

PROVIDED TO
SOUTH BAY CORRECTIONAL FACILITY
ON 3-1-18 22 FOR MAILING

No. _____

TERM 2018

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN ROLAND — PETITIONER

VS.

JULIE L. JONES, SECRETARY FLORIDA
DEPARTMENT OF CORRECTIONS, ET AL., — RESPONDENT

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

Kevin Roland, DC # L74380
Southbay Correctional Facility
Post Office Box 7171
Southbay, Florida 33493
(Petitioner *pro se*)

QUESTION(S) PRESENTED

ISSUE ONE

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED WHEN IT DENIED PETITIONER'S CERTIFICATE OF APPEALABILITY (COA) APPLICATION BASED ON THE CONCLUSION, THAT PETITIONER HAS FAILED TO MAKE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT PURSUANT TO 28 U.S.C. § 2253(c) (2).

LIST OF PARTIES

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

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

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF CASE AND FACTS	4-6
REASON FOR GRANTING PETITION	7-15
CONCLUSION	15

INDEX OF APPENDICES

APPENDIX A

The decision of the United States Court of Appeals for the Eleventh Circuit denying petitioner a Certificate of Appealability (COA), and Leave to Proceed In Forma Pauperis was rendered on October 24, 2017. Reconsideration denied, December 18, 2017.

APPENDIX B

The decision of the Florida's United States Southern District Court rendered a final judgment and order denying Petitioner's petition under Title 28 U.S.C. § 2254, for Writ of Habeas Corpus, Certificate of Appealability (COA), and Leave to Proceed In Forma Pauperis, May 03, 2017.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
-------	-------------

<i>Barefoot v. Estelle</i> , 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).....	15
<i>Boddie v. Connecticut</i> , 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)	12
<i>Caraballo v. State</i> , 39 So. 3d 1234, 1252 (Fla. 2010).....	12
<i>Dillingham v. Wainwright</i> , 422 F. Supp. 259 (S.D.Fla.1976), aff'd, 555 F.2d 1389 (5th Cir. 1977).....	15
<i>Drope v. Missouri</i> , 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).....	11
<i>Mora v. State</i> , 814 So. 2d 322, 333 (Fla. 2002)	12
<i>Roland v. Jones</i> , 2017 U.S. Dist. LEXIS 58228 (S.D. Fla., 2017)	6
<i>Roland v. State</i> , 149 So. 3d 27; 2014 Fla. App LEXIS 14165 (Fla. Dist. Ct. App. 4th Dist., 2014) (Table)	4
<i>Roland v. State</i> , 212 So. 3d 373, 2016 Fla. App. LEXIS 8899, 2016 WL 3191537 (Fla. Dist. Ct. App. 4th Dist., June 9, 2016)	5
<i>Sawyers v. Collins</i> , 986 F.2d 1493, 1497 (5th Cir. 1993)	15
<i>Slack v. McDaniel</i> , 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000).	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	10

FEDERAL STATUTES TITLES

28 U.S.C. § 2253(c) (2)	passim
28 U.S.C. § 2253(c) (2).....	ii, 7, 13
28 U.S.C. §1254(1).	2
28 U.S.C. Section 1746.....	16
28 U.S.C. § 2254	iv, 6

FLORIDA RULES OF CRIMINAL AND APPEALLATE PROCEDURES

Fla. R. Crim. P. 3.210(b) and 3.212(a)-(b)	10, 11
Fla. R. Crim. P. 3.850(c).....	15

Fla. R. App. P. 9.141..... 15

CONSTITUTIONAL PROVISIONS

Fifth, Sixth and Fourteenth.....passim

FLORIDA STATUTES

Florida Statutes § 812.13(2)(c)4

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

☒ For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at 2017 U.S. Dist. LEXIS 58228 (S.D. Fla., Apr. 14, 2017); or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Third District Appeals court appears at Appendix _____ to the petition and id

☐ reported at, _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was
October 24, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition of rehearing was denied by the United States Court of
Appeals on the following date: December 18, 2017, and a copy of the order
denying rehearing appears at Appendix A.

☐ An extension of time to file the petition for a writ of certiorari was granted
to and including _____ (date) on _____ (date)
in Application No. ____ A _____.

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

☐ For cases from state courts:

The date on which the highest state court decided my case _____ A
copy of that decision appears at Appendix _____.

☐ A timely petition of rehearing was thereafter denied on the following date:
_____, and a copy of the order denying rehearing appears
at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted
to an including _____ (date) on _____ (date)
in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

Fifth, Sixth, and Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE AND FACTS

Petitioner, Kevin Roland was charged by information robbery with no firearm, deadly weapon, or other weapon occurring October 06, 2011, in violation of Florida Statutes § 812.13(2)(c), a felony of the second degree in the Seventeenth Judicial Circuit in and for Broward County Fort Lauderdale, Florida under assigned Lower Tribunal Case No. 11-16684 CF 10A.

Petitioner pled not guilty, proceeded to trial before the Honorable Paul L. Backman, Circuit Judge on November 29, 2012, the jury found him guilty as charged and the trial court adjudicated him guilty.

On January 7, 2013, Petitioner was sentenced to a term of twenty (20) years with fifteen (15) years mandatory incarceration in the Florida Department of Corrections (FDOC) as a as a prison releasee reoffender (PRR), followed by ten (10) years of probation as a habitual felony offender (HFO).

The case was taken on appeal to the District Court of Appeal, for the Fourteenth District Case No. 4D13-0248, where the judgment was affirmed *per curiam* without written opinion. *Roland v. State*, 149 So. 3d 27; 2014 Fla. App LEXIS 14165 (Fla. Dist. Ct. App. 4th Dist., 2014) (Table). No rehearing motion was filed, and the appeal concluded with the issuance of the mandate on October 10, 2014. Petitioner also did not seek discretionary review with the Florida Supreme Court.

Petitioner returned to the state court before his conviction became final, filing a motion to mitigate his sentence and for leniency, pursuant to Florida Rules of Criminal Procedure 3.800(c).

On February 23, 2015, the trial court entered an order denying the motion. Petitioner filed an appeal, assigned Case No. 4D15-1654, but the Fourteenth District Court of Appeal dismissed the appeal for lack of jurisdiction, relying on cases that stand for the proposition that orders denying motion to mitigate, such as the one filed here, are not appealable.

Petitioner's conviction became final on December 10, 2014, until he filed a State Petition for Writ Of Habeas Corpus on or about September 10, 2015, with the appellate court, assigned Case No. 4D15-3427. The petition was denied on the merits on October 28, 2015.

Before the habeas petition was denied, petitioner returned to the trial court, filing his first Rule 3.850 motion for post-conviction relief on October 27, 2015, which was subsequently denied by the trial court on March 24, 2016. The denial of the Rule 3.850 motion was *per curiam* affirmed by the Florida Fourteenth District Court of Appeal on June 9, 2016. *Roland v. State*, 212 So. 3d 373, 2016 Fla. App. LEXIS 8899, 2016 WL 3191537 (Fla. Dist. Ct. App. 4th Dist., June 9, 2016)(unpublished). The proceeding concluded with the issuance of the mandate on August 19, 2016.

Petitioner filed his § 2254 petition for writ of habeas corpus in the Florida's United States Southern District Court's on April 6, 2017, when he handed it over to

prison authorities for mailing in accordance with the mailbox rule. He was assigned Case No. 17-60718-Civ-DIMITROULEAS.

On April 14, 2017, the Magistrate Judge rendered a report and recommendation that Petitioner's habeas corpus proceeding be dismissed as time-barred, that a certificate of appealability be denied; and, the case closed. *Roland v. Jones*, 2017 U.S. Dist. LEXIS 58228 (S.D. Fla., 2017).

Petitioner did not timely file an objection to the Magistrate Judges recommendation. Thus, the District Judge conducted a *de novo* review and disagreed with the Magistrate that Petitioner's § 2254 petition for writ of habeas corpus was timely filed; the District Judge adopted the factual findings of the state court's and incorporated them in his final judgment and order denying Petitioner's petition under Title 28 U.S.C. § 2254, for Writ of Habeas Corpus, Certificate of Appealability (COA), and Leave to Proceed In Forma Pauperis on May 03, 2017.

Petitioner timely filed a Notice of appeal, Leave to Proceed in Forma Pauperis, and for issuance of a COA to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit denied issuance of a COA and Leave to Proceed in Forma Pauperis, October 24, 2017. Petitioner's reconsideration motion was denied, December 18, 2017.

This certiorari follows.

REASON FOR GRANTING PETITION

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED WHEN IT DENIED PETITIONER'S CERTIFICATE OF APPEALABILITY (COA) APPLICATION BASED ON THE CONCLUSION, THAT PETITIONER HAS FAILED TO MAKE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT PURSUANT TO 28 U.S.C. § 2253(c)(2).

Petitioner sought a COA. The Eleventh Circuit Court of Appeals denied his COA application after deciding that he failed to make a substantial showing of a denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2). *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L. Ed. 2d 542 (2000).

Petitioner challenges the validity of his claim that the trial court committed fundamental error by the limitation on the cross-examination of witness and former co-defendant Tyuan William; even though, Mr. Williams admitted on cross-examination he faced years and years in prison, he had lied to police when arrested, that he did use drugs either the night before or on the day of the incident, that he was on probation and control release at the time of the offense. The state trial court's refusal to permit defense counsel to cross examine Mr. William's regarding his bias and motive for testifying violated the confrontation clause of Sixth and Fourteenth Amendment confrontation and due process clause claims are always cognizable issues for federal habeas review.

Petitioner was denied a fundamentally fair trial, as required by due process, by the trial court's flagrant abuse of discretion by denying defense counsel a reasonable opportunity to confront Mr. Williams, a state witness and instead allowed the jury to rely on Mr. Williams's damaging testimony implicating the petitioner. The state court's factual finding involved an unreasonable application of

clearly established Federal law, and resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The right to confront witness includes the right to cross-examine witnesses to attack their general credibility or to show their possible bias or self-interest in testifying. The right is not unlimited, however, and a trial judge retains wide discretion in limiting the scope of cross-examination; however, in this case there is basis for Petitioner to assert that his Confrontation Clause rights were violated.

Not allowing Petitioner to properly cross exam the State's witness about his bias and reasons for testifying had a substantial and injurious effect or influence on the jury's verdict. Thus, Petitioner was prejudiced to an unknown and possibly great extent that quite possibly contributed to his conviction.

Petitioner's case presents a strong factual basis for the argument that limiting the scope of cross-examination affected the verdict. At the very least, jurist of reason could debate whether petitioner has shown, by clear and convincing evidence, that the State Court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.

The Court of Appeal's review should not have rested on the ground that Petitioner has failed to make a substantial showing of a denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2) as to this ground for relief.

Petitioner challenged the trial court committing fundamental error when his sentence was obtained by a violation of the protection against double jeopardy.

Petitioner contended a double jeopardy violation occurred by the trial court when it imposes both a habitual offender and a prison releasee reoffender sentence.

Petitioner case presents a strong factual basis for jurist of reason to debate whether petitioner has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.

The Court of appeal's review should not have rested on the ground that petitioner has failed to make a substantial showing of a denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2) as to this ground for relief.

Petitioner challenged his defense counsels effectiveness, for failure to have a second mental health expert examine him to determine whether he was competent to stand trial. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). One doctor examined Petitioner and determined he was competent to stand trial. The act or omission not to have a second mental health expert examine his client constituted an error "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Arguably, the trial court erred by not *sua sponte* ordering a competency hearing. Notwithstanding, in not ruling on a motion to determine Petitioner's competency to stand trial, the question before this Court is whether there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." There is a reason to

believe Petitioner may have been incompetent, not whether he is incompetent. The latter issue should be determined after a hearing. Petitioner argues that the trial court would have been mandated to grant a motion for a competency hearing under Florida Rule of Criminal Procedure 3.210(b), had his defense counsel filed for continuation to complete an additional mental health evaluation of his client's competency.

Competency Determination Requirements

In *Drope v. Missouri*, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), this Court recognized that “the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” Procedural due process requires adequate notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.” *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

Further, it is well-settled that a criminal prosecution may not move forward at any material stage of a criminal proceeding against a defendant who is incompetent to proceed. *Caraballo v. State*, 39 So. 3d 1234, 1252 (Fla. 2010); see Fla. R. Crim. P. 3.210(a). Florida Rules of Criminal Procedure 3.210-3.212 were enacted to set forth the required competency hearing procedures for determining whether a defendant is competent to proceed or has been restored to competency. See *Mora v. State*, 814 So. 2d 322, 333 (Fla. 2002).

Pertinent to this case are rules 3.210(b) and 3.212(a)-(b), (c)(3), (c)(5)-(7).

Rule 3.210(b) provides:

If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and may order the defendant to be examined by no more than 3 experts, as needed, prior to the date of the hearing. . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits States from trying and convicting mentally incompetent defendants. Here, Petitioner was examined by only one doctor contrary to Rule 3.210, violating his constitutional rights under the U.S. Const. Amend., Fifth, Sixth and Fourteenth to effective assistance of counsel, by securing a second mental expert opinion. Defense counsel did not undertake any further investigation into Petitioner's mental health. Thus, The U.S. District reliance on giving trial counsel more deference, because he was familiar with counsel as a state court judge, is misplaced as a matter of law and his assertion that counsel's conduct was reasonable is unavailing and debatable.

Petitioner's case presents a strong factual basis for jurist of reason to debate whether Petitioner has shown by clear and convincing evidence that the State and Federal Court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.

The Court of Appeal's review should not have rested on the ground that Petitioner has failed to make a substantial showing of a denial of a constitutional right pursuant to 28 U.S.C. § 2253(c) (2) as to this ground for relief.

Petitioner contends that U.S. 11th Circuit Court Judges Tjoflat and Hull's denial of Petitioner's COA should be remanded for reconsideration as U.S. District Judge Dimitrouleas failed to address his constitutional violations by deferring to the State's summary denial in state court. Where the State Court failed to hold an evidentiary hearing and failed to attach records that conclusively refuted the petitioner's claims in State Court.

Petitioner alleged that jurist of reason would find it debatable whether the petition for writ of habeas corpus states a valid claim of the deprivation of a constitutional right and that jurist of reason would find debatably whether the U.S. District Court was correct in its ruling on the merits. A review and evaluation for the U.S. Court of Appeals assessment of the constitutional claims are debatable and wrong. Moreover, the petitioner has shown that jurists of reason would find the U.S. court of appeals and U.S. District Court's assessment of the constitutional claims debatable or wrong.

Petitioner has not failed to make a substantial showing of the denial of a constitutional right. Thus, the finding of the U.S. Court of Appeals and U.S. District Court's denying Petitioner a COA was in error because Petitioner has made the requisite showing in these circumstances. Finally, because Petitioner is entitled to a COA, he is entitled to appeal in forma pauperis.

In order to succeed, an applicant must show either "that the issues are debatable among jurists of reason; that the Court of Appeals could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Sawyers v. Collins*, 986 F.2d 1493, 1497 (5th Cir. 1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983)). Here the U.S. 11th Circuit Court was wrong in their failure to grant Petitioner's COA and his motion for leave to proceed in forma pauperis.

This Court is urged to re-evaluate the claims presented and assess the nature of the issues. The issuance or denial of a § 2253 certificate must be preceded by a judicious evaluation of the merits, and not simply a ritualistic re-affirmation of the prior decision. Although deference is given to the State Court decision there is clear and convincing evidence in this case that the Federal Courts deprived Petitioner of his entitlement to appeal as a matter of right these meritorious claims.

The courts have distinguished a "weak" argument from one that was "frivolous" under 28 U.S.C.S. 2253. Even a "weak" argument one which may be well beyond the law's existing frontier, but well within the frontier of rationality is properly certified under § 2253, whereas a frivolous argument one for which no rational argument can be made is not subject to § 2253 certification.

Although this Court may believe that an argument may be so weak as to become frivolous, the standard adopted in *Dillingham v. Wainwright*, 422 F. Supp. 259 (S.D.Fla.1976), aff'd, 555 F.2d 1389 (5th Cir. 1977), is valid.

In the instant case, Petitioner filed a motion for reconsideration of the U.S. 11th Circuit Court of Appeals order denying relief, in which he presented, detailed arguments as to why the Court's order was in error. Although this Court would classify petitioner's claims as very weak ones, it could find that petitioner has made a "rational argument on the law and/or facts in support of his claim. Therefore, this Court could find that a COA should be reconsidered and granted.

In the case of a petitioner proceeding *pro se*, the courts cannot expect to see arguments formulated in such a way that they belong within the frontier of rationality, but rather, must decide whether an attorney, whose craft it is to mold the facts and law into a rational thesis, could succeed in making an argument which is neither frivolous, nor so weak as to border on mere palaver. In requiring a question of some substance, or a substantial showing of the denial of a federal right, obviously Petitioner *pro se* need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues other than how the court has; or that the questions are adequate to deserve encouragement to proceed further.

The U.S. District Judge's conclusion begs the question, as the State Court deprived petitioner of the opportunity to show that defense counsel's deficient performance prejudiced him. In summary, a Rule 3.850 defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim if he specifies fact, not conclusively rebutted by the record and demonstrates counsel's deficient

performance that prejudiced him. The State's analysis was inconsistent with Fla. R. Crim. P. 3.850(c) and 9.141(c). Therefore, District Court should have reversed and remanded for the court to conduct an evidentiary hearing.

CONCLUSION

Petitioner's motion to proceed in forma pauperis and the petition for a writ of certiorari should be granted, vacating the judgment of the 11th Circuit Court of Appeals, and remand this case for further consideration of the question of whether Petitioner is entitled to a COA.

Respectfully Submitted,

/s/ 
Kevin Roland, DC # L74380
Southbay Correctional Facility
Post Office Box 7171
Southbay, Florida 33493
(Petitioner *pro se*)

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing petition for certiorari has been hand-delivered to prison officials at South Bay Correctional Facility to be mailed to: Acting Solicitor General of the United States of the United States, Ian Heath Gershengorn, Department of Justice, 950 Pennsylvania Ave, N. W., Room 5614 Washington, DC 20530-0001; Pam Bondi, Attorney General of Florida, The Capitol, PL-01 Tallahassee, Florida 32399-1050, on this 1 day of MARCH 2018.


Kevin Roland, DC # L74380
(Petitioner *pro se*)