

No. _____

IN THE
SUPREME COURT OF UNITED STATES

Emerson Pinkney, - PETITIONER

VS.

Sec'y, Fla. Dept. of Corr., - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
The Circuit Court of Appeal, Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Emerson Pinkney, 719392, B2208
Okeechobee Corr. Inst.
3420 N.E. 168TH Street
Okeechobee, Florida 34972

Petitioner Pro. se

QUESTION(S) PRESENTED

Whether the district court ~~erred~~ erred when it denied defendant's claim that his appellate counsel rendered ineffective assistance by failing to argue that the state trial court committed a fundamental error when it instructed the jury on the defense of self-defense and justifiable use of deadly force?

When newly discovered evidence supports self-defense and ineffective of counsel claims, does procedural actual innocence exceptions to state procedural defaults pursuant to 28 U.S.C. § 2244(d)(1)(D), deprive petitioners of habeas corpus review under legal/not factual innocence?

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:

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 14.1(b); 24.1(b) and 29.6, the undersigned hereby certifies the following persons have an interest in the outcome of this case:

- 1.) Pamela Jo Bondi, Florida Attorney General
- 2.) Hon. Sheri Polster Chappell, Federal ~~District~~ Court Judge
- 3.) Michael Crews, Secretary, Florida Department of Corrections
- 4.) Hon. Ed. Carnes, Eleventh Circuit Court of Appeals Judge
- 5.) Hon. Douglas N. Frazier, Federal Magistrate Judge
- 6.) Jean-Paul Galasso, Assistant State Attorney
- 7.) Hon. Lynn Gerald, State Circuit Court Judge
- 8.) Barbara-Ann Jones, Victim
- 9.) Edward Kelly, Former Attorney of Appellant
- 10.) Stephen Leskovich, Former Attorney of Appellant
- 11.) Emerson Pinkney, Appellant
- 12.) Lise Plattner, Assistant State Attorney
- 13.) Michael Pusateri, Attorney for Appellant
- 14.) Tonja R. Vicker, Assistant Attorney General

15.) Hon. Edward Voltz, State Circuit Court Judge

16.) Roy Williams, Victim (deceased)

17.) LaToya Woolfork, Victim

18.) Greenberg Traurig, LLP

TABLE OF CONTENTS

OPINIONS BELOW....., 1

JURISDICTION....., 2

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED....., 3,4

STATEMENT OF THE CASE....., 4,5,6

REASONS FOR GRANTING THE WRIT....., 7-17

CONCLUSION....., 17

INDEX TO APPENDICES

APPENDIX A ~ Eleventh Circuit Court, order of denial ~

Date issued: December 6, 2017

APPENDIX B ~ Eleventh Circuit Court, order denying rehearing ~

Date issued: February 23, 2018

APPENDIX C ~ Eleventh Circuit Court, order denying
motion to expand C.O.A. ~

Date issued: unknown

APPENDIX D ~ United States District Court, Middle District
of Florida, opinion and order ~

Date issued: September 12, 2014

APPENDIX E ~ Supreme Court of Florida, order denying writ of mandamus to re-instate appeal and order denying rehearing ~ Date issued: January 7, 2011 and March 10, 2011

APPENDIX F ~ Florida District Court of Appeal, Second District order dismissing appeal as untimely ~ Date issued: June 23, 2010

APPENDIX G ~ Circuit Court of The Twentieth Judicial Circuit In and For Lee County, Florida; order denying remaining grounds of defendant's 3.850 postconviction motion after evidentiary hearing; ~ Date issued: March 22, 2010

2.) order denying in part, dismissing in part, and directing evidentiary hearing as to ground O and R of defendant's 3.850 motion for post-conviction relief, and appointing regional counsel to represent defendant for purposes of the evidentiary hearing; and ~ Date issued: February 20, 2008

3.) order denying defendant's motion for rehearing. Date issued: April 27, 2010

APPENDIX H ~ Florida District Court of Appeal, Second District order denying petition alleging ineffective assistance of appellate counsel; and rehearing ~ Date issued: October 5, 2006; and September 5, 2006

APPENDIX I ~ Florida District Court of Appeal, Second District Order affirming direct appeal ~ Date issued: August 31, 2005

(V)

TABLE OF AUTHORITIES CITED

CASES	Page(s)
<u>Arizona v. Fulminante</u> , 499 U.S. 379 (1991).....	13
<u>Bates v. State</u> , 883 So.2d 907, 908 (Fla. 2d DCA 2005).....	9
<u>Bevan v. State</u> , 908 So.2d 524 (Fla. 2d DCA 2005).....	9
<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 637 (1993).....	11, 12
<u>California v. Roy</u> , 117 S.Ct. 337 (1996).....	11
<u>Damoulakis v. State</u> , 814 So.2d 1804 (Fla. 2d DCA 2002).....	10
<u>Domberg v. State</u> , 661 So.2d 235 (Fla. 1995).....	8
<u>Estelle v. McGuire</u> , 502 U.S. 62, 72 (1991).....	11, 12, 15
<u>Fair v. Crosby</u> , 858 So.2d 1103, 1105 (Fla. 4 th DCA 2003).....	9
<u>Elyan v. State</u> , 947 So.2d 1229 (Fla. 2d DCA 2007).....	10
<u>Francis v. Franklin</u> , 105 S.Ct. 1965, 1976 n.8 (1985).....	14
<u>Franco v. State</u> , 901 So.2d 901, 904 (Fla. 4 th DCA 2003).....	10
<u>Furney v. State</u> , 115 So.3d 1095 (Fla. 4 th DCA 2013).....	8

TABLE OF AUTHORITIES CITED

CASES	Page(s)
<u>Giles V. State</u> , 831 So.2d 606 (Fla. 1 st DCA 2002).....	9
<u>Granberry V. State</u> , 919 So.2d 699, 701 (Fla. 5 th DCA 2006).....	8, 9
<u>Harrington V. Richter</u> , 562 U.S. 86 (2011).....	8, 9
<u>Hartford V. Culliver</u> , 459 F.3d 1193, 1200 (11 th Cir. 2006).....	15
<u>Hernandez V. State</u> , 884 So.2d 281 (Fla. 2d DCA 2004).....	9
<u>House V. Bell</u> , 547 U.S. 518 (2006).....	16
<u>Houston V. State</u> , 919 So.2d 489 (Fla. 2d DCA 2006).....	9
<u>In re Winship</u> , 90 S. Ct. 1068 (1970).....	5, 12, 14
<u>Kotteakos V. U.S.</u> , 66 S. Ct. 1239 (1946).....	12, 13
<u>Martin V. Ohio</u> , 107 S. Ct. 1098 (1987).....	7, 11, 12, 13, 14
<u>Martinez V. State</u> , 981 So.2d 499 (Fla. 2008).....	9
<u>Miller V. Fenton</u> , 474 U.S. 104 (1985).....	12
<u>Mills V. State</u> , 490 So.2d 204 (Fla. 3d DCA), rev. denied, 494 So.2d 1183 (Fla. 1986)....	10
<u>Mullaney V. Wilbur</u> , 95 S. Ct. 1881 (1975).....	10, 11
<u>Murray V. Carrier</u> , 477 U.S. 478 (1986).....	15
<u>Ortiz V. State</u> , 905 So.2d 1016 (Fla. 2d DCA 2005).....	9

TABLE OF AUTHORITIES CITED

CASES

Page(s)

<u>Patterson v. New York</u> , 97 S.Ct 2319 (1977).....	7, 12, 13
<u>Pinder v. State</u> , 8 So. 837 (Fla. 1891).....	10
<u>Pinkney v. Sec'y, Fla. Dept. of Corr.</u> , 2014 WL 4542862 (M.D. Fla. Sept. 12, 2004)...	1
<u>Rasley v. State</u> , 878 So.2d 473, 476 (Fla. 1 st DCA 2004).....	13
<u>Rozzelle v. Sec'y, Fla. Dept. of Corr.</u> , 672 F.3d 1000, 1009 (C.A. 11 th 2012).....	6
<u>Schlup v. Delo</u> , 115 S. Ct. 851 (1995).....	16
<u>Smith v. State</u> , 521 So.2d 106 (Fla. 1988).....	12
<u>St. Louis S.W.R. Co. v. Arkansas</u> , 235 U.S. 350, 362 (1914).....	14
<u>State v. Smith</u> , 573 So.2d 306 (Fla. 1990).....	10
<u>Strickland v. Washington</u> , 104 S. Ct. 2052 (1984).....	7, 9
<u>Van Loan v. State</u> , 736 So.2d 803, 804 (Fla. 2d DCA 1999).....	10
<u>Wright v. State</u> , 213 So.3d 881, 911 (Fla. 2017).....	8

STATUTES

Sixth Amendment of the United States Constitution.....	3, 7
Fourteenth Amendment of the United States Constitution.....	3, 12, 7
28 U.S.C. § 1254(1).....	2

TABLE OF AUTHORITIES CITED

STATUTES

Page(s)

28 U.S.C. § 2244(d)(1)(A)....., 4, 6, 16

3.6 (f), Fla. Standard Jury Instruction, (2004)....., 3

F.S. 776.012(2), (2003)....., 3

F.S. 776.041(1), (2003)....., 3

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 D to the petition and is

☒ reported at, 2014 WL 4542862 (M.D. Fla. Sept. 12, 2014); 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 December 6, 2017.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 23, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

Florida Statute 776.012(2), (2003);

"
a person is justified in using deadly force if he reasonably believes that it is necessary to prevent 'imminent death or great bodily harm to himself or another.'"

Florida Statute 776.041(1), (2003);

provides in relevant part... "justification defense is not available to a person who... 'is attempting to commit, committing or escaping after the commission of, a forcible felony'..."

3.6(f), Florida Standard Jury Instruction, (2004):

However, the use of force likely to cause death or great bodily harm is not justifiable if you find: "in relevant part... 'defendant was attempting to commit, committing or escaping after the commission of a forcible felony'..."

28 U.S.C. § 2244(d)(1)(A);

"a state prisoner has one year to file a federal petition for habeas corpus, start from 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.'" Exceptions to this rule are cause and prejudice, and fundamental miscarriage of justice.

STATEMENT OF THE CASE

1.) Whether district court erred when it denied defendant's claim that appellate counsel rendered ineffective assistance by failing to argue that state trial court committed a fundamental error when it instructed the jury on the defense of self-defense and justifiable use of deadly force? In opinion of denial the Eleventh Circuit issued a two theory or argument, the first in the Respondent's favor and second in petitioner's. The Eleventh Circuit theory for its determination stops short of determining whether a fairminded jurist would disagree as required and conflicts with the principles of law established by this Court and the Supreme Court of Florida prior to its ruling. The Eleventh Circuit forced theory of excusable homicide upon Petitioner to eliminate the requirement of sole or primary defense which met the fundamental error per se reversal rule at the time of appeal, and agreed with the

Respondent that the Petitioner is not entitled to relief because the Florida District Court of Appeal, Second District, silent denial reveals that it did not find fundamental error, and in the alternatively, the court applied a fundamental error determination for Florida District Court of Appeal, Second District, that was not established until three years after the lower courts ruling.

These holdings departs from decisions of this Court and conflicts with the Supreme Court of Florida principle of law that a silent denial does not reveal whether a court did not find fundamental error, and claims of ineffective assistance of appellate counsel must be evaluated from the law at the time of appeal. This Court has established the standard of review, De Novo, for ineffective assistance of counsel claims, and that a state court establish its on principle of law.

Both the State and Federal courts agrees that the instruction is erroneous. However, their concern is with formalism rather than substance as required in Winship, and the unique due process rights that accompany's burden of persuasion, or jury instructions that shifts the burden of persuasion on affirmative defenses to defendants. Once its done and the defendant produces a perponderance of evidence creating a jury question, a fair trial under due process requires the jury to find beyond a reasonable doubt that he did not prove self-defense.

2.) When newly discovered evidence supports self-defense and ineffective assistance of counsel claims, does exceptions to state

procedural defaults pursuant to 28 U.S.C. § 2244(d)(1)(D), deprive petitioners of habeas corpus review under legal/not factual innocence?

In application for C.O.A. in the Eleventh Circuit, Petitioner raised the issue of cause and prejudice test, and procedural actual innocence. The court only granted C.O.A. regarding question one herein, Petitioner filed a motion to expand C.O.A. regarding procedural actual innocence and court denied, (app. C).

Petitioner raised the cause and prejudice test, and procedural actual innocence claim in the federal district court in regards of state procedural defaults of 3850 postconviction motion appeal. As to cause and prejudice test the district court determined that Petitioner could not show prejudice, and nor can Petitioner show fundamental miscarriage of justice to overcome the procedural default these claims, and determined the issue in the case boiled down to whose story the jury found more credible, the jury did not believe he acted in self-defense, (app. D, 16-17).

Petitioner pointed out in C.O.A. that the district court did not apply the proper standard of review for procedural actual innocence, instead applying a substantive innocence review, and the district court made its determination without guidance ~~from~~ from the Eleventh Circuit, due to affirmative defenses/procedural actual innocence conflict in the circuit courts and its silence of the issue, *Rozzelle v. Sec'y, Fla. Dept. of Corr.*, 672 F.3d 1000, 1008 (C.A. 11th (Fla.) 2012) (conflict among the circuit courts).

REASONS FOR GRANTING THE PETITION

This Court's review of the questions presented is plainly warranted; the decision below is wrong; that decision conflicts with the holdings of other federal and state courts; and the questions are of tremendous practical and doctrinal importance.

1.) The decision below cannot be squared with this Court's Sixth and Fourteenth Amendment jurisprudence. In Strickland v. Washington, 104 S. Ct. 2052 (1984), the court established the two-prong test of ineffective assistance of counsel, in effort to protect defendants rights to effective assistance of counsel and a fair trial under the sixth amendment of the United States Constitution. The Court's due process requirements under the fourteenth amendment of the United States Constitution, requires the jury to find beyond a reasonable doubt, base on all the evidence, including that relating to self-defense, each element of the crime and also conclude that the defendant had not proved his affirmative defense, Martin v. Ohio, 107 S. Ct. 1098, 1101 (1987), Patterson v. New York, 97 S. Ct. 2319 (1977), In re Winship, 90 S. Ct. 1068 (1970).

In light of the above, the Eleventh Circuit, Supreme Court of Florida and Respondant rationale can not withstand constitutional scrutiny; the lower court's reasoning to the contrary in this case is incorrect. To begin with, the Eleventh Circuit rejected the district court ~~incorrect~~ incorrect findings and proceeded under the concept of law that Petitioner could not show prejudice under Strickland, id., because the Florida

District Court of Appeal, Second District, has already determined the error is not fundamental error, (app. A, 15-18), and that the court is bounded by the state courts construction of its own laws. The Eleventh Circuit erred in its determination and conflicts with the holding of the Supreme Court of Florida and this Court.

Prior to the lower court's ruling the Supreme Court of Florida held in Wright v. State, 213 So.3d 881, 911 (Fla. 2017) (c.f., Clark v. State, 102 So.3d 763, 765 (Fla. 2012) (distinguishing Chandler, because the court had affirmed the direct appeal without a written opinion and therefore did not reveal whether it had found that no fundamental error occurred)),¹ also see Furney v. State, 115 So.3d 1095 (Fla. 4TH DCA 2013).¹ This is an indication of state law procedural principle to the contrary, of the determination adopted by the lower court in adjudication of claim and thus erroneous. As has been noted before by this Court, the state court or Legislature can alter the state's practices or elaborate more fully on their import, Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624, 639-40 (2011) (citing, Evans v. Chavis, 546 U.S. 189, 197, 199 (2006)).

The Petitioner can only bring his claim under the law in effect at the time of appeal. In the state of Florida the ^{law} at time of ~~app~~ appeal applies when determining whether appellate counsel was ineffective, Domberg v. State, 661 So.2d 285 (Fla. 1995); Gronberry v. State, 919 So.2d

(Footnote)

1.) Furney, was in the same time frame as Petitioner crimes, but was 3.850 postconviction motion ten year later, Petitioner was on 9.141, Fla. R. App. P. (2001), State Writ of Habeas Corpus.

699, 701 (Fla. 5th DCA 2006); Strickland, id.; Harrington, id., 639-40 (the courts can alter the states practices or elaborate more fully on their import.). The above indication of state law procedural principle makes Martinez V. State, 981 So.2d 499 (Fla. 2008), rendered three years after Petitioners conviction became final on August 31, 2005, (app. I), inapplicable to case.

Petitioner, must show that the court had no reasonable bases to deny relief, Harrington, id., and utilizes the lower courts background in opinion, (app. A, 2-7). At the time of appeal the appellate courts of Florida had overturned numerous of cases under the erroneous instruction as per se fundamental error, (see) Fair V. Crosby, 858 So.2d 1103, 1105 (Fla. 4th DCA 2003); Oritz V. State, 905 So.2d 1016 (Fla. 2d DCA 2005); Bates V. State, 883 So.2d 907, 908 (Fla. 2d DCA 2004); Hernandez V. State, 884 So.2d 281 (Fla. 2d DCA 2004); Giles V. State, 831 So.2d 606 (Fla. 1st DCA 2002); Houston V. State, 919 So.2d 489 (Fla. 2d DCA 2006); Bevan V. State, 908 So.2d 524 (Fla. 2d DCA 2005), some with multiple forcible felonies and claiming self-defense to all counts same as Petitioner, Bevan, id.; Houston, id.; Bates, id.; Hernandez, id.. Under these cases and law at the time of appeal the state court had no bases to deny Petitioner.

The Eleventh Circuit determined that self-defense was not the sole or primary defense. Due to Petitioner testifying it was an accident and the trial court giving excusable homicide jury instructions, (app. A, 4-5). This determination runs afoul of state and federal law.

1. First State Law

In the state of Florida trial courts are required to give justified and excusable homicide jury instructions in all homicides and manslaughter case, does not matter if defendant raised neither defenses, (see) Van Loan v. State, 736 So.2d 803, 804 (Fla. 2d DCA 1999); Dameoulakis v. State, 814 So.2d 1204 (Fla. 2d DCA 2002). Petitioner trial counsel never argued excusable homicide at no point to the court or jury, (see) (Br. of Appellant 21-23); (Reply Br. of Appellant 3-6), also see, Franco v. State, 901 So.2d 901, 904 (Fla. 4th DCA 2005) (No argument that the shooting was excusable). Furthermore, the excusable homicide ~~jury~~ jury instructions as given is inherently misleading when a dangerous weapon is involved, (see) State v. Smith, 573 So.2d 306 (Fla. 1990), and the courts has held accidental and self-defense are intertwined for over one hundred years, (see) Pinder v. State, 8 So. 837 (Fla. 1891); Mills v. State, 490 So.2d 204 (Fla. 3d DCA), rev. denied, 494 So.2d 1183 (Fla. 1986); Flynn v. State, 947 So.2d 1229 (Fla. 2d DCA 2007).

2. Second Federal Law

7.7- Florida standard jury instruction, (2004), for manslaughter ~~requires~~ requires that a defendant intentionally caused the death of victim. Due to the fact that excusable homicide by accident negates the element of intentionally, the Respondent would have had to disprove accidental beyond a reasonable doubt to prove the mens rea of manslaughter, Mullaney v. Wilbur,

95 S.Ct. 1881 (1975), *Martin*, *id.*, (mens rea of the crime). Because the instructions are inherently misleading and negates an element of the crime the Eleventh Circuit would be forced to reverse for a new trial on its own determination under a violation of due process. However, such theory of the court ~~lower~~ is a far-reaching attempt to eliminate the claim of sole or primary defense is fatally undermined as a matter of law.

The Eleventh Circuit must remove the claim of sole or primary defense to defeat the fundamental error assessment, must be gleaned from the record, at the time of appeal. Once determining fundamental error occurred no fairminded jurist could disagree that the state court decision conflicts with this Court precedents, as the Eleventh Circuit explained in its second theory in *Petitioner Faver*, (app-A, 15-16).

However, a final hurdle must be addressed before the writ can be issued; the constitutional error must have had, "a substantial and injurious effect," on the outcome of the proceeding, *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *California v. Roy*, 117 S.Ct. 337 (1996). The appropriate question on habeas review of erroneous state court jury instruction is, "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The Petitioner rationale is yes; and the Eleventh Circuit, Supreme Court of Florida and Respondent is applying formalism over substance.

Whether a defendant is deprived of a fair trial is a legal question that must be determined under federal law. Here, the Eleventh Circuit

disregarded this determination and gave total deference to the state court, any principle that can be given meaning only through its application to the facts of the case is generally regarded as a legal question and will not be accorded a presumption of correctness, Miller V. Fenton, 474 U.S. 104, 114 (1985). The determination of depriving a defendant of a fair trial allows Florida courts to violate due process under the fourteenth amendment and would essentially read Patterson v. New York, 97 S.Ct. 2319 (1977), Martin V. Ohio, 107 S.Ct. 1098 (1987), In re Winship, 90 S.Ct. 1068 (1970), Kotteakos V. U.S., 66 S.Ct. 1239 (1946), Brecht, id., and Estelle, id., off the books.

The Eleventh Circuit and Supreme Court of Florida determination is predicated on the burden of persuasion on affirmative defenses and faulty jury instructions that shifts the burden of persuasion to a defendant is harmless, Smith V. State, 521 So.2d 106 (Fla. 1988), (app.A, 19-26). This rationale is formalism and can not withstand close scrutiny for substance under constitutional law, a jury instruction that shift the burden of persuasion on an affirmative defense, "can not", equate an erroneous jury instruction that negates an affirmative defense. Although, neither effects the Respondent's burden of proof under Winship, in case, Winship, reaches beyond such requires in a jury trial. Meaning, as to what is required of the jury, must be reflected in the verdict and the jury question on self-defense. Winship, Patterson, id., Martin,, and Kotteakos, id., under due process, also stands for, "the jury is 'required' to find beyond a reasonable doubt, based on all the evidence, including that relating to self-defense, each element of the crimes and also

conclude that the defendant had not proved his affirmative defense.", Martin, id., at 1100-01. The Eleventh Circuit and Supreme Court of Florida rationale would eliminate this requirement of the trial under due process. Once the Petitioner meets his burden of persuasion by a preponderance of evidence he creates a jury question that must be answered by the jury on the disputed facts, Rosley v. State, 878 So.2d 473, 476 (Fla. 1st DCA 2004). The court can not substitute its determination of the evidence for that of the jury, Kotteakos, id.; Rosley, id.. Especially, where the petitioner has exercised the most fundamental right of our criminal judicial system, "a trial by a jury of his peers." At this point evidence of self-defense constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what ~~what~~ credit and weight the jury gave the evidence, Arizona v. Fulminante, 499 U.S. 279 (1991), especially where the victim was armed with a gun.

The court gave erroneous jury instruction that negated the Petitioner's sole or primary defense of self-defense. The instruction tells the jury there is ^{no} justification, under that circumstance the verdict does not reflect as it must that none of the self-defense evidence raised a reasonable doubt in the killing of Roy Williams or any other crime. However, Petitioner never had a fair opportunity under state law and the instructions given to justify the killing and show himself to be blameless by proving that he acted in self-defense. There is no way to conclude beyond a reasonable doubt that ^{the} jury thought he failed to do so, and Florida is as entitled to punish the petitioner, as Ohio was to punish Martin, and New York was to punish Patterson, (see) Martin, id., at 1101-02. The jury was essentially

told there is no justification, how can the erroneous jury instruction not deprive the petitioner of a fair trial and violate due process. It is "settled law... that when exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, the verdict must be set aside," *Francis V. Franklen*, 105 S. Ct. 1965, 1976 n.8 (1985). The legal interpretation of every verdict of guilty as charge is that the jury believed from all the evidence beyond a reasonable doubt that the ~~jury~~ accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertained a reasonable doubt as to the existence of a fact which is essential to guilt, namely, self-defense?

This is what the lower court rationale lacks or stops short of determining. *Winship*, is concerned with substance rather than this kind of formalism, the rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the state," *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914), and to the interest of both the state and the defendant as affected by the allocation of the burden of proof. In other words, when the burden of persuasion on an affirmative defense is upon Petitioner, by a preponderance of evidence and its met, under due process, the jury is required to find beyond a reasonable doubt that self-defense was not proved. This is a structural requirement of a fair trial, *Martin*, id., the erroneous instruction removed the requirement from the trial, thus, leaving the Petitioner defenseless and proceedings fundamentally unfair and in

violation of the due process clause, *Estelle*, id. The Court must grant, vacate and remand back to the lower court to apply the law that was in effect at the time of appeal, or grant a new trial.

2. The Petitioner was granted an evidentiary hearing in the State trial court on grounds (k), ineffective assistance of trial counsel for failure to investigate and present exculpatory evidence. At the hearing Dontre Crawford, Mr. Leskovich, trial counsel, Mr. Galasso, assistant state's attorney, and Petitioner testified. Mr. Crawford, presented testimony that supported the theory of defense, evidence of Ms. Jones prior convictions, mental health issues and housing agreement with Fort Myers Housing Authority showing that such would be terminated for criminal activity to establish motive for dishonesty. Prior to trial ~~testimony~~ Petitioner wrote Mr. Leskovich a notarized letter concerning Mr. Crawford and his whereabouts, counsel testified that he was never informed of Mr. Crawford and this was his first time hearing such testimony. Petitioner, impeached counsel with the notarized letter and counsel entire testimonial changed regarding Mr. Crawford.

The Petitioner defaulted his claims of ineffective assistance of counsel in the state court by failing to timely appeal, (app. D, 14-17). The district court held Petitioner could not show prejudice under *Murray v. Carrier*, 477 U.S. 478, 493 (1986); *Hartford v. Culliver*, 459 F.3d 1193, 1200 (11th Cir. 2006). Nor can Petitioner show a fundamental miscarriage of justice to overcome procedural default of these claims. The issue in the case boiled down to whose story the jury found more

credible. Apparently, the jury did not believe that Petitioner acted in self-defense in this case., id., at 17.,

Interesting, the district court made no assessment of the evidence presented by petitioner. Does not reveal what standard of review the court applied in making its determination, procedural or substantive actual innocence, the court cites *House v. Bell*, 547 U.S. 518, 536-37 (2006), application to the "cause and prejudice" standard of review, at 16, and facts presented therein. However, the court goes silent as to procedural actual innocence standard of review established in *Schlup v. Delo*, 115 S.Ct. 851 (1995), recognized in *House*, id.,. Under this review the Petitioner may avoid procedural default under 28 U.S.C. § 2244 (1)(d),. However, the court disregarded evidence of Mr. Crawford, credibility of Ms. Jones and motive to be untruthful. In contrast, under the gateway standard, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments, *Schlup*, id., 869. Makes clear petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict. The court did not perform a probabilistic inquiry, the court gave its independent judgment as to whether reasonable doubt exist, it is not the court's independent judgment as to whether reasonable exist that the standard addresses, rather the standard requires the court to make a probabilistic determination about what reasonable properly instructed jurors would do. The court simply pitted the credibility issue between the Petitioner and Respondent's principal witnesses, at 17.,

The Petitioner appealed to the Eleventh Circuit alleging that the district court did not apply the correct standard of review. Due to the courts lack of guidance from the court and conflict in the Circuit Court of Appeals, that affirmative defenses can not raise to the level of procedural actual innocence, "legal/not factual innocence". The Eleventh Circuit declined to grant C.O.A. on the issue, only granting C.O.A. on question one herein, Petitioner filed motion to expand C.O.A., which the lower court denied, (app. C). The Court should grant review to settle the conflict among the Circuit Courts and grant any relief deemed just including but not least a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted, to correct the incorrect rulings of the Eleventh Circuit and settle the conflict among the Circuit Court of Appeals on affirmative defenses/procedural actual innocence.

Respectfully Submitted,

Emerson Pinkney, pro.se
Emerson Pinkney, Petitioner, pro.se

Date: May 10, 2018