No.

IN THE
Supreme Court of the United States

DONNIE BERRY,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

MOTION TO PROCEED *IN FORMA PAUPERIS*

The petitioner, DONNIE BERRY, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without the prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39. Attached hereto is the **Affidavit or Declaration in Support of Motion for Leave to Proceed** *In Forma Pauperis* completed and signed by Petitioner Berry.

Petitioner Berry previously sought *in forma pauperis* status and was found to be indigent by the Alachua County Clerk of Court. Petitioner Berry has been incarcerated since November 3, 2008.

WHEREFORE, Petitioner, DONNIE BERRY, asks for leave to proceed *in*

forma pauperis.

DATED this November 13, 2019.

Respectfully submitted,

KENT & McFARLAND
ATTORNEYS AT LAW

s/William Mallory Kent
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ATTORNEY FOR PETITIONER

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Donnie Berry, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify): _____	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

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2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
N/A	$ N/A	$ N/A
	$	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value N/A

☐ Motor Vehicle #2
Year, make & model N/A
Value N/A

☐ Other assets
Description N/A
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ 0	$ 0
	$ 0	$ 0
	$ 0	$ 0

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
N/A	N/A	N/A

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) N/A Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$ 0
Utilities (electricity, heating fuel, water, sewer, and telephone) N/A	$ 0	$ 0
Home maintenance (repairs and upkeep)	$ 0	$ 0
Food	$ 0	$ 0
Clothing	$ 0	$ 0
Laundry and dry-cleaning	$ 0	$ 0
Medical and dental expenses	$ 0	$ 0

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ 0
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$ 0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$ 0
Life	$ 0	$ 0
Health	$ 0	$ 0
Motor Vehicle	$ 0	$ 0
Other: _____	$ 0	$ 0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$ 0
Installment payments		
Motor Vehicle	$ 0	$ 0
Credit card(s)	$ 0	$ 0
Department store(s)	$ 0	$ 0
Other: _____	$ 0	$ 0
Alimony, maintenance, and support paid to others	$ 0	$ 0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$ 0
Other (specify): _____	$ 0	$ 0
Total monthly expenses:	$ 0	$ 0

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? 0

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? 0

If yes, state the person's name, address, and telephone number:

N/A

12. Provide any other information that will help explain why you cannot pay the costs of this case.

N/A

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: OCT 4, 2019

(Signature)

No.

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OCTOBER TERM, 2019

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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Question Presented

Whether Petitioner Berry Is Entitled to a Certificate of Appealability on the Single Issue Whether Defense Counsel Rendered Ineffective Assistance of Counsel by Failing to File a Motion to Suppress Gregory Young's Identification of Berry – an Identification Which Was Unnecessarily Suggestive in Violation of Berry's Due Process Rights.

List of Parties and Corporate Disclosure Statement

Donnie Berry, Petitioner.

Secretary, Florida Department of Corrections, Respondent.

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United States Court of Appeals
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Petition for a Writ of Certiorari

The Petitioner, DONNIE BERRY, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

Opinion below

The unreported opinion of the United States Court of Appeals for the Eleventh Circuit, *Berry v. Secretary, Florida Department of Corrections, et al.* is found at ___Fed. Appx. ___, Berry (11th Cir. 2019).

Jurisdiction

The United States Court of Appeals for the Eleventh Circuit rendered its judgment on August 20, 2019. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254.

Constitutional Provisions Involved

The Sixth Amendment of the United States Constitution provides:

> 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

In 2006, the Petitioner, Donnie Berry ("Berry") was charged with two counts of robbery with a firearm. The offenses occurred in Gainesville, Florida during the early morning hours of December 17, 2006.

The case proceeded to trial in October of 2008. At the conclusion of the trial, the jury found Berry guilty of both robbery counts. The state trial court sentenced Berry to a total sentence of twenty-five years' imprisonment. On direct appeal, the Florida First District Court of Appeal affirmed Berry's conviction and sentence. See *Berry v. State*, 28 So. 3d 47 (Fla. 1st DCA 2010).

Following the direct appeal, Berry timely filed a Florida Rule of Criminal Procedure 3.850 motion. Initially, the state trial court summarily denied all of the claims raised in the rule 3.850 motion, but on appeal, the Florida First District Court of Appeal remanded for an evidentiary hearing on two of the claims. See *Berry v. State*, 145 So. 3d 222 (Fla. 1st DCA 2014). Following the evidentiary hearing, the state postconviction court denied the remaining two claims. On appeal, the Florida First District Court of Appeal affirmed the denial of Berry's rule 3.850 motion. See *Berry v. State*, 189 So. 3d 760 (Fla. 1st DCA 2016).

Berry subsequently filed a petition pursuant to 28 U.S.C. § 2254. Berry raised several claims in the petition – but only one of which is at issue in this petition: (1)

whether Berry received ineffective assistance of counsel as a result of his trial counsel's failure to litigate a motion to suppress an unnecessarily suggestive identification. On June 13, 2018, the magistrate judge issued a report and recommendation recommending that Berry's § 2254 petition be denied. Thereafter, on December 10, 2018, the district court denied Berry's § 2254 petition and denied a certificate of appealabliity ("COA"). Berry then sought a COA from the Eleventh Circuit Court of Appeals, which was denied August 20, 2019. This petition seeking a COA from this Court followed in a timely manner thereafter.

Statement of the Facts

a. The Trial Proceedings.

The facts, as alleged by the State, were that four black males acted together on December 17, 2006, to rob Gregory Young and Antonio Williams. The State alleged the four black males included Berry, as well as, Adrian Price, Felton Woulard, and Jarell Whitehead. *See id.* Berry's theory at trial was that he was mistakenly identified as one of the perpetrators of these crimes.

The primary evidence against Berry was provided by testimony from Gregory Young. Mr. Young testified that the robbery began when a light skin black male who was shorter than him, had a short haircut, and wore a striped collar shirt, put a semiautomatic gun to his head and took his necklace. When the robbery began, Mr.

Young was sitting on the right front passenger side of the hood of a car and the other victim, Antonio Williams was sitting in the driver's seat of the car.

Mr. Young, who indicated that he was himself six feet tall, testified that the person who first approached him and put the gun to his head was shorter than him. Mr. Young identified the person who put the gun to his head as Berry. Mr. Young made this identification through in-court identification of Berry, as well as an in-court identification of a photograph containing only an image of Berry. *See id.* Mr. Young also testified that the police brought him to the Gainesville Police Station on the same day of the incident to see if he could make an identification of Berry. Mr. Young indicated that when he arrived at the Gainesville Police Station, he was simultaneously shown four pictures, one containing an image of Berry and the other three containing images of the codefendants. Mr. Young indicated that he recognized the three codefendants because he saw them as they were being arrested at the scene. *See id.* Mr. Young testified that as the police showed him the four photographs, the police asked him to identify one of the guys the police took away from the scene that Mr. Young did not see at the scene. It was after being given this instruction that Mr. Young identified Berry as the fourth man involved in the crime.

Mr. Young testified that in addition to the first male, there was another male on that side who was taller than the first male, more slender, and had long dread

locks. Mr. Young identified the second male as Adrian Price.

During cross examination, defense counsel highlighted the suggestiveness of the circumstances surrounding the original photographic identification of Berry by Mr. Young. The cross-examination also showed inconsistencies in how Mr. Young described the first male's clothing. *Id.* While testifying at trial, Mr. Young described the person as having worn a striped collar shirt; however, in deposition testimony, Mr. Young had not mentioned the shirt being striped. *See id.* There was also testimony suggesting that Mr. Young may not have physically been able to clearly remember the events that evening, because Mr. Young admitted that at the time of the robbery he was intoxicated by alcohol to the point that he believed that if he had been driving he would have been over the legal limit.

The testimony of Antonio Williams, the other alleged victim in the case, did not support Mr. Young's identification of Berry as a perpetrator of the crime. Mr. Williams was able to identify the person who put the gun to his own head as Jarell Whitehead. In addition, Mr. Williams did see the light skinned male with a short hair cut, who was the first person that put the gun to Mr. Young's head. Mr. Williams saw this light skinned male when the male stepped around from the side of the car after he pointed the gun at Mr. Young. However, Mr. Williams was not able to identify Berry as the light skinned male when he looked at a photographic line up, which

consisted of several photographs included a picture of Berry, later that morning.

Additionally, evidence admitted at trial contradicted Mr. Young's testimony that it was Berry who had taken his gold necklace. When the police stopped the vehicle used by the robbers to get away from the scene, Jarell Whitehead was actually wearing the necklace taken during the robbery. Berry was never seen in possession of that necklace.

A short amount of time passed from the time of the robbery until the time that the police stopped the get away vehicle. According to Mr. Young, the get away vehicle was apprehended within two or three minutes after the robbery. Mr. Young testified that once the robbers left in the get away vehicle, that he and Mr. Williams called 911 to report the crime. According to Officer Preston, who stopped the get away vehicle and who made first contact with two of the perpetrators inside the vehicle, he located the get away vehicle within thirty seconds of receiving the dispatch. Upon seeing a vehicle that matched the description of the get away vehicle, Officer Preston, who was in his patrol vehicle, got behind it and activated his emergency lights and siren.

When Officer Preston activated his lights and sirens, the get away vehicle accelerated, turned onto a side street, pulled abruptly into a parking lot driveway. According to Officer Preston, when the vehicle stopped he saw doors of the vehicle

open and people leave the vehicle from the passenger side. Two other individuals remained in the vehicle. These two were Felton Woulard, who was the driver of the get away vehicle, and Jarell Whitehead, who again was immediately seen by Officer Preston wearing the stolen necklace.

Officer Preston, who had stopped the get away vehicle across from a Bank of America parking lot, remained focused on the two individuals who remained in the vehicle and could not identify the people who ran. Officer Preston reported this flight to dispatch.

Benjamin Walker testified as lay witness, and he had no connection to the victims, the defendants, or law enforcement. He described that he was in the area when Officer Preston conducted the traffic stop. He witnessed two people exit the get away vehicle and run. Mr. Walker described the two males running from the vehicle as being around about the same height, approximately 6'3" or 6'4", one of the men having dread locks and both being athletically built. *Id.*

Based on the evidence presented at trial, these two people that fled from the vehicle had to include the first and second men who approached and robbed Young. This is because Mr. Whitehead was identified as the person who put a gun to Mr. Williams and Felton Woulard was identified as the person that stood behind Mr. Whitehead during the robbery. The two people that left the vehicle were the people

that physically robbed Mr. Young. Mr. Walker's testimony that both of the men that fled from the vehicle were approximately the same height and that both were well over six feet tall, materially questioned Mr. Young's identification of the first robber as shorter than him and less than six feet tall.

As a result, the testimony of Officer David Reveille became important to establishing the identification of the men who had fled from the scene. Officer Reveille, who heard the original 911 dispatch and who was in the general area, heard the follow up dispatch called in by Officer Preston concerning the flight of people from the get away vehicle. As Officer Reveille proceeded to Officer Preston's area, he saw two black males running together towards his direction. He saw the two black males both jump over a fence. Seeing this, Officer Reveille pulled his vehicle into a business referred to as Floral Gardens, got out of his vehicle, and went behind the business to a road called Gator Alley. As Officer Reveille ran to catch these two black males, he lost sight of them and relied on the information from an unknown, unidentified individual when deciding how to proceed. This unknown person asked Officer Reveille if he was looking for "someone," referred to as a singular person, and then indicated that the person had run through a doorway that connected Gator Alley to a bar. There is nothing in the record to indicate that this unknown person ever mentioned seeing a pair of men running together. *Id.* Officer Reveille went through

the doorway, down a hallway, and then found what he described as one of the suspects mingled in with the crowd, walking, not running, westbound on the sidewalk. Officer Reveille ran after this person, who ended up being Berry. When Berry saw Officer Reveille running after him, he began running until he was apprehended. *Id.* Officer Reveille was the only witness who provided the nexus at trial that the male running from the area of get away vehicle and the person apprehended by him was the same person.[1]

Berry testified that his reason for running from Officer Reveille was because he had been in a fight earlier that evening with a Latonia Jackson. Ms. Jackson had threatened to call the police and he could not afford to have contact with law enforcement because he was already on probation. *See id.* Berry explained that instead of staying in Ms. Jackson's vehicle, he got out and walked across the street to the Shamrock bar, which is the bar near Gator Alley where Officer Reveille eventually saw him standing. After staying for a brief time at the Shamrock bar,

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[1] Officer David Reveille is no longer an officer with the Gainesville Police Department (and at the time of the direct appeal, he was in custody in the Alachua County Jail in case numbers 2008-CF-5431; 2008-CF-5433; 2008-CF-5434; 2008-CF-5435; 2008-CF-5437; 2008-CF-5438; and, 2008-CF-5440). According to the sworn complaints in the above mentioned cases, the charges against Officer Reveille included sexual battery (three counts), attempted sexual battery (one count), false imprisonment (two counts), simple battery (one count), felony official misconduct (seven counts), and offering to engage/commit in prostitution/lewdness (three counts).

Berry walked outside and started heading on University Avenue to find a ride home. *Id.* Shortly thereafter, Berry heard someone quickly approaching him and saying "we got you now." According to Berry's testimony when he heard this, he instinctively started running. This person ended up being Officer Reveille, who made the physical arrest of Berry. At the time of his arrest, Berry was wearing a necklace; however, this necklace belonged to Berry's step-father, the necklace was not collected as evidence in the case, and this necklace was returned by law enforcement to Berry.

There was some discrepancy about whether Berry had been with Ms. Jackson on the night of the robbery. Ms. Jackson denied seeing Berry. However, there was testimony that Ms. Jackson was romantically involved with one of the codefendants (Mr. Whitehead), who was caught by the police in the get away vehicle. Also, according to Berry, he and Ms. Jackson had engaged in an argument around the same time that the robbery was taking place and she was so angry that she threatened to call the police on him.

To support his testimony, Berry called three witnesses who indicated that they saw the Berry with Ms. Jackson at or near the time of the robbery. Berry's mother (Wanda Owens) testified at trial that she saw her son get into a vehicle with Ms. Jackson that night.

Berry's neighbor (Mike McKenzie) confirmed the testimony that Berry left

with Ms. Jackson from his driveway. Mr. McKenzie testified that he was outside at 10 p.m. on December 16, 2006, having a conversation with Berry at his home, when a light skin heavyset female driving a gray car pulled up to Berry's home. Mr. McKenzie also testified that Berry got into this vehicle with the female and drove away. *Id.*

Corey Mosely testified that he had seen Berry with a female named Latonia on the night in question while they were all at a night club. Mr. Mosely indicated that he saw Berry leave the night club in a vehicle driven by Ms. Jackson. *See id.*

b. State Post-conviction Evidentiary Hearing Testimony

Attorney Stephen Bernstein testified he received the discovery and police reports, which included the written statements made by the victims, and he was aware that one of the robbers was described as wearing a striped shirt. He stated he had reviewed the depositions of the victims, and Mr. Williams had stated he had gone to the scene to identify two suspects, but neither suspect he identified was Berry. Mr. Young was shown two suspects at the scene, and then he was taken to another scene to do an identification where the police pulled two men out of a patrol car for a show-up; Mr. Young had also stated he was shown three individual photographs at the police station, and he identified Berry. Mr. Bernstein was aware of the show-up procedure and photograph procedure with Mr. Young. Mr. Bernstein stated his

theory of defense was mistaken identity. Despite that theory and information in the victims' depositions, he explained he did not file a motion to suppress the unduly suggestive identification because he wanted the jury to hear that Mr. Young had identified Berry based on his theory that Mr. Young was the least reliable of the witnesses. Mr. Bernstein stated even if he had filed a motion to suppress and it was granted, the jury was still going to hear Mr. Young identify Berry in the courtroom. During counsel's cross-examination of Mr. Young during trial, he recalled Mr. Young testifying that law enforcement asked him to come back to identify one of the suspects taken away from the scene. The trial transcript reflected that Mr. Young testified he was shown four photographs, he was asked if he knew all of the pictures on the table, and he stated he had already seen the other three men who were in custody and he knew all of the pictures. Mr. Bernstein testified that based on Mr. Young's testimony, he could conceive of a basis to have filed a motion to suppress, and he recalled during his closing argument stating the identification by Mr. Young was suggestive because Mr. Young had only been shown four people and he was called by the police because they said, "I've got a picture of the guy who they took to the hospital that we have in custody, and I want to see if you can identify him." Mr. Bernstein had asked the jury if that was a suggestive procedure. Mr. Bernstein further testified he believed the procedures used by law enforcement were

unnecessarily suggestive, but he did not believe a motion to suppress would have been granted and believed it was better to make the argument to the jury. However, he agreed that whether police procedures were unduly suggestive was a legal issue to be determined by the court and not a proper issue for the jury. When asked for an explanation as to why he did not make the legal argument to the court regarding the suppression, Mr. Bernstein responded it was a strategic decision based on "what kind of arguments you're going to make, what kind of reception you're going to get by the judge – in this case, I think I had a lot of play." Mr. Bernstein testified, "I think if we filed a motion to suppress and we lost that, we might not get that same reception because we covered that ground." Mr. Bernstein was aware that had he filed the motion, the State would have been required to establish the reliability of the identification. Mr. Bernstein could not give a definitive answer as to whether he considered filing a motion to suppress prior to trial, and he did not believe he had a discussion with Berry about it. When confronted with a letter from Berry dated April 7, 2008, indicating "this confirms there was a biased show up, [t]here was an ID off of the picture, and not a lineup," Mr. Bernstein did not recall the letter. Mr. Bernstein stated it could have hurt the defense to file a motion to suppress because the court may have had a "different attitude about whether we covered that ground or not. And then you've also got to consider what if it was granted in your

argument."

Reasons for Granting the Writ

Whether Petitioner Berry Is Entitled to a Certificate of Appealability on the Single Issue Whether Defense Counsel Rendered Ineffective Assistance of Counsel[2] by Failing to File a Motion to Suppress Gregory Young's Identification of Berry – an Identification Which Was Unnecessarily Suggestive in Violation of Berry's Due Process Rights.

The defense in this trial was misidentification. The only person to identify Berry as the robber was one of the two robbery victims, Gregory Young. Challenging the identification was the heart of the defense and heart of the case. If Young's out of court and in-court identification of Berry had been suppressed, no court could have reasonably determined that the outcome of the trial would have been the same.

The method by which Young first identified Berry was undisputed. There had been four persons involved as perpetrators in the robbery, and two victims, Young and Antonio Williams. All four perpetrators jumped in an SUV and fled immediately following the robbery. Young and Williams took off after them shortly thereafter calling 911 at the same time. Within a minute of the 911 call a responding officer saw the fleeing SUV and after a brief chase made a stop of the SUV. Two of the four suspects remained in the SUV and were apprehended but the other two suspects ran

[2] Referring to the right to effective assistance of counsel guaranteed under the Sixth Amendment to the United States Constitution.

away. Young was at the scene of the stop and saw the two suspects who remained. One of those two suspects who was found in the SUV was wearing the neck chain which he reported the robber had stolen from him. Shortly thereafter a third suspect was caught and brought back where Young was permitted to see him. So Young saw at the scene of the arrest three of the four suspects.

Berry, however, was arrested away from the scene of the car chase, alone. His arrest was a violent encounter resulting in his being taken to the hospital where he was kept overnight. Young did not get to see him, but instead he was called to the police department about two hours after the arrest of the first three suspects and was shown a group of four photos, three of which were the three men he had already seen at the time of the arrest, the fourth photo placed together with that of the other three, was that of Berry. The photos were on a table together with Young's neck chain which had been stolen in the robbery.

It was in this setting that Young identified Berry has the fourth man.

For all practical purposes this was a single photo identification procedure, but far worse than any single photo or show up identification, because Berry's photo was placed together with the photos of the two suspects Young had seen arrested at the end of the SUV chase and with the photo of the third person who had been brought back to the scene of the initial arrest. The identification was further tainted by

placing the photo on a table together with the necklace or neck chain which had been stolen from Young. As far as the record shows, at the time of the identification of the Berry photo, Young had not been told that his neck chain had not come from Berry, but instead had come from one of the first two men arrested. Young well may have assumed that the necklace had then been taken from Berry.

There was no investigatory reason for the police to do this unnecessarily suggestive photo identification of Berry. Instead, the only reason to use this procedure was to cause Young to pick Berry as the fourth man.[3]

The error and misidentification was then compounded when at a first trial, which resulted in a mistrial, Young was shown Berry one on one in the courtroom, with Berry being the only defendant in the courtroom. This setting was intended as a courtroom-jury identification, but because of the mistrial, it resulted in another unnecessarily suggestive one-on-one identification, which served to only further cement Young in his misidentification at the subsequent retrial, where he again identified Berry as the fourth robber.

At the time of the robbery, Young did not know who had robbed him. The

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[3] This well may have been very intentionally done to take pressure off of Officer Reveille, who had a history of excessive use of force complaints, as discussed below, and who on this occasion had been so violent in his arrest of Berry that Berry had to be hospitalized. Officer Reveille was since discharged from the Gainesville Police Department, criminally prosecuted and is currently in prison.

robber was unknown to him. The robbery occurred at night, there was a streetlight of unspecified strength at an unspecified distance from his location, where he was sitting, by his own admission, intoxicated, on the hood of a car. The first he was aware of the robber was when he felt the barrel of a pistol pressed against his forehead. He looked up and the robber demanded him to give it up and in response he turned over his neck chain. The robber turned and ran to a nearby SUV.

Young testified that the entire episode lasted only twenty seconds.

This twenty second episode which began and ended with the barrel of a gun pressed to his forehead, in the dark, at night, while he was intoxicated, was the only basis upon which Young had to identify his robber.

On these facts it is self-evident that the use of a single photo included with the photos of the suspects whom Young had seen arrested, the four photos placed together on a table with the neck chain which had been taken from his neck, led Young to an irreparably mistaken identification of Berry.

Despite this overwhelming record to support a motion to suppress based on an unnecessarily suggestive identification procedure leading to irreparable misidentification, Berry's defense counsel filed no motion to suppress.

His stated rationale at the post-conviction hearing was that it was a strategic choice, somehow reasoning that because misidentification was his sole defense, that

it would be a stronger defense to not challenge the identification pretrial, but instead let the jury hear that the victim had identified Berry just two hours after the robbery, and then let the jury hear and see the victim repeat the identification of Berry in court, but then, win the trial based on cross examination of the victim based on the suggestiveness of the police procedure. This "strategy" is so obviously illogical that it cannot serve as a strategic choice to defeat an ineffective assistance of counsel claim. No reasonably competent criminal defense attorney would choose to forego a pretrial suppression of a victim identification, when the state's case rests essentially on that identification, and choose instead to simply cross examine the victim on nothing more than the suggestiveness of the identification procedure which the police, not the victim, used.

In fact defense counsel did not cross examine Young at all on the suggestive nature of the identification. There were *no questions* put to Young by the defense counsel about the suggestive procedure or circumstances of the photo identification. Indeed, his entire cross examination of the victim was barely six pages of transcript. If this had been his strategic choice he forgot to do it.

Instead of strategic choice Berry's ineffective assistance of counsel claim must be decided based on the prejudice that he suffered from the deficient performance of his counsel. The prejudice which is at issue is solely that of whether a motion to

suppress would have been granted, nothing else. It is false to argue that had the motion been granted and had the victim not been allowed to identify Berry as the robber, that this Court could be confident that the outcome of the trial would have been the same.[4]

So the only question at issue to determine whether Berry qualifies for issuance of a certificate of appealability[5] is whether jurists of reason would find it fairly debatable that a motion to suppress would have been granted or framed in terms of AEDPA, whether the state court's determination of this question was unreasonable, one as to which no fair minded jurists could agree. *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140 (2004).

The test to be applied is found in *Manson v. Brathwaite*:

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[4] "In *Strickland v. Washington*, [466 U.S. 668, 104 S.Ct. 2052 (1984)] we held that to . . . show prejudice, it must be established that the claimed lapses in counsel's performance rendered the trial unfair so as to "undermine confidence in the outcome" of the trial. Id., at 694." *Nix v. Whiteside*, 475 U.S. 157, 164-65, 106 S. Ct. 988, 993 (1986).

[5] "To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Barefoot*, 463 U.S. at 893, and n. 4 ("summing up" the "'substantial showing'" standard)." *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 1603-04 (2000).

> [R]eliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. 409 U.S., at 199-200. These *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 his prior description of the criminal, (4) the level of certainty demonstrated *at the confrontation*, and (5) the time between the crime and the confrontation. *Against these factors is to be weighed the corrupting effect of the suggestive identification itself*.

Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253 (1977) (emphasis and parenthetical numbering added).

We know from *Simmons v. United States* that an identification procedure such as that used here leads to misidentification:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him 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. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Simmons v. United States, 390 U.S. 377, 383-84, 88 S. Ct. 967, 971 (1968).

Therefore, for the identification - the out of court and subsequent in court identification - to be admissible, the State would have had the burden in a pretrial motion of establishing the reliability of the identification weighed against the corrupting influence of the unnecessarily suggestive identification procedure, and would have had to have done so applying the *Manson v. Brathwaite* factors.

The first *Manson v. Brathwaite* factor, the opportunity of the witness to view the perpetrator at the time of the crime, weighs strongly against a reliable identification. The entire encounter, according to the victim himself, was no more than twenty seconds, starting and ending with a gun barrel pressed to his head. This less mere seconds long opportunity to view the robber took place at night lit only be a streetlight and when the victim was admittedly intoxicated. The robber was a complete stranger, someone unknown to him, never seen before. There could be no reliability ascribed to an identification made under these circumstances.

The second *Manson v. Brathwaite* factor, the witness's degree of attention, also undercuts the reliability of Young's identification. His attention was focused on the threat of the gun pressed to his head, his attention was focused on not being shot, his attention focused on complying with the robber's demand to give it up. There is no evidence to support a claim that his attention was focused on identifying his robber.

In any event, his attention was impaired by his admitted intoxication.

In addition, as to the third *Manson v. Brathwaite* factor, the accuracy of his prior description, substantial evidence from the trial record suggests that Young in fact identified the wrong person as his robber.

Benjamin Walker was a witness at trial. He was simply a citizen who had no relationship to any of the parties. He described that he was in the area when Officer Preston conducted the traffic stop of the SUV. He witnessed two people exit the get away vehicle and run. Walker described the two males running from the vehicle as being around about the same height, approximately 6'3" or 6'4", one of the men having dread locks and both being athletically built. Id. This description did not fit Berry, who was short and slender.

Based on the evidence presented at trial, these two people who fled from the SUV had to include the man who robbed Young. This is because Jarell Whitehead was identified as the person who put a gun to Antonio Williams and Felton Woulard was identified as the person that stood behind Jarell Whitehead during the robbery. These two individuals remained in the SUV when the police stopped it and did not flee. Therefore the two men who fled had to have included Young's robber. Walker's testimony that both of the men that fled from the vehicle were approximately the same height and that both were well over six feet tall, did not fit Young's

identification of the first robber as shorter than him and less than six feet tall. This goes to the third *Manson v. Brathwaite* factor, the accuracy of the original description. We know from a disinterested witness that the robber did not in fact match the description Young gave.

Other evidence from the trial likewise shows that Young's description of his robber was wrong. This is indisputably proved by the fact that his neck chain was found on Jarell Whitehead, one of the two individuals who remained in the SUV when it was stopped. If Berry had been the robber, he would have been in possession of the neck chain stolen from Young, not Whitehead.

The only eyewitness to the robbery to be shown a non-suggestive standard photo spread was Antonio Williams. Williams had been sitting on the hood of the car with Young, one on each side of the front of the car, when they both were approached by robbers. Williams, who was within an arm's reach of Young and his robber did not identify Berry as Young's robber when shown a standard photo-spread. Williams testified that he did see a light skinned male with a short hair cut, who was the first person that put the gun to Young's head. Williams saw this light skinned male when the male stepped around from the side of the car after he pointed the gun at Young. However, despite having seen the actual robber, when shown a photo spread which included Berry, Williams did not pick out Berry as the robber. This photo spread was

shown to Williams later in the morning hours of the robbery.

The very circumstances of Berry's arrest suggest that the police arrested the wrong person to start with, and this led to the mistaken identification by Young, who was led to believe that Berry was the fourth man. Officer Reveille is the person who arrested Berry. Officer David Reveille is no longer an officer with the Gainesville Police Department, having been fired, prosecuted and sentenced to prison. At trial he testified that he heard the original 911 dispatch and was in the general area, and then heard the follow up dispatch called in by Officer Preston concerning the flight of people from the get away vehicle. As Officer Reveille proceeded to Officer Preston's area, he saw two black males running together towards his direction. He saw the two black males both jump over a fence. Seeing this, Officer Reveille pulled his vehicle into a business referred to as Floral Gardens, got out of his vehicle, and went behind the business to a road called Gator Alley. As Officer Reveille ran to catch these two black males, he lost sight of them and relied on the information from an unknown, unidentified individual when deciding how to proceed. This unknown person asked Officer Reveille if he was looking for "someone," referred to as a singular person, and then indicated that the person had run through a doorway that connected Gator Alley to a bar. There is nothing in the record to indicate that this unknown person ever mentioned seeing a pair of men running together. Id. Officer

Reveille went through the doorway, down a hallway, and then found what he described as one of the suspects mingled in with the crowd, *walking*, not running, westbound on the sidewalk. Officer Reveille ran after this person, who ended up being Berry. When Berry saw Officer Reveille running after him, he began running,[6] until he was apprehended. Id. Officer Reveille was the only witness who provided the nexus at trial that the male running from the area of get away vehicle and the person apprehended by him was the same person.

Last, Young identified his robber as dressed in all black except for a striped shirt, but Berry was wearing white shorts, not black pants, when he was arrested by Officer Reveille.

So each of the first three *Manson v. Brathwaite* factors must be read as failing to establish the reliability of Young's subsequent, suggestively induced identification of Berry as his robber.

The fourth *Manson v. Brathwaite* factor is the level of certainty demonstrated *at the confrontation*, i.e., at the time of the photo identification. Without any cross-examination on this point Young simply stated without elaboration on direct examination that he identified Berry in the photograph and in a single follow up

[6] Berry explained that he ran because he was on probation and afraid of a police encounter which could violate his probation, not because he had committed any crime.

question "Was there any doubt in your mind then?" he answered no. This factor arguably could, when taken out of context, support a reliability finding. However, when read in context - one statement, from a witness who had been intoxicated, gun literally to his head, a twenty second encounter, an unknown assailant, in fear of being killed, then hours later presented with a single photo placed together with the three men he saw flee and be arrested, together with his stolen neck chain - it cannot be said to *fairly* support a reliable identification.[7]

The only *Manson v. Brathwaite* factor which facially could support a reliability determination is the time between the crime and the confrontation. But when the circumstances surrounding that short time frame are considered, it reveals that rather than supporting reliability, it supports misidentification. The photo identification was made about two hours after the robbery, that is, relatively close in time to the crime. However, weighing against this is that the identification was made by a victim witness who had been intoxicated at the time of the incident and given that only two hours had elapsed before he was shown the photo and made the identification, may well have still been intoxicated at the time of the identification. There was no evidence that he had sobered up in the approximately two hours from the initial

[7] We note again that defense counsel entirely failed to cross examine on this identification. It remained untested. This is a complete failure of assistance of counsel meeting the *Strickland* standard.

incident to the photo identification. In addition to being intoxicated, the victim witness now was sleep deprived as well. The robbery had occurred in the middle of the night. Berry had been injured when arrested and taken to the hospital. A photo was made of Berry and then in the early morning hours shown to Young. There was no evidence that Young had had any sleep. Under these circumstances - intoxication and sleep deprivation - the time frame suggests that the identification was less reliable, rather than more, reliable.

Against these factors *Manson v. Brathwaite* commands that the court is to weigh the corrupting effect of the suggestive identification itself. This must be one of the most corrupting identification procedures a court has ever seen. It was designed, we would argue intentionally designed, to identify Berry irrespective of whether he was the true robber or not. There was no necessity to use this suggestive procedure. It was a flagrant violation of Berry's right to Due Process.

Thus we see that a reasonable application of *Manson v. Brathwaite* results in a conclusion that this was an irreparable misidentification and the state post-conviction court's contrary conclusion is an unreasonable application of *Manson v. Brathwaite*.

Certainly the argument is sufficiently strong that it meets the test for issuance of a certificate of appealability, that is, it deserves encouragement to proceed further.

Accordingly, for all of the reasons set forth above, Berry submits that he has made "a substantial showing of the denial of a constitutional right" – i.e., defense counsel was ineffective failing to file a motion to suppress Mr. Young's identification. *See* 28 U.S.C. § 2253(c)(2). The district court's resolution of this claim is "debatable amongst jurists of reason." Hence, Berry meets the standard for obtaining a COA – this issue is "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003).

Conclusion

Petitioner Donnie Berry respectfully requests this honorable Court grant this petition and vacate the judgment of the Eleventh Circuit Court of Appeals and issue Berry a Certificate of Appealability on the single issue argued above.

Respectfully submitted,

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