

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON JOHNSON
Petitioner

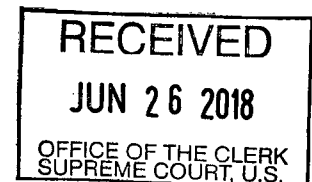
v.

PEOPLE OF THE STATE OF FLORIDA
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT OF FLORIDA, **CASE NO.: 5:15cv34-WS/CAS**

PETITION FOR WRIT OF CERTIORARI

**JASON JOHNSON
SANTA ROSA C. I.
5850 E. MILTON RD.
MILTON, FL. 32583**



QUESTION PRESENTED

Whether a court's inclusion of jury instructions concerning principals as it related to counts one and two of a charging information that only alleged the Defendant was the actual perpetrator — after his jury trial — violated his right to due process and effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

OPINION BELOW.....	5
JURISDICTION.....	6
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	6
STATEMENT OF CASE.....	7
REASONS FOR GRANTING THE PETITION.....	8

APPENDICES:

Appendix A - Opinion of Magistrate Judge adopted by United States District Court for the Northern District of Florida.....	1-69
Appendix B - Denial of COA by Eleventh Circuit Court of Appeals.....	70-72
Appendix C – State motion for post conviction relief Rule 3.850.....	73-85
Appendix D - Relevant State Statute and cases.....	86-98
Appendix E – Petition for Habeas Corpus.....	99-128

TABLE OF AUTHORITIES

	PAGE
1.) <u>Barefoot v. Estelle</u> , 463 U.S. 880 (1983).....	8,10
2.) <u>De Jonge v. Oregon</u> , 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).....	10
3.) <u>Hohn v. United States</u> , 524 U.S. 236 (1998).....	8
4.) <u>Slack v. Mcdaniel</u> , 529 U.S. 473, 478 (2000).....	8
5.) <u>Thornhill v. Alabama</u> , 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).....	10

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON JOHNSON, Petitioner

v.

PEOPLE OF THE STATE OF FLORIDA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT OF FLORIDA CASE NO.: 5:15cv34-WS/CAS

Petitioner, Jason Johnson, pro se, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States District Court for the Northern District of Florida, CASE NO.: 5:15cv34-WS/CAS, filed on February 19th, 2015.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Florida, which was unpublished, was issued on May 15th, 2017, and is attached as Appendix A. The Eleventh Circuit Court of Appeals one-page order denying the

Petitioner's application for a Certificate of Appealability is attached as Appendix B. The Petitioner's State court Rule 3.850 Motion for Post Conviction Relief is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The decision of the United States District Court for the Northern District of Florida, for which petitioner seeks review was issued on May 15th, 2017. The Eleventh Circuit Court of Appeals order denying petitioner's application for a Certificate of Appealability was filed on February 6th, 2018. This petition is filed within 90 days of the Eleventh Circuit's denial of the Petitioner's application for a Certificate of Appealability.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 6 provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Florida statutory provisions and cases that are relevant to this petition, section 777.011 Florida Statutes, *State v. Gray*, 435 So. 2d 816, 818(Fla. 1983); *Moran v. State*, 869 So. 2d 613,615(Fla. 4th DCA2004); *Mauldin v. State*, 696 So. 2d 801,801(Fla. 2d DCA1997) *McMillan v. State*, 832 So. 2d 946, 948 (Fla. 5th DCA2002) are reprinted in Appendix D.

STATEMENT OF CASE

Petitioner was convicted by jury of count I Second degree murder and count II attempted second degree murder as a “principal” — despite the fact that he was not being charged as a “principal” to commit these crimes and — despite the fact the jury found that he did not discharge a firearm during the commission of the crime. At petitioner’s judgment and sentencing on November 18th, 2011, the trial court sentenced the petitioner to 30 years and life in prison for these convictions. App. C at 74.

In the State courts, petitioner argued that the trial court’s decision to include the jury instruction for “principals” pursuant to Florida Statute 777.011 violated his federal constitutional right to a fair and impartial jury trial because he was not charged in the charging information with being a principal to these crimes — he was being charged with actually being the person who committed them — thus, he had no prior notice that he would be subject to conviction as a principal nor was he able to prepare an adequate defense for this charge — therefore it was fundamental error for the court to include this instruction to the jury after the petitioner’s trial for being the actual perpetrator of the crime. App. C at pages [80-83].

The State courts’ rejected petitioner’s argument on the merits and affirmed his sentence. App. A at [4-6].

Petitioner sought habeas review of this issue in the United States District Court for the Northern District of Florida, making the same federal constitutional argument and citing the same basic authorities. Petition for habeas Corpus App. E pages [105-106]. The United States District Court for the Northern District of Florida granted review, then subsequently, summarily denied the Petitioner’s habeas petition and denied his application for Certificate of Appealability.

The Eleventh Circuit Court of Appeals likewise denied the petitioner's application for a Certificate of Appealability without discussing their finding that he failed to satisfy the test for Appealability set forth by the United States Supreme Court in *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). App. B.

REASONS FOR GRANTING THE PETITION

This case concerns the Eleventh Circuit Court of Appeals denial of the Petitioner's application for a Certificate of Appealability. *Barefoot v. Estelle*, 463 U.S. 880 (1983) and *Hohn v. United States*, 524 U.S. 236 (1998) establishes the standard for a habeas corpus petitioner to obtain a COA. This Court explained that this standard requires that a petitioner: "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. [*Slack v. McDaniel*,] 529 U.S. [473], at 484 [(2000)] (quoting *Barefoot*, supra, at 893, n.4). 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 Courts 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."

The question being presented by the petitioner's allegations — whether it is fundamental error for a court to include a jury instruction for a crime not charged in the charging information *after* he has had a jury trial based on the information included in that charging information — is a question that jurists of reason would find debatable that there exists the denial of a

constitutional right and that jurists of reason would find debatable whether the district court was correct in its denial of the petitioner's application for a Certificate of Appealability.

This is especially true because this exact same problem has been found to violate criminal defendant's rights to due process of law in several other cases. See > State v. Gray, 435 So. 2d 816, 818(Fla. 1983); Moran v. State, 869 So. 2d 613,615(Fla. 4th DCA2004); Mauldin v. State, 696 So. 2d 801,801(Fla. 2d DCA1997) ("*It is a basic tenet of constitutional law that due process is violated when an individual is convicted of a crime not charged in the charging instrument.*")([T]he test for granting relief based on a defect in the charging document is actual prejudice to the fairness of the trial.") Gray, 435 So. 2d at 818. (So-called technical deficiencies in a charging instrument are waived if the defendant does not raise them before the state rests its case.") McMillan v. State, 832 So. 2d 946, 948 (Fla. 5th DCA2002).

As noted above, these courts focused their inquiry on whether there existed *prejudice* to the fairness of the trial. They found that when a charging instrument is fundamentally defective because it is so vague, inconsistent and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense that "*[t]he overriding concern is whether the defendant had sufficient notice of the crimes for which he is being tried.*" McMillan, 832 So. 2d at 948.

Such is this case here. The petitioner did not have the benefit of being given any notice that he would be or even could be subject to conviction for the commission of these crimes as a "principal" because he was being charged as the actual perpetrator of these crimes. Therefore, he was not able to adequately prepare and present his defense for these charges prior to the jury being instructed that he could be found guilty of them as a principal.

The petitioner's conviction on a charge not made by the indictment or information is a denial of due process of law.

In Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) and De Jonge v. Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937) this Court held: "*If the charging instrument completely fails to charge a crime a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time--before trial, after trial, on appeal, or by habeas corpus.*"

The Eleventh Circuit Court of Appeals denial of the petitioner's application for a Certificate of Appealability without providing any explanation as to how it made the finding that the petitioner "failed to satisfy Slacks *ibid.* test" is contrary to clearly established federal law as explained by this court in Barefoot v. Estelle, where it held: "[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. 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. [I]ssuance of a COA must not be *pro forma* or a matter of course. A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part. Barefoot, *supra*, at 893. We do not require petitioner to prove, before the issuance of a

COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail."

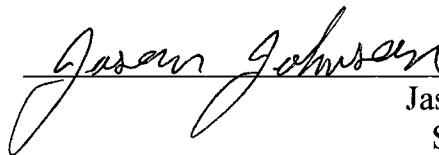
Petitioner urges this Court to take review in order to delineate the scope of criminal defendants' constitutional right's relating to jury instructions concerning principals that are being given to juries by courts after criminal defendants are put on trial for information and indictments where they are not charged as being a principal.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: 6/18/18

Respectfully submitted,



Jason A. Johnson
Santa Rosa C.I.
5850 E. Milton Rd.
Milton, fl.32583