No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE A. KEYS,
Petitioner,
v.
MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals correctly interpreted the "fair presentation"/exhaustion requirement of 28 U.S.C. § 2254 in the decision below and/or whether the Eleventh Circuit's interpretation is in conflict with the standard adopted by this Court and other circuit courts of appeals.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

A. QUESTION PRESENTED FOR REVIEW ii

B. PARTIES INVOLVED iii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iv

1. Table of Contents iv

2. Table of Cited Authorities v

D. CITATION TO OPINION BELOW 1

E. BASIS FOR JURISDICTION 1

F. STATUTORY PROVISION INVOLVED 1

G. STATEMENT OF THE CASE 2

H. REASON FOR GRANTING THE WRIT 5

The question presented is important and has a potential impact on all 28 U.S.C. § 2254 petitions filed in this country. 5

I. CONCLUSION 9

J. APPENDIX

2. TABLE OF CITED AUTHORITIES

Baldwin v. Reese, 541 U.S. 27 (2004). 7

Burnett v. Hargett, 139 F.3d 911 (10th Cir. 1998). 8

Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997). 6

Dale v. Attorney Gen. of Cal., 19 F.3d 1439 (9th Cir. 1994). 7

Daugharty v. Gladden, 257 F.2d 750 (9th Cir. 1958). 7

Daye v. Attorney General, 696 F.2d 186 (2d Cir. 1982). 7

Duncan v. Henry, 513 U.S. 364 (1995). 5

Giglio v. United States, 405 U.S. 150 (1972). 3-7

Keys v. Sec'y, Fla. Dep't of Corr., 773 Fed. Appx. 556 (11th Cir. 2019). 1

Keys v. State, 56 So. 3d 21 (Fla. 5th DCA 2011). 2

Picard v. Connor, 404 U.S. 270 (1971). 7-8

United States ex rel. Sullivan v. Fairman, 731 F.2d 450 (7th Cir. 1984). 8

b. Statutes

28 U.S.C. § 1254. 1

28 U.S.C. § 2254. . . . . *passim*

28 U.S.C. § 2254(b)(1). 5

c. Other Authority

U.S. Const. amend. VI 7

The Petitioner, KYLE A. KEYS, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on May 23, 2019 (A-2),[1] rehearing denied on July 16, 2019. (A-1).

D. CITATION TO ORDER BELOW

Keys v. Sec'y, Fla. Dep't of Corr., 773 Fed. Appx. 556 (11th Cir. 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the opinion of the Eleventh Circuit Court of Appeals.

F. STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254 provides in pertinent part:

> (b) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

G. STATEMENT OF THE CASE

The Petitioner was charged in state court with murder and robbery. The case proceeded to trial in 2007 and the trial ended in a mistrial because the jury was hung. Notably, during the 2007 trial, the State did *not* present the testimony of alleged codefendant Toris Oliver. A retrial was held in 2008. At the retrial, the State's key witness was Mr. Oliver. During his trial testimony, Mr. Oliver claimed that the Petitioner told him that he (i.e., the Petitioner) shot the victim in this case (i.e., Mr. Oliver asserted that the Petitioner confessed to the crime). During Mr. Oliver's testimony, the prosecutor specifically asked Mr. Oliver whether he had been promised anything by the prosecution in exchange for his trial testimony and Mr. Oliver responded "no." (A-49). At the conclusion of the 2008 retrial, the jury found the Petitioner guilty as charged for both counts and the state trial court sentenced the Petitioner to life imprisonment. On direct appeal, the Florida Fifth District Court of Appeal *per curiam* affirmed the Petitioner's convictions and sentence. *See Keys v. State*, 56 So. 3d 21 (Fla. 5th DCA 2011).

Following the trial (while the Petitioner's case was pending on direct appeal), Mr. Oliver wrote a letter to the Petitioner's trial counsel wherein Mr. Oliver admitted that at the time of trial, he had, in fact, been offered a lesser sentence by the prosecution in exchange for his trial testimony in the Petitioner's case. (A-34). Mr. Oliver also disclosed a letter from his attorney (Nancy McClintic) wherein Ms. McClintic tells Mr. Oliver (prior to the Petitioner's trial) that she had talked to the prosecutor and the prosecutor told her that he would offer Mr. Oliver a shorter

sentence if Mr. Oliver would testify against the Petitioner. (A-36). Both of these letters (Mr. Oliver's post-trial letter and Ms. McClintic's pretrial letter) establish that Mr. Oliver's trial testimony was false (i.e., Mr. Oliver lied when he stated during the Petitioner's trial that he had not been promised anything by the prosecution in exchange for his trial testimony).

After receiving Mr. Oliver's letter, the Petitioner timely filed a state court postconviction motion, and in the motion, the Petitioner argued that he was entitled to relief because the prosecution's key witness had been offered a lenient sentence in exchange for his testimony). In 2014, the state postconviction court summarily denied the Petitioner's motion (without first holding an evidentiary hearing). On appeal, the Florida Fifth District Court of Appeal affirmed the denial of the Petitioner's state court postconviction motion.

Thereafter, the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. The Petitioner raised two claims in the petition – one of which is the focus of the instant petition: the prosecution committed a *Giglio* violation during the trial. In the response to the Petitioner's § 2254 petition, the Respondents-Appellees argued that the Petitioner's *Giglio* claim was not properly exhausted in the Petitioner's state court postconviction motion (and therefore the Respondents-Appellees did not address the merits of this claim in the response). The Petitioner filed a reply and explained that the *Giglio* claim had been exhausted in state court. Subsequently, the district court issued an order directing the Respondents-Appellees to submit a supplemental memorandum addressing the merits of the *Giglio* claim. After the parties submitted

their supplemental memoranda, the district court dismissed/denied the Petitioner's § 2254 petition (and in the order, the district court found that the *Giglio* claim was unexhausted and the district court alternatively denied the claim on the merits). (A-17).

The Eleventh Circuit Court of Appeals subsequently granted a certificate of appealability on the following issues:

> Whether the District Court erred in concluding that Mr. Keys did not fairly present his *Giglio* [*v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972),] claim to the state court and therefore failed to exhaust the claim.
>
> Whether the District Court erred in denying Mr. Keys's *Giglio* claim on the merits without holding an evidentiary hearing.

(A-16). After the parties briefed these issues, the Eleventh Circuit affirmed the dismissal of the Petitioner's § 2254 petition. (A-14).

H. REASON FOR GRANTING THE WRIT

The question presented is important and has a potential impact on all 28 U.S.C. § 2254 petitions filed in this country.

The question presented in this case is as follows:

> Whether the Eleventh Circuit Court of Appeals correctly interpreted the "fair presentation"/exhaustion requirement of 28 U.S.C. § 2254 in the decision below and/or whether the Eleventh Circuit's interpretation is in conflict with the standard adopted by this Court and other circuit courts of appeals.

Undersigned counsel submits that guidance on this issue is needed from the Court so that the federal habeas corpus statute can be applied uniformly by all of the federal courts in the country.

Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies. *See* 28 U.S.C. § 2254(b)(1). In order to provide the state court with the opportunity to pass upon and correct an alleged violation of the state prisoner's federal rights, the prisoner must "fairly present" his claim in each appropriate state court, thereby alerting that court to the federal nature of the claim. *See Duncan v. Henry*, 513 U.S. 364, 365-366 (1995).

In *Giglio v. United States*, 405 U.S. 150, 153-155 (1972), this Court held that any promise, reward, or inducement to a prosecution witness in a criminal case must be disclosed to the defendant prior to trial in order to enable counsel to cross-examine the witness to establish bias. In his state court postconviction motion, the Petitioner alleged the following facts (as *directly quoted* below):

> The State's key witness at trial was Toris Oliver. During his trial testimony, Mr. Oliver claimed that the Defendant told him that he (the

> Defendant) shot the victim in this case (i.e., Mr. Oliver asserted that the Defendant confessed to the crime). (T-167). During Mr. Oliver's testimony, the prosecutor specifically asked Mr. Oliver whether he had been promised anything by the prosecution in exchange for his trial testimony and Mr. Oliver responded "No." (T-175).
>
> Following the trial (while the Defendant's case was pending on direct appeal), Mr. Torres wrote a letter to the Defendant's trial counsel – wherein Mr. Torres admitted that at the time of trial, he had, in fact, been offered a lesser sentence by the prosecution in exchange for his trial testimony in the Defendant's case. Mr. Oliver has also disclosed a letter from his attorney (Nancy McClintic) wherein Ms. McClintic tells Mr. Oliver (prior to the Defendant's trial) that she had talked to the prosecutor and the prosecutor told her that he would offer Mr. Oliver a shorter sentence if Mr. Oliver would testify against the Defendant. Both of these letters (Mr. Oliver's post-trial letter and Ms. McClintic's pretrial letter) establish that Mr. Oliver's trial testimony was false (i.e., Mr. Oliver lied when he stated during the Defendant's trial that he had not been promised anything by the prosecution in exchange for his trial testimony).

(A-42). The Petitioner then quoted *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997), in his state court postconviction motion, wherein the Ninth Circuit Court of Appeals cited *Giglio* and explained the importance of informing the jury that a prosecution witness has been offered a lenient sentence in exchange for his or her testimony. (A-43-44). The Petitioner then argued in his state court postconviction motion that "[c]onsistent with the Ninth Circuit's reasoning in *Carriger*, Mr. Oliver was 'inherently untrustworthy' in light of the fact that he was offered a lighter sentence by the State in exchange for his testimony." (A-44). Finally, in his state court postconviction motion, the Petitioner asserted that had the jury been informed that Mr. Oliver had been offered a lighter sentence in exchange for his testimony, the defense would have been able to impeach Mr. Oliver and the jury would have disbelieved his testimony. (A-44).

This Court has stated that "[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition . . . by citing in conjunction with the claim . . . a case deciding such a claim on federal grounds." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). That is exactly what the Petitioner did in this case when he cited *Giglio* in his state court postconviction motion.

In *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982), the Second Circuit Court of Appeals explained that a petitioner may satisfy the "fair presentation"/exhaustion requirement by

> assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution [or] allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

See also Dale v. Attorney Gen. of Cal., 19 F.3d 1439 at *1 (9th Cir. 1994) ("Although Dale's *pro se* petition for review did not expressly invoke the Sixth Amendment or employ the phrase 'ineffective assistance of appellate counsel,' a claim may be fairly presented to the state courts without citing 'chapter and verse' of the Constitution when the facts alleged call to mind a specific right protected by the Constitution.") (unpublished) (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)) (quoting *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958) (concluding that exhaustion was satisfied where all operative facts giving rise to asserted constitutional principle were raised in state court)). Had these standards been applied to the Petitioner's case, then the Petitioner would have been afforded the opportunity to have his *Giglio* claim considered on the merits in federal court.

The "'fair presentation' requirement . . . does not go so far as to require a habeas petitioner to recite certain *magic words* to invoke a particular claim." *Burnett v. Hargett*, 139 F.3d 911 at *4 (10th Cir. 1998) (emphasis added) (unpublished opinion). "[W]e do not imply that respondent could have raised [his claim] only by citing 'book and verse on the federal constitution.' . . . We simply hold that *the substance* of a federal habeas corpus claim must first be presented to the state courts." *Picard*, 404 U.S. at 278 (emphasis added) (citations omitted). A claim is "fairly presented" if it asserts "in terms so particular as to call to mind a specific right protected by the Constitution . . . [or] alleg[es] a pattern of facts that is well within the mainstream of [federal] constitutional litigation." *United States ex rel. Sullivan v. Fairman*, 731 F.2d 450, 454 (7th Cir. 1984).

The Petitioner respectfully submits that the Eleventh Circuit has misinterpreted the "fair presentation" requirement of § 2254 (i.e., the Petitioner satisfied the "fair presentation"/exhaustion requirement when he argued in his state court postconviction motion that he was entitled to relief because the prosecution's key witness had been offered a lenient sentence in exchange for his testimony). Alternatively, the Petitioner submits that the Eleventh Circuit's application of the standard is in conflict with the cases cited above. Accordingly, the Petitioner requests the Court to grant his petition for a writ of certiorari to determine whether the Eleventh Circuit has correctly interpreted the "fair presentation" requirement and/or resolve the conflict among the circuits regarding the proper application of the exhaustion requirement. As stated above, this case has a potential impact on all § 2254 petitions nationwide.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER