CASE NO. 17-8046

IN THE UNITED STATES SUPREME COURT

October 2017, Term

ROBERT RIMMER,

Petitioner,

vs.

SECRETARY,
Florida Department of Corrections, et. al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

PAMELA JO BONDI
Attorney General
Tallahassee, Florida

Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No. 698271
Office of the Attorney General
1515 N. Flagler Dr. - Suite 900
West Palm Beach, FL 33401
Telephone (561) 837-5000
Facsimile (561) 837-5108

QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

1 through 2. Whether this Court should accept review of a Brady claim where the allegedly withheld material was either known to the defense, not exculpatory or impeaching, and would not have altered the outcome of Petitioner's trial and where the underlying Eleventh Circuit Court of Appeals' decision affirming the denial of habeas relief does not conflict with any of this Court's precedent or present an important or unsettled question of constitutional law?

3. Whether this Court should grant review of the Eleventh Circuit Court of Appeals' decision not to grant a certificate of appealability on the admission of eyewitness identification testimony where the lineups were not unduly suggestive and the underlying state court decision presents no significant or important federal question and whose result is not fairly debatable?

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The decision of which Petitioner seeks discretionary review is reported as *Rimmer v. Secretary, Florida Department of Corrections*, 876 F.3d 1039 (11th Cir. 2017) which was issued on November 15, 2017.

JURISDICTION

Petitioner, Robert Rimmer, ("Rimmer"), is seeking jurisdiction pursuant to 28 U.S.C. § 1254(1). This is the appropriate provision.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent, the Secretary, Florida Department of Corrections (hereinafter "State"), accepts as accurate Petitioner's recitation of the Sixth, Eighth, and Fourteen Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Rimmer, is in state custody and under a sentence of death pursuant to a valid judgement and sentence for the first-degree murders of Bradley Krause and Aaron Knight, which the Florida Supreme Court affirmed[1] on July 3, 2002. *Rimmer v. State,* 825 So.2d 304 (Fla. 2002), *cert denied Rimmer v. Florida,* 123 S.Ct. 567 (2002). That Court found the following facts:

> Appellant and codefendant Kevin Parker were jointly tried and convicted of two counts of first-degree murder, armed robbery, armed kidnaping, attempted armed robbery, and aggravated assault for the robbery and murders that occurred at the Audio Logic car stereo store in Wilton Manners, Florida. The facts in this case reveal that on May 2, 1998, appellant Robert Rimmer and possibly two others, including co-felon Kevin Parker, robbed Audio Logic, during which Rimmer shot and killed two people. The two employees, Bradley Krause and Aaron Knight, who were in the installation bay area of the store, were told to lie face down on the floor and their hands were duct-taped behind their backs. Two customers, Joe Moore and Louis Rosario, were also told to lie face down on the floor and their hands were then bound by duct tape. According to eyewitness Moore, appellant stopped him as he was leaving the store, showed him a gun tucked into the waistband of his pants, and ordered Moore to go back inside the store. Rosario, who was outside smoking a cigarette when the robbery began, also had been ordered to go inside the store, but he did not see the person who had told him to go inside. Personal items were taken from Knight, Krause, and Moore, including Moore's wallet and cellular telephone. During this episode, appellant was

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[1] Also affirmed were the convictions for three counts of armed robbery, four counts of armed kidnapping, one count of attempted armed robbery, and one count of aggravated assault. *See Rimmer v. State,* 825 So.2d 304, 332 (Fla. 2002).

armed with a Vikale .380 caliber semiautomatic weapon.

While this was taking place, another victim, Kimberly Davis Burke ("Davis"), was sitting in the waiting room of the store with her two-year-old daughter. While there, she had observed a purplish Ford Probe and a Kia Sephia drive up to the store. The Kia Sephia stopped in front of the store and co-felon Parker got out. He entered the store through the front door, looked inside a display case that was in the waiting room, spoke briefly with Davis and her daughter, and then exited through one of the doors that led to the bay area. Soon thereafter, Davis noticed appellant in the installation area. He then entered the waiting room and told Davis that her boyfriend Moore was looking for her. When Davis walked into the bay area of the store and observed the four men lying on the floor, she immediately understood what was happening and sat down, placing her daughter on her lap.

Although appellant told Davis not to look, she observed appellant and two other individuals load stereo equipment into the Ford Probe, which was parked in the bay area. At one point, appellant asked victim Knight for the keys to the cash register. He also asked if anyone owned a weapon. Knight told appellant that he had a gun, which he kept in a desk drawer in the store. Appellant retrieved the gun, a Walther PPK. Appellant also asked the two employees if there were any surveillance cameras, and if so, where the tapes were kept. The employees told appellant that the store did not have any surveillance cameras.

When the men finished loading the Ford Probe, appellant told Davis to move away because "he didn't want this to get on her." The victims heard appellant start to drive the car out of the bay area and then stop. Appellant returned to the bay area and said to Knight, "You know me." Knight responded that he did not. Appellant then said, "You do remember me" and walked up to Knight, placed the pistol to the back of his head and shot him. At

the sound of the gunshot, Moore jumped to his feet. Appellant pointed the gun at him and told him to lie back down. Appellant then walked over to Krause and shot him in the back of the head. Appellant then thanked the three remaining victims for their cooperation and told them to have a nice day. According to the surviving victims, the entire episode lasted fifteen to twenty minutes.

Knight died instantly. Krause, who was still alive when the police arrived, was taken to the hospital where he later died. According to the medical examiner, although Krause did not die instantly, he would have lost consciousness upon being shot. The police recovered a spent projectile fragment and shell casings from the scene of the crime, which were later identified as .380 caliber components. According to the State's firearm expert, the projectile fragment and shell casings came from the gun used by the assailant.

On May 4, 1998, Davis provided a sketch artist with a description of the shooter. The resulting sketch was given to Mike Dixon, the owner of the Audio Logic store, and several of his competitors. One competitor, John Ercolano, recognized appellant as the person depicted in the sketch and called Dixon. Apparently, Audio Logic had installed speakers in appellant's car in November of 1997. Appellant had returned in December of 1997 complaining that the speakers were not working properly. He had also taken his car to Ercolano's shop, complaining that Audio Logic had not installed the speakers correctly. Based on records kept by Audio Logic, the police learned appellant's identity, phone number, and address.

On May 8, Davis and Moore picked appellant out of a photographic lineup and later identified him from a live lineup as the person who shot the victims. Dixon identified appellant as the person who he had spoken to about installing equipment in his car.

Appellant was arrested on May 10, 1998, after leading the police in a twelve-minute, high-speed car chase which ended at his residence. During the chase, appellant threw several items from his car, including Moore's wallet, the firearm used during the shooting, and the Walther PPK stolen from the store. At the time of his arrest, appellant was driving a 1978 Oldsmobile. Shortly after his arrest, appellant's wife drove up in the Ford Probe. Both the Probe and the Oldsmobile were registered to appellant and both cars were impounded. During a subsequent court-ordered search of the Oldsmobile, the police discovered a day-planner organizer which contained a lease agreement for a storage facility. Appellant had rented the storage unit on May 7, just five days after the shooting incident. When the police searched the storage facility pursuant to a search warrant, they found the stolen stereo equipment. Both appellant's and Parker's fingerprints were on the equipment. A surveillance tape, which was admitted in evidence, showed appellant renting the storage unit. Parker was arrested on June 12, 1998.

During appellant's case-in-chief, appellant's wife testified that on the day of the murders, appellant had intended to go fishing with his son. She further testified that she drove the Ford Probe that day, not appellant. The defense also called two experts who testified about appellant's visual impairment. Apparently, appellant wears corrective lenses. It was the defense's theory that appellant could not have been the shooter because he wears glasses and the person who committed the murders was not wearing any glasses. The State presented rebuttal testimony from a Detective Kelley who also wears corrective lenses. Over defense counsel's objection, Detective Kelley testified about his ability to see without wearing glasses. At the close of all the evidence, the jury returned guilty verdicts on all counts charged in the indictment as to both defendants.

During the penalty phase, the trial court severed the proceedings so that each defendant could present mitigation evidence separately from the other. The court held Rimmer's penalty phase proceeding first. Parker's penalty phase proceeding commenced after the jury rendered an advisory sentence for Rimmer. During Rimmer's penalty phase proceeding, the State introduced facts surrounding Rimmer's conviction of prior felonies and victim impact evidence. The defense presented several witnesses, who testified about Rimmer's background, work, and family relationships. The defense also presented testimony from Dr. Martha Jacobson, a clinical psychologist who testified about appellant's mental illness. According to Dr. Jacobson, appellant suffers from a schizophrenic disorder. However, she offered no opinion as to whether appellant's mental condition supported any statutory mitigators.

The jury recommended that appellant be sentenced to death for both murders by a vote of nine to three. The trial court followed the jury's recommendation, finding six aggravating factors: (1) the murders were committed by a person convicted of a felony and under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person; (3) the murders were committed while the defendant was engaged in a robbery and kidnaping; (4) the murders were committed for the purpose of avoiding or preventing lawful arrest; (5) the murders were especially heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP). The trial court only gave moderate weight to the HAC and murder in the course of a felony aggravators; the court gave great weight to the remaining four aggravators. The trial court found no statutory mitigators, but found several nonstatutory mitigators: (1) Rimmer's family background (very little weight); (2) Rimmer is an excellent employee (some weight); (3) Rimmer has helped and ministered to others (minimal weight); (4) Rimmer is a kind, loving father (not much

> weight); and (5) Rimmer suffers from a schizoaffective disorder (little weight).

Rimmer, 825 So.2d at 308-311.

Following the denial of certiorari, on September 15, 2004, Rimmer sought collateral relief in state court. The trial court granted an evidentiary hearing on several postconviction claims, including the issue that the State violated *Brady v. Maryland,* 373 U.S. 83 (1963), for allegedly withholding various reports from law enforcement agencies. After the hearing, the trial court denied relief and the Florida Supreme Court affirmed. *Rimmer v. State,* 59 So.3d 763 (2010).[2] The state court correctly applied the test for a *Brady* violation set out in *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) and *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), finding "that the evidence [in the WMPD or FDLE reports][3] '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 state court found trial counsel's testimony credible:

> There was also testimony, at the evidentiary hearing, about a Plantation Police Department investigation of a murder at a muffler shop. Mr. Garfield testified that he does not believe he could have used this information because the crimes are not similar enough to each other, to get into evidence, and that jury's [sic] expect you to prove it was

[2] Rimmer also filed a petition for writ of habeas corpus, which the Florida Supreme Court denied.

[3] Wilton Manors Police Department ("WMPD") and Florida Department of Law Enforcement ("FDLE").

> the other person. Concerning the reports that two Wilton Manors Police Officers observed Ford Probes, the same kind of car used in the crimes, Mr. Garfield stated that this information would not have been any use to him because there was nothing to follow-up on.
>
> . . .
>
> Rimmer has not proven each of the elements required of a successful *Brady* claim. In particular, Rimmer has not shown how the evidence would have been exculpatory or impeaching

Rimmer, 59 So.3d at 786.

On May 2, 2011, Rimmer filed a petition for habeas corpus under 28 U.S.C. §2254. On September 29, 2014, the district court denied the petition and granted a COA on the *Brady* issue. Rimmer filed a Rule 59(e) Fed.R.Civ.P motion, which the court denied on August 25, 2015. Rimmer appealed. The Eleventh Circuit affirmed the denial on November 15, 2017. *Rimmer v. Secretary, Florida Department of Corrections,* 876 F.3d 1039, 1264 (11th Cir. 2017). The Eleventh Circuit noted that the state court found trial counsel's testimony credible and relied upon it to reject Rimmer's claim. *Rimmer,* 876 F.3d at 1055. The circuit court deferred to the Florida Supreme Court's factual finding that counsel did not find the police reports helpful to the defense, finding it reasonable in light of the record. The Eleventh Circuit stated:

> As Garfield noted in his testimony, the bulk of the information in the FDLE report pertained to Parker or provided information of which Garfield was already aware. The only potentially useful information provided in the FDLE report was the names and descriptions of the

> three other suspects—St. Louis, Gilbert, and Broughton—who police initially considered in investigating the Wilton Manors Audio Logic crimes. The Latent Fingerprint Report, which was given to Rimmer's trial counsel, already listed these three as suspects, described them as black males, and gave their dates of birth. That the FDLE report contained their photographs, height, and weight was not favorable or exculpatory as to Rimmer. In 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. Further, 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.
>
> It was also not unreasonable for the Florida Supreme Court to determine that the Plantation Report was not favorable to Rimmer. That another robbery and murder occurred in another city at another time does not help Rimmer. In addition, counsel Garfield noted that the crimes in the Plantation Report were different from the Wilton Manors Audio Logic crimes in several critical respects. These differences would have made it difficult for Rimmer to use the Plantation report to suggest that the person who committed those Plantation crimes was responsible for the Wilton Manors Audio Logic crimes instead of Rimmer. And if Garfield 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. at 1056. Also, the circuit court recognized that duplicative and unhelpful nature of the information in the reports would not have been sufficient to change the outcome of the proceedings. *Id.* The circuit court further recognized that, while the

information in the reports might have been useful to Rimmer's misidentification defense, when weighing the few facts in those reports against the evidence implicating Rimmer, its confidence in the guilty verdict was not undermined. *Id* at 1057. Specifically, the court stated:

> The fact that law enforcement initially considered other suspects and the fact that another robbery and murder took place in Plantation, Florida just before the Wilton Manors Audio Logic robbery and murders does not undermine at all the substantial inculpatory trial evidence establishing Rimmer's guilt. Eyewitness Davis Burke provided a description of Rimmer to a sketch artist, who produced a drawing. When Ercolano saw that drawing, he recognized Rimmer, which helped law enforcement to ascertain Rimmer's contact information. Eyewitnesses Moore and Davis Burke picked Rimmer out of a photographic lineup and later chose Rimmer from a live lineup. On the date of his arrest, Rimmer was in possession of Moore's wallet, the Walther PPK pistol stolen during the robbery, and the .380 Baikal pistol used to kill Knight and Krause. The evidence established that Rimmer rented a storage unit where he kept the stereo equipment stolen from Audio Logic on the day of the murders and that Rimmer owned a Ford Probe, which was the make and model of the car used during the crime.

Id.

The Eleventh Circuit concluded that the Florida Supreme Court's decision "did not unreasonably fail to consider the totality of the circumstances in denying Rimmer's *Brady* claim", and that Florida Supreme Court's decision was not "based on an unreasonable determination of the facts and is not contrary to, or an

unreasonable application of, clearly established federal law." *Id.* This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

ISSUE I

THIS COURT SHOULD DECLINE REVIEW OF A BRADY CLAIM WHERE THE ALLEGEDLY WITHHELD MATERIAL WAS EITHER KNOWN TO THE DEFENSE, NOT EXCULPATORY OR IMPEACHING, AND WOULD NOT HAVE ALTERED THE OUTCOME OF PETITIONER'S TRIAL AND WHERE THE UNDERLYING ELEVENTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DENIAL OF HABEAS RELIEF ADOES NOT CONFLICT WITH ANY OF THIS COURT'S PRECEDENT OR PRESENT AN IMPORTANT OR UNSETTLED QUESTION OF CONSTITIONAL LAW.

Rimmer asserts that this Court should grant Certiorari for an alleged *Brady* violation. This claim involves reports from the FDLE and the Plantation Police Department that were not disclosed, although the information was known or was not exculpatory. The FDLE report was a compilation of the original local police report on the murder and contained descriptions of possible suspects. The other report was an unrelated crime. Rimmer argues that these reports were vital to his defense theory of misidentification. The Eleventh Circuit Court of Appeals' denial of federal habeas relief and rejection of the claim of a *Brady* violation comported with the dictates of AEDPA and that decision does not conflict with the decision of any other

state court of last resort or any decision of any federal court of appeals. Furthermore, Rimmer cannot show that the Eleventh Circuit's opinion decided an important question of federal law in a manner which conflicts with a decision of this Court. *See* Sup. Ct. R. 10. Although the failure to meet any of these considerations is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). As no compelling reason for review has been offered under Rule 10, certiorari should be denied.

Review of the denial of habeas corpus relief by the Eleventh Circuit Court of Appeals is circumscribed by 28 U.S.C. Section 2254(d)(1)[4] which focuses solely on

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[4] 28 U.S. 2254 was amended by AEDPA and as this Court explained in *Brown v. Payton*, 544 U.S. 133, 141 (2005):

> AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra*, at 405, 120 S.Ct. 1495; *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362,

the propriety of the state court's decision on the merits of the claim. Federal habeas corpus relief is not available unless the state decision is "contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or the state court's determination of facts was unreasonable in light of the evidence." *Williams v. Taylor*, 529 U.S. 362 (2000). *See, Woodford v. Visciotti*, 537 U.S. 19 (2002) (explaining when habeas applicant alleges Sixth Amendment violation, he must show that state court applied *Strickland* in an objectively unreasonable manner); *Yarborough v. Gentry*, 124 S. Ct. 1 (2003) (noting that the focus is on the state court's application of governing federal law). The AEDPA, 28 U.S.C. § 2254, "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Felkner v. Jackson*, 131 S.Ct. 1305, 1307 (2011) (per curiam). The Eleventh Circuit Court Appeals, in its *de novo* review, concluded that the Florida Supreme Court applied the proper standard, the factual findings were supported by the record, and the decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent.

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154 L.Ed.2d 263 (2002) (per curiam). A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra*, at 405, 120 S.Ct. 1495; *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

The standard of review for the federal appellate court reviewing the denial of habeas relief is *de novo*, but circumscribed by *Williams v. Taylor*, 529 U.S. 362 (2000); *Williams v. Taylor*, 529 U.S. 420 (2000); *Lindh v. Murphy*, 521 U.S. 320 (1997). Under AEDPA, it is the state court decision on the merits which is entitled to AEDPA deference and this was recognized by the federal circuit court in its *de novo* review. Certiorari review by this Court is not a means for correcting any alleged error in the federal court's analysis of the issue. Under AEDPA, the focus is on the Florida Supreme Court's decision on the merits. As provided in *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011), AEDPA review under § 2254(d)(1) is limited to the record before the state court that adjudicated the prisoner's claim on the merits and AEDPA's "backward-looking language requires an examination of the state-court decision at the time it was made." *Cullen* 131 S.Ct. at 1398. A federal court may not issue a writ of habeas corpus unless "the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). This Court emphasized that a habeas petitioner must establish that "there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011). This Court has observed that even a strong case for relief does not make the state court's contrary conclusion unreasonable. The *Richter* Court stated that if the AEDPA standard for granting

federal habeas relief was "difficult to meet, that is because it was meant to be." *Richter*, 131 S.Ct. at 786. Rimmer has not carried his burden under AEDPA and certiorari should be denied.

To establish a *Brady* violation, the defendant must prove three things (1) that favorable evidence either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the State, and (3) the defendant suffered prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). *Brady* only applies to "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). In order to show that suppressed evidence is material, a habeas petitioner must show that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to under confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985).

As the Eleventh Circuit agreed, the evidence was not shown to be exculpatory or impeaching. The circuit court properly deferred to the State court's factual finding about Garfield's credibility. *Baldwin v. Johnson*, 152 F.3d 1304, 1316 (11th Cir. 1998) (announcing "[w]e must accept the state court's credibility determination and thus credit [the attorney's] testimony over the petitioner's"), *cert. denied*, 526 U.S. 1047 (1999); *Devier v. Zant*, 3 F.3d 1445, 1456 (11th Cir. 1993) (recognizing

that "[f]indings by the state court concerning historical facts and assessments of witness credibility are ... entitled to the same presumption accorded findings of fact under 28 U.S.C. §2254(d)."), *cert. denied*, 513 U.S. 1161 (1995). The court noted that during the state court evidentiary hearing, Garfield went through the FDLE reports he had not received and noted that the information within the report either dealt exclusively with the co-defendant or contained information he already knew.

Further, Garfield explained that the pages containing copies of driver's licenses, the suspects listed on the fingerprint list, and an unusable blurry photo line-up would not have given him any new information. Garfield had no indication that the line-ups were used. The latent fingerprint report, which Garfield had, already listed the other possible suspects and their descriptions. The fact that the reports contained the height and weight of the other possible suspects was not exculpatory nor favorable to Rimmer. *Rimmer,* 876 F.3d at 1056. Furthermore, Garfield reviewed the Plantation report, which he had not received, and noted the marked dissimilarity between that crime and this one; he saw nothing useful or exculpatory in it. He also indicated that he did not want to put the gun in Rimmer's hand in another murder. The pith of counsel's testimony was that neither report would have been exculpatory or useful to the defense.

Rimmer's assertion that the "problems" with the eyewitness identifications is unfounded especially considering how the sketch was created which led to Rimmer's

identification. Rimmer discounts the fact that, after the witness and sketch artist created a drawing of the suspect, he became the focus of the investigation. This sketch led to a shop owner identifying Rimmer as an angry customer, which then led to an identification by the eyewitness and the discovery of the stolen items and murder weapon in Rimmer's possession. The fact that others may have been suspects and included in line-ups not used by the police does not undermine confidence in the verdict and does not establish prejudice under *Brady*. The Florida Supreme Court identified the relevant law, applied it in a manner which was not contrary to or an unreasonable application of law considering the facts and established federal law. Rimmer did not carry his burden under AEDPA.

Also, the Eleventh Circuit determined properly that that the Florida Supreme Court reasonably concluded that the information in the FLDE and Plantation Reports was not material with the meaning of *Brady*. *Rimmer* 876 F.3d at 1056. Garfield's testimony demonstrates that the reports disclosure would not have been significant enough to change the outcome. When looking at that entire record, even if the reports could be useful to Rimmer's misidentification defense, they did not outweigh the evidence establishing Rimmer as the murderer. *Id.* at 1057. As such, the finding that the withheld reports were not material comports with this Court's jurisprudence.

Rimmer cites to *Kyles v. Whitley*, 514 U.S. 410, 451 (1995), to suggest that the Eleventh Circuit "confused the weight of the evidence with its favorable

tendency…" *Kyles* does not further Rimmer's position. In *Kyles*, the withheld information called into question the veracity and culpability of the state's main witness and was exculpatory. Here, the photo line-ups at best might have included a third suspect, but they did not suggest that Rimmer was not involved in the crime or was not the shooter. Likewise, those line-ups did not call into question the identifications made in this case or the inculpatory evidence gathered directly from Rimmer: i.e. the murder weapon; the lease, with Rimmer's fingerprints, for the storage unit were the stolen items were found, the stolen firearm; and Joe Moore's wallet.

Rimmer's argument that the Eleventh Circuit failed to properly assess the totality of the circumstances is without merit. First, Rimmer fails to recognize the unrebutted testimony that counsel had the information, that the information was developed by WMPD and given to FDLE, and that FDLE did no "investigation" in the case. FDLE's involvement was to prepare photographic line-ups, some of which were not used. A third assailant was involved so the existence of other line-ups does not speak to the quality of the investigation or eyewitness identification of Rimmer. Further, the investigation focused on Rimmer after a composite sketch was created by a victim which another store owner recognized as an angry client, leading to Rimmer's identification. *Rimmer*, 825 So.2d at 310. Two eyewitnesses, and another witness, then identified Rimmer from the photo line-up. The police arrested

Rimmer after a high-speed chase during which he discarded, and the police later recovered, the murder weapon, the stolen gun, and the stolen wallet. The police also found the rental agreement, containing Rimmer's fingerprints, for the storage unit containing the stolen audio equipment. Finally, Rimmer's wife owned the car used during the robbery/homicide. Taken together, the jury heard of the extent of the police investigation, the strength of the identifications and the physical evidence linking Rimmer to the crimes. "Under the totality of the evidence in the record, including the alleged criticism of the eye witness identifications and any issues with Detective Kelley's testimony, the information in the undisclosed reports does not undermine confidence in the verdict. *Rimmer,* 876 F.3d at 1057. Rimmer has not carried his burden under AEDPA, and has not shown entitlement to certiorari review under Rule 10. Certiorari should be denied.

ISSUE II

THIS COURT SHOULD DECLINE REVIEW OF THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION NOT TO GRANT A CERTIFICATE OF APPEALABILITY ON THE ADMISSION OF EYEWITNESS IDENTIFICATION TESTIMONY WHERE THE LINEUPS WERE NOT UNDULY SUGGESTIVE AND THE UNDERLYING STATE COURT DECISION PRESENTS NO SIGNIFICANT OR IMPORTANT FEDERAL QUESTION AND WHOSE RESULT IS NOT FAIRLY DEBATABLE?

Rimmer next argues that he was entitled to a certificate of appealability ("COA") on the issue of the eyewitness identification. He asserts that the Eleventh

Circuit failed to conduct a threshold inquiry into the underlying merits of the claim and failed to analyze whether Rimmer had made a substantial showing of a denial of a constitutional right when it declined to issue a COA on this issue. On the underlying eyewitness identification issue, Rimmer contends that the line-up identification procedure the police used was unnecessarily suggestive and led to mistaken identification in violation of his constitutional right to due process. Rimmer is incorrect and the petition should be denied.

This Court has held that jurisdiction exists to entertain certiorari petitions challenging the denial of a COA by the circuit courts. *Hohn v. United States*, 524 U.S. 236, 253 (1998) (holding Supreme Court "has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals."). However, there is no basis for granting certiorari review of this case. There is no conflict between the Eleventh Circuit and this Court or any other circuit court regarding the denial of a COA, and Petitioner has not established any reason for this Court to grant review of these fact-specific claims. This Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. 182, 184, n. 3 (1987). As no compelling reason for review has been offered under Rule 10, certiorari should be denied.

Congress mandates that a prisoner seeking collateral relief under 28 U.S.C. §2254 does not have an automatic right to appeal a district court's denial or dismissal of his federal petition. Instead, the petitioner must first seek and obtain a COA. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A COA may be granted only where there is "a substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), which this Court has interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) (observing that to be entitled to a COA a petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claim or that jurists could conclude that issues presented are adequate to deserve encouragement to proceed further."). The decision to grant a COA requires a threshold inquiry into the underlying merit of the claims. *Miller-El*, 537 U.S. at 327 (citing Slack, 529 U.S. at 481). This Court has maintained that issuance of "a COA must not be *pro forma* or a matter of course." *Miller-El*, 537 U.S. at 337. The petitioner must actually prove that he meets the above standard before a COA can issue. *Id.* at 337-38. The Eleventh Circuit's denial of the certificate on Rimmer's claim was proper. Reasonable jurists would not disagree, thus, Rimmer deserves no encouragement to pursue the matter further.

The Florida Supreme Court fully analyzed whether the two identifications in question were unduly suggestive and determined that, given the totality of the circumstances, the procedures used did not create a substantial likelihood of misidentification. In rejecting the challenge on direct appeal, the court provided the following:

> A. Moore
>
> Appellant challenges Moore's identification on the basis that (1) Moore identified appellant from a photo spread despite his earlier statements to the police that the gunman had a baseball cap pulled down over his eyes, (2) Moore's description of Rimmer did not match Rimmer's actual physical attributes, and (3) Moore was only able to glimpse the gunman during the robbery and murders. However, we do not find that these allegations render the photopack and live lineup identifications unnecessarily suggestive. At most, these allegations suggest that Moore did not have sufficient opportunity to observe the perpetrator. But the ability to observe is a far cry from whether the police employed unnecessarily suggestive procedures to secure an identification. Moreover, any claim that the procedure was suggestive is diminished by the fact that Louis Rosario was not able to pick any persons from the photo spread or live lineup.
>
> Appellant further contends that Moore later identified Rimmer from a live lineup only after the police told him that Rimmer had been arrested and had his (Moore's) wallet. However, the fact that the police told Moore prior to his viewing the physical lineup that they had included a suspect in the lineup does not taint Moore's identification. In Green, the victim was shown a photo array consisting of six photographs, one of which was a picture of the defendant. The police then told the victim that they had included a picture of the suspect within the

photo spread. After picking the photograph of the defendant, the police told her that she had identified the right person. 641 So.2d at 394. After applying the above-mentioned test, this Court held that the police procedure was not unnecessarily suggestive. We reasoned that the photo spread consisted of six men with similar characteristics. Although defendant Green's photo was darker than the others, there was no evidence that the police directed the victim's attention to it. Thus, we held that the trial court did not err in refusing to suppress the out-of-court identification. See id. at 395.

Appellant does not allege that the other persons in the lineup possessed characteristics different than the appellant, such that appellant would stand out. The 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. In fact, Moore testified at the suppression hearing that he did not speak to anyone who also had viewed the live lineup and that he made his selection based on the robbery incident and not the prior photo identification.

B. Davis

Appellant challenges Davis's identification on the grounds that she initially selected a person other than appellant from the photo spread and that she selected appellant's photo only after a police officer told her that Moore had also picked him. Appellant further contends that in the subsequent live lineup shown to Davis, Rimmer was the only person in the lineup whose photo had been displayed in the photo spread. Thus, argues appellant, Davis not surprisingly picked Rimmer from the lineup. We find no error with the admission of Davis's identifications.

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.

Even if we were to find the procedure employed with regard to Davis was unnecessarily suggestive, it does not appear from the totality of the circumstances that the procedure created a substantial likelihood of misidentification, using the five factors mentioned above. See *Neil*, 409 U.S. at 199-200, 93 S.Ct. 375. First, of the three surviving witnesses, Davis had the best opportunity to view the assailant. She initially saw him in the waiting room of the store and later watched him and another load boxes of stereo equipment into appellant's car. Unlike the other victims, Davis had not been forced to lie face down on the floor. Davis later provided a description of the assailant to a police sketch artist, which helped the police obtain appellant's identity. Second, her degree of attention was greater than the other witnesses because, as mentioned above, she was not told to lie face down on the floor. Rather, she was able to observe the appellant for the entire episode, which last approximately twenty minutes. Third, Davis's description appears to be an accurate depiction of appellant, despite the fact that she described the assailant as being much shorter than appellant's actual height. As noted above, Davis provided the sketch artist with a description that permitted the police to obtain the identity of appellant. Appellant does not claim that the sketch does not resemble him. Fourth, Davis selected appellant from the photo spread as one of her choices. Thus, the fact that she also picked another photo does not affect her level of certainty because she claimed that the two photos looked alike. Finally, Davis viewed the photo spread just six days

> after the robbery. Thus, it appears that Davis's out-of-court identification was reliable.
>
> Accordingly, we find no error with the trial court's refusal to suppress the out-of-court identifications of Moore and Davis.

Rimmer v. State, 825 So. 2d 304, 316–18 (Fla. 2002)

That court's analysis was properly based on this Court's established law set out in *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375 (1972). *Rimmer*, 825 So.2d at 315-318. The district court reviewed that decision and found that the state court's rejection of the issue was not objectively unreasonable in light of the facts. Rimmer failed to show that the state court's determination of the facts was unreasonable as required by AEDPA.

Given the facts in the record and the order denying federal habeas relief, it is clear that Rimmer could never prevail on this claim and the denial of the COA was appropriate. In its analysis of the case, the district court considered the totality of the circumstances.[5] The court explained that Ms. Davis-Burke, a short period after the

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[5] A due process violation under the Fourteenth Amendment may exist where the identification procedure utilized was unnecessarily suggestive and conducive to irreparable misidentification. *See Stoval v. Denno,* 388 U.S. 293 (1967). The conviction based on eyewitness identification following pretrial identification is invalid if the procedure was so impermissibly suggestive as to give rise to the likelihood of irreparable misidentification. *Simmons v. United States,* 390 U.S. 377 (1968). The factors utilized to determine whether an identification should be excluded are: 1) did the police employ an unnecessarily suggestive procedure in obtaining it; and 2) if so, considering all the circumstances, was a likelihood of irreparable misidentification thereby created. *Manson v. Braithwaite,* 432 U.S. 98

murders, gave a sketch artist enough information to render a sketch, which led to Rimmer being identified by two separate shop owners. Ms. Davis-Burke picked Rimmer out of a photograph and live line-up. In addition, Mr. Moore repeatedly testified that he saw Rimmer murder the victims. As a result, the district court concluded the Florida Supreme Court's ruling that the identifications were reliable was not an unreasonable application of established federal law and was not based on an unreasonable determination of facts. The controlling federal law was reviewed and applied properly.

A circuit judge **must** deny a COA, even when the petitioner has made a substantial showing that his constitutional rights were violated if all reasonable jurists would conclude that relief is barred. *Miller-El,* 537 at 349-350. Rimmer has failed to show that reasonable jurists would find that the district court's determination was contrary to or an unreasonable application of federal law.[6] *See*

(1977). If there is evidence of some suggestion, the question becomes, "whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers,* 409 U.S. 188, 199 (1972). The factors used to assess whether an identification is reliable include: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confirmation; and 5) the length of time between the crime and the confrontation. *Neil,* 409 U.S. at 199-200.

[6] In his petition, Rimmer cites to *Buck v. Davis,* 137 S.Ct. 759 (2017), to support his assertion that reasonable jurists would disagree with the district court's decision. This case is inapplicable to the case before the Court. In *Buck,* this Court found that the Fifth Circuit Court of Appeals erred by "first deciding the merits of an appeal,

Lamarca v. Secretary, Department of Corrections, 568 F.3d 929, 942 (where 11th Circuit found that that defendant failed to demonstrate that reasonable jurists could disagree with the district court's ruling and, therefore, failed to make substantial showing of the denial of a constitutional right and was not entitled to COA).

Rimmer's assertion that the Eleventh Circuit failed to conduct a threshold inquiry into the merits of his claim is belied by the circuit court's extension of the COA to include an additional issue. This extension of the COA demonstrates that the Eleventh Circuit conducted an analysis of the record to determine if there was a substantial showing of a denial of a constitutional right. That court explained its denial of the COA on the remaining issues by saying: "The court does not find 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 further encouragement to proceed further." Furthermore, there is no requirement in the case law or statute that requires the courts to provide a written explanation for its granting or denying a certificate of appealability. Certiorari should be denied.

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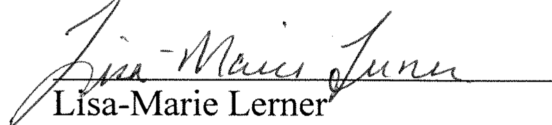
and then justifying its denial of the COA based on it adjudication of the actual merits..." *Buck,* 137 S.Ct. at 774. There is absolutely no indication that the Eleventh Circuit denied the COA only after determining the appeal on the merits.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent requests respectfully that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL



Lisa-Marie Lerner
Assistant Attorney General
Florida Bar No. 698271

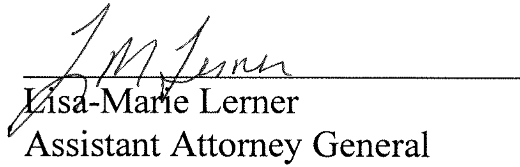
Ilana Mitzner
Assistant Attorney General
Florida Bar No. 0087065

OFFICE OF THE ATTORNEY GENERAL
1515 N. Flagler Dr.; 9th Floor
West Palm Beach, FL 33401
Office: (561) 837-5000
Facsimile: (561) 837-5108

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent via electronic filing and by United States mail, postage prepaid, to Linda McDermott, 20301 Grande Oak Blvd., Suite 116-611, Estero, FL 33928, and to lindammcdermott@msn.com, this 4th day of May, 2018.



Lisa-Marie Lerner
Assistant Attorney General