

DOCKET NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2017

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DAVID PITTMAN,

Petitioner,

vs.

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

Respondents.

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

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## QUESTIONS PRESENTED--CAPITAL CASE

1. Whether the creation of an irrebutable presumption, that there was an adjudication on the merits of a constitutional claim unless the state court clearly stated that its decision was based solely on a state procedural rule, is contrary to this Court's precedent?

2. Whether the Eighth and Fourteenth Amendments permit a defendant to be precluded from introducing evidence of another individual's confession to the homicide at issue in the defendant's capital trial when the confession has circumstantial support and would be admissible if the person who confessed was the one standing trial for the murder?

3. Whether the pro forma denial of a certificate of appealability (COA) by the district court complies with the standards for reviewing a COA as set forth in Rule 22 (b) of the Federal Rules of Appellate Procedure?

4. Whether the pro forma denial of an issue for a COA by the Eleventh Circuit Court of Appeals complies with the standards for reviewing a COA as set forth in *Slack v. McDaniel* and later enunciated in *Miller-El v. Cockrell*?

5. Whether the petitioner has demonstrated that jurists of reason could disagree with the district court's resolution of his *Brady* claim, or that such jurists could conclude the issue presented is adequate to deserve encouragement to proceed further, thereby entitling petitioner to the issuance of a certificate of appealability?

6. Whether the Florida Supreme Court's denial of petitioner's *Brady* claim was contrary to or an unreasonable application of federal law?

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Petitioner, **DAVID PITTMAN**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue a writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

### **CITATION TO OPINIONS BELOW**

The Eleventh Circuit's decision appears as *Pittman v. Secretary*, 871 F.3d 1231 (11<sup>th</sup> Cir. 2017), and is Attachment A to this petition. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The Eleventh Circuit's order granting in part Pittman's motion for a certificate of appealability (COA) is Attachment C to this petition. The district court's order denying relief is Attachment D to this petition. The Florida Supreme Court's opinion affirming the denial of postconviction relief is Attachment E to this petition. The Florida Supreme Court's opinion on direct appeal is Attachment F to this petition.

### **STATEMENT OF JURISDICTION**

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on September 22, 2017. Rehearing was denied on December 19, 2017.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the Constitution of the United States provides in relevant part:

No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to have compulsory process for obtaining witnesses



in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

#### **PROCEDURAL HISTORY**

On July 12, 1990, David Pittman was indicted on three counts of first-degree murder, two counts of arson, and one count each of burglary and grand theft (R. 4836-40). Trial began on March 18, 1991 (R. 5200). On April 19, 1991, the jury returned a guilty verdict on all counts with the exception of the burglary charge (R. 5108-11). The jury recommended a death sentence by a 9 to 3 vote (R. 5165-67). The judge imposed a death sentence (R. 5175-82). On direct appeal, the Florida Supreme Court affirmed the convictions and death sentences. *Pittman v. State*, 646 So. 2d 167 (Fla. 1994). Certiorari review was denied. *Pittman v. Florida*, 514 U.S. 1119 (1995).

On March 24, 1997, Pittman filed a motion to vacate in the state circuit court. After several amendments and an evidentiary hearing, the circuit court denied relief on November 5, 2007. On appeal, the Florida Supreme Court affirmed. *Pittman v. State*, 90 So. 3d 794 (Fla. 2011).

On July 19, 2012, Pittman filed a § 2254 petition and a memorandum of law in the Middle District of Florida (Doc. 1). Pittman's petition was denied by the district court on February

20, 2015.<sup>1</sup> In its order, the district court stated that it would not grant a certificate of appealability (COA) (Doc. 30 at 119).

On March 19, 2015, Pittman filed a motion to alter or amend the judgment (Doc. 32). The motion was denied on March 26, 2015 (Doc. 33). On April 23, 2015, Pittman filed a notice of appeal (Doc. 34). Pittman asked the Eleventh Circuit to issue a COA on five grounds set forth in his § 2254 petition. On June 28, 2016, the Eleventh Circuit granted the application in part, finding that a COA was warranted as to two issues: 1) whether trial counsel was constitutionally ineffective during the penalty phase; and 2) whether Pittman's constitutional right to present a defense was violated. Pittman filed a motion for reconsideration of the Eleventh Circuit's order denying a COA on the three other grounds. The motion was denied on August 29, 2016.

On September 22, 2017, subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion affirming the denial of Pittman's federal habeas petition. *Pittman v. Secretary*, 871 F.3d 1231 (11<sup>th</sup> Cir. 2017). Pittman moved for rehearing en banc and panel rehearing. Pittman's motion was denied by the Eleventh Circuit on December 19, 2017.

Pittman thereafter filed a motion for extension of time with this Court in which to file his petition for writ of certiorari. The motion was granted, and Pittman was afforded until May 18, 2018, in which to file his petition.

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<sup>1</sup>Judgment was entered on February 23, 2015 (Doc. 31).

## **FACTS RELEVANT TO QUESTIONS PRESENTED**

### **A. THE TRIAL**

At 3:10 a.m. on May 15, 1990, a newspaper distributor saw a burst of fire in the sky some two miles away (R. 1144-46, 1152). The fire was at the Knowles residence in Mulberry. Firemen were dispatched to the scene at 3:32 a.m. and arrived at 3:46 a.m. (R. 1264). After the fire was extinguished, police found three victims dead inside the burned house. Clarence and Barbara Knowles were found in a hallway. Their daughter, Bonnie Knowles, was found in her bedroom (R. 1269-71). The medical examiner determined that each victim had been stabbed multiple times (R. 1513-22). All three were dead before the fire started (R. 1521).

A burn pattern on the living room floor showed where a flammable liquid had been poured (R. 1381-82). The fire spread from the living room. In Bonnie's bedroom, a tire under the bed caused the fire to burn hotter (R. 1386-87). A burn trail extended from the front of the house to a side yard (R. 1385). A phone wire had apparently been cut by wire cutters (R. 1391-93, 3347). A murder weapon was never located (R. 1430-31).

A brown Toyota belonging to Bonnie was missing (R. 1237). The car was found burning on Prairie Mine Road (R. 1500-01). James Gardner testified that the car was not present on Prairie Mine Road at 3:26 a.m., but it was there at 5:00 a.m. (R. 1296-99). James Troup saw the car on his way to work at 6:30 a.m. (R. 1282-86). He saw an orange glow in the back window. He stopped and unsuccessfully tried to put a small interior fire out. He then called the fire department and left (R. 1286). Dennis Waters

saw the car on his way to work at about 6:25 a.m. (R. 1647-48). He later saw a homemade wrecker pull into his jobsite, back out and go down the road towards the car (R. 1648-50). Five to seven minutes later he saw smoke (R. 1651-52). Waters later identified the wrecker as belonging to Pittman (R. 5059).

Barbara Davis lived in an apartment on Prairie Mine Road near where the car was burning (R. 1699-1700). Davis first saw the vehicle "between 6:35 or 6:40" when she noticed some black smoke (R. 1702-03). Davis saw a man coming up the embankment who she later identified as Pittman (R. 1704, 1715). An identifying feature cited by Davis were the holes or bad skin on the side of his face (R. 4998).

Bobbie Jo Pittman, Pittman's step-sister, testified that before 3:00 p.m. on May 14<sup>th</sup>, the day before the bodies were discovered, Pittman called her (R. 2061). He asked her to pick him up in Plant City where he had been staying, so he could spend the night at his step-dad's house in Mulberry where she stayed. She then picked him up and got back to their dad's house at around "4:00 or 4:30" (R. 2063). Later, they went to a Majik Market and called a friend, Bob Barker, to invite him to "party" with them (R. 2033).<sup>2</sup> Between 7 p.m. and 8:00 p.m., another friend, Tammy Davis, arrived (R. 2065). The threesome hung out

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<sup>2</sup>It was 1/2 mile (a 13 minute walk) from the Pittmans' home to the Knowles' (R. 2179). From the Pittmans' home to where Bonnie Knowles' car was found was 1/10 of a mile (a 4 minute walk) (R. 2180). It was 3 miles from Prairie Mine Road to the Majik Market (a 4 minute drive). The Majik Market was 7 miles (or an 8 minute drive) from Barker's. From the Knowles' house to Prairie Mine Road it was a 4 to 6 minute drive (R. 2696-99).

together until Tammy left at about midnight (R. 3156). Bobbie Jo and David watched TV together until 2:30 a.m. (R. 2070).

Eugene Pittman, David's stepfather, testified that he got home from work at about 3:00 a.m. on May 15<sup>th</sup> (R. 2087-88). He did not see David (R. 2094). The door to the bedroom where David was staying was locked (R. 2113). Eugene did not knock or check to see if David was there. Eugene went to bed, but was not able to sleep (R. 2095). He heard noises. At about 3:30 a.m., he got up and saw "David coming out of this back bedroom" (R. 2097, 2099). He looked tousled-up, like he had been asleep (R. 2116). David said that he had an upset stomach, and Eugene went back to bed (R. 2099).

Soon, fire "sirens went off" (R. 2118). Then, Eugene heard the phone ring, and he got up. David was on the phone in the kitchen (R. 2101). Carmen Alton had called to tell David that the Knowles' house was on fire (R. 3841). David screamed: "Oh, no" (R. 2120). When he hung up, David woke Bobbie Jo. David was crying and wanted Bobbie Jo to "find out if his kids were okay" (R. 2074). Bobbie Jo testified that David's kids usually stayed at the Knowles' (R. 2074). David asked her to take him back to Plant City, saying that he was afraid of being blamed for the fire (R. 2041). He was wearing the same blue clothes he had worn earlier (R. 2073).

Bobbie Joe dropped David off at Barker's house in Plant City at 5:00 a.m. (R. 1573). David ran in the house "[w]et, nervous, hysterical, saying something or other about his babies was dead" (R. 1574). Barker told him to call the fire and police

departments to find out about his kids. David made about six calls (R. 1575-78). When Bobbie Jo called to say that his kids were safe, Barker went back to bed (R. 1575-78).

Deputy Lindsay went to Eugene Pittman's home at about 7:00 or 7:30 a.m. looking for David (R. 3125, 3128). Thereafter, David talked with his mother and agreed to turn himself in (R. 2083). David's mother went to Plant City to get him. She told him that the Knowles family died in the fire - he cried (R. 3199-3201).

No physical evidence was found linking David Pittman to the crime scene or to Bonnie Knowles' Toyota. His fingerprints did not match the latent prints found in Bonnie's car (R. 3766-70). His prints were not found anywhere in the Knowles' house (R. 2707). Pittman's clothes did not have any burns on them nor was there blood on his pants, shirt, socks, shoes or pocketknife (R. 3345, 3357-58, 3361, 3364).

David Pounds, a habitual offender who was briefly in jail with Pittman after his arrest in May of 1990, testified that he had heard Pittman say, "the people that I killed," then changed it to "the people they say I killed" (R. 1895). He also claimed that he heard Pittman admit the crime but say that "they" could not "pin" it on him (R. 1897).

Carl Hughes had been put in a cell with Pittman in the Polk County Jail from June 20-27, 1990 (R. 2248-50).<sup>3</sup> Hughes claimed

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<sup>3</sup>At the time of trial, Hughes was in the federal penitentiary for falsifying a firearms application and bribery (R. 2246). He also had been convicted in Polk County of seventeen counts of bribery and grand theft (R. 2246-47). He was sentenced  
(continued...)

that Pittman confessed to committing the murders and setting the house on fire (R. 2252). Hughes said that Pittman had called Bonnie Knowles to see if she would talk with her parents about him seeing his kids (R. 2252). He then went to the house and knocked on Bonnie's bedroom window (R. 2253). Once inside, he talked to her for awhile trying to convince her to have sex with him (R. 2253). They talked about it but Bonnie was "on her period." (R. 2253). They discussed oral sex (R. 2253). Her lack of interest made him mad (R. 2253). She "hollered" and he tried to shut her up (R. 2253). Again, all according to Hughes, Pittman said he "lost it," cut her throat and stabbed her eight times (R. 2253, 2261). Bonnie's mother ran to the bedroom door and Pittman stabbed her three times and then grabbed her father, who was on the phone, knocked him down and stabbed him five times in the hall (R. 2253-54). He then went to an outside shed, found some gasoline which he carried inside the house and poured on Bonnie's bed (R. 2254). Before lighting the gas, he found a tire to put under her bed to make the fire burn hotter there. He spread the gas throughout the house (R. 2254). He washed up in the bathroom before starting the fire outside (R. 2254). He then put the gas can in Bonnie's car and drove somewhere near his father's house (R. 2254). He parked the car and went to his father's house at 2:30 or 3:00 a.m. (R. 2254-55). Hughes said Pittman returned to the abandoned car later, sat in his wrecker and watched the

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<sup>3</sup>(...continued)  
to eighteen months in federal prison to be served concurrently with 4 ½ years in state prison (R. 2247).

police find the burning car before returning to Barker's place (R. 2255).<sup>4</sup>

Hughes further testified that while he was jailed with Pittman, he called his wife, Kathie Anders, and "asked her if she had heard anything about [the murders] and she said no. So [Hughes] asked her to contact [FDLE agent] Randy Dey, ask him in fact was there any murders like this occurred" (R. 2261). Anders later told Hughes that she had related the information about the murders to Agent Dey who said that he would "be very interested in talking to Carl [Hughes] about it" (R. 2338). On June 26<sup>th</sup>, Dey, along with Tom Cosper, a police officer, went to see Hughes in the jail (R. 2263).

On August 3, 1990, Hughes was sentenced in federal court. Agent Dey spoke to the judge on Hughes' behalf at a side bar during the sentencing (R. 2321). On September 7, 1990, Hughes wrote to his state court judge, telling him of his cooperation in Pittman's case (R. 2322). On September 11, 1990, Hughes gave the police a taped statement about his conversations with Pittman. Hughes was sentenced on September 26, 1990 in state court (R. 2323).<sup>5</sup>

Hughes testified that he received nothing for his testimony against Pittman (R. 2336-37). During the cross, Hughes told Pittman's counsel: "So I haven't got any rewards that you're

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<sup>4</sup>The defense maintained that it was an impossible time line and that Hughes' claim was not credible.

<sup>5</sup>Prosecutor David Bergdoll backed away from earlier demands that Hughes receive an 85 year sentence as a career criminal, and instead sought a 6 year sentence (R. 3007-08).



going to be able to convince this jury I got. I haven't got any incentives to sit here today and do this." (R. 2336). Hughes claimed that because the State did not want to create an appearance that he received any benefit, he was treated worse by the State than "everybody else" (R. 2357).

Barbara Marie (Knowles) Pridgen, Pittman's ex-wife, testified that Pittman had in the past made threats against her and her family, the Knowles (R. 2548-49, 2561, 2906, 3792-94). Barbara Marie and Pittman were separated when the homicides occurred (R. 2525, 2564). She had filed for a divorce in October of 1989 (R. 2528).<sup>6</sup> Pittman had called Barbara Marie's parents twice in February of 1990 in order to talk about her and his kids (R. 3820). He had last seen Barbara Marie at a custody hearing when they had paternity tests and spoke cordially (R. 3821-22).

In early 1990, Pittman had been investigated for a sexual assault or battery committed on Bonnie Knowles (R. 2777-78). The offense allegedly occurred in June, 1985 (R. 2778). The State was unable to prosecute due to the statute of limitations (R. 2780). A "no bill" was entered on March 21, 1990, but the alleged victim's name was not shown (R. 2781). Pittman received the "no bill" but did not know who made the allegation (R. 3803).

Pittman testified at his trial that he had stayed at his father's on May 14, 1990, because Barker had pending federal charges pending relating to stolen heavy equipment and there was

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<sup>6</sup>Although he was opposed to the divorce, David filed a response to the petition and agreed the marriage was irretrievably broken (R. 2529, 2565). He told Barbara Marie he wanted to remain friends (R. 2577-78).

concern that the "federal law" would be coming (R. 3824). Federal authorities had questioned Pittman about the matter (R. 3825). Pittman stayed up for 5 or 10 minutes after Bobbie Jo went to bed at 2:30 a.m., but nothing interesting was on TV. He went to bed in the spare room (R. 3836-37). He saw the headlights when his father returned, but did not get up (R. 3838). Later, he got up to drink some milk (R. 3838). He had not eaten since breakfast and had a couple of beers on an empty stomach (R. 3838).

When Carmen Alton called, Pittman went "all to pieces" because his kids stayed at the Knowles' about 95% of the time. He felt certain they were there (R. 3841-42). Because he was afraid that the federal agents had a warrant for him, he did not want to go to the scene of the fire (R. 3844). He was also worried that he might be blamed for the fire. He asked Bobbie Jo to take him back to Plant City (R. 3844). Later, he talked with his mother and decided he should go to the sheriff's office to answer their questions (R. 3856-57).

Pittman testified that he had nothing to do with the murders nor did he tell anyone that he committed the homicides (R. 3868).

#### **1. *The Hodges issue***

During the State's case, Pittman's counsel told the judge that the prosecutor had received a letter from George Hodges, a death row inmate. Hodges said that he had received a letter from his stepson, Jessie Watson, who stated that he and another man had committed the murders (R. 2636-37) (Def. Ex. 8B, p. 4-5, 13). According to this letter, Watson had written that he and his cousin, Aaron, were high on crack cocaine, broke into a house in

Mulberry, were surprised by the occupants, were scared, and, "before they knew what they were doing," had killed all three people. Watson wrote that Aaron set the house on fire to cover up the murders. Hodges offered to take a polygraph (Court Ex. I).

The judge said he would only admit Hodges' testimony if the defense produced some corroboration (R. 2659-60). The judge gave the defense several days to investigate the matter and find additional evidence (R. 2643). Later, defense counsel told the judge they had identified Aaron Gibbons as the other perpetrator named by Watson (R. 2811). Gibbons and Watson, cousins, lived less than a mile from where William Smith saw the blue wrecker behind the Majik Market (R. 2822).<sup>7</sup> Gibbons sometimes stayed with a relative in Mulberry (R. 2822). Watson was a crack addict (R. 2822) (Def. Ex. 8B, p. 4; 9A; 11A, p. 7).

Hodges no longer possessed his stepson's letter. But another death row inmate, Michael Bedford, had also read it. Thinking the letter was a joke, Bedford and Hodges had decided to destroy it to avoid any trouble (Def. Ex. 6). Hodges had not known about the Knowles homicides until later when he read about them in the St. Petersburg Times (Def. Ex. 13). When he learned that the murders described in the letter were real and that someone else was being prosecuted for them, he wrote the prosecutor (R. 2836-38).<sup>8</sup>

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<sup>7</sup>At trial, Smith identified Pittman and his wrecker as the man and wrecker he saw stop briefly behind a Majik Market shortly after Bonnie Knowles' car was burned (R. 1788-1803).

<sup>8</sup>Hodges also wrote to Watson, apologizing for reporting him. He said in the letter that he loved Watson but could not let an  
(continued...)

After a continuance of two more days, defense counsel told the court of additional evidence that had been uncovered (R. 2859-3523). Gibbons and Watson were living in the Mulberry area at the time of the murders. Gibbons was described as 5'8", blondish-brown hair, with bad acne - - a pock-marked face (R. 2838, 3516) (Def. Ex. 12). Thus, he matched the description given by Barbara Davis of the man with "holes" in his face. Hodges indicated that Gibbons knew Bonnie Knowles and had dated her. He had snuck into her bedroom at night to see her (R. 2838). Gibbons only said that he had gone to school with Bonnie (R. 2840).

Watson had a drug problem and had gone to detoxification and drug rehabilitation (Def. Ex. 22B). Watson and Gibbons did drugs together (Def. Ex. 11A, p. 7, 22). They had committed crimes to support their crack habits (Def. Ex. 11A, p. 5). Neither Watson nor Gibbons had an alibi. They may well have been together doing crack the night of the murders (Def. Ex. 11A, p. 22; 22B, p. 6). Bob Barker and Bobbie Jo Pittman had seen a blue wrecker in the area where Gibbons and Watson lived (R. 2841).

Hodges was interviewed at Florida State Prison. Hodges said he once participated in a burglary with Watson and Gibbons (Def. Ex. 8A, p. 8-9). Although Gibbons first denied it, he recanted his denial when confronted. Gibbons once participated in a crime where he and a man named "Ramsey" stole a boat motor, poured gas in the boat, and used a fire trail to burn the boat to cover up

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<sup>8</sup>(...continued)  
innocent man be blamed(Def. Ex. 7). When it arrived, Watson's mother took the letter to the police (Def. Ex. 22B, p. 7, 19-20).

their fingerprints (Def. Ex. 11A, p. 11-12). Gibbons admitted this when confronted (R. 2859-60, 3513). Roger Ramsey had been interviewed and admitted that he participated with Gibbons in the boat arson (R. 3588) (Def. Ex. 21).

Pittman's counsel also had the suspects' arrest records as well as maps to show distances (R. 3602). And, counsel learned that at Hodges' trial, it was brought out that Watson had written letters to Hodges, to which he denied authorship at trial. A handwriting expert had to identify the handwriting at the trial. Thus, Watson had a history of writing incriminating letters and later denying having written them (R. 2861, 3523).

The trial court, citing the hearsay rule, disallowed Hodges' testimony and that of the other proffered defense witnesses based on the declarant's availability. The judge ruled there was insufficient indicia of trustworthiness (R. 3558). The judge denied defense counsel's motion to disclose Watson's drug rehabilitation records and his motion to compel production of hair samples and fingerprints from Watson and Gibbons in order to obtain further corroboration (R. 3628-29).

Pittman's counsel moved for a continuance three different times in order to get additional corroboration that the judge required to find the testimony admissible (R. 3561, 3576, 3627). Counsel said a fingerprint expert would testify that latent prints found on Bonnie's car were not Pittman's (R. 3591). Counsel wanted to compare those unidentified prints to Watson and Gibbons (R. 3591). Counsel asked for a two day continuance not inconsistent with the two days granted earlier in the trial (R.

3579). The request was denied. The judge found that the defense's proffers failed to show a connection with the crime and did not constitute independent evidence that someone else committed it. He refused to permit the defense to present any evidence about Watson's confession to the murders (R. 3610-11, 3615).

#### **B. THE POSTCONVICTION PROCEEDINGS**

Several claims were advanced by Pittman at his postconviction evidentiary hearing. With regard to Pittman's claim that the State withheld favorable, exculpatory evidence, much of the information concerned the two snitches in the case, Carl Hughes and David Pounds. As to Hughes, evidence was presented contradicting his trial testimony that he received no benefit for his testimony, and it also showed that he was trying to get evidence for the State. Hughes' former wife, Kathie Anders, testified that while in jail Hughes told her that he was "trying to keep me from being arrested along with him and that he had been asked by FDLE to obtain information regarding this case that had been in the newspapers, which, in fact, was Pittman's case" (PC-R. 3542). Hughes told Anders that "the FDLE had [her] and the house under surveillance and that they were watching [her] coming and going" (PC-R. 3543).<sup>9</sup> In order to protect her and their three young children, Hughes said "[h]e was to - - the way it was told to me is that he was to gather information for them by way of befriending Pittman while they were both

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<sup>9</sup>Anders testified that she was interviewed by the prosecutor on her husband's case (PC-R. 3545). She was even given a polygraph to check the accuracy of her statements (PC-R. 3549).

incarcerated" (PC-R. 3543). Anders explained that Hughes told her that "he had kept her from being arrested" by agreeing "to obtain information regarding the Pittman case" (PC-R. 3549-50). Hughes told her that "if he did certain things, that they could, in fact, possibly lower that time in jail. He was going to do some time in jail, but it wouldn't be as much if during this time he cooperated doing other things" (PC-R. 3546).

Also undisclosed as to Hughes were handwritten summaries, notes and letters authored by the prosecutor, the lead detective, and Hughes himself. These documents showed that Anders acted as a go-between for Hughes and the State (PC-R. 3513, 3967; PC-RE. 894-904); Hughes was threatened with contempt and a longer prison sentence if he did not testify (PC-R. 3917, 3919; PC-RE. 839); the lead detective believed that Hughes' description of the time sequence of the murders was "real off on time of occurrence" (PC-R. 3509); and there was an additional undisclosed meeting between Hughes and the State (PC-R. 41664).

As to David Pounds, evidence was presented establishing that the State did not disclose his PSI and DOC records relating to his mental health issues. The PSI included a psychological history of Pounds, which indicated that he was suffering from visual and auditory hallucinations (PC-R. 3930). Reference was made that Pounds "heard voices talking to him" (PC-R. 3930). The psychological history included that Pounds was at the time being treated with psychotropic medication - Vistaril, Tofranil and Thorazine (PC-R. 3931). The PSI also indicated that Pounds was going to need mental health help in prison (PC-R. 3933). The DOC

records, from June of 1990, contained a discussion of Pounds' mental health problems, including that his major depression had relapsed, and included psychotic features (PC-R. 4051, 4054).

Additionally, evidence was presented showing the State's failure to disclose a third interview Pounds had with the police, on June 19, 1990 (PC-RE. 812-13). It was clear from Pounds' trial testimony that between his June 4<sup>th</sup> taped statement and his June 25<sup>th</sup> taped statement, his story changed. Pounds' explanation was that he withheld the information on June 4<sup>th</sup> (R. 1923). But, the existence of another interview that was not taped gave Pounds an opportunity to learn information about the case. It explained his 2006 testimony that someone had told him to mention Carl Hughes (PC-R. 4021-42).<sup>10</sup>

The State also did not disclose documents showing that Pounds and Hughes were never jailed with Pittman at the same time (PC-RE. 869-93). The defense had attempted to access the jail records at the time of trial in order to ascertain the names of individuals who had been jailed with Pittman (PC-RE. 1135-36). The defense was told that the jail records were unavailable having been purged (PC-R. 4143). However, it was shown that the State had obtained the records and did not disclose them.

Further undisclosed by the State were notes from an interview of Barbara Marie Pridgen, wherein she advised that Pittman "and my parents had [a] pretty good relationship", and

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<sup>10</sup>In his second taped statement, Pounds identified other individuals in the same pod with Pittman and himself (PC-R. 3488). Pounds included the name Carl Hugh which prompted the detective to ask "Hughes or Hugh" (PC-R. 3488).



that Bonnie Knowles was known for "making up physical ailments" (Def. Ex. 13). Pridgen's first statement contradicted the State's claim at trial that there was bad blood between Pittman and her parents, which was argued as demonstrating motive for the murders. The second statement was also relevant given that the State had argued at trial that Pittman's motive for the murders was his anger that Bonnie had gone to the police and told them that he had raped her (PC-R. 4199). According to trial counsel, information that Bonnie was prone to make up ailments could have been used to support an argument that the rape claim was false, and that the anger of an innocent falsely accused of rape would have been less likely to lead to murder (PC-R. 4607).

Additionally, in undisclosed notes relating to George Hodges, it was clear that the State had not provided the defense with the correct address for Aaron Gibbons (PC-R. 3941).<sup>11</sup> There was a phone message to the prosecutor indicating that Gibbons had in fact not taken off, but provided an address where he could be found (PC-R. 3943).<sup>12</sup> The defense was not apprised of this.

Also undisclosed was the fact that Dennis Waters had advised law enforcement of his doubts that the wrecker he saw was in fact Pittman's. He merely told the police that the wreckers "looked similar" (PC-R. 3557). When asked to review his trial testimony wherein he testified that it was "the same wrecker", Waters indicated that he felt that the trial testimony was not accurate

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<sup>11</sup>The defense was unable to locate Gibbons during the trial.

<sup>12</sup>The defense was told that after his deposition, Gibbons packed and left without saying where he was going (R. 2860).

because the best he could say was "it was similar to the wrecker" (PC-R. 3564-77).

Finally, undisclosed by the State was information that William Smith had advised the prosecutor that he believed the person he saw on the morning of May 15, 1990, was the same person he had seen a couple of weeks before at used car lot on Highway 60 (PC-RE. 843). Trial counsel testified that from the defense perspective this information was significant and would have effected his trial preparation. Investigation would have been conducted to delve deeper into the matter and definitely Smith would have been cross-examined in order to suggest that his recognition of the man on the morning of May 15<sup>th</sup> was because he recognized him from an earlier event, and not because he recognized the man as Pittman (PC-R. 4133-35).

### **THE COURTS' RULINGS**

#### **A. CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE**

In his direct appeal to the Florida Supreme Court, Pittman asserted that the trial court erred in excluding the testimony of George Hodges that his stepson confessed to the murders for which Pittman was charged. While Pittman cited to and relied on *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Florida Supreme Court treated the issue as simply a Florida law issue about the hearsay rule and exceptions to the hearsay rule:

[A]t a hearing on the matter, the judge held that Hodges' testimony concerning what his stepson had told him was hearsay that did not fit within any exception and was therefore inadmissible.<sup>6</sup> We find that the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception.

F<sup>n</sup> 6 Although Pittman argued that section 90.804(2)(c), Florida Statutes (1989) ("A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement."), applied to the statement by Hodges' stepson, the trial judge found that the stepson was available to testify and that the statement lacked corroboration and trustworthiness.

*Pittman*, 646 So. 2d at 141-41. In his federal habeas proceedings, Pittman asserted that the state court's ruling was contrary to and an unreasonable application of clearly established federal law. The district court in its order disagreed and held that the Florida Supreme Court denied the issue on an adequate and independent state law ground:

A violation of a state law or rule does not present a cognizable claim for federal habeas corpus relief. See, *Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6, 103 S. Ct. 843, 853 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). The Florida Supreme Court properly rejected Pittman's claim on an adequate and independent state law ground. Years after his direct appeal was final, Pittman sought to relitigate his exclusion of evidence claim in his state habeas petition, citing *Holmes v. South Carolina*, 547 U.S. 319, 319-20, 126 S. Ct. 1727 (2006). In denying this sub-claim, the Florida Supreme Court clearly applied a procedural bar.<sup>11</sup> See *Pittman v. State*, 90 So. 3d at 818. Again, the Florida Supreme Court properly denied this claim on an adequate and independent state law ground.

(Doc. 30 at 86-89) (fn omitted).<sup>13</sup>

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<sup>13</sup>The district court further held that Pittman had not shown that the state court's adjudication of his exclusion of evidence claim on direct appeal either (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 or (2) 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 (Doc. 30 at 90).

In its opinion addressing this issue, the Eleventh Circuit disagreed with the district court as to the procedural bar. It found that Pittman had raised and the Florida Supreme Court had addressed constitutional issues on the merits:

In his first claim, Pittman argues that the state trial court's exclusion of the testimony of George Hodges regarding the Watson letter deprived him of his constitutional right to present a complete defense in violation of *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297(1973). Before addressing the merits,<sup>3</sup> we must first decide whether the Florida Supreme Court adjudicated the claim on the merits entitling its determination to deference under § 2254(d)(1).

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99, 131 S.Ct. 770. That presumption stands unless rebutted by evidence from the state court's decision and the record that "leads very clearly to the conclusion that the federal claim was inadvertently overlooked in state court." *Childers v. Floyd*, 736 F.3d 1331, 1334 (11<sup>th</sup> Cir. 2013) (en banc) (quoting *Johnson v. Williams*, 568 U.S. 289, 133 S.Ct. 1088, 1097, 185 L.Ed.2d 105 (2013)) (alteration adopted).

Here, Pittman's *Chambers* claim was squarely presented to the Florida Supreme Court on direct appeal; his brief addressed this claim at considerable length and made it quite clear that he was raising a federal constitutional claim along with his state law evidentiary claim. He argued that the exclusion of the Hodges testimony violated his right to present a defense as articulated in *Chambers*. Notably, his brief focused not on compliance with the Florida hearsay rule, but instead on federal constitutional cases and Florida cases applying these principles. Likewise, when the Florida Supreme Court reviewed the argument Pittman had made in the trial court, it would have been apparent that Pittman clearly focused on his *Chambers* claim. Nonetheless, in addressing the Hodges evidence on direct appeal, the Florida Supreme Court said only that "the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception." *Pittman I*, 646 So.2d at 172.

On collateral review, Pittman again raised the *Chambers* issue in his petition for a writ of habeas corpus filed directly with the Florida Supreme Court. In the section of his brief addressing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), Pittman added a discussion of *Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), another case in the *Chambers* line addressing a constitutional override of a state evidentiary rule.

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The Florida Supreme Court held that it could not address Pittman's constitutional argument because "claims raised in a habeas petition which [Pittman] ha[d] raised in prior proceedings and which have been previously decided on the merits in those proceedings are procedurally barred in the habeas petition." *Pittman II*, 90 So.3d at 818 (alteration omitted and emphasis added) (quoting *Porter v. Crosby*, 840 So.2d 981, 984 (Fla. 2003)). Indeed, Florida's high court recognized that Pittman had raised a constitutional claim arising under *Chambers* and its progeny. Specifically, it acknowledged in footnote 11 that Pittman's argument was based on *Holmes v. South Carolina* and *Williamson v. United States*. *Pittman II*, 90 So.3d at 818 & n.11. *Holmes v. South Carolina* squarely confronted the defendant's right to present a meaningful defense. 547 U.S. at 324, 126 S.Ct. 1727. *Williamson v. United States* addressed the hearsay exception for statements against penal interest. 512 U.S. 594, 596, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994).

For starters, because the issue was clearly presented in his initial appeal, we presume that the Florida Supreme Court adjudicated the claim on the merits. See *Williams*, 133 S.Ct. at 1096-97. Moreover, the Florida Supreme Court's rejection of this claim on collateral review because it had already been adjudicated "on the merits," specifically citing to *Holmes v. South Carolina*, strongly suggests to us that Florida's high court did not overlook Pittman's constitutional claim. After all, we can see little reason why the Florida Supreme Court would have cited to a Supreme Court case addressing a defendant's right to present a meaningful defense and rule that the argument was barred because it had previously been rejected on the merits, if the court had not indeed previously rejected that argument on the merits. See *Cone v. Bell*, 556 U.S. 449, 466-67, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009). Nothing in this record "leads very clearly to the conclusion that the federal claim was inadvertently overlooked in state court." *Childers*, 736 F.3d at 1334 (quotations omitted and alterations omitted). We are, therefore, obliged to afford the Florida Supreme Court deference under § 2254(d)(1).

*Pittman*, 871 F.3d at 1244-45. The Eleventh Circuit ruled against Pittman on the merits, giving deference to the state court ruling:

Pittman's case is far from "materially indistinguishable" from *Chambers*. In *Chambers*, McDonald confessed at least four times; "[t]he sheer number of [McDonald's] independent confessions provided additional corroboration for each." *Id.* at 300, 93 S.Ct. 1038. Here, Watson confessed at most once. McDonald's confessions were to friends with no motive to fabricate evidence against him, while Hodges had a clear motive to get back at Watson, a key witness in the prosecution that landed him on death row. While McDonald repudiated his confession, he never denied he had made the statement; here, significantly, Watson stated under oath that he never wrote the letter. What's more, in this case there was no letter produced, and Hodges' explanation of the letter's absence hardly inspires confidence — he said he destroyed the letter because he thought it was a joke. No one thought McDonald was joking. Moreover, unlike *Chambers*, who produced evidence that McDonald had purchased a gun of the same caliber as the murder weapon just before the shooting, Pittman produced no physical evidence tying Watson to the crime. And unlike in *Chambers*, where eyewitnesses placed McDonald at the scene before, after, and even during the shooting, no witnesses ever placed Watson or his cousin at the Knowles residence that night or near Bonnie Knowles's burning Toyota the next morning. The Florida Supreme Court's rejection of Pittman's claim was not contrary to *Chambers*.

Nor was the decision an unreasonable application of clearly established federal law. The Florida hearsay rule is not arbitrary in general nor was the exclusion of the Hodges evidence disproportionate to the interests served by the rule. At the relevant time, Florida's Rules of Evidence excluded out of court statements offered to prove the truth of the matter asserted. Like many jurisdictions, Florida recognized an exception for statements made against penal interest. Under the rule, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement." Fla. Stat. § 90.804(2)(c) (1989). The Florida rule thus largely tracks *Chambers*'s holding. See *Chambers*, 410 U.S. at 302, 93 S.Ct. 1038 (holding that the hearsay rule cannot be applied to exclude critical defense evidence that bears "persuasive assurances of trustworthiness").

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Since hearsay prohibitions are not arbitrary, Pittman would only be entitled to a constitutional override of Florida's rules if Pittman had offered evidence that the Hodges' hearsay statement was sufficiently trustworthy and reliable. See, e.g., *id.* at 302, 93 S.Ct. 1038 (holding that the generally valid prohibition on hearsay was overcome because the hearsay evidence "bore persuasive assurances of trustworthiness"). Pittman failed to meet his burden. The declarant, Watson, denied ever writing any confession letter, and the only evidence that this letter ever existed came from two death row inmates, one of whom had a powerful interest in seeing Watson prosecuted — not only to get revenge because Watson had testified against him, but also to exonerate himself. Although it's not clear how, Hodges apparently believed that this letter would allow him to clear his own name. In his letter to Pittman's prosecutor, Hodges intimated that proving Watson committed the triple homicide would also prove that Hodges did not commit the murder he was convicted of. Indeed, at his deposition, Hodges said that his own conviction was "why [he] wrote [the letter]."

Nor did the weak and circumstantial evidence discovered by the defense team make up for these deficiencies. All defense counsel could confirm was that Gibbons and Watson frequented an area near the murder site, had used crack cocaine on occasion, matched some aspects of the witnesses' description of the man who was seen running away from Bonnie's car, and had destroyed evidence by fire in the past. These facts fall far short of the "circumstances that provided considerable assurance of [the hearsay evidence's] reliability" in *Chambers*, 410 U.S. at 300, 93 S.Ct. 1038. That's especially true where, as here, there was also evidence that undercut the Watson-as-perpetrator theory. Notably, the prosecution presented records establishing that Watson had checked in for work at 7 a.m. at Seminole Fertilizer on the morning after the murder, despite the fact that Bonnie Knowles's car had been set on fire some distance away around 6:40 a.m.

In as much as the Florida Supreme Court could reasonably have determined that the proffered evidence did not offer sufficient assurances of trustworthiness to override the traditional reliability concerns embodied in the hearsay rules, its decision to reject this claim was neither contrary to nor an unreasonable application of clearly established federal law under § 2254(d)(1), and the district court was correct to deny Pittman relief.

*Pittman*, 871 F.3d at 1247-49.<sup>14</sup>

Eleventh Circuit Judge Jordan concurred in the result with an analysis that differed from the majority:

1. In my opinion the Florida Supreme Court completely failed to address, on direct appeal, Mr. Pittman's federal due process claim under *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and its progeny. As the majority notes, Mr. Pittman clearly asserted this constitutional claim in the trial court and on appeal, yet the Florida Supreme Court only addressed a non-existent claim under state hearsay law. See *Pittman v. State*, 646 So.2d 167, 172 (Fla. 1994). Applying the analysis set forth in *Childers v. Floyd*, 736 F.3d 1331, 1334 (11<sup>th</sup> Cir. 2013) (en banc), I conclude that Mr. Pittman has successfully rebutted the presumption that the Florida Supreme Court addressed and resolved the *Chambers* claim on the merits. See, e.g., *Bester v. Warden*, 836 F.3d 1331, 1336-37 (11th Cir. 2016). I would therefore review the *Chambers* claim without AEDPA deference.

Under plenary review, however, Mr. Pittman's *Chambers* claim fails. As the majority correctly explains, see Maj. Op. at 1249-50, the circumstances surrounding Mr. Watson's letter did not provide sufficient assurance of reliability. See *Chambers*, 410 U.S. at 300, 93 S.Ct. 1038.

*Pittman*, 871 F.3d at 1254-55 (Jordan, J., concurring in the judgment).

## **B. UNDISCLOSED EVIDENCE**

In its opinion denying Pittman's various *Brady* claims, the Florida Supreme Court quoted the circuit court's findings and stated, "Based on this record, we conclude that Pittman has failed to show that the postconviction court erred in denying this claim." *Pittman*, 90 So. 3d at 806, 808, 809, 810. According to the Florida Supreme Court, Pittman had not shown that the

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<sup>14</sup>The Eleventh Circuit further stated that it would not overturn the Florida Supreme Court's affirmance of the exclusion of this evidence even if its review was de novo. *Id.* at 1249.



State suppressed admissible evidence that was favorable to the him; that the State did so either willfully or inadvertently; and that had the evidence been disclosed, a reasonable probability existed that the jury would have reached a different verdict. *Id.*

In its order, the federal district court likewise relied heavily on the state circuit court's findings. The district court found that the state courts did not contravene clearly established federal law, unreasonably apply clearly established federal law, or reach an unreasonable determination of the facts (Doc. 30 at 29, 35, 49).

The Eleventh Circuit declined to issue a COA as to Pittman's *Brady* claim. It provided no basis for its decision.

#### **REASONS FOR GRANTING THE WRIT**

- I. THIS COURT SHOULD RESOLVE 1) WHETHER THE ELEVENTH CIRCUIT PROPERLY GAVE DEFERENCE TO A NON-EXISTENT STATE COURT CONSTITUTIONAL RULING, AND 2) WHETHER THE ELEVENTH CIRCUIT PROPERLY ANALYZED PITTMAN'S CLAIM THAT HE WAS IMPROPERLY DENIED THE RIGHT TO PRESENT EVIDENCE OF ANOTHER'S CONFESSION TO THE HOMICIDES FOR WHICH PITTMAN WAS STANDING TRIAL.**

Pittman submits that this Court should grant certiorari to consider whether the Eleventh Circuit's affirmance of the denial of habeas relief was based on a flawed legal and factual analysis. In addressing this issue, the Eleventh Circuit found that Pittman's claim, premised upon *Chambers v. Mississippi*, 410 U.S. 284 (1973), was squarely presented to the Florida Supreme Court on direct appeal. *Pittman*, 871 F.3d at 1245. Parting ways with the district court, the Eleventh Circuit found that the evidence strongly suggested that the Florida Supreme Court did not overlook Pittman's constitutional claim. *Id.* at 1246. Thus,

the Eleventh Circuit said that it was "obliged to afford the Florida Supreme Court deference under § 2254(d)(1)." *Id.*

Pittman submits that the Eleventh Circuit erred in giving deference when the Florida Supreme Court had clearly not addressed the constitutional claim. Despite Pittman's argument that the judge's rulings violated his constitutional rights under *Chambers v. Mississippi*, the Florida Supreme Court in affirming the exclusion of the evidence did not refer to the constitutional basis of Pittman's claim of error. Instead, the Florida Supreme Court treated the issue as simply about Florida law, i.e the hearsay rule and exceptions to the rule. It wrote: "the trial judge correctly excluded Hodges' testimony as substantive evidence under the hearsay rule and that there is no applicable hearsay exception." *Pittman*, 646 So. 2d at 172. The Florida Supreme Court's failure to address the constitutional basis of the claim had led the federal district court in its order to say that Pittman's claim was rejected on an adequate and independent state law ground (Doc. 30 at 88). And as Eleventh Circuit Judge Jordan concluded in his concurring opinion, "Mr. Pittman has successfully rebutted the presumption that the Florida Supreme Court addressed and resolved the *Chambers* claim on the merits." *Pittman*, 871 F.3d at 1254 (Jordan, J., concurring in the judgment).

Pittman submits certiorari review is warranted as to the deference that the Eleventh Circuit gave to a non-existent state

court ruling. See *Pittman*, 871 F.3d at 1249.<sup>15</sup> Constructing an imaginary state court ruling to give deference to in a federal habeas proceeding as the Eleventh Circuit did here, provides state courts with a ready means to foreclose virtually all federal habeas review. It can be accomplished by refusing to address the federal constitutional basis for claims raised in criminal cases and always deciding cases on the basis of state law even when the claim was not presented on the basis of state law.

Certiorari review of this aspect of the Eleventh Circuit decision is warranted. It is an important and recurring matter warranting this Court's attention.

As to the merits, the Eleventh Circuit first gave deference to a non-existent state court ruling and said that the non-existent ruling was not contrary to nor an unreasonable

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<sup>15</sup>Pittman submits that the Eleventh Circuit, while giving the imaginary ruling, had relied on factual distinctions from *Chambers v. Mississippi* as showing that federal law had not been unreasonably applied. This analysis overlooked the fact the AEDPA does not prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. In *Panetti v. Quarterman*, 127 S.Ct. 2842, 2858 (2007), this Court explained: "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.' . . . Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" (Citations omitted). See also *Williams v. Taylor*, 120 S.Ct. 1495, 1505, fn 9 (2000) ("A literal application of the Fourth Circuit test would yield a particularly perverse outcome in cases involving the *Strickland* rule for establishing ineffective assistance of counsel, since that case, which established the 'controlling' rule of law on the issue, contained facts insufficient to show ineffectiveness.").

application of federal law. It then gave an alternative ruling and held:

Indeed, we would not overturn the Florida Supreme Court's affirmance of the exclusion of this evidence even if our review was de novo. The accuracy of jury trials depends on adversarial testing, and the broad prohibition on hearsay evidence reflects an understanding that hearsay statements are not amenable to many of the methods our adversarial system relies on to test the quality of evidence.

*Pittman*, 871 F.3d at 1249.

The Eleventh Circuit's conclusion ignores the fact that had Watson been standing trial, his confession to Hodges would have been admissible as an admission. If Watson was standing trial, Watson's confession could have led a jury to convict and if so, would have provided sufficient evidence to preclude a challenge to the sufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979).

A review of the record demonstrates that the State's evidence against Pittman was as circumstantial as the evidence the defense wished to introduce (R. 3615). In fact, the defense evidence against Jessie Watson and Aaron Gibbons mirrored the State's evidence against Pittman. Both parties' primary witnesses were "snitches" who were in prison -- Carl Hughes and George Hodges. The State's evidence against Pittman included sightings of him and his wrecker around the time of the car fire, evidence of prior threats and other bad acts allegedly committed by Pittman, and his alleged motive and proximity to the homicides. The defense evidence included sightings of wreckers in the vicinity of Watson's and Gibbons' residences, Gibbons' acne

scars, evidence of their prior crimes and bad acts, motive (drug use), and Watson's and Gibbons' proximity to the scene of the homicides at the time. Most of the State's evidence was no more convincing than the defense evidence against Watson and Gibbons. Had Barbara Davis, the witness who identified Pittman at trial, been shown photos of Gibbons, she might have identified him instead of Pittman because of the acne on his face.

The jury did not get to hear the evidence concerning Watson's confession and the corroborating circumstances. The jury was only permitted to hear the evidence of Pittman's alleged confessions to two jail inmates with pending prosecutions against them and a lot more to gain by assisting the State to prosecute Pittman, as well as the evidence the State claimed corroborated those confessions. In these circumstances, Pittman was deprived of the opportunity to present his own witnesses to establish a defense. *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

Certiorari review as to this aspect of the Eleventh Circuit's ruling is also warranted. *See Holmes v. South Carolina*, 547 U.S. 319 (2006).

**II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER PITTMAN WAS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON HIS *BRADY* CLAIM.**

During his federal habeas proceedings before the district court, Pittman raised a number of issues, including one based on the assertion that the State withheld evidence which was material and exculpatory in nature.

In its order denying relief, the district court declined to issue a COA as to any of Pittman's grounds for relief (Doc. 30 at 119). The district court's order stated in its entirety:

**CERTIFICATE OF APPEALABILITY AND  
LEAVE TO APPEAL IN FORMA PAUPERIS DENIED**

The Court declines to issue a certificate of appealability pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2).

Because Petitioner is not entitled to a certificate of appealability, Petitioner is not entitled to appeal in forma pauperis.

Petitioner is required to pay the \$505.00 appellate filing fee unless the appellate court grants Petitioner in forma pauperis status on appeal.

(Doc. 30 at 119-20).

Pittman then asked the Eleventh Circuit to issue a COA on five grounds set forth in his § 2254 petition, including his *Brady* claim. While the Eleventh Circuit granted Pittman's motion as to two issues, a penalty phase ineffective assistance of counsel claim and the *Chambers* issue, it denied a COA as to the remaining issues including the *Brady* claim. The extent of the Eleventh Circuit's analysis as to the remaining issues was as follows: "Appellant's motion for a certificate of appealability is DENIED with respect to all of his other claims."

Pittman proceeded to file a motion for reconsideration of the denial of a COA as to the three remaining grounds. Pittman cited to this Court's June 6, 2016 certiorari grant in *Buck v. Stephens*, 136 S.Ct. 2409 (2016), which concerned whether an unduly burdensome COA standard had been imposed in contravention

of this Court's precedent. The Eleventh Circuit denied Pittman's motion, stating only the following: "Appellant's motion for reconsideration of the June 28, 2016, Order denying in part the motion for certificate of appealability is DENIED."

In *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), this Court delineated the proper procedures for the issuance of a COA in habeas cases under the AEDPA. Then, in *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003), this Court further elaborated:

In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel*, 529 U.S. 473, 481, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000). Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra*, 529 U.S. at 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595.

This Court then explained the manner in which a federal court should conduct a COA inquiry:

The COA determination under § 2253(c) **requires an overview of the claims in the habeas petition and a general assessment of their merits**. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner “has already failed in that endeavor.” *Barefoot, supra*, at 893, n. 4.

*Miller-El*, 537 U.S. at 336-37 (emphasis added). Thereafter, this Court found error in the court of appeals’ resolution of the COA:

The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner’s constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. **As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits.** *Slack*, 529 U.S., at 481; *Hohn*, 524 U.S., at 241. **The Court of Appeals should have inquired whether a “substantial showing of the denial of a constitutional right” had been proved.** Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

*Id.* at 342 (emphasis added).

The holding in *Miller-El* is pertinent to the circumstances of Pittman’s case. Contrary to this Court’s precedent, there is no indication that the Eleventh Circuit conducted a “threshold inquiry into the underlying merit[s]” of Pittman’s claims. Indeed, it appears as though no “overview of the claims” nor “general assessment of their merits” was conducted. And, no



analysis as to “whether the applicant had made a substantial showing of a denial of a constitutional right” was performed by the Eleventh Circuit. This absence of a COA inquiry is compounded by the failure of the district court to provide any explanation or analysis for its denial of a COA as to the entirety of the habeas petition.<sup>16</sup>

Pittman submits that when a proper analysis is conducted, jurists of reason could disagree with the district court’s determination that the Florida Supreme Court did not contravene clearly established federal law, unreasonably apply clearly established federal law, or reach an unreasonable determination of the facts (Doc. 30 at 29). First, jurists of reason could find that the Florida Supreme Court failed to conduct the requisite cumulative analysis. In *Smith v. Secretary*, 572 F.3d 1327, 1343 (11<sup>th</sup> Cir. 2009), the Eleventh Court found that the Florida Supreme Court’s analysis of Smith’s *Brady* claim was an unreasonable application of clearly established federal law because it failed to include all of the undisclosed favorable information in a cumulative analysis of whether confidence was undermined in the outcome. In Pittman’s case, the Florida Supreme Court employed the same discredited analysis it used in *Smith v. State*, 931 So. 2d 790 (Fla. 2006). The Florida Supreme Court went through the various *Brady* claims individually and stated as to

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<sup>16</sup>Rule 22(b), F.R.A.P., provides in pertinent part:

If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.

the Carl Hughes, David Pounds and William Smith's *Brady* claims the same stock paragraph:

Based on this record, we conclude that Pittman has failed to show that the postconviction court erred in denying this claim. Pittman has failed to show that the State suppressed admissible evidence that was favorable to the defense, that the State did so either willfully or inadvertently, and that the defendant was thereby prejudiced. Specifically, Pittman has failed to show that, had the evidence been disclosed, there is a reasonable probability that the jury would have reached a different verdict.

*Pittman*, 90 So. 3d at 806, 808, 810. As to the *Brady* claims concerning other witnesses where nondisclosure was acknowledged by the trial prosecutor, the Florida Supreme Court stated:

The court's factual findings are supported by competent, substantial evidence and the court properly applied the law. Pittman has failed to show that the State suppressed admissible evidence that was favorable to the defense, that the State did so either willfully or inadvertently, and that the defendant was thereby prejudiced. Specifically, Pittman has failed to show that, had the evidence been disclosed, there is a reasonable probability that the jury would have reached a different verdict.

*Id.* at 809, 810. The only time that the Florida Supreme Court mentioned a cumulative analysis of the *Brady* violations, it did not conduct one because: "Pittman has failed to show (1) that the State committed any *Brady* violations." *Pittman*, 90 So. 3d at 811. Jurists of reason could find that the Florida Supreme Court's analysis did not comport with clearly established federal law.

Jurists of reason could also find that the Florida Supreme Court improperly deferred to the circuit court's evaluation of evidence presented at the postconviction evidentiary hearing as

it related to the materiality prong of the *Brady* standard.<sup>17</sup> In *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009), this Court ruled that the Florida Supreme Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), was "an unreasonable application of our clearly established law." In *United States v. Bagley*, 473 U.S. 667 (1985), this Court expressly adopted the *Strickland* prejudice prong standard, i.e. "reasonable probability of a different outcome", as the standard to be used when conducting the materiality analysis of undisclosed favorable information in *Brady* cases. Thus, this Court's rejection in *Porter* of the Florida Supreme Court's *Strickland* prejudice prong analysis as too deferential to the lower court considering a penalty phase ineffectiveness claim applies with equal force where the Florida Supreme Court has been inappropriately deferential to a lower's court rejection of *Brady* claims for a want of materiality.<sup>18</sup>

Jurists of reason could also find that the state court as well as the district court imposed a diligence requirement (Doc. 30 at 42)<sup>19</sup>, despite the fact that diligence does not comprise a

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<sup>17</sup>As to Pittman's *Brady* claim, the Florida Supreme Court recited and gave deference to the lower court's order: "Pittman has failed to show that the postconviction court erred in denying this claim." *Pittman*, 90 So. 3d at 806, 808, 809, 810, 815.

<sup>18</sup>See *Sochor v. Sec'y Dept. of Corrs.*, 685 F.3d 1016, 1029 (11<sup>th</sup> Cir. 2012) ("As measured against the decision of the Supreme Court of the United States in *Porter [v. McCollum]*, the Supreme Court of Florida unreasonably applied *Strickland* to decide the issue of prejudice . . . .").

<sup>19</sup>The state circuit court's order, upon which the Florida  
(continued...)

component of the *Brady* standard.<sup>20</sup> Jurists of reason could find that both the state court and the district court erroneously thought that there can be no *Brady* violation if the prosecutor is unaware of information in the possession of police. See *Kyles v. Whitley*, 514 U.S. 437 (1995). Concurring in the result, Justice Pariente noted, “[T]he majority could be read to approve of the trial court’s misstatements of the law – statements that there is a due diligence requirement in *Brady* and statements that appear to emphasize that the prosecutor did not have knowledge of notes in the possession of police in denying Pittman’s *Brady* claims.” *Pittman*, 90 So. 3d at 820 (Pariente, J., concurring in result).

Pittman further submits, contrary to the district court’s resolution of this issue, that jurists of reason could find that the non-disclosures undermine confidence in the outcome. The State’s case was entirely circumstantial. It was the testimony of the snitches in particular that was in essence the State’s case. For instance, through Hughes, the State argued that while the window of opportunity was small, Pittman told Hughes that he was able to commit the murders nonetheless. The testimony and credibility of Hughes and also Pounds was absolutely critical to

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<sup>19</sup> (...continued)  
Supreme Court relied, faulted trial counsel for a lack of diligence. See *Pittman*, 90 So. 3d at 806-07.

<sup>20</sup>This Court held in *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999), there are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

the State's case. As it was, the jury still had some difficulty reaching a verdict. The deliberations were lengthy and dragged out over two days (PC-R. 4124). The undisclosed information that impeached Hughes and Pounds would on its own have undermined confidence in the outcome. Likewise, a proper cumulative analysis of all of the withheld evidence demonstrates that there is more than a reasonable probability of a different outcome.

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S.Ct. 759 (2017) (citation omitted).

Pittman submits that his *Brady* issue itself is deserving of a COA and certiorari review. He also submits that the Eleventh Circuit's handling of COA applications warrants certiorari review in this Court.

#### **CONCLUSION**

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing petition has been furnished by U.S. Mail, first class postage prepaid, to Timothy A. Freeland, Attorney General's Office, 3507 E. Frontage Rd, Ste. 200, Tampa, FL 33607, on this 17<sup>th</sup> day of May, 2018.

/s/. Martin J. McClain  
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