DOCKET NO. _______

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ROBERT RIMMER,

Petitioner,

vs.

SECRETARY,
Florida Department of Corrections, et al.,

Respondents.

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

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QUESTIONS PRESENTED--CAPITAL CASE

1. Whether a court must consider the totality of the circumstances when determining whether confidence in the outcome of a trial is undermined as a result of the State's failure to disclose exculpatory evidence?

2. Whether the materiality standard of a *Brady* claim requires a defendant to conclusively establish that the undisclosed evidence would have resulted in a new trial?

3. Whether the petitioner has demonstrated that jurists of reason could disagree with the district court's resolution of his constitutional due process claim based on unnecessarily suggestive eyewitness identifications, or that such jurists could conclude the issue presented is adequate to deserve encouragement to proceed further, thereby entitling petitioner to the issuance of a certificate of appealability?

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

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

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Rimmer v. Secretary*, 876 F.3d 1039 (11th Cir. 2017), and is Attachment A to this petition. The Eleventh Circuit's order denying panel and en banc rehearing is Attachment B to this petition. The Eleventh Circuit's order denying Rimmer's motion to expand the certificate of appealability (COA) is Attachment C to this petition. The district court's order denying relief is Attachment D to this petition. The Florida Supreme Court's opinion affirming the denial of postconviction relief is Attachment E to this petition. The Florida Supreme Court's opinion on direct appeal is Attachment F to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on November 15, 2017. Rehearing was denied on December 28, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

> have been committed . . . and to have the assistance of counsel for his defence.

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

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

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

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

PROCEDURAL HISTORY

On May 28, 1998, Robert Rimmer was indicted with two counts of first degree murder, three counts of armed robbery, four counts of armed kidnaping, one count of attempted armed robbery, and one count of aggravated assault (R. 2089-92).[1] Following a jury trial in January, 1999, Rimmer was found guilty as charged (R. 2283-93).

Rimmer proceeded to a penalty phase, whereupon the jury recommended the death penalty for both murders by a vote of 9 - 3 (R. 2320). On March 19, 1999, the trial court followed the jury's recommendation and sentenced Rimmer to death (R. 2383-99). On direct appeal, a divided Florida Supreme Court affirmed Rimmer's convictions and sentences. *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002). This Court denied certiorari on November 18, 2002. *Rimmer v. Florida*, 537 U.S. 1034 (2002).

---

[1]Rimmer was tried jointly with codefendant Kevin Parker.

On November 5, 2003, Rimmer filed a postconviction motion in the state circuit court (SPC-R. 470-756). Following an amendment and an evidentiary hearing, the circuit court denied relief on December 18, 2006 (SPC-R. 2407-31). Rimmer appealed to the Florida Supreme Court, which affirmed the denial of postconviction relief on September 16, 2010. *Rimmer v. State*, 59 So. 3d 763, 780 (Fla. 2010).[2] Rimmer filed a motion for rehearing, which was denied on April 12, 2011. The Florida Supreme Court's mandate issued on April 28, 2011.

On May 2, 2011, Rimmer filed a federal habeas petition in the Southern District of Florida (Doc. 1). Rimmer's petition was denied by the district court on September 29, 2014 (Doc. 23).[3] On October 26, 2014, Rimmer filed a motion to alter or amend the judgment. Rimmer's motion was denied on August 25, 2015 (Doc. 28). On September 23, 2015, Rimmer filed a motion seeking to expand the COA (Doc. 29). On that same date, Rimmer filed a notice of appeal (Doc. 30). Rimmer's motion was denied by the district court on November 9, 2015 (Doc. 33).

Thereafter, Rimmer filed a motion requesting that the Eleventh Circuit expand the COA to include four additional issues. On April 15, 2016, the Eleventh Circuit issued an order granting Rimmer's motion as to one additional issue, a penalty phase ineffective assistance of counsel claim.

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[2]Rimmer also filed a state habeas petition, which was denied by the Florida Supreme Court in the same opinion.

[3]At the conclusion of its order, the district court stated that it was granting a COA as to one issue concerning a violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

On July 25, 2017, subsequent to briefing and oral argument, the Eleventh Circuit issued an opinion affirming the denial of Rimmer's federal habeas petition. Rimmer thereafter moved for rehearing en banc and panel rehearing. On November 15, 2017, the Eleventh Circuit panel withdrew its previous opinion and issued a new opinion which again affirmed the denial of Willacy's federal habeas petition. *Rimmer v. Secretary*, 876 F.3d 1039 (11th Cir. 2017).[4]

On December 6, 2017, Rimmer moved for rehearing en banc and panel rehearing of the new opinion. Rimmer's motion was denied by the Eleventh Circuit on December 28, 2017.

FACTS RELEVANT TO QUESTIONS PRESENTED

A. SUPPRESSION HEARING

On May 2, 1998, a robbery-homicide occurred at the Audio Logic in Wilton Manors. Before leaving the scene, the perpetrators shot and killed employees Bradley Krause and Aaron Knight. Witnesses Joe Moore, his girlfriend Kimberly Davis-Burke, her toddler daughter and Luis Rosario were left physically unharmed.

Prior to trial, Rimmer moved to suppress the identifications of him as the perpetrator by Moore and Davis-Burke (R. 2176-78). A pre-photospread description of the gunman provided by Moore was of a brown skinned black male, five feet ten inches tall weighing one hundred fifty to one hundred sixty pounds wearing baggy

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[4]The Eleventh Circuit did not address Rimmer's penalty phase ineffective assistance of counsel claim, finding the issue moot in light of the fact that Rimmer received a new sentencing proceeding in state court. *Rimmer*, 876 F.3d at 1052, fn 8.

clothes and a baseball cap (SR. 21-22, 27).[5] During the robbery-murder, Moore was laying face down on the floor for a period of twenty to thirty minutes (SR. 23-24). Some difficulty in providing a description was a result of the baseball cap worn by the gunman which was pulled down over his eyes (SR. 27-28). When on the floor, Moore was able to obtain only glimpses of the gunman when he walked by (SR. 28).

Subsequent to the photospread, but before the live line-up, detective Anthony Lewis advised Moore that Rimmer had been arrested and was in possession of Moore's wallet at the time (SR. 29-31). The detective also let Moore know that his girlfriend Davis-Burke as well picked the image of Rimmer (SR. 31-33). Rimmer was the only individual in the live line-up whose image appeared in the photospread displayed to Moore (SR. 35).

Davis-Burke initially described the gunman as five feet eight to five feet nine inches tall, wearing a baseball hat (SR. 37-38). At a photospread presentation by Detective Lewis, Davis-Burke selected an image other than Rimmer as being the gunman she encountered in the Audio Logic store (SR. 42-54). Davis-Burke made a second selection of Rimmer only after Detective Lewis advised her that Moore had done so (SR. 44-50, 95-96). In a subsequent live lineup, Rimmer was the only person standing whose image was in the photospread (SR. 44-46). Davis-Burke selected Rimmer (SR. 44-46).

[5] Rimmer was at this time six feet two inches tall and weighed almost two hundred pounds (R. 1252).

Davis-Burke stated that during the robbery, she was told not to look at the gunman and she complied with that direction (SR. 50-52). Although Davis-Burke’s testimony at the suppression hearing was that she made her two selections prior to the detective’s suggestion, her post-photospread police statement indicates otherwise (SR. 54). In the recorded exchange, Davis-Burke stated that she only expressed a second choice of Rimmer “because after you [Detective Lewis] told me that Joe [Moore] picked him, I paid more attention to it. I paid more attention to it and thought it sort of looked like him” (SR. 50, 95-96).

Detective Lewis testified at the suppression hearing to the identification procedure as follows:

> Q. When you were taking the, conducting the identification process, with witness Kimberly Burke, what date was that?
>
> * * *
>
> A. This is the date. It was May 8th.
>
> * * *
>
> Q. As you told Mr. Magrino Kimberly Davis selected two people, first number six, which does not correspond to my client, Mr. Rimmer?
>
> A. Yes.
>
> Q. During this time, did you ask her why did you have a second choice, did you ask her that question?
>
> A. Yes, I did.
>
> Q. And in fact was not her answer to you as follows, “because after you told me that Joe picked him, I paid more attention to it. I paid more attention to it and though it sort of looked like him.” Was that her answer?

A. Yes, sir, but understand -

Q. Was that her answer?

A. Yes.

Q. Wasn’t that her answer in direct response to your question why did you say you have a second choice?

A. Yes, sir.

Q. And also after these, the photographic line-up procedures occurred, you did advise I think by your own testimony, did you not, that you told Mr. Moore and Ms. Davis they both selected No. 3?

A. Yes, sir.

Q. That was before the live line-up occurred, obviously, on July 13, two months later?

A. Yes, sir.

Q. And you also told before this - strike that. You also told, before the live line-up, you advised Mr. Moore that his wallet had been recovered?

A. Yes, sir.

(SR. 94-97).

The trial court denied the motions to suppress (R. 2194).

B. TRIAL PROCEEDINGS

During Rimmer’s trial, Moore, Davis-Burke and Rosario all had a similar account of what occurred at the Audio Logic: At approximately 12:00 p.m., Rosario was grabbed from behind and told to lie down inside the bay area of the store (R. 767). Someone then came up to Rosario and taped his hands behind his back with duct tape (R. 772).

Moore was walking out of the bay area of the Audio Logic when a black male with a gun in his waistband approached him and told him to go back inside and lie down on the floor (R. 879-80).

Moore complied and lay on the floor with his face down (*Id.*). Moore's hands were taped together behind his back by a black male whose face he never saw (R. 885). Moore's wallet and cell phone were taken from him (R. 886).

Davis-Burke was sitting in the waiting area around noon when she noticed a vehicle pull in near the front of the store (R. 792). The vehicle was a Kia Sephia. A black male exited the vehicle and entered the front door of the store (R. 793). Davis-Burke's daughter walked over to the man who took her hand and walked her back to her mother (*Id.*). Davis-Burke identified Kevin Parker as the man who exited the Kia Sephia and entered the Audio Logic (R. 795).

A few minutes later another black man approached Davis-Burke and told her that her boyfriend called her, so she went into the bay area (R. 797). Davis-Burke identified Rimmer as the man who approached her (R. 799). Davis-Burke sat down and saw the same individual as before in the storeroom and moving boxes (R. 803). She also saw another individual moving boxes (*Id.*). While Rosario, Moore and Davis-Burke were sitting and/or laying on the ground, cars were moved inside the bay area and a Ford Probe was loaded with stereo equipment (R. 774, 804, 888-90). Rosario and Moore heard one of the perpetrators ask an employee of the store if there were any guns there (R. 774-75, 886).

Also, Davis-Burke saw the perpetrator she identified as Rimmer with a gun. Both Davis-Burke and Moore testified that the perpetrator kneeled down next to Knight and asked what kind of gun it was (R. 806, 894). He asked Knight about any surveillance

equipment and the key to the cash register (R. 807-08, 891). Davis-Burke also saw him move her vehicle (R. 837).

Rosario and Moore then heard a car start and begin to leave, but then it was driven back into the bay area (R. 776, 895). The perpetrator exited the car and asked one of the employees of the store if "he knew him" (R. 777, 895-96). Even though the employee said "no", Rosario heard a gunshot (*Id.*). Moore saw the employee shot in the head (R. 896). The shooter approached Davis-Burke and told her to lie down because he did not "want this to get on you." (R. 809). She then saw Knight shot. At this point, Moore jumped up, but the shooter told him to get on the ground (R. 812, 897). The perpetrators then walked over to the other employee and shot him in the back of the head (R. 778, 812). The gunman then told the remaining victims to "have a nice day" (R. 779, 812, 898). He entered the Ford Probe and drove away (R. 813, 898).

Rosario described the shooter as a black male, 6'2" tall and wearing a baseball cap pulled down almost to his nose (R. 768-69, 783). Despite the fact that Rosario believed he could identify the shooter, he was unable to identify anyone from the photo or live line-up as the perpetrator (R. 780-81, 783).

Moore said that the shooter, who he later identified as Rimmer, was not wearing glasses during the crimes (R. 902). He also described the shooter as 5'7" - 5'9" tall, 150-160 lbs., with reddish brown skin and a hat (R. 903, 907).

Davis-Burke described the shooter, who she later identified as Rimmer, as a black male, 5'8" - 5'9" tall, 175 lbs., wearing a baseball cap pulled down a little bit to his eyes with the bill

of the cap at a straight angle downward (R. 797-98, 834, 838). She did not recall the shooter wearing eyeglasses (R. 833), and she was not sure if he had any facial hair (R. 834).

On May 4, 1998, Davis-Burke met with a sketch artist (R. 814). After the sketch was completed, Moore was shown the sketch (R. 900). He was satisfied with it. Michael Dixon, owner of the Audio Logic, was faxed a copy of the sketch (R. 629). Dixon did not identify anyone from the sketch (R. 680), but faxed it to other business owners (R. 629). One owner named John Ercolano believed that the sketch resembled Rimmer (R. 1072). He had met Rimmer in February, 1998, when he (Rimmer) came into his store about some problems he was having with his car stereo (R. 1073, 1080). Rimmer complained about the installation completed by the Audio Logic employees (R. 1076).[6]

After assisting with the composite sketch and based on the information from Ercolano, Davis-Burke was shown a photo line-up by Detective Anthony Lewis (*Id.*). When Davis-Burke looked at the photos, Detective Lewis told her to pick out the person who most resembled the shooter (R. 843). She chose two individuals from the line-up.[7] The first photo she chose was not Rimmer (R. 845). However, because Detective Lewis told her that Moore had selected

[6]Based on Ercolano's statements, Dixon reviewed his records and determined that on December 12, 1997, Rimmer had some stereo equipment installed in his Oldsmobile at the Audio Logic in Wilton Manors (R. 632-36). Sometime after December 12th, Rimmer returned to Dixon's Davie Audio Logic store due to a malfunction in the stereo system (R. 643).

[7]Davis-Burke testified that "four of the photographs didn't look anything like the characteristics of the guy I thought committed the crime." (R. 844).

Rimmer, she then chose him. At trial, Davis-Burke explained that even then, she "wasn't saying these are the guys. From what I can remember, they look like the person that most fits the description out of all the pictures he showed me." (R. 845).

When Moore was shown the photo line-up, he selected Rimmer's photo as being the shooter (R. 902). Detective Lewis told Moore that he and Davis-Burke selected the same photo (R. 905). He also told Moore that Rimmer had been arrested and was in possession of Moore's wallet (R. 908). Later, Davis-Burke and Moore selected Rimmer from a live line-up (R. 816, 902).

On May 10, 1998, law enforcement attempted to locate Rimmer and search his vehicle. Rimmer engaged the police in a chase (R. 985-91). During the chase, Rimmer was seen throwing objects from his vehicle (R. 993). The objects included a wallet with Moore's license inside and a firearm (R. 1008, 1014). Upon exiting his vehicle, Rimmer ran and was apprehended (R. 992). Rimmer was searched and had $896.00 (R. 1305).

Rimmer's vehicle was searched. Based on a lease agreement seized from Rimmer's vehicle, the police learned that on May 7, 1998, he rented a storage space (R. 972, 1198). When law enforcement searched the storage space they found several items of stereo equipment from the Audio Logic (R. 649-62, 1199-1200).

Over the next several months, Deidre Bucknor, an employee of the Broward County Sheriff's Office, compared numerous fingerprints that were obtained from the crime scene and from the items recovered from the storage unit (R. 1126). While she identified some fingerprints as belonging to Rimmer from items in

the storage unit, none of Rimmer’s fingerprints were identified at the crime scene or from Davis-Burke’s vehicle (R. 1129, 1134, 1140-48). Numerous other fingerprints of value from the crime scene were unidentified, including fingerprints from Davis-Burke’s vehicle (R. 1140-41), the door leading to the office at Audio Logic (R. 1141), the front door of the Audio Logic store (R. 1143), the cash register (R. 1143), the shelf in the storage area (R. 1144), the duct tape used to bind the victims (R. 1144-45), and other equipment and boxes (R. 1141, 1145-48).

In Rimmer’s defense, trial counsel explained to the jury in his opening statement: “[T]he defense in this case is Robert Rimmer did not commit those crimes and he was not present at the Audio Logic store on May 2nd, 1998” (R. 549). Trial counsel presented evidence that Rimmer wore glasses all of the time because he was “legally blind without correction” (R. 1322-23; *see also* 1344-45). Rimmer’s eyesight was 20/400 without correction (R. 1325-26). Trial counsel also presented testimony that Rimmer drove an Oldsmobile and his wife drove a blueish-purple Ford Probe (R. 1345). Moreover, Rimmer’s wife testified that on the day of the crimes, Rimmer took his son fishing at around 8:00 or 9:00 a.m. in the Oldsmobile and returned around 3:30 p.m. (R. 1355). Meanwhile, she used the Probe to go to the laundromat (R. 1346-47).

In rebuttal to the evidence of Rimmer’s eyesight, the State presented Officer Kenneth Kelley to discuss his own eyesight, which was 20/300 (R. 1404). Officer Kelley described what he could see without his glasses and told the jury that he had

driven previously without his glasses and not gotten into any accidents (R. 1404-05). Further, over the defense's objection, Officer Kelley assisted in a demonstration where the trial prosecutor lay on the floor and instructed Officer Kelley to point his finger at his (the trial prosecutor's) head (R. 1406).[8]

During deliberations, the jury had numerous requests for evidence concerning the identification of Rimmer by the eyewitnesses, including the composite sketch, photo line-up, a read back of Davis-Burke's testimony, the fingerprint evidence, photos of the live line-up, Davis-Burke's sworn statement,[9] the store display and Rimmer's day planner (R. 1616). The jury also asked a question indicating some confusion about the instruction regarding principals (R. 1715).

C. POSTCONVICTION PROCEEDINGS

During his postconviction evidentiary hearing, Rimmer presented evidence as to a number of issues, including violations of *Brady v. Maryland*. Rimmer established as undisclosed pertinent reports from the Florida Department of Law Enforcement (FDLE) and information concerning a similar homicide in Plantation, Florida.

1. The FDLE reports

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[8]The Florida Supreme Court found that the trial court erred in permitting Officer Kelley to testify in rebuttal. *Rimmer*, 825 So. 2d at 321. However, the court divided, four to three, in favor of finding that the error was harmless. *Id*. at 322, 334.

[9]The jury was instructed that Davis-Burke's sworn statement was not evidence (R. 1641). During cross-examination of Davis-Burke, trial counsel impeached her several times with her prior sworn statement (*See* R. 834, 836, 849, 853, 856-59).

Prior to trial, Rimmer's attorney demanded discovery. On December 17, 1998, the State disclosed a 48 page Latent Fingerprint Report compiled by Deirdre Bucknor (Def. Ex. 38). This report listed which latent prints matched Rimmer and Parker. 24 prints matched Rimmer, and they were all found on stereo equipment seized several days after the crime at Rimmer's storage facility (*Id.*). Out of the 209 identifiable prints lifted in the investigation, none of the prints obtained at the crime scene matched Rimmer (*Id.*). In addition to Rimmer's and Parker's names, several other individuals were listed on the latent print report as possibly matching the prints found at the scene of the crime and on stereo equipment taken from Audio Logic (*Id.*). However, several of these other individuals' fingerprints were not checked to determine if they matched any of the latent prints found.

On January 7, 1999, Bucknor was deposed by defense counsel for Parker (Def. Ex. 40). Trial counsel was present for the deposition. During her deposition, Bucknor stated that she was told not to conduct a comparison of these suspects against latent prints lifted from the scene of the crime and the stereo equipment (*Id.*).

Trial counsel specifically requested information on these other suspects listed on the latent fingerprint report from law enforcement (2SPC-R. 617). Trial counsel was told by law enforcement that they were unaware why those names were listed on the fingerprint report, and that they had no additional information on their identity, or how they became a part of the investigation (*Id.*).

However, these representations by the police to trial counsel were directly contradicted by reports commissioned by the Wilton Manors Police Department ("WMPD") from the Florida Department of Law Enforcement ("FDLE") (*See* Def. Ex. 43). Both trial counsel and the trial prosecutor confirmed that the reports from FDLE were not disclosed (2SPC-R. 627, 771). While trial counsel attempted to minimize the importance of the undisclosed documents, he did concede that he would have wanted to know about other suspects in the case (2SPC-R. 754).

According to the FDLE reports, on May 13, 1998, WMPD requested the assistance of FDLE in investigating the crimes (Def. Ex. 43 at 1631). In response to WMPD's request, an FDLE agent "went to the South Florida Investigative Support Center to obtain emergency Florida Drivers License photographs and make up photographic line-ups based on those photographs. Special Agent (SA) Ingram obtained drivers license photographs of the several subjects suspected of participating in the double homicide . . . on May 7, 1998." (*Id.*).

According to his report, SA Ingram obtained photographs of five suspects, including Rimmer and Parker, as well as three additional suspects who were included in the latent fingerprint report (*Id.*). Photographic lineups were prepared by FDLE and turned over to Detective Lewis "so that they could be viewed by the witnesses that viewed the homicides." (*Id.*).[10]

---

[10]A review of the FDLE files for this case shows that two photographic lineups were prepared (*Id.* at 1622-24). One of these (continued...)

2. The Plantation homicide

On April 27, 1998, less than a week before the homicides in the instant case, a Mieineke Muffler store was robbed and an employee was shot and killed (Def. Ex. 46 at 1850). According to a report by the Plantation Police Department:

> Cade, another employee, Anthony Ostuni (the victim of the homicide), and a customer, Darryl Stewart, were all inside the first bay, closest to the front office, working on Stewart's car that was up on a lift. In his sworn statement, Cade advised he first noticed the suspect when he heard someone say "give me the money". When he turned to look from where the voice had come, he saw a black male kneeled down in front of the office door in the first bay pointing a small barreled, dark colored revolver at them. Cade and Stewart walked towards a counter where Cade retrieved the cash from the drawer and he believed Ostuni might have moved to get a rag to clean his hands when the suspect fired one shot, hitting Ostuni, causing him to fall down. The suspect then took the money from Cade and demanded the jewelry off the customer, Stewart. Per the suspect's demands, to get his necklace off quicker, Stewart just yanked it off his neck without opening the clasp.

(Def. Ex. 46 at 1850). The suspect was described as a black male, 5'7" to 5'8", medium build, 25-35 years of age (Def. Ex. 46 at 1823).

The facts of the crimes were similar enough that the Plantation Police requested cooperation from WMPD, which provided prints and photos of Rimmer (*Id.* at 1864). However, witnesses did not identify Rimmer as being involved:

> On 051198, Detective Cindy Hager and I met with Mark Lowbridge at Transmission King. I showed Mark Lowbridge a photo line-up containing the photograph of Robert Rimmer, at which time he stated that he saw the

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[10] (...continued)
lineups contained 6 photographs, including those of additional suspects in the investigation (*Id.*).

> photograph in the newspaper. I showed Mark Lowbridge the photo line-up, at which time he stated that Rimmer did not fit the description based on his height and weight. I then met Gordon Cade at Meineke Muffler in Hollywood and showed him the photo line-up of Robert Rimmer. This met with negative results.

(*Id*.). Ultimately, other individuals were implicated and an arrest was made for the robbery-homicide (*Id*. at 1835, 1867). There was no connection to Rimmer, yet the aforementioned information was not disclosed to trial counsel (2SPC-R. 641).[11]

THE COURTS' RULINGS

A. *BRADY V. MARYLAND*

In denying Rimmer's *Brady* claim, the Florida Supreme Court agreed with the state circuit court's conclusion that "the evidence 'does not establish that any of the reports, not provided to the defense, contained favorable evidence, or did not contain information that the defense already had.'" *Rimmer*, 59 So. 3d at 785. The Florida Supreme Court concluded that Rimmer was not entitled to relief because he failed to demonstrate how the evidence would have been exculpatory or impeaching. *Id*. at 786.

In addressing this issue during Rimmer's federal habeas proceedings, the district court initially questioned the standard utilized by the Florida Supreme Court, as it relied heavily on the testimony of trial counsel that he would not have used this information even if it had been available (see Doc. 23 at 33) ("I

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[11]Despite the relevance of the information, trial counsel testified at the postconviction evidentiary hearing that he would not have used the documents even if he had possession of them (2SPC-R. 690-92).

am unaware of any clearly established federal law which relies on the representations of trial counsel (in this case, counsel who has also been alleged to have provided ineffective assistance at trial) during postconviction when determining whether or not the suppressed evidence at issue was exculpatory, impeaching, or material.”). The district court, however, found that “[e]ven though I may disagree with the Florida Supreme Court’s determination that the documents were not exculpatory or impeaching, a determination for which I must apply AEDPA deference, since I also find that Mr. Rimmer’s claim fails even under a less deferential *de novo* standard, I need not analyze the Florida Supreme Court’s determination for reasonableness.” (Doc. 23 at 33).

With regard to the Plantation Police Department reports, the district court found that while it may have assisted the defense to show that there had been a crime of a recent similar nature for which Rimmer was not a suspect, this was not enough given the eyewitness testimony identifying Rimmer as the shooter at the Audio Logic store (Doc. 23 at 35-36). As to the FDLE reports, the district court found that while it was “suppressed evidence and qualifies as evidence advantageous to Mr. Rimmer,” it likewise did not meet the materiality requirement (Doc. 23 at 36-37). The district court stated:

> While the report does show that there were initially other suspects and that information may have been useful in Mr. Rimmer’s defense of misidentification, the testimony at trial shows that two surviving eyewitnesses testified that they saw Mr. Rimmer shoot and kill the two victims. They also picked Mr. Rimmer out of the line-up prepared by the FDLE and shown in

> the report. Perhaps, the FDLE report could have impeached certain aspects of Detective Lewis' testimony, but it would not have impeached the surviving eyewitness' testimony. This fact, in combination with Mr. Rimmer's acknowledgment that he was in possession of the proceeds from the robbery and the gun used to commit the murder when he was arrested, is unlikely to have been overcome by the information gained by possessing the FDLE report. While not dispositive, Mr. Rimmer's trial counsel did testify at the evidentiary hearing, that the report did not contain information he did not already know, and had he had known this information it would not have changed his strategy because there was "nothing relevant here." ([DE 13, Ex. C, SPCR .5] at 678). Even though Mr. Rimmer makes a compelling argument for why this information would have been useful in, not only the investigatory stage, but also at trial to impeach and cross-examine the State's witnesses, that alone is not enough to create a reasonable probability of a different result. A review of the record shows that the bulk of the FDLE report is a summary of the information which was later proven at trial. So, there is not a reasonable probability that the information contained in the FDLE report was such that it undermined confidence in the outcome of Mr. Rimmer's trial.

(Doc. 23 at 36-37). In an accompanying footnote, the district court stated that considering both the Plantation Police report and the FDLE reports en masse pursuant to *See Kyles v. Whitley*, 514 U.S. 419, 446 (1995), it would still find that Rimmer had not shown that those two reports were material as defined by *Brady*. (Doc. 23 at 37, fn 16).

In its opinion addressing this issue, the Eleventh Circuit initially determined that the district court erred by conducting *de novo* review and in not according deference to the Florida Supreme Court's decision denying Rimmer's *Brady* claim. *Rimmer*, 876 F.3d 1053-55. The Eleventh Circuit proceeded to review Rimmer's claim under the deferential standard set forth in the AEDPA. *Id*. at 1055.

As to *Brady*'s first prong, that the State possessed favorable evidence, the Eleventh Circuit did not find unreasonable the Florida Supreme Court's determination that the information contained in the FDLE and Plantation reports were neither exculpatory nor impeaching. *Id*. at 1055-56. In addressing the FDLE report, the Eleventh Circuit dismissed the relevance of the information related to three additional suspects on the basis that their names, race and dates of birth were listed on a latent fingerprint report that had been provided to defense counsel. *Id*. at 1056. Thus, according to the Eleventh Circuit, "That the FDLE report contained their photographs, height, and weight was not favorable or exculpatory as to Rimmer." *Id*. The Eleventh Circuit found that "[i]n any event, that police considered these other suspects does not impeach the testimony of the eyewitnesses who identified Rimmer as the shooter or otherwise exculpate Rimmer." *Id*. And, according to the Eleventh Circuit, "the FDLE report does not weaken in any way the strong evidence that Rimmer (1) threw Moore's wallet, the stolen firearm, and the murder weapon from his car and 2) rented a storage unit in which he stored the items stolen from Audio Logic." *Id*.

As to the undisclosed reports from the Plantation Police Department, the Eleventh Circuit also found that it was not unreasonable for the Florida Supreme Court to determine that the information was not favorable to Rimmer. *Id*. According to the Eleventh Circuit, "That another robbery and murder occurred in another city at another time does not help Rimmer." *Id*. Moreover, the Eleventh Circuit relied on trial counsel's testimony that the

crimes in the Plantation reports differed from the instant case in several critical respects, making it difficult to suggest the two crimes were committed by the same perpetrators. *Id.* The Eleventh Circuit concluded that if trial counsel "was unable to conclusively establish that the Plantation perpetrator was actually responsible for the Wilton Manors Audio Logic crimes as well, then the presentation of this Plantation evidence might well have been harmful to Rimmer's defense." *Id.*

B. EYEWITNESS IDENTIFICATION

Rimmer asserted on direct appeal that the procedures used by the police during the photo spread and live lineup identifications were unnecessarily suggestive. The Florida Supreme Court disagreed, finding that the out-of-court identifications were not unnecessarily suggestive. *Rimmer*, 825 So. 2d at 316. As to Joe Moore, the Florida Supreme Court stated that "[t]he fact that appellant was the only person in the physical lineup that had also been in the photo spread does not taint Moore's identification because the physical lineup took place on July 13, 1998, two months after the photo spread, and there is no evidence in the record that Moore reviewed the photo spread shortly before viewing the physical lineup." *Id.* As to Kimberly Davis-Burke, the Florida Supreme Court stated:

> While Detective Lewis's comment to Davis that Moore had picked the same person as she was improper, it does not appear to have rendered the entire procedure unduly suggestive. First, the record makes clear that Davis had already selected appellant from the photo spread when Detective Lewis made his comment. Second, there is no indication that the police caused Davis to select appellant. Indeed, she picked another photograph before selecting the appellant's. Davis testified that she

picked the two photographs because they both resembled the assailant.

Id. at 317-18. Finally, the Florida Supreme Court found that even if the procedure employed with regard to Davis was unnecessarily suggestive, it did not appear from the totality of the circumstances that the procedure created a substantial likelihood of misidentification. *Id*. at 318.

In addressing the eyewitness identification issue, the federal district court stated that while it did not condone the conduct of the detective during the line-ups, "a review of the record shows that Ms. Davis, who had the best opportunity of anyone during the crime to view Rimmer, gave a sketch artist enough information to sketch a rendition of the defendant within a very brief period of time after the crime occurred; she later picked Rimmer out of a photo line-up (albeit after she had selected a different individual first); she also picked Rimmer out of a live line-up and identified him at trial." (Doc. 23 at 44). Additionally, the district court found that Moore's testimony was unequivocal that Rimmer was the man he saw shoot the victims (Doc. 23 at 44). Based on the totality of the circumstances, the district court found that the Florida Supreme Court's determination that the identification was reliable was not an unreasonable application of clearly established federal law, nor was the ruling based on an unreasonable determination of the facts (Doc. 23 at 44).[12]

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[12]The Eleventh Circuit declined to issue a COA as to this (continued...)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER THE ELEVENTH CIRCUIT'S ANALYSIS OF RIMMER'S *BRADY* CLAIM IS IN DIRECT CONFLICT WITH THE PRECEDENT OF THIS COURT.

Rimmer submits that this Court should grant certiorari to consider whether the Eleventh Circuit's denial of habeas relief was based on a flawed legal and factual analysis. The eyewitness identifications by Kimberly Davis-Burke and Joe Moore were the only pieces of evidence which tied Rimmer directly to the scene of the robbery and murders, and as a result were crucial to the State's prosecution of Rimmer. The fact that the police, along with FDLE, were at one point actively investigating other potential suspects to the crime was information that would have been of vital importance to Rimmer's defense theory of misidentification. Trial counsel should have been able to inquire of the State as to why these suspects were targeted in the first place in order to fully investigate Rimmer's defense. Similarly, the jury should have been made aware of these other suspects so that it could properly determine whether the investigation was more likely to produce distorted evidence incriminating Rimmer, or accurate evidence as to the true identity of the gunman. *See Kyles*, 514 U.S. at 446, citing to *Bowen* v. *Maynard,* 799 F. 2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in

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[12] (...continued)
issue. It provided no basis for its decision.

assessing a possible *Brady* violation"); *Lindsey* v. *King*, 769 F. 2d 1034, 1042 (5th Cir. 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case"). Here, overlooked by the Eleventh Circuit is the fact that the acknowledged problems with the State's eyewitness identifications would have been compounded had the jury been given the opportunity to evaluate those identifications in light of the other suspects.[13]

Moreover, the Eleventh Circuit's reliance on the "strong" evidence against Rimmer does not change the fact that the FDLE reports constitute exculpatory evidence. The Eleventh Circuit's determination "confuses the weight of the evidence with its favorable tendency . . .". *Kyles*, 514 U.S. at 451. Additionally, the Eleventh Circuit omitted from consideration many of the facts and circumstances favorable to Rimmer. Indeed, Rimmer's convictions rested in part on the inadmissible testimony of Officer Kenneth Kelley and the critically flawed eyewitness

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[13]The FDLE files included copies of the driver's licenses of each of the suspects, revealing that two of the three additional suspects in this case had similar physical characteristics to Rimmer. Moreover, both were 6'0" or taller (Rimmer is 6'2"). Also, according to their driver's licenses, none of the additional suspects required corrective lenses in order to drive. None of the witnesses to the Audio Logic homicides described the gunman as wearing glasses. In contrast, Rimmer is severely near-sighted and must wear glasses in order to see properly.

identifications.[14] Further, there was no physical evidence linking Rimmer to the crime scene, and even in the absence of the withheld evidence, Rimmer was just one vote shy of having his conviction overturned by the Florida Supreme Court.

When assessing prejudice, a court "must consider the totality of the evidence before the judge or jury . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 685-96 (1984). *See also Porter v. McCollum*, 130 S.Ct. 447, 453-54 (2009) (To evaluate the probability of a different outcome, the court must consider "the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - and reweigh it against the evidence in aggravation."); *United States v. Agurs*, 427 U.S. 97, 112 (1976) (In determining whether the suppression of evidence is sufficiently prejudicial to rise to the level of a *Brady* violation, the omitted evidence is analyzed "in the context of the entire record."); *United States v. Bagley*, 473 U.S. 667, 683 (1985) ("The reviewing court should assess the possibility that

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[14]As noted by the Florida Supreme Court's dissenting opinion in support of the argument that Officer Kelley's testimony was not harmless, there were significant issues with the eyewitness identifications. *Id*. at 336-39 (Pariente, J., concurring in part and dissenting in part, in which Anstead, C.J., and Shaw, J., concur). These issues included the fact that unnecessarily suggestive techniques were utilized, there was a discrepancy about Rimmer's weight, and both eyewitnesses identified the shooter as being five feet, ten inches tall and not wearing glasses, whereas Rimmer is six feet, two inches tall and is legally blind without his glasses. *Id*. at 339.

such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."). Contrary to the Eleventh Circuit's opinion, Rimmer submits that in conjunction with the exculpatory evidence, the errors at trial can no longer be rendered harmless.

With regard to the reports from the Plantation Police Department, Rimmer submits that the Eleventh Circuit's opinion ignores the fact that the crimes were similar enough for the Plantation Police to request cooperation from WMPD, which provided prints and photos of Rimmer (Def. Ex. 46 at 1864). And importantly, witnesses from the Plantation crime did not identify Rimmer as being involved (*Id.*). Ultimately, other individuals were implicated and an arrest was made for the robbery-homicide (*Id.* at 1835, 1867). There was no connection to Rimmer. Thus, the evidence concerning the robbery homicide that occurred in Plantation, just days before the crimes at issue, would have demonstrated that similar crimes had occurred by individuals not connected to Rimmer, thereby further lending credence to the defense theory of misidentification.

The Eleventh Circuit in its opinion dismissed the significance of the evidence by burdening Rimmer with an exceedingly high standard, that he conclusively establish that the Plantation perpetrator was actually responsible for the Wilton Manors crimes. However, materiality concerns what

inferences the jury could have drawn from such undisclosed information. *Kyles*, 514 U.S. at 445 ("Beanie's statements to police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder."). Indeed, as this Court explained in *Kyles*:

> Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id.,* at 682 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland v. Washington,* 466 U.S. 668, 694 (1984)); *Bagley*, supra, at 685 (White, J., concurring in part and concurring in judgment) (same); see 473 U.S., at 680 (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); cf. *Strickland, supra,* at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Nix* v. *Whiteside,* 475 U. S. 157, 175 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland* "). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley,* 473 U S., at 678.

514 U.S. at 434. Contrary to the Eleventh Circuit's analysis, Rimmer submits that when proper consideration is given to the totality of the circumstances, confidence in the outcome of his

trial is undermined. *See Smith v. Cain*, 132 S.Ct. 627, 630 (2012). Certiorari review is warranted.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER RIMMER WAS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON HIS EYEWITNESS IDENTIFICATION ISSUE.

During his federal habeas proceedings before the district court, Rimmer raised a number of issues, including one pertaining to the eyewitness identifications in this case.

In its order denying relief, the district court stated that it was granting a COA as to one issue, a *Brady* claim (Doc. 23 at 55). The district court stated:

> A Certificate of Appealability is **GRANTED** as to Claim III: Due Process Violation Pursuant to *Brady v. Maryland*:
>
> > Whether or not the Florida Supreme Court's determination that the FDLE and Palm Beach County police reports were not exculpatory or impeaching was unreasonable and, if so, were those reports material?
>
> The undersigned is persuaded that Mr. Rimmer has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)(citation omitted).

(Doc. 23 at 55).

Rimmer subsequently filed a motion in the district court seeking to expand the COA to include four additional issues, including the eyewitness identification issue (Doc. 29). Rimmer presented the factual basis in support of his claims as well as the applicable caselaw governing the issuance of a COA. Rimmer's motion, however, was denied by the district court on the basis

that it lacked jurisdiction as Rimmer had filed a notice of appeal (Doc. 33 at 1-2).

Rimmer subsequently filed a motion to expand the COA in the Eleventh Circuit to include the four additional issues, again including the aforementioned eyewitness identification issue. While the Eleventh Circuit granted Rimmer's motion as to one additional issue, his penalty phase ineffective assistance of counsel claim,[15] it denied a COA as to the remaining issues. The extent of the Eleventh Circuit's analysis as to the remaining issues was as follows: "Appellant's Motion is denied as to the other issues."

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

> In resolving this case we decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. *Slack v. McDaniel, 529 U.S. 473, 481, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*. Consistent with our prior precedent

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[15]The Eleventh Circuit stated:

> Appellant's Motion for Expansion of Certificate of Appealability is granted as to this one additional issue:
>
> > Whether the district court erred in denying Appellant's claim that his trial counsel rendered ineffective assistance of counsel in the investigation and presentation of mitigating evidence during the penalty phase of Appellant's 1999 trial?

> and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. *Slack, supra, 529 U.S. at 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595*.

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

> The COA determination under *§ 2253(c)* **requires an overview of the claims in the habeas petition and a general assessment of their merits**. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with *§ 2253* that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot, supra, at 893, n. 4*.

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

> The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional

> claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. **As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits**. *Slack, 529 U.S., at 481; Hohn, 524 U.S., at 241*. **The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved.** Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Id. at 342 (emphasis added).

The holding in *Miller-El* is pertinent to the circumstances of Rimmer's case. Contrary to this Court's precedent, there is no indication that the Eleventh Circuit conducted a "threshold inquiry into the underlying merit[s]" of Rimmer's claims. Indeed, it appears as though no "overview of the claims" nor "general assessment of their merits" was conducted. And, no analysis as to "whether the applicant had made a substantial showing of a denial of a constitutional right" was performed by the Eleventh Circuit. Further, the absence of a COA inquiry by the Eleventh Circuit was compounded by the failure of the district court to provide any explanation or analysis for its denial of a COA as to this issue.[16]

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[16]Rule 22(b), F.R.A.P., provides in pertinent part:

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

Rimmer submits that when a proper analysis is conducted, jurists of reason could find that the trial court erred in not excluding the pretrial and trial identifications of him by Moore and Davis-Burke, as the identification procedure employed by the police was unnecessarily suggestive and conducive to irreparable mistaken identification. Indeed, the suggestive elements in the process leading up to the live line-up made it all but inevitable that Moore would select Rimmer whether or not he was in fact the gunman. *See Neil v. Biggers*, 490 U.S. 188, 198-199 (1972); *Foster v. California*, 394 U.S. 440, 443 (1969)(A police procedure whereby accused was first placed in lineup and after no positive identification was made, a one-to-one confrontation was arranged with robbery victim who made only a tentative identification until subsequent lineup at which victim identified accused, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process).

A defendant's right to due process of law includes the right not to be the object of suggestive police identification procedures that create a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384 (1968). The live-lineup identification made of Rimmer by Moore should have been excluded as a result of the impermissible comments of Detective Lewis which clearly suggested to the identifying witness that Rimmer "was more likely to be the culprit". *See Jarrett v. Headley*, 802 F.2d 34, 41 (2d Cir. 1986); *United States v. Archibald*, 734 F.2d 938, 940 (2d Cir. 1984).

Moreover, because the pretrial identification procedure was unduly suggestive, Moore's in-court identification of Rimmer should similarly have been disallowed. There was no showing by the prosecution that an in-court identification would be independently reliable rather than a product of the suggestive police procedure. The focus of the inquiry is on the reliability of the identification testimony in view of the "totality of the circumstances". *See Manson v. Brathwaite*, 432 U.S. 98 (1977). The factors to be considered include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Biggers*, 409 U.S. at 190-200; *Manson*, 432 U.S. at 114.

At the suppression hearing, Moore said that the person identified in the live line-up appeared to have lost weight since the commission of the crime, some ten weeks earlier (SR. 27). While laying face down on the floor on his stomach, Moore was only able to "peek" at the gunman who wore a baseball cap low on his head (SR. 23-24, 27-28). The physical description given by Moore varied greatly from Rimmer's characteristics (SR. 21, 27; R. 1250). Consequently, it cannot be said that Moore's in-court identification of Rimmer rested on his independent recollection of the gunman rather than upon the illegal live line-up. *See Gilbert v. California*, 388 U.S. 263, 277 (1967) (the State may not adduce any evidence of an unconstitutional pretrial lineup

identification and may only use a trial identification when there exists by clear and convincing evidence that the in-court identification is based upon observations of the suspect independent from the lineup identification); *United States v. Wade*, 388 U.S. 218, 240 (1967); *Frisco v. Blackburn*, 782 F.2d 1353 (5th Cir. 1986); *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992). Both the live line-up identification and the in-court identification of Rimmer by Moore should have been excluded from use as evidence in the prosecution’s presentation.

As to Davis-Burke, there is no question that the identification procedure was impermissibly suggestive based on Detective Lewis’ remarks. *See Gilbert*, 388 U.S. at 270 n.2, 272 (pretrial identifications prejudicial and in-court identifications possibly tainted when numerous witnesses viewed lineup and made identifications in each other’s presence). It is equally clear that the live line-up and trial identifications lacked a clear and convincing showing of reliability in view of Davis-Burke’s limited opportunity to view the gunman at the time of the crime, the inaccuracy of Davis-Burke’s description of the gunman prior to the identification, and the significant level of uncertainty expressed by Davis-Burke when identifying the gunman at the confrontation. *See Manson*, 432 U.S. at 114-115.

Rimmer submits that jurists of reason could find that the suggestive elements in the process leading to the live line-up made it all but inevitable that the two aforementioned eyewitnesses would select Rimmer whether or not he was in fact the gunman. A lineup must be conducted in a manner that is not

suggestive or conducive to irreparable misidentification. Any form of suggestion on the part of the police might foster an unjust result. *Pearson v. United States*, 389 F.2d 684 (5th Cir. 1968). Moreover, as this Court observed in *Simmons*, 390 U.S. at 385:

> Improper employment of photographs by police may sometime cause witnesses to err in identifying criminals . . . Even if the police subsequently follow the most correct photographic identification procedures and show him (the witness) the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.

Rimmer submits that jurists of reason could conclude that even when viewed under the "totality of the circumstances" standard, there existed in the instant case a substantial likelihood of irreparable misidentification. Because the prosecution failed to show reliability based solely upon the two witnesses' independent recollection of the offender at the time of the crime, uninfluenced by the suggestiveness of the procedure, these pretrial and trial identifications of Rimmer should have been excluded.

Rimmer submits that jurists of reason could find, contrary to the district court's determination, that the suggestive identification procedures employed by Detective Lewis violated Rimmer's right to a fair trial resulting in a denial of due

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

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Leslie Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, on this 6th day of March, 2018.

/s/. Linda McDermott
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