Dexter Harrison #87979-020
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February 12th 2015

To The Honorable Circuit Judges:
Stanley Marcus, William Prior,
Beverly Martin, et. al.
United States Court of Appeals
For The Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Fed. R. App. P. 28(j) Notice in Appeals No. 12-15502-CC; Petition for Rehearing with Suggestion for Rehearing En Banc.

Dear Clerk,

Dexter Harrison has pending before this court a petition for rehearing with a suggestion en banc. The gravamen of that petition is the panel overlooked that an actual injury occurred when trial counsel failed to recognize, and appellate counsel abandoned, a **Bruton**[1/] claim. A conclusion that turns on whether if properly presented the original events would have required the trial court to sever the original case or whether this court would have reversed the conviction if the claim had been preserved at trial and presented in the direct appeal. Subsequent to the filing of Mr. Harrison's petition, a panel of this circuit decided an unrelated case, the panel's opinion elucidates and supports Mr. Harrison's position. Mr. Harrison draws this court's attention to that case and that panel's articulation of the relevant law.

> Typically, defendants charged with a common conspiracy should be tried together. **United States v. Lopez**, 649 F.3d 1222, 1234 (11th Cir. 2011). Severance may be required when: (1) the defendants rely upon mutually antagonistic defenses; (2) and defendant would exculpate the other defendant in a

1/. **Bruton v. United States**, 391 U.S. 123 (1968).

> separate trial; (3) inculpatory evidence will be admitted against one defendant that is not admissible against the other defendant; or (4) a prejudicial spillover effect will prevent the jury from making an individualized determination as to each defendant. **United States v. Chavez**, 584 F.3d 1354, 1360-61 (11th Cir. 2009). Severance is mandated when a joint trial leads to denial of a constitutional right or when the jury would be prevented from making a reliable judgment. **United States v. Blankenship**, 382 F.3d 1110, 1123 (11th Cir. 2004). A confession of a non-testifying codefendant is inadmissible if it directly inculpates the defendant. **United States v. Brias**, 984 F.2d 1139, 1142 (11th Cir. 1993). Accordingly, a Confrontation Clause violation occurs when in the light of the government's whole case, a codefendant's statement compels a reasonable person to infer the defendant's guilt. **United States v. Schwartz**, 541 F.3d 1331, 1335 (11th Cir. 2008).

See **United States v. Vernon**, No.12-15480, p.5-6 (11th Cir. Nov. 21, 2014) (unpublished).

Applying this authority to the panel's earlier opinion reveals an intracircuit conflict. That is, contrary to the current panel's original assessment, Mr. Harrison makes out a prima facie claim of an actual injury from the district court's due process error. Put differently, Mr. Harrison demonstrates that his counsel's in actions prejudiced him. If trial counsel had perfected the trial errors[2/] (**Bruton** and **Blankenship** severance) then the outcome on direct appeal would have been

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2/. Mr. Harrison actually believes that under Rule 51 the errors were perfected, but arguing that point is unnecessary at this stage.

different.[3/] Notably, even under plain error review, Mr. Harrison likely would have won, thus appeals counsel's abandonment of those claims were equally prejudicial to trial counsel's omission. In other words, but for the attorneys serial errors, and the habeas court's procedural error which prevented any court from ever reviewing the claim, Mr. Harrison would have prevailed on appeal.

Put differently, if trial counsel or appellate counsel had noticed either the **Bruton** error or the **Blankenship**-serverance, then this court would have vacated Mr. Harrison's conviction, thus under the **Vernon** panel's legal premise Mr. Harrison demonstrated an actual injury.

Prepared by Frank L. Amodeo and respectfully submitted this 12th day of February 2015.

Sincerely,

W. Dexter Harrison

cc:

Myra Nicholson, Esquire
Donald Samuel, Esquire
Jerry Brimberry, Esquire
Lean E. McEwen, Esquire
James N. Crane, Esquire

3/. For good measure Mr. Harrison identifies this circuit's "reasonable probability" test applicable to these types of error (unpresented trial error claims; abandonment of stronger claims by appeals counsel: in order to determine whether, in the context of an unpreserved claim of trial error, there is a reasonable probability that the result of the proceeding would have been different, a reviewing court must decide if the appellate court was more likely to have ruled in the defendant's favor, under the standard for a preserved claim. See, e.g., **Dell v. United States**, 710 F.3d 1267, 1274 (11th Cir. 2013); **United States v. Bradley**, 644 F.3d 1213, 1283 (11th Cir. 2011).