No. 25-5718

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In Re: Christopher Bradford, Petitioner

United States Court of Appeals for the Eleventh Circuit

Petition For An Extraordinary Writ of Habeas Corpus

Christopher Bradford, DC# 181256
South Bay Correctional Facility
600 U.S. Highway 27, South
South Bay, Florida 33493-2233

QUESTION(S) PRESENTED

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in its decision to dismiss the Petitioner's 'application for leave to file a second or successive habeas corpus petition,' based on AEDPA's gatekeeping provision 28 U.S.C. §§2244(b)(2). When this Court held that "second or successive language is a term of art that incorporates pre-AEDPA abuse of the writ principles."
2. Whether the United States Court of Appeals for Eleventh Circuit violated the Petitioner's constitutional rights when it erroneously dismissed his 'cause and prejudice' claims to overcome the procedural default as required by the procedural default and abuse of the writ doctrines.

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:

RELATED CASES

The case listed below is directly related to the above captioned case in this Court: Appeal number 24-12608-F, case styles in re: Christopher Bradford. Opinion rendered August 23, 2024.

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PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

OPINIONS BELOW

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

[✓] reported at 2024 U.S. App. LEXIS 21432; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

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

[ ] reported at

[ ] has been designated for publication but is not yet reported; or;

[ ] is unpublished.

[ ] For cases from **state courts:**

JURISDICTION

[✓] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[✓] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651(a). In compliance with Rule 20, the Petitioner will demonstrate that this Extraordinary Writ of Habeas Corpus Petition shall meet the requirements as stipulated in 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of §2242.

The Petitioner affirmatively states that he has no other recourse for his lot which the remedy by state and federal extraordinary writs (Fla.R.App.P. 9.030 and §§2254) are inadequate to test the legality of his imprisonment. The claims asserted herein refer to the procedural default Doctrine and the cause and Prejudice standard which could not be brought before the United States District Court of the southern district due to Federal procedural limits under AEDPA. Therefore, the Petitioner sought relief, via, an application for leave to file a second writ of habeas corpus to the United States Court of Appeals for the Eleventh Circuit, only to have his application dismissed because the Eleventh Circuit held that, the gatekeeping provision of AEDPA does not authorize it to recognize any claims outside the two narrow

exceptions of 28 U.S.C. §§2244(b)(2). See Eleventh Circuit's order attached hereto as Appendix "A".

By Eleventh Circuit case laws within its jurisdiction, a petition cannot reach this court because the Eleventh Circuit applies §§2244(b)(2) to bar pre-AEDPA review to state prisoners. Neither the government nor the Petitioner can seek review of that interpretation of §§2244(b)(2) from this Court, because AEDPA separately bars petitions for certiorari from "[t]he grant or denial of an authorization by a court of appeals to file a second application." §§2244(b)(3)(e). For this reason, the Eleventh Circuit's order is in conflict with this court, and with majority of other courts around the country; 28 U.S.C. §1251(a). This case warrants this Court's appellate jurisdiction because of the exceptional circumstances which require its discretionary powers to resolve, not to mention, no other adequate relief can be obtained in any other form or from any other court due to state and federal procedural restrictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional amendments and statutory provisions herein are a requisite in supporting the facts and laws demonstrated by the Petitioner.

The U.S. Const. Amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...and to have the assistance of counsel for the defense."

The U.S. Const. Amend. VIII states: "Excessive bail shall not be required, nor excessive funds imposed, nor cruel and unusual punishments inflicted."

The U.S. Const. Amend. XIV, Sec. 1 states: "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

28 U.S.C. §1651, 28 U.S.C. §1254, 28 U.S.C. §2241(a), 28 U.S.C. § 2242 - and its provision in the last paragraph. 28 U.S.C. §1251(a), 28 U.S.C. §§2244(b)(1),(2).

STATEMENT OF THE CASE
Rule 20 Statement

On or about August 5th, 2024, the Petitioner submitted o the United States Court of Appeals for the Eleventh Circuit an application for leave to file a second Petition for Writ of Habeas Corpus.

The application raised two (2) new claims significant to the provisions of the procedural default doctrine, cause and prejudice standard. Ground One in the application asserted that the appellate counsel's meritless brief on direct appeal was cause for the procedural default that prejudiced the Petitioner from having his structural error claims raised in the first instance (direct review).

The structural errors that the appellate counsel failed to raise was the Trial Court's unannounced absence during the entire jury deliberation, and the bailiff's *ex parte* communication with the jury outside the presence of the Trial Court. (See T.T. 451-453 attached hereto as Appendix "C").

Ground Two in the Petitioner's application asserted that the trial counsel's ineffectiveness was cause for the procedural default that prejudice him in the first forum. Trial counsel sat back nonchalantly without any objections and allowed the bailiff to go in and out of the juryroom in the absence of the Trial Court.

On or about August 23, 2024, the United States Court of Appeals for the Eleventh Circuit dismissed both the of Petitioner's new claims, by concluding that the former "cause and prejudice" standard that required a petitioner to show that he was prejudiced by an inability to raise the stated claim in an earlier proceeding "no longer governs analysis of successive petitions." The Petitioner's cause and prejudice claims had never before been raised or adjudicated on the merits by any state or federal court in his initial 3.850 post-conviction motion, state habeas corpus petition, nor in his initial §2254 federal habeas corpus petition.

The Petitioner previously filed three applications for leave to file a second or successive writ of habeas corpus into the United States Court of Appeals for the Eleventh Circuit. The first was filed November 20th, 2006, that application was summarily denied on December 1st, 2006 (case number 06-16091). The second application was filed on February 21st, 2008, that application was summarily denied on March 20th, 2008 (case number 08-10763). As for the third application it was filed on May 1st, 2009, that application was summarily denied on May 18th, 2009 (case number 09-12197). None of the preceding applications raised a cause and prejudice claim to overcome the procedural default. Only the current application, which is the basis for this petition.

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

AEDPA's subsection §§2244(3)(a) provides that, "before a second or successive application permitted by this section is filed in the District Court, the applicant shall move in the appropriate court of appeals for an order authorizing the District Court to consider the application."

A petition cannot reach this court from the Eleventh Circuit who reads §§2244(3)(c) to bar state prisoners that file new claims of "cause and prejudice." When a state prisoner files a second §2254 motion that raises such procedural default doctrines, the Eleventh Circuit or the Southern District Court here in Florida will apply §§2244(b)(2) as a strict compliance.

The Eleventh Circuit and the Southern District of Florida only recognize the gatekeeping provisions of §§2244(b)(2) as grounds for review on a second habeas corpus petition. See §§2244(4).

REASONS FOR GRANTING THE PETITION

GROUND ONE FOR RELIEF

> Whether The United States Court Of Appeal For The Eleventh Circuit Erred In Its Decision To Dismiss The Petitioner's 'Application For Leave To File A Second Or Successive Habeas Corpus Petition,' Based On AEDPA's Gatekeeping Provision 28 U.S.C. §2244(B)(2), When This Court Held That, "Second Or Successive Language Is A Term Of Art That Incorporates Pre-AEDPA Abuse Of The Writ Principles."

This Court should order the United States Court of Appeals for the Eleventh Circuit, to Grant the Petitioner's application for leave to file a

second or successive habeas corpus petition, due to its previous rulings in *Slack v. McDaniels*, 529 U.S. 473 (2000) and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Where this Court has recognized a mixed petition filed by a Petitioner into the Federal district court, but was dismissed because of unexhausted claims, such Petitioner can later refile that petition after exhausting in the state courts, and include any new additional claims in a subsequent petition. *Slack,* 529 U.S. at 486-487.

In *Slack*, the Court held,

> "a petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition. " Id. at 487.

The Petitioner contends that, on July 15th, 1996, his initial Federal petition for writ of habeas corpus (§2254), was filed into the United States District Court of the Southern District of Florida. On November 7th, 1996, the Assistant Attorney General sought to have the petition dismissed because two claims asserted in the Petitioner's petition (issue one and issue six) were either not raised or exhausted in the state courts. On June 24th, 1997, the Magistrate Judge Sorrentino ordered the Petitioner to explain the cause for failing to exhaust those claims in state court; never did the Magistrate Judge explain to the Petitioner, that he had two options. He could withdraw his mixed petition, exhaust the remaining claims, and return to the district court

with a fully exhausted petition. Instead, on July 29th, 1997, the Petitioner filed a response to the court, albeit that response failed to demonstrate in any way how he had exhausted issues one and six in his initial petition §2254. Soon afterwards the Magistrate Judge issued her report and recommendation (July 1st, 1998) determining that, issue one in the petition was not cognizable for federal review and meritless, and as for issue six, she had also concluded it to be meritless, as for issues two through five she had entertained those claims on the merits.

On July 24th, 1998, District Judge Ryskamp adopted the magistrate judge's report and recommendation and summarily denied with prejudice the Petitioner's initial petition (§2254). In *Rose v. Lundy,* the Court added additional requirement of "total exhaustion," requiring that every claim in a petition be exhausted (or claims that are unexhausted be dismissed, or the petition be stayed pending exhaustion). See *Rose v. Lundy,* 455 U.S. 509, 510 (1982) ("because a rule requiring exhaustion of all claims furthers the purposes underlying the habeas statute, we hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to the state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.") It should be noted that, although the federal district judge denied the Petitioner's initial habeas petition, that denial was based on the

magistrate judge's erroneous report and recommendation on his mixed petition, which should have been dismissed enabling him to eventually resubmit it in accordance with this Court's decision in *Rose v. Lundy.* See *Slack,* 529 U.S. at 488. The Petitioner asserts that his application for leave to file a second writ of habeas corpus should not be recognized as an attempt to numerically file a second writ of habeas corpus, because of the district court's inappropriate handling of his initial habeas corpus petition.

Therefore, the Eleventh Circuit's decision to dismiss the Petitioner's application because he failed to make a *prima facie* showing that his new claims qualifies for one of the narrow exceptions specified in 28 U.S.C. §2244(b)(2) should be determined by this court as a misapplication of the law. This Court explained in *Slack v. McDaniel,* that, "second or successive" is "a term of art," thus providing guidance—albeit, vague guidance—as to the way in which lower courts should determine whether a petition falls within AEDPA's gatekeeping provision. See, e.g. *Magwood v. Patterson,* 561 U.S. 320, 332 (2010) (relying on *Slacks* definition of "second or successive" as a "term of art" (quoting *Slack,* 529 U.S. at 486.)) This Court does not read the term literally such that numerically second petitions are always "second or successive." E.G., *Panetti v. Quarterman,* 551 U.S. 930, 944 (2007); *Magwood,* 561 U.S. at 332 ("[I]t is well settled that the phrase [second or successive]

does not simply refer to all §2254 applications filed second or successively in time." (quoting *Panetti,* 551 U.S. at 944.))

As explained in *McCleskey v. Zant,* 499 U.S. 467, 470, 489 (1991), the abuse of the writ doctrine is a "complex and evolving body of equitable principles," informed by historical usage, that "define the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for writ of habeas corpus." These circumstances include cases in which the Petitioner deliberately abandons a claim from an earlier petition; fails to raise a claim "'that could have been raised'... in the first federal habeas petition" but were not; and procedurally defaults. *Id.* at 488-90 (quoting *Delo v. Stokes,* 495 U.S. 320, 321-22 (1990) *per curiam.*)) Notwithstanding, this Court further explained that the meaning of "second or successive" is colored by its prior habeas cases, including those preceding AEDPA. *Slack,* 529 U.S. at 486 ("The phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases.") *Panetti,* 551 U.S. at 943-44 (explaining that the phrase "takes its full meaning from [prior] case law, including decisions predating [AEDPA]".) Therefore, this Court should consider whether the subsequent filing of the Petitioner's application for leave to file a second habeas corpus constitutes an abuse of the writ in pre-AEDPA law. *Banister v. Davis,* 140 S.Ct. 1698, 1705-06 (2020)(See application attached hereto as Appendix "B".)

This Court has also considered the relationship between the Federal Rules of Civil Procedure and AEDPA's gatekeeping provision in certain contexts. AEDPA itself provides that habeas petitions may be amended pursuant to the Federal Rules of Civil Procedure. 28 U.S.C. §2242; See, e.g., *Mayle v. Felix*, 545 U.S. 644, 656-57 (2005)(applying Rule 15(c)(2) to find that an amended habeas petition did not relate back when the Petitioner asserted a new ground for relief that was supported by facts differing by time and type from those asserted in the initial petition); See also R. GOVERNING SEC. 2254 CASES IN THE U.S. DIST. CTS. 12 (permitting application of the Federal Rules of Civil Procedure to habeas cases to the extent that they do not conflict with statutory habeas rules.)

It is the Petitioner's contention that, the Eleventh Circuit's interpretation of AEDPA's gatekeeping provision 28 U.S.C.§§2244(b)(2) is in conflict with majority of the other circuits, including panels within the Eleventh Circuit itself. The panel responsible for deciding the Petitioner's case mistakenly believes that, "congress intended for the courts of appeals to authorize the filing of a second or successive petition, only when such applicants make a *prima facie* showing that, the claim advanced qualifies for one of the narrow exceptions specified in §§2244(b)(2)." See *In re: Magwood*, 113 F.3d 1544, 1550 (11th Cir. 1997); See also, (Appendix "A" attached hereto.) Albeit, other circuits have interpreted "second or successive"

differently in different cases, sometimes interpreting it to incorporate these pre-AEDPA standards, and other times interpreting it literally. The majority of circuits; however, when faced with the issue, reject a literal reading of "second or successive" in §§2244(b), and instead hold that AEDPA's "second or successive" language is a term of art that incorporates the pre-AEDPA abuse of the writ principles.

The First, Second, Third, Eight, Ninth and Tenth Circuits have all uniformly and consistently followed this interpretation. See e.g., *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000); See e.g. *James v. Walsh*, 308 F.3d 162, 167 (2nd Cir 2002); See e.g., *Benchoff v. Colleran*, 404 F.3d 812, 817 (3rd Cir. 2005);. See e.g. *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001); See e.g. *Hill v. Alaska*, 297 F.3d 895, 897-98 (9th Cir. 2002); See e.g. *Reeves v. Little*, 120 F.3d 1136, 1140 (10th Cir. 1997).

In interpreting "second or successive" in §§2244(b) as a term of art that incorporates the pre-AEDPA abuse of the writ principles, these circuits rely on this Court's decision in *Slack v. McDaniels,* and *Stewart v. Martinez-Villareal,* to support their interpretation. Although neither *Slack* nor *Martinez-Villareal* expressly adopted this interpretation of "second of successive." These courts rely on the rationale and the language used by this Court in those decisions to support their interpretation of "second or successive" as a term under AEDPA. The Eleventh Circuit however has

generally strictly interpreted second or successive according to the plain meaning of the words and the phrase; See, e.g. *In re: Medina,* 109 F.3d 1556, 1565 (11th Cir. 1997)(noting that the "plain terms" of §§2244(b) applied to bar a successive habeas petition.) Despite the fact that the Eleventh Circuit generally recognizes a distinction between the pre- and post- AEDPA standards; see, e.g. *Gonzalez v. Sec'y for the Dept. of Corr.*, 366 F.3d 1253, 1269 (11th Cir. 2004).

One panel's decision has followed the majority of circuits and holding that "second or successive" is a term of art that incorporates the pre-AEDPA abuse of the writ principles. See, *Medberry v. Crosby*, 351 F.3d 1049, 1062 (11th Cir. 2003)("the term 'second or successive' remains a term of art that must be given meaning by reference to both the body of case law developed before the enactment of AEDPA and the policies that prompted AEDPA enactment.") In reviewing *Slack v. McDaniels*, and *Stewart v. Martinez-Villareal*, it is clear that this Court did not provide a broad or conclusive interpretation of "second or successive" under AEDPA in any of those decisions. Instead, the decisions provide a definitive determination of whether a particular habeas application is "second or successive" only if that habeas application fits squarely into one of the unique factual scenarios before the court in those cases. Accordingly, these decisions do not provide a

clear interpretation regarding what constitutes a "second or successive" application under 28 U.S.C. §§2244(b).

Finally, another reason why "second or successive" must be interpreted as a term of art that incorporates pre- AEDPA standards is because a literal reading of the phrase would raise serious constitutional issues. The suspension clause of the constitution provides: "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. U.S. Const. Art. 1, § 9, Cl. 2." Not to mention, under the rules of statutory construction, the statute should be construed to adopt the pre-AEDPA abuse of the writ principles. This interpretation of "second or successive" is proper because it avoids the constitutional problems raised by a literal interpretation and it is not contrary to the intent of congress. As one commentator has noted, "there is no indication that Congress intended to supersede this established meaning [of what constitute a successive petition under pre-AEDPA law] rather than incorporate it into its undefined term second or successive." Randall S. Jeffrey, Successive Habeas Corpus Petitions and Section 2255 Motion After The Anti-Terrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues, 84 Marq.L.Rev. 43, 71-72, (noting the problems with a literal reading of the 28 U.S.C. §§2244(b) and advocating for a non-literal reading of the statute.)

The Petitioner asserts, since the enactment of the AEDPA, this Court has yet to recede from any of its case laws pertaining to procedural default and the abuse of the writ doctrines. So it stands to reason that, all procedurally defaulted case laws that this Court has decided or ruled in favor of are still precedent. See, e.g. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); See, *Murray v. Carrier*, 477 U.S. 478, 494-96 (1986); See, *McCleskey v. Zant*, 499 U.S. 467 (1991); See also *Coleman v. Thompson*, 501 U.S. 722 (1991). Furthermore, the Petitioner humbly requests that this court extend its decision in *Slack v. McDaniels*, and *Stewart v. Martinez-Villareal* to the circumstances encompassing his case, and order the Eleventh Circuit to grant him leave to file a second petition for writ of habeas corpus to address his new claims demonstrated under the provisions of pre- AEDPA laws, ("cause and prejudice standard.") This issue falls squarely within this Court's jurisdiction pursuant to 28 U.S.C. §1251(a) "the Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states."

GROUND TWO FOR RELIEF

Whether The United States Court Of Appeals For The Eleventh Circuit Violated The Petitioner's Constitutional Rights When It Erroneously Dismissed His "Cause And Prejudice" Claims To Overcome The Procedural Default As Required By The Procedural Default And Abuse Of The Writ Doctrines.

The Petitioner asserts that, this Court should order the United States Court of Appeals for the Eleventh Circuit to grant his "application for leave to file a second habeas corpus petition," based on this Court's ruling in *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977); *McCleskey v. Zant*, 499 U.S. 467 (1991); and *Coleman v. Thompson*, 501 U.S. 722 (1991). The Eleventh Circuit's decision to dismiss the Petitioner's "cause and prejudice" claims to overcome the procedural default doctrine violated his constitutional rights under the 6th, 8th, and 14th Amendments. Where the Petitioner established in his application, the facts and law necessary to demonstrate ineffective assistance of trial and appellate counsel for causing the procedural default, and actual prejudice that resulted from their misrepresentation in the first forum. The Petitioner has in his case two structural defects that warrants him the constitutional right to relief.

As the name suggests, structural errors do not occur in a vacuum. See *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991),("the entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal Defendant, just as it is by the presence on the bench of a judge who is not impartial...each of these constitutional deprivations... affects the framework within which the trial proceeds, rather than simply an error in the process itself.") The first structural error which occurred in the Petitioner's case relates to the absence of the trial judge during the entire

jury deliberation. (T.T. 451-453, Appendix "C"). See, e.g. *Gomez v. United States*, 490 U.S. 858 (1989); see, e.g. *United States v. Mortimer*, 161 F.3d 240 (3rd Cir. 1998); See e.g. *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995).

The Petitioner asserts that, after the trial judge instructed the jury during the 'charge to the jury' phase he dismissed them to deliberate, then left the bench unannounced (T.T. 451-453, Appendix "C"). Out of the absence of the trial judge the jury communicated with the bailiff of its desire to see a particular piece of evidence (T.T. 451-453, Appendix "C"). However, the bailiff informed the prosecutor that, "he will not give them just this particular piece of evidence, but any and all items that were on the prosecutor's table," because he felt that this is what the judge would decide. (T.T. 451-453, Appendix "C"). Many of these items that the bailiff and prosecutor carried back into the jury room the jury should not have been allowed to have without the consent of the trial judge. "When the judge is absent at a 'critical stage' the forum is destroyed. *Gomez v. United States*, 490 U.S. 858, 873 (1989)... there is no trial. The structure has been removed. There is no way of repairing it. The framework "within which the trial proceeds" has been eliminated. See *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)... the verdict is a nullity. *Gomez,* 490 U.S. at 876..." *Mortimer,* 161 F.3d at 241. Even the Ninth Circuit has recognized the "the structural error" in trial judge's unannounced absence during any phase of a trial. "a judge's absence

during a criminal trial, including court proceedings after a jury begins deliberations, is error of constitutional magnitude... the presence of a judge is at the 'very core' of the Constitutional guarantee of trial by an impartial jury...This proposition has been so generously admitted, and so seldom contested, that there has been little occasion for its distinct assertion." *Riley*, 56 F.3d at 119.

The Petitioner asserts that, the record in this case undoubtedly reflects the violation of his Sixth and Fourteenth Amendment rights to a fair trial, impartial judge and impartial jury. The trial judge in this case was not present to oversee any of the proceedings, learn of the jury's questionnaire, or rule on whether jurors will be allowed to review certain pieces of admissible or inadmissible evidence. The second structural error to occur in this case is in association with the absence of the trial judge, and involves the bailiff's *ex parte* communication with the Petitioner's jury panel during deliberation. (T.T. 451-452, Appendix "C"). The Petitioner asserts that, the bailiffs *ex parte* communication with the jury and his role in going on the record and making a decision for the trial judge triggered a structural error, because it undermined the fairness of the entire criminal proceeding. *United States v. Marcus*, 560 U.S. 258, 263 (2010). This Court held in *Parker v. Gladden*, 385 U.S. 363, 364 (1966) ("We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made

applicable to the states through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a...trial, by an impartial jury...[and] be confronted with the witnesses against him..."). This court also held that, "information is deemed 'extraneous' if it derives from a source 'external' to the jury." *Warger v. Shauers*, 135 S.Ct. 521, 529 (2014) "'External' matters include publicity and information related specifically to the case the jurors are meant to decide..." *Id.*

The introduction of prejudicial extraneous influences into the jury room constitutes misconduct that may result in the reversal of a conviction. A potential for prejudice is the same, if not greater, when a bailiff, rather than a trial judge, answers a jury's inquiry directly without notice to and outside the presence of defense counsel, trial court, and the state. It has been noted by the federal courts that, the official character of the bailiff, as an officer of the court, as well as the state, beyond question carries great weight with a jury. Under *Remmer v. United States*, 347 U.S. 227 (1954), the proper inquiry is whether the harm complained of would have been sufficient to grant a new trial.

First, the Petitioner have to show that bailiff's *ex parte* communication triggered *Remmer's* presumption of prejudice. See *Remmer,* 347 U.S., at 229 ("In a criminal case, any private communication, contact, or tampering

directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial").

Second, that during a *Remmer* hearing triggered by this presumption, the State would not have been able to meet its burden of demonstrating that the alleged extrinsic contact was harmless, See *Id.*, and finally, thirdly, the state court would have found actual prejudice based on this extrinsic contact that would have entitled Petitioner to a new trial. The Petitioner did not raise the claim, and is now procedurally barred under state law from doing so, the claim is also considered procedurally defaulted and will be dismissed with prejudice, absent a showing of cause and prejudice, or actual innocence. *Bousely v. United States*, 523 U.S. 614, 622 (1998)("Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.')

The procedural default doctrine is purely court-made; to this day, it has not been contained in any federal habeas statute. See Catherine T Struve, Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules, 103 COLUM.L.REV. 243, 312 (2003)(noting that AEDPA does not focus significant attention on the doctrine of procedural default.) The Petitioner contends, under AEDPA, the procedural default doctrine permits review of otherwise defaulted claims, even those newly claims raised in a

second habeas petition, where Petitioner can demonstrate cause and prejudice or actual innocence. See, *Sykes*, 433 U.S. 72, 87 (1977)(establishing the "cause and prejudice" rule for procedural default doctrine.) This Court has not clearly defined either "cause" or "prejudice." See 2 HERTZ & LIEBMAN, *Supra* note 40, at §§ 26.3[b],[c] (discussing the imprecise definitions of "cause" and "prejudice," respectively.) However, such event generally must be "some objective factor external to the defense." See, *Smith v. Murray*, 477 U.S. 527, 533-34 (1986); see also *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Nonetheless, this Court has recognized as sufficient 'cause' situations where defense counsel error caused the default at a stage where Petitioner was constitutionally or statutorily entitled to effective assistance of counsel. See *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991)("where a Petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State... must bear the cost of any resulting default...") Similarly, "cause" to excuse a procedural default also arises where the state denies Petitioner a constitutional or statutory right to counsel altogether, thus forcing him to proceed *pro se*. See *Id.* at 755-756 (explaining that indigent criminal defendants have a right to counsel in their first appeal of right.)

In this case trial counsel's deficient performance prejudice the Petitioner from having his structural error claims brought to the attention of

the Trial Court and the district court of appeals. When Counsel not only failed to object to the bailiff's *ex parte* communication with the jury, and absence of the judge during the entire jury deliberation, but also failed to object to the erroneous read back instruction the trial judge gave during the jury charge phase. Both issues were in complete violation of Petitioner's substantive and procedural right."Counsel is unconstitutionally ineffective if his performance is both deficient, meaning his errors are 'so serious' that he no longer functions as "counsel," and prejudicial, meaning his errors deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Once the judge returned to the courtroom trial counsel never brought to his attention the proceedings carried out in his absence, which leaves the Petitioner to believe that counsel was either unfamiliar with the rules involving jury deliberations and Trial Court absences, or he was just that incompetent to begin with. Trial counsel's inability to raise a novel claim, such as, the structural errors in this case, shows the ineffectiveness in his duty to represent the Petitioner in a competent and efficient manner, were it not for his unreasonable performance, the Petitioner would not have been deprived of his substantial rights. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic

research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263 (2014)

The Petitioner contends that on a number of occasions throughout the trial, counsel's actions demonstrated incompetency by either omitting facts and evidence favorable to the defense, or making decisions that were questionable and adverse to it. For instance, as to the erroneous read back instruction given to the jury during trial court's "charge to the jury" this issue would have been a per se reversible error had counsel objected to it. In Florida, the per se reversible error rule announced in *Ivory v. State*, 351 So.2d 26 (Fla. 1977) is prophylactic in nature and must be invoked by contemporaneous objection at trial. Had the Petitioner received the benefits of effective representation there lies a strong and reasonable probability that the structural errors in his case would have been properly preserved for direct review, or brought to the Court's attention in the first instance, when Petitioner had a constitutional protected right.

As for those constitutional errors that remained per se reversible without a finding of harmlessness—such as violation of one's right to counsel, or one's right to be tried before an impartial Judge—those errors cannot simply be "assessed in the context of other evidence." Instead, those are "structural defects" that affect "the constitution of the trial mechanism,

which defy analysis by "harmless error" standards. *Fulminante*, 499 U.S. at 307-10.

Trial counsel's unreasonable professional judgment in this case reveals just how inexperienced he was to pre-trial preparation and trial strategies. No competent legal minded counsel would have taken the action that trial counsel took. After the prejudicial acts committed by the bailiff at no time did counsel communicate to the trial judge his acceptance of the procedure employed by the bailiff, because trial judge was not available the entire time, so this issue was never waived, perhaps forfeited, however, it is still ripe in this habeas corpus petition.

The term waiver and forfeiture - though often used interchangeably by jurists and litigants - are not synonymous. "Forfeiture is the failure to make the timely assertion of a right; waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993). Whereas forfeiture allows for the possibility of review in cases where the failure to raise the error was unintentional. *Olano,* 507 U.S. at 733-34. By contrast, forfeiture occurs when the relinquishment of a right was not intentional. *United States v. Flores*, 929 F.3d 443 (7th Cir.).

The Petitioner asserts that, appellate counsel's brief in this case was frivolous and inadequate, and only caused him to suffer actual and constructive denial of assistance of counsel. This Court held in *Smith v.*

Robbins, 528 U.S. 259, 272 (2000) ("We, however, emphasize that the right to appellate representation does not include a right to present frivolous arguments to the court...and, similarly, that an attorney is "under an ethical obligation to refuse to prosecute a frivolous appeal.") When an error in trial occurs, but does not rest on an error committed by trial counsel alone, appellate counsel must bring it in the first instance on direct appeal. It is these claims of ineffective assistance of appellate counsel, that do not rest on a trial attorney's error, that simply arose through trial, which appellate counsel should have brought up to be heard initially on direct appeal, but for some reason failed to do so rendering counsel ineffective.

Compare, *Smith*, 447 U.S. 527, 536 (1986). Declining to raise a claim on appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court. See, e.g, *Robbins*, 528 U.S. at 288. In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors. To demonstrate just how unreasonable and ineffective appellate counsel was on direct appeal, her argument that the Trial Court committed "fundamental reversible error" by giving the jury a no read back instruction was not only a meritless argument to present to the Fourth District Court of Appeal, but her reliance on the two cases(*George v. State*, 548 So.2d 867 (Fla. 4th DCA 1989)(cited by *Hendrickson v. State*, 556 So.2d 440 (Fla. 4th DCA 1990)) went amiss and had

no factual or legal similarities with the Petitioner's case. Appellate counsel's argument and the cases she relied on was related to erroneous instructions the judge gave the jury during preliminary stages of the trial, but the Fourth District Court of Appeal had receded from those cases no less than three weeks after Counsel filed her brief. See *Farrow v. State*, 573 So.2d 161 (Fla. 4th DCA 1990).

The Petitioner contends that the so-called read back instruction Trial Court gave in his case was a jury charge (preemptive) instruction that required a different application of law, See, e.g., *Huhn v. State*, 511 So.2d 583 (Fla. 4th DCA 1987); *Biscardi v. State*, 511 So.2d 575 (Fla. 4th DCA 1987). Not to mention precedent case law throughout the state had long recognized that, such legal and factual no read back instructions to the jury, especially during preliminary phase, met constitutional muster. Instead of filing a supplemental brief and argue the Petitioner's claims of merit (structural errors) under the correct application of law, appellate counsel filed nothing else into the district court. Her brief was so frivolous and meritless, it also unreasonably failed to be supported by any state or federal constitutional violations, it only relied on a state rule of law (Fla.R.Crim.P. 3.410) that was also misconstrued.

That being said, if this Court compares the frivolous and prejudicial issue raised by counsel, to the structural error claims the Petitioner brings

before this court for the first time. It would be obvious and apparent for any reasonable jurists to acknowledge as being a more successful and meritorious claim for appeal. Appellate counsel's ineffectiveness egregiously caused the Petitioner the failure of presenting, in a timely manner, his per se reversible (structural errors), when she objectively unreasonably failed to raise trial court's absence during the most critical stage of the trial (jury deliberation) when the jury had a question for the trial judge (T.T. 451-453, Appendix "C"). Moreover, appellate counsel's unreasonable professional judgment caused her to overlook the bailiff's *ex parte* communication (extraneous influence) with the jury outside the presence of the trial court, the Petitioner and his incompetent trial Counsel.

For *Strickland's* performance prong, "[w]here, as here, appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so." *Engle v. Isaac*, 456 U.S. 107 (1982). The problem with this case, during direct review appellate counsel, nor the Fourth District Court of Appeal engaged in a full-record assessment of the particular facts involving the absence of the trial judge and the bailiff's extraneous influence on the jury. These issues were completely ignored and overlooked by counsel and the appellate court. The trial judge's failure to be present during jury deliberation, resulted in the

Petitioner to not only suffer actual prejudice, which causes him to remain imprisoned on a void verdict and judgment, but created a structural constitutional error which the Petitioner seeks an evidentiary hearing to resolve. Furthermore, the Petitioner should not be held accountable for failing to assert these claims in his initial collateral attack, because at the time of the commission of the structural errors, he had a constitutional right to an impartial judge, effective trial counsel, and adequate appellate representation.

It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amount to a deprivation of the constitutional right to counsel. See *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). An error amounting to constitutionally ineffective assistance is "imputed to the state" and is therefore external to the prisoner. *Murray*, at 488. However, if this explanation is not sufficient enough, then this Court should consider the fact that, the Petitioner who is intellectually disabled has continued to suffer from life-threatening head trauma injuries he sustained from two separate occasions, once when he was just ten (10) years of age a metal rod went in his forehead causing trauma to his frontal lobe, and the next time a few weeks before his arrest for the armed robbery charge, he was involved in a head-on collision with another motorist and totaled his mother's car. No fault of his own.

Both incidents are medically documented in the Broward General Hospital records archive, along with incident reports filed by the Broward Sheriff and Fort Lauderdale Police Departments. Not to mention the Petitioner also had a history of childhood mental health issues while under the care of the health rehabilitation services (HRS) agency.

At the time of trial and direct appeal the Petitioner was a seventh grade dropout, suffering from hyperthyroid disease, with very little education and comprehension skills. Throughout his entire incarceration he had to depend on Department of Correction assigned law clerk to assist him with preparing his post-conviction motions, state and federal habeas corpus petitions. The Petitioner's ignorance of state and federal substantial and procedural proceedings should not be employed to deprive him of his substantial rights because he did not intentionally abandon nor deliberately withheld these claims in bad faith, or to otherwise abuse the writ or cause a procedural default. The structural defect in particular, requires a level of abstract reasoning that is beyond the mental capacity of the Petitioner, and he is certain other *pro se* Petitioner's as well.

CONCLUSION

The Petitioner contends that, it would be an Eighth Amendment violation of his constitutional right for this court to continue ignoring the Eleventh Circuit's misinterpretation of AEDPA's gatekeeping provision §§2244(b)(2), when that Court's interpretation fails to comport with this Court's rationale in *Slack v. McDaniels* and *Stewart v. Martinez-Villareal.* The cause and actual Prejudice demonstrated by the Petitioner meets the procedural default doctrine, and affords him a due process right to have another, fair and just, bite at the apple, (second habeas corpus petition).

Wherefore, the Petitioner humbly submits this Petition For An Extraordinary Writ of Habeas Corpus, §2241(a), in good faith and states that based on the facts and cited authorities mentioned herein, his petition be granted by this Court, and an order be entered that he be given an evidentiary hearing, or whatever relief this court deems necessary in the interest of justice.

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