, *Wilson* remains undecided.

The Eleventh Circuit's application of its en banc decision in *Wilson* to Mr. Himes's case was dispositive. The panel cited *Wilson* and specifically assigned error to the district court's consideration of the trial court's explanation. App. 154-155. In addition, since this Court decided to review *Wilson*, the Eleventh Circuit has been careful to flag its non-reliance on *Wilson* where the standard would not impact the outcome. *See, e.g., Stuckey v. Crews*, 706 Fed. Appx. 609, 618 n.5 (11th Cir. 2017) ("We need not decide here whether to look through to the state 3.850 court decision on [sic] the trial or the summary First DCA decision because it does not matter to the result. This avoids any complications whether the Supreme Court agrees or disagrees with our Court's decision" in *Wilson*).

Consolidating Mr. Himes's case with *Wilson* would also provide this Court with a vehicle to address the unique impact *Wilson* is having in Florida. The majority's holding in *Wilson* is legally flawed for the reasons explained by the dissenting Eleventh Circuit judges. Reversal is the easy question in *Wilson*. What do with the tension between *Ylst* and *Richter* is a much more difficult concern from a pragmatic standpoint. Mr. Himes's case reveals that the *Ylst* presumption is vital to habeas review of Florida decisions in ways that are unique to Florida.

From July 1998 to June 1999, 69.2% of criminal appeals were resolved with the same unwritten per curiam affirmance Mr. Himes received on direct appeal. Leen, Craig E., *Without Explanation: Judicial Restraint, Per Curiam Affirmances,* *and the Written Opinion Rule*, FIU Law Review, Vol. 12, No. 2, Art. 7, 12 FIU L. Rev. 309, 311 (Spring, 2017). From February 2016 to July 2016 the percentage of appeals resolved by per curiam affirmance rose 74.85% statewide. *Id.* Accordingly, "PCAs constitute a supermajority of all DCA decisions in Florida." *Id.* at 312.

Moreover, the Florida Constitution prohibits Florida Supreme Court review of per curiam affirmances. The rampant use of unexplained affirmances in the Florida appellate system, coupled with the Florida Supreme Court's inability to review them, means that most habeas proceedings challenging Florida decisions will contain only a lower court's explanation for its ruling. If federal habeas courts are required to ignore the lower court's explanation and confine their assessments to the myriad possible—but unexplained—reasons the state appellate court affirmed, habeas relief under AEDPA will be insurmountable.

III. Courts need additional guidance on the meaning of "clearly established law."

The district court found the denial of Mr. Himes's continuance request was contrary to, or involved an unreasonable application of, this Court's decisions in *Ungar v. Sarafite* and *Kemna v. Lee.* The Eleventh Circuit acknowledged the factual similarities between Mr. Himes's case and *Lee*, but because the *Lee* Court did not reach the defendant's due process claim on the merits, the Eleventh Circuit determined *Lee* did "not clearly establish that the denial of a motion for continuance to secure an alibi witness amounts to a due process violation." Reviewing the Eleventh Circuit's conclusion will give this Court an opportunity to explain whether a general rule, like that announced in *Ungar*, can be narrowed by another Supreme

Court decision that may be inadequate, standing alone, to constitute clearly established law.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Himes's petition and reverse the Eleventh Circuit's opinion.

Respectfully submitted on this 1st day of March, 2018,

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