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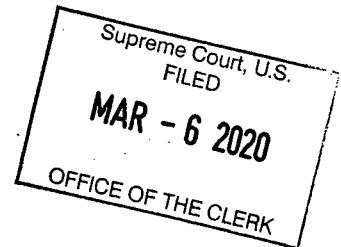
INMATE'S INITIALS MD

No. 19-7994

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID A. BUTLER — PETITIONER
(Your Name)



VS.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND DISTRICT COURT OF APPEAL OF STATE OF FLORIDA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David A. Butler D.C. No. 112034

(Your Name)

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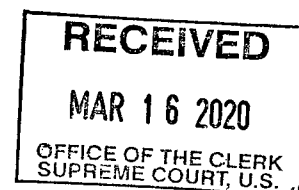
500 Ike Steele Road

(Address)

Wewahitchka, FL 32465

(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

1. Did court-appointed counsel deprive Petitioner of the Sixth Amendment guarantee to the effective assistance of counsel in purportedly making a strategic decision not to seek to obtain video footage of the alleged victim's specific prior acts of violence?
2. Did court-appointed counsel's act of misleading Petitioner into believing all efforts to obtain the video footage were being made create an adversarial conflict resulting in a constructive denial of counsel, in violation of the Sixth Amendment?
3. Under these circumstances, was Petitioner's waiver of counsel voluntary under the Sixth and Fourteenth Amendments?
4. Was Petitioner's due process rights violated by the prosecution's failure to have preserved and produced for the defense the requested video footage in violation of the Fourteenth Amendment?
5. Was Petitioner's due process of law rights violated by the prosecution's introduction as substantive evidence of guilt an unauthenticated DVD of the altercation in violation of the Fourteenth Amendment?
6. Was Petitioner deprived of his right to confrontation of witnesses by the admission of DVD surveillance evidence via the investigating detective who testified the alleged victim told him the acts depicted therein were how he sustained his injuries in a hospital interview in violation of the Sixth Amendment?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,

☒ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 10-23-19.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: 12-10-19, and a copy of the order denying rehearing appears at Appendix B.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

6th Amendment to U. S. Constitution¹

14th Amendment to U. S. Constitution²

¹ In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... and to have the assistance of counsel for his defence.

² ... nor shall any State deprive any person of life, liberty, or property, without due process of law....

PRELIMINARY STATEMENT

The trial transcript was not numbered consecutively to the rest of the appellate record. Those transcripts will be referred to with the prefix "T." followed by the appropriate page number and the rest of the record pages will be referred to with "R." followed by the appropriate page number. The pages in the supplemental volume will be referred to with the prefix "S".

STATEMENT OF THE CASE AND FACTS

On August 22, 2016, the State Attorney for the Sixth Judicial Circuit, in and for Pinellas County, Florida, filed an information against the Appellant, David A. Butler, charging him with aggravated battery on a prison, jail, or detention facility detainee, a violation of section 784.045 and 784.082(1), Florida Statutes (2016) (VI:R15-17).

On August 4, 2016, the Regional Counsel's Office was designated to represent Mr. Butler. (R2P). On September 23, 2016, the State filed a notice of enhanced penalty stating Mr. Butler qualified to be sentenced as a Prison Releasee Reoffender (PRR), an Habitual Felony Offender, a Violent Career Criminal and a 3-Time Violent Felony Offender (R30-31). As a result, his case was reassigned from Division B to M (R29).

On August 30, 2016, Appellant filed "correspondence regarding video footage of SF7 from 7-13 to 7-22." (R23-26). Therein he stated, "I did not provoke the fight." "Let it be on record, I have requested that video footage from the date I was moved into SF7 7-13 or 14 to the day of the fight 7-22 be obtained by counsel on my behalf because it will show the threatening, hostile and provoking actions of Mr. Chapman which lead up to the altercation that he provoked and started." Notably, the State Attorney's Office, the Public Defender's Office and Regional Counsel were served by the clerk with a copy of this correspondence. (R23).

On October 13, 2016, Appellant filed a pro se motion for a Nelson hearing (R34-35). He contended that he "has repeatedly in several letters and phone calls advised Regional Counsel Christie Pardo that he acted in self-defense... and requested she obtain the video footage of these incidents (prior acts of violence)... that Counsel's lack of dili-

gence in obtaining a copy of the DVR footage from July 15, 2016 to the day and time of the incident, is severely prejudicing my ability to present my Stand Your Ground defense, in violation of my state and federal right to effective assistance of counsel." Appellant also filed a Voluntary Waiver of Counsel (R37), Demand For Speedy Trial (R38), Motion to Dismiss Based on Statutory Immunity Under Florida's Stand Your Ground Law S. 776.032 (R39-40), Motion to Compel Jail Officials to Preserve Video Footage Evidence DVR 5F7 (R41-42), and a Motion to Compel Production of Additional Discovery (R42). On October 24, 2016, he filed a prose Motion For Disqualification (R43-44). On October 24, 2016, a Nelson and Faretha hearing was held before the Honorable Philip J. Federico (S329-367).

At the beginning of this hearing, Judge Federico stated:

"THE COURT: Apparently we've got to have him and have a little assistance with him."

(S332). Evidencing bias before Appellant appeared before him on the motions he had filed,

Christie Pardo from the Regional Conflict Counsel's Office had been appointed to represent Appellant (S332). Mr. Butler moved for a Nelson inquiry. The court asked him what Ms. Pardo was not doing that Appellant believed she needed to be doing (S334). He said there were prior acts of violence towards him from the alleged victim Mr. Chapman days before the alleged battery and on the same day (S335). Those incidents were on video and he asked Ms. Pardo to get that video. Mr. Butler said he only punched Mr. Chapman because Mr. Chapman threatened him (S336). The court then asked, So that gives you the right three days or five days or six days later to punch the guy out? And later stated:

"THE COURT: Okay. So I'm not sure what-- if you had a conversation with the -- one, there's no audio.... I'm not sure what three or five or six days before, whatever the interaction was, that would give rise to you claiming self-defense for pounding the guy in the face nine times, State?"

(5337). Mr. Butler said Mr. Chapman verbally threatened him, and he made motions to come charge (5338). The court commented,

"THE COURT: Okay. So he came towards you and then you pounded him nine times. And you're going to say that's self-defense?"

Appellant stated yes. And the court replied,

"THE COURT: I don't care if you're on the moon. That's not self-defense."

So just to make sure he doesn't do anything, I get to beat him up and hit him nine times?"

(5339). Appellant stated he had a right to protect himself from further acts of physical violence from Mr. Chapman. The court responded, "No. You have a right to complain."

Appellant then stated that he had no problem stating his case before a jury but needed the video, he was requesting (5340). The court then stated Appellant was complaining about Ms. Pardo not getting a video which isn't going to have anything to do with a self-defense claim.

"THE COURT: You haven't stated a claim for why the video would matter."

(5341). Appellant then attempted to explain that the events leading up to the fight were ongoing. The court then stated, "There's no audio on the video. So who started the conversation is not going to come from the video." Mr. Butler then said, "He's making it seem like I was the one that was aggressing towards him." The court then said, "And there's nothing in the video that's going to rebut that."

"THE COURT: Okay. I don't have anything--well, let me hear from Ms. Pardo. Let me-- I'm anticipating your reasons for why you don't--haven't gotten the video the week before."

(5343).

Ms. Pardo then echoes the court's statement's word for word.

"MS. PARDO: But that's exactly why. I mean, the video is not going to--it's not a legal defense that somebody was messing with you three days before to

assert then a self-defense claim for an act that appears on the video to be not -- I mean we can't hear the voices.

THE COURT: Right.

MS. PARDO: So anything -- if any verbal threats were made, they're not on video. The video doesn't show any aggression that day, I just watched it, from the alleged victim. So for me to try to search through days and days of video in the hopes that I can tell if some guy is messing with you in the pod, it's just -- they're just not going to give me all of that.

THE COURT: Well, not only that. I don't know what it's legally relevant to.

MS. PARDO: I don't either.

THE COURT: I guess he's saying it's going to impeach him. But without any sound, I don't know how it's going to impeach him.

MS. PARDO: Right.

THE COURT: It's going to impeach his actions? Is that what you're saying?

THE DEFENDANT: Right, correct.

(5344). The court said it did not agree that Ms. Pardo was not doing what she was supposed to be doing in regards to investigating the case because Mr. Butler had not shown the relevance of the prior videos. The court ruled against Appellant as to the Nelson grounds, finding there was no basis for Ms. Pardo to have to get or need the videos (5344-345).

The court then proceeded to hold a Faretta hearing on Appellant's request to represent himself, (5345). At the end, Appellant said he still wanted to represent himself (5354).

The court then addressed Mr. Butler's pro se motion to disqualify Judge Federico based on things the judge had said at Mr. Butler's previous sentencing in 2002 (5355). In his pro se motion for disqualification Mr. Butler alleged that at that previous sentencing, with Judge Federico as the sentencing judge, Judge Federico called Mr. Butler's religious beliefs "comical," and he imposed three consecutive 5-year terms for relatively minor offenses (5343-44). Mr. Butler asserted that Judge Federico accused him of believing himself to be "The Messiah" and above the

laws just because Mr. Butler was seeking the protections of the 4th and 5th Amendments to the U.S. Constitution (R43). Mr. Butler alleged that it was his sincere belief that Judge Federico is irreparably biased and prejudiced against him and could not receive a fair trial from the judge. The court asked if Appellant was going to file any transcripts from his 1998 or 2002 cases (S357). Appellant stated he was not required to do so under Rule 2.330. The court denied the motion (R47; S357). The written order denying the motion states that Judge Federico found the motion legally insufficient under Florida Rule of Judicial Administration 2.330 (R47).

The court then noted that in the written motion Mr. Butler stated he had "extensive mental health issues" (R43; S357). It then stated it had to appoint Dr. Poorman to see whether Appellant was capable and met the standard for self-representation (S360-361).

At that point, Appellant requested the court order the jail to retain the requested video footage (S362). The court stated that Ms. Pardo was still representing Appellant and there is no motion for production on record at this point (S363). Appellant then asked Ms. Pardo to motion to preserve this video. She responded that she couldn't because she didn't have the specific dates for the jail (S363). The court advised her it was for the week before the battery. She stated she'd call DIU (S364). The State then commented that the Sheriff's Office would have a right to an objection and had a right to be noticed for that kind of hearing (S364).

Ironically, Ms. Pardo advised the court, Appellant lost a chance at getting videos (S365), in the original case which was the basis for her appointment.

The Faretti hearing continued on October 27, 2016 (S368-395). According to the court, Dr. Poorman told him earlier that Appellant was competent to represent himself (S372). The court held it was allowing Mr. Butler to represent himself (S373).

The court then addressed Appellant's demand for speedy trial, which was withdrawn (S374). It then moved on to Appellant's pro se motion for production (S375). It was then discussed that Appellant was seeking DVR footage from pod 5B7, cell 3 from July 15, 2016 midnight to July 22, 2016, 4:45 p.m.; a list of names of the inmates who were in the cell from that time period and any sworn statement from Mr. Chapman (S376, 390).

The court stated the sheriff's office had a right to be heard on the motion and the State agreed (5377). It then asked Ms. Pardo if she had called anybody. She said she did and stated,

"MS. PARDO: Well, I called DIU to speak to the deputy that Mr. Butler had referenced. And he said I always direct everybody to their attorney and I direct the attorneys to the State. If the State doesn't want to provide it, then you're making a public records request. So then I called Mr. Vonderheide who had been in court in place of Mr. Ripplinger. And he said, well, I don't believe it's relevant evidence, so I'm not inclined to provide it."

(5377).

Again, the court advises Appellant that he was supposed to notice the sheriff's office to see if they have a complaint (5378-380). Appellant then pointed out that under case law, the DVR footage was in the constructive possession of the State (5380).

Appellant argued the video was relevant to show Mr. Chapman provoked the fight (5381). The court stated it was not arguing that there's relevance, only if it's unduly burdensome to the sheriff's office to produce it. So it was going to reset it for next week to allow the sheriff to be heard. Appellant then asked if the video will still be there next week. At which time Ms. Pardo advised that she was not able to learn who she could talk to at the jail about verifying how long their kept (5382).

Ms. Pardo pointed out that the State could do that and that DIU was certainly not going to cooperate with Appellant (5383). Appellant then requested the court order the sheriff to preserve the DVR footage sought (5383). The court stated it didn't have a problem doing so, but by the time Appellant drafted an order and sent it in for signing, it'll be next week (5384). Appellant then stated that his understanding of the rules was that he's supposed to request the DVR footage from the State who is then obligated to obtain the DVR footage because it's in their constructive possession. And that if they had a problem with the request, then they should communicate such to the court. The court then stated it was a good question if the situation was being handled correctly.

The court then orally granted the motion to preserve the evidence (5385). And asked Ms. Pardo did she know who to call over at DUL. She said no. The Court then asked Appellant if he had a problem with the court calling over to find out who's in charge of the DVR and to preserve it. Appellant did not. Neither did the State nor Ms. Pardo (5387-388). The court then stated it was going to call the legal department about getting the requested DVR footage (5388-390).

The court also granted the motion to compel the list of anybody that was in the pod during that relevant timeframe of 7/15/16 through 7/22 and any sworn statement from John Chapman (5392).

The court held another hearing on November 3, 2016, in reference to Appellant's motion to compel DVR footage (5396-410). It stated,

"THE COURT:....I called over there right after I left court and, frankly, it was probably a good thing that we handled it that way because they hold it for 90 days and they were -- fortunately, they had not destroyed all of the video even though it was past the 90 days because I guess sometimes there's a lapse in getting it done."

(5400). The State then advised that Nathan Shawn at the PCSO electronic system created DVD of video from pod 5F7 from July 19, 2016 at 2:55 p.m. to 3:00 p.m. and July 21, 2016, from 2:57 p.m. to 3:01 p.m. and a DVD of video from pod 5F7 from July 21st at 3:00 p.m. to July 22, 2016 at 4:45 p.m., and an email noting that July 15th was 404 days and July 22nd was 97 days past the 90-day retention period (5401). The court stated that Appellant was provided with the last three days leading up to the alleged incident (5402). Even though, only five minutes of video was provided for July 19; and four minutes for July 21. Supposedly, the other DVD contained 25 hours and 45 minutes (but only has 1 hour, 2 minutes and 59 seconds of footage according to the timer on the DVD itself).

Appellant then informed the court that he had filed another motion for recusal the day before (5402-403). Because of such, the court stated it couldn't do anything else

on the case until it actually received, reviewed and ruled upon the motion (S403).

Pursuant to the mailbox rule and Appellant's representations, this second motion for disqualification was mailed November 2, 2016. The clerk received and filed it on November 7, 2016 (R50-51). In this motion, Appellant argued that the lower court "made comments indicating its preconceived notions of guilt, despite the fact that Butler has not had any meaningful opportunity to present his side and the unprovoked acts of aggression the victim subjected Butler to. This Court stated Butler should have 'complained.' Butler reasonably believes this Court is unable and unwilling to honor his statutory right under Florida's Stand Your Ground Law to defend himself against unlawful force. Butler informed the Court of the violent environment of jail and the need to be on guard at all times. This Court stated it did not care, such did not give Butler the right to pommel the victim. Butler seeks statutory immunity. He proffers that he can demonstrate by a preponderance of the evidence that the victim threatened to do violence to him and he defended himself. However, this Court without hearing any of Butler's defensive evidence, doesn't care about the facts. Or the no duty to retreat provision of the statute."

Appellant further asserted; he "reasonably and sincerely believes based on the expressed comments of the Court, it will not afford him his constitutional right to the presumption of innocence, or an impartial determination of his right to statutory immunity."

At a hearing on November 4, 2016, Ms. Pardo moved to reschedule the set hearing on Appellant's second motion for disqualification (S411-A17). According to her, she was not aware a pretrial was set for November 7, 2016, although just the day before, she advised the lower court of the scheduled hearing (S493-404). On November 9, 2016, a hearing was held on the second disqualification motion (S679-705). Judge Federico acknowledged receipt of the motion and denied it (S681; R58). The court denied the motion as being legally insufficient under Rule 2.330, citing to 2.330(h) and the case of *Kokal v. State*, 901 So. 2d 766, 775 (Fla. 2005).

Appellant then advised the court that the State had not complied with its previous order compelling them to provide a list of the inmates who were in the

pod between July 15 to July 22, 2016 (S392). The court refused to adhere to its earlier order and told Mr. Butler, "It's not their job to do your investigation for you. . . . If you think there's other witnesses, then you can use whatever means you have." (S687)(S691).

Then it was discussed that Ms. Pardo had waived Appellant's speedy trial rights in a September 22, 2016, pre-trial hearing in front of Judge Michael F. Andrews, without Mr. Butler's presence (S691-693; S671-676).

FNI. Appellant alleges that Ms. Pardo, the State, as well as

Judges Federico and Andrews, kept him out of court,

in order to suppress the video footage of Mr. Chapman's

acts of violence. There was a scheduled October 14,

2016, pretrial in front of Judge Federico, that's not on

the clerk's docket. Assistant State Attorney Vonderheide

alludes to it at the October 24, 2016, hearing (S332).

Mr. Butler is troubled by the fact that the clerk's docket

makes no mention of this October 14, 2016 court date.

The September 28, 2016 Notice Returned Served should be

for this court date (R7). It was removed to prevent Mr.

Butler's prose demand for the DVR footage.

Appellant was then allowed to file his prose motion to dismiss based on Brady

violation (S696-697; R53-57) and a motion for reconsideration of the denial of the

Nelson hearing based upon Ms. Pardo not getting the video in a timely manner (R48-49).

In his motion for reconsideration, Mr. Butler alleged Ms. Pardo colluded with the State

to suppress the exculpatory video evidence and requested new counsel, so that the facts

surrounding her alleged collusion could be properly litigated. The court denied the renewed

motion (S698; R63).

Appellant then sought from Judge Federico the name of the person he claimed to have

spoken with in regards to Mr. Butler's motion to compel production of the DVR video

footage (S701). Judge Federico claimed not to know and stated, "It doesn't matter."

(S702-703). He then stated, "The grand conspiracy needs to be developed on the record?... I'm not going to be a party to whatever investigation is in that regards either." He then set a November 28, 2016, hearing date on Appellant's motion to dismiss based on Brady violation (S703-704).

A hearing was held on November 28, 2016, on Appellant's Brady motion (S706-737). In the motion, Mr. Butler stated, "He has consistently maintained that he acted in self-defense under Florida's Stand Your Ground law." That he had submitted an additional discovery demand for DVR footage of cell 3 in pod 5F7 for the time period beginning July 15, 2016 to July 22, 2016, to support his defense. Mr. Butler argued that the alleged victim threw punches at him in the early morning hours of July 18, 2016, provoking a fight." Butler sought to present this video evidence, to the jury, to show the reasonableness of his fear of imminent unlawful force, by the victim. Appellant argued he had requested this video footage be preserved back in August of 2016 (R23-26). Appellant stated that he had asked Ms. Pardo in numerous letters and phone conversations since August of 2016, of the need and relevance of this video evidence; but that she intentionally ignored his pleas to obtain the video footage, in effort to assist the State in willfully suppressing this exculpatory evidence.

Appellant further alleged, that he had had a phone call with Ms. Pardo on October 7, 2016, and concluded she wasn't making any sense about why she had not obtained the footage. He then submitted pleadings that very same day to waive counsel and a demand for the video footage. Knowing his case was on the court docket for October 14, 2016. However, he was not called. "Later that day, he phoned Ms. Pardo. She advised my case had to rescheduled." Appellant stated, he then informed Ms. Pardo of his desire to go pro se and asked her to schedule a hearing. She advised she would do so for Monday or Tuesday, the 17th or 18th. She did not. Appellant argued this was further circumstantial evidence of her unlawful and unethical conduct in sabotaging his defense.

Afterwards, Appellant only received her voice mail and left messages for her to get him into court.

Appellant contended that the Sheriff intentionally destroyed and/or falsely represented it had been destroyed and/or failed to preserve the footage, with the bad faith purpose of prejudicing the defense. He alleged that the video footage should've still existed on October 27, 2016, the day the court intervened.

Lastly, he argued that the prosecution was apprised of the materiality of the video footage, yet took no effort to preserve or produce it, with the intent of suppressing this highly exculpatory evidence.

The court addressed the fact that Appellant had listed itself and Ms. Pardo as witnesses for the purpose of the Brady hearing (5721-722). It stated it nor Ms. Pardo was going to be a witness nor was there going to be an evidentiary hearing.

Appellant then argued the facts his motion to dismiss is based on, as outlined above (5724-728). The State then responded that "previously the Court found out that the video is no longer there and the jail said that they were never given a request to save that video. They provided what they had."

If your Honor would like to hear from the jail, I could have someone come at another hearing date to explain the contents, I called over to them, I have a name of a person who would come here and explain it, but the video doesn't exist. They were never told to save the video. And once they received that request, they were only able to go back to that date and they provided us with what they had." (5729). Appellant then argued that he had sent them a 62 asking them to retain that video. The court stated such a request was a nullity because Mr. Butler was not pro se at that time (5730).

The court then ruled,

"THE COURT: The bottom line is there would be nothing in that video that would give rise to the possibility of a defense that occurred on the 22nd.

I'm going to deny the motion to dismiss based on the Brady violation. There's been no showing that that evidence in any would be exculpatory other than your bare allegations to suggest that. There are three days of videos leading up to the alleged incident. And there's video of the actual incident.

of what occurred.

So certainly, three days leading up to it would be sufficient if there

was provocation on his part to you regarding that.

We made every effort once we were advised that the video might be rele-

vant."

(5730-731) (K62) was then on the stand.

Appellant then asked the court to be allowed to have Ms. Pardo state on record, why she had misled me to believe she was in the process of obtaining the video. But the court did not allow it.

"THE COURT: And there's been no showing that even basically it would be exculpatory. You made some vague allegations as to what might have occurred, but even if something had occurred four days before, it has nothing to do with whether you can pound the guy into submission on the date in question.

I mean that's the bottom line."

(5732).

Ms. Pardo then stated she had a conflict because she was listed as a witness (5735).

The court then advised that it was formally striking him and Ms. Pardo from the defense witness list. (5735-736).

"(Pardo) ..."

Stand Your Ground Hearing

On October 13, 2016, Appellant filed a prose motion to dismiss the case based on section 776.032, Florida Statutes (2016), Florida's Stand Your Ground law (K34-40). And on December 27, 2016, he filed a motion in limine (K72, 68-73). A hearing was held on January 6, 2017 (5422-502).

Appellant advised the court he had filed a motion in limine to exclude any statements the alleged victim John Chapman made to the deputies (5428). The court granted the motion in limine (5429-430).

Mr. Butler testified that on July 6, 2016, he was placed in pod 5F7 (5435-437).

Mr. Chapman was in the pod as well. Mr. Butler noticed that Mr. Chapman was

having confrontations with people. Both he and Mr. Chapman were on boats in the dayroom. A bunk came open and Mr. Chapman was next in line, but Appellant ended up getting the bunk because Mr. Chapman did not get along with the gentlemen (S 438). Subsequently, Mr. Chapman moved into the cell with Appellant (S 441). Mr. Butler observed that Mr. Chapman was having problems coping and that Mr. Chapman explained he was in jail because he threw a beer bottle or something at his wife or girlfriend. Appellant stated he didn't want any problems with Mr. Chapman and was reaching out to him, trying to encourage him and sharing his canteen to help Mr. Chapman feel more at ease (S 442-443).

On July 15, 2016, problems started between Appellant and Mr. Chapman over a seasoning pack (S 444). Mr. Chapman started snapping at Appellant. Because of this, Appellant chose to leave him alone and not speak to him anymore. On the 18th, Mr. Butler said he was laying on his bunk when all of a sudden, Mr. Chapman jumps up, gets into a fighting stance, and says, "Come on. I'll beat your ass." (S 445). He kept insisting he wanted to fight. Appellant then told him, "Let's do it then." Mr. Chapman went back to his bunk and sat down. Appellant said, he remained awake the rest of the night on the defensive because he did not understand Mr. Chapman's hostility towards him.

A few days later, Appellant was brushing his teeth at the sink when Mr. Chapman came up and brushed his shoulder against him (S 445-446).

On the day of the alleged battery, Mr. Chapman kicked Appellant three different times. Then he sat down with a smirk on his face. Appellant did nothing in response. Mr. Butler used the bathroom. When he returned, Mr. Chapman jumped up real fast like he was trying to spook Appellant (S 447). Mr. Butler told him he needed to "stop all this." Mr. Chapman then said, "Fuck you. What do you want to do about it?" And came at Appellant with his fists balled up (S 448-449). And Appellant "just took off on him" because Mr. Chapman made him feel like he was going to do something to him. Appellant said Mr. Chapman instigated the fight. Mr. Butler told the court he did not know how many times he hit Mr. Chapman but he stopped when Mr. Chapman said he was sorry (S 450). That's when the fight ended. Appellant said Mr. Chapman came at him in a threatening

manner which he perceived as a threat and defended himself (5454-455).

Appellant told the court that it was dangerous in jail and that one does not act aggressively toward another unless you intend to do something to somebody (5456). Mr. Chapman's acts of aggression was an indication he was going to do "something" to Mr. Butler (5457).

On cross-examination, Appellant maintained that he perceived Mr. Chapman's acts as threats and feared Mr. Chapman was going to hit him (5458-459).

The State attempted to have Appellant stipulate to a video being entered into evidence (5461). Appellant objected on the grounds of lack of authentication (5461-462). The court inquired of the State,

"THE COURT: Did you want to ask him about the video or do you want to just play it after he's done?"

And then attempted to have Appellant authenticate the video by asking if the video depicted the cell pod (5462). Appellant refused, and asked that the State bring in a witness and authenticate the video (5463). The court stated,

"THE COURT: They don't have to bring it in. You're a witness. You were there."

Appellant stated he did not make the video. The court then told Appellant that he did not have to make the video in order to authenticate it and again attempted to have Appellant affirm that the video was going to show what happened in the pod. Appellant still refused. The court then commented and ruled,

"THE COURT: We'll have to deal with this in front of a jury, but I'll receive it as the State's Exhibit B at this point. Go ahead."

The video was then entered into evidence, despite Appellant's objection.

Appellant claimed the video had been tampered with, because it did not show Mr. Chapman balling up his fists and coming at Mr. Butler (5464-465). And noted that

there was no date and time stamp on the video. The State claimed a date and time stamp is on the video, but "for some reason" not pulling up. "It's on there."

Appellant testified the video did not show the full picture of what actually went on (5470-471). He insisted the video had been edited to wipe out the part showing Mr.

Chapman kicking him and the part where he raised his fists (5474).

Next Pinellas County Sheriff's Detective Chris Brady testified. He worked at the Pinellas County Jail and was assigned to investigate the battery incident involving Mr. Butler and Mr. Chapman on July 22, 2016 (5475-476). Appellant objected to Detective Brady testifying as to who the parties of the incident were and where it occurred on the grounds it was hearsay. The court overruled the objection because he investigated the battery and saw the video.

Over Appellant's hearsay objection, Detective Brady was allowed to testify that Appellant and Mr. Chapman were cellmates (5477-478). He then explained the process for retrieving video from the pod (5479). A screen pops up where it asks for the suspected date and time is entered. If you want to record that, a recordable DVD is put in the hard drive, you export it and it automatically records. Detective Brady then said he made a soundless video of the incident (5480). However, at no time during his testimony did he ever claim to have made the video the State entered over Appellant's objection.

Detective Brady later met Mr. Chapman in ICU at Largo Medical Hospital (5481). He said Mr. Chapman told him what happened. Photos of Mr. Chapman taken by another deputy on the day of the incident were introduced into evidence over Appellant's objection. He then testified the photos accurately and fairly represented Mr. Chapman on the day he met him after the incident (5482).

Appellant argued to the court that the video did not show in any way whatsoever that he didn't act in self-defense, but showed him acting in self-defense (5484). Moreover, he said the portions of the video where Mr. Chapman raised his hands and kicked him were took off. The court asked if there was a government conspiracy to delete the stuff that was on the real video. Mr. Butler then said he had put his request for the video footage from July 15, 2016, in the court file and had requested Ms. Pardo obtain it (5485). She sarcastically replied, "Does the grassy knoll gunman have the video?" Appellant objected that he had not had an opportunity to make a proper record into why Ms. Pardo told him they wouldn't give her the video. Mr. Butler was adamant that the video had been doctored because "the things that happened

aren't on that video." (5486-487).

The State asked the court to rely on the video, because obviously nothing on it that the victim did to provoke Mr. Butler (5488).

The court found that the video did not show anything that would give rise to a claim of Stand your ground and denied the motion (5489).

Afterwards, the State advised the Court that the video it had just watched (State's Exhibit 8) is the video he called about (5496). Quite clearly, this video was made by Nathan Shown (5401, 652).

The court then directed Assistant State Attorney Festa to ask Detective Brady sit down with Appellant on Monday (January 9, 2016) and show Appellant both videos "that way, if he (Mr. Butler) says I never got a chance to see the video the cop can testify I sat there with him and showed him both videos on Monday." (5497). Ms. Festa asked Appellant if he was going to cooperate and go down to DIV. Appellant said he would.

STATE'S EXHIBIT 8²

FNZ. After this Court directed the lower court clerk to serve

this Exhibit and Exhibit Z used at trial on the Appellant,

Gulf C.I. changed its policy to no longer allow inmates to receive CD/DVDs. Thus, Butler is only able to proceed off

his memory.

At the Stand Your Ground hearing, Exhibit 8 was admitted into evidence over Appellant's objection on grounds of lack of authentication. So, there was no testimony adduced by the prosecution, as to what exactly the DVD was supposed to be a portrayal of. Nor does the video contain a date and time-stamp.

Appellant recalls that, prior to the video showing the fight, it showed him entering the cell in an orange shirt; and a second later, swinging at Mr. Chapman in a white T-shirt. And paperwork was strewn all over the floor of the cell.

In other words, there are obvious portions missing. It doesn't show Appellant taking off the orange shirt or how the paperwork came to be strewn across the floor. The DVD is 1 hour, 2 minutes and 59 seconds. However, the acknowledgement of additional discovery reflects it should be either 25 hours, 45 minutes - from July 21 at 3pm to July 22, 2016 at 4:45pm; or if July 21 is an error, it should be 1 hour, 45 minutes. (5401; R652). Either way, the length of the DVD does not coincide with the time reflected in the State's acknowledgment of additional discovery. Nor does it match State's Exhibit 3 and 4 (R669-670), which has no paperwork strewn across the cell floor.

Significantly, due to the missing portions, the video does not show the actual events leading up to the altercation.

JURY TRIAL

The trial was originally scheduled for January 10, 2017. Appellant and the State both announced their readiness. (R740). But supposedly, Ms. Pardo had another trial that was scheduled before Judge Andrews that was a 14 witness case; he was anxious to try. Thus, the trial was rescheduled. (R741).³

FN3. Notably, no mention of this was made at the Stand Your Ground hearing held four days prior on January 6, 2017.

The State did not make any disclosure that Deputy Brady was going to claim Appellant had identified himself and Mr. Chapman on the video.

The trial was held on January 17, 2017. (5503-644; T1-153). Appellant represented himself with Ms. Pardo present.

Judge Federico addressed Appellant's motion for production of inmate witnesses for trial. (5606; R759-760).

Appellant sought the production of inmates: Justin Dieter, Cornelius Brown, Casteneda, first name unknown, and D Brown, whom were in the pod at the times of this incident (5607). He advised the court that there was still 10 days left on his speedy trial demand, which was enough time for the State to produce them (5609).

Appellant contended that as they were in state custody, the State was obligated to produce them. The court noted it was the morning of trial and the court had only now been informed Appellant wanted those witnesses produced. The court asked, "What I'm supposed to snap my fingers?" Appellant stated the motion was filed over a week ago. Appellant said there were 10 days left; and the court said, "Click my heels and me and Toto are going back to Kansas?" and then "Get Scotty to beam them?" Appellant again interjected there were 10 days left; and the court said, "Scotty is in the transporter room. He's going to beam them here, right? Is that what's happening?" (5610).

Appellant then informed the court that D. Brown was in pod 4F9 in the county jail, one of six people. (5611). Appellant told the court D. Brown had also had a fight with Mr. Chapman. (5612). The court said, "Okay. Well, you have not subpoenaed that person. I'm not going to the jail and looking for that person today on the morning of trial." The court denied Appellant's motion (T12-13).

Appellant asked the court to reconsider its denial of statutory immunity because ASA Festa had Detective Brady authenticate a video that he didn't make. (5612). The court ruled, "He doesn't have to make it if he authenticates it and says that's the video, right? the person that-- the machine records it?" And ASA Festa said, "And it would be under the silent witness theory."

Next Appellant advised the court that he had a third motion to disqualify (5616, 617; R130-132). In the motion, Appellant stated that on October 9, 2016, he had filed motions which sought pro se representation, demand for a speedy trial and DVD video surveillance footage of pod 5F7 of the South Division of the jail for the period beginning July 15, 2016 at 12:00 am to July 22, 2016 at 4:45 pm, in anticipation of a scheduled October 14, 2016, pre-trial hearing, because Ms. Pardo had been falsely claiming she was undertaking efforts to obtain the footage. Appellant alleged Judge Federico colluded with the State and Regional Counsel to cancel the October 14, 2016, court date and delay entertaining the motions, solely for the purpose of allowing the 90-day retention period to elapse.⁴

FN4: Appellant's allegations are supported by ASA N. Vonderheide's

comment at the October 24, 2016, hearing, "And I thought David Butler had already been reset to November 7th." (R332). The Court acknowledged as much.

A review of the clerk's progress docket report does not reflect when this rescheduling occurred, or why. Appellant posits that the absence of their being a public record proves Judge Federico and the prosecution engaged in unethical conduct compelling this Court to request a JQC and Florida Bar inquiry, as well as an investigation into the clerk's office.

Appellant further alleged that Judge Federico denied replacing Ms. Pardo in effort to conceal the illegal delay. Appellant alleged he attempted at the November 28, 2016, hearing on his Brady claim, to have the court divulge the name of the person it spoke with on October 27, 2016, regarding the requested video footage and have Ms. Pardo state on the record why she had misled Appellant into believing she was making effort to obtain the requested footage, but Judge Federico would not allow a record to be made to show the footage was intentionally suppressed. Appellant alleged he sincerely believed the court did so to prevent him from establishing the truth of the suppression and Ms. Pardo's unethical conduct. The court reviewed the motion and denied it as to both form and substance. (5617-618).

Appellant then argued he should be allowed to argue the spoliation and unlawful suppression of the video footage (5619). The court said that was not an issue for the jury. Appellant responded it goes towards the integrity of the whole proceeding. The court then asked ASA Festa if she'd given a copy of their motion in limine and then essentially proceeded to argue it for the State, granting it excluding any evidence of failure to preserve the video footage of the prior acts of violence by Mr. Chapman. (5619-621).

Appellant then requested that he be able to have IT Tech Nathan Shawen, who actually made State's Exhibit 8. (5621). He wanted Mr. Shawen to reconcile why the DVD was only 1 hour, 2 minutes and 59 seconds, whereas it is supposed to be either 25 hours, 45 minutes if the State's additional discovery is accurate; or 1 hour, 45 minutes. (5622) And to explain why it shows Appellant enter the cell in an orange shirt, then swinging in

a white T-shirt. Appellant said that's how he knows the video has been doctored. (5623).

ASA Festa told the court the deputy viewed both videos -- they're both the same. (5625). The court then asks, "Both videos. What do you mean both?" ASA Festa then explains that one is a five-minute snippet of just the battery happening. "Then there's one that has an hour prior to the battery showing that there was no interaction between the victim and the defendant." The hour long one was used for purposes of the stand your ground motion.

Appellant was adamant that the video had been doctored and asked the court to play State's Exhibit B. (5626-627). The court refused. (5627). And again ruled that the Appellant was not allowed to raise the issue of doctoring of the video; after suggesting, by asking the State, if they were moving in limine that the doctoring situation not be brought up. (5629). Afterwards, the court and Appellant verbally sparred with respect to Appellant's assertion that the video had been doctored. (5630-635)

Appellant reiterated his concerns regarding the lack of authentication of the videos. "It hasn't been authenticated. They haven't proved with a date stamp that it hasn't been edited, that it hasn't been tampered with, that they hadn't gone through the video, copied the portions they wanted, copied it and edited it like they made it a movie that they wanted to show." (T9-10). The court said, "Well, your objection would be better stated at the time they attempt to introduce the video."

Supposedly, ASA Festa advised the court that Deputy Brady "would also indicate that he spoke with Mr. Butler. They watched the video together. Mr. Butler indicated that it was himself on the video, that it was the victim on the video." ⁵

FNS. Appellant denies ASA Festa made such a statement. There was no written report memorializing this event. Appellant alleges this is precisely why.

Judge Federico ordered the State to have Deputy Brady show the videos, as opposed to stand-by counsel.

Although this was a late disclosure, the court did not conduct a Richardson hearing; or otherwise require the State to fully disclose the circumstances, or video footage (D.I.U. is video and audio monitored).

The State gave their opening statements. There was no claim Deputy Brady was going to testify. Appellant identified himself and the victim. (T22-24).

Dr. Jeffrey Levenson then testified for the State that he treated John Chapman at the Largo Medical Center (T29-30). Mr. Chapman was in stable condition and had been in the hospital for 24 to 48 hours at the time. He had been transferred from the emergency department to the intensive care unit. HE REVIEWED MR. CHAPMAN'S RECORD PRIOR TO SPEAKING WITH HIM AND NOTED, "he claimed to have been assaulted in the jail. He was transferred from the jail to the hospital emergency department, complaining of pain in the back of his head and on the right side of his chest (T31). He read that Mr. Chapman had a laceration to the back of his head that had been closed by the emergency room physician. And an acute right fourth anterior rib fracture and a small puncture to the lung leading to a partial collapse of the lung. The pulmonary critical care consultant had inserted a needle to allow the lung to re-expand (T32).

According to him, "If a pneumothorax is not treated, it potentially can lead to total collapse of the lung, and this could lead to the patient not being able to breathe or suffocate and that could possibly lead to death." And that acute, "means it was a very recent fracture, usually within hours or DAYS." Mr. Chapman was in the hospital four days. Notably, he did not provide any dates regarding Mr. Chapman's hospitalization.

On cross-examination, Dr. Levenson agreed that he could not say the injuries were not self-defense and that he did not speak at all with Mr. Chapman regarding the circumstances of the altercation (T35).

Pinellas County Sheriff's Detective Christopher Brady worked at the Pinellas County Jail (T37). He testified he was assigned to investigate a battery that took place at the jail on July 22, 2016, at approximately 4:30 p.m., in pod 5F7, in cell three involving Inmate David Butler and Inmate John Chapman (T38). Appellant objected.⁶ The

FN6. Based on the prior motion in limine the defense filed seeking to exclude all testimonial hearsay statements Mr. Chapman told the deputies, which was granted at the January 6, 2016, stand your ground hearing.

court overruled it. Video cameras recorded what happened that day (T39-42). Appellant

objected based on the previous arguments regarding authentication, and the prior order granting the defense's motion in limine excluding testimonial hearsay statements of Mr. Chapman (T40, 42). But was overruled. Detective Brady explained the process of how the video of the jail cell was recovered. Namely, that he inputted the date of July 22, 2016, at 4:30 p.m. "brought it up and went back a couple minutes to REVIEW THE ACTIONS THAT TOOK PLACE" (T41). The videos and photo images from the videos were then introduced into evidence over Appellant's objections (T42, 46, 48).⁷ After State's Exhibit 1 was admitted, Detective Brady said he watched the videos with Appellant and Appellant identified himself in the video "sitting, reading his legal papers; and then Detective Brady was allowed to point out Appellant on the video screen (T44). He also said Appellant identified John Chapman in the video by the name Chapman and was allowed to point to him on the screen. Appellant objected that to Detective Brady's narration of the video and was overruled (T43).

FN7. According to the record, Exhibit 1, is State's Exhibit # 8 (RZB4).

Detective Brady testified that an hour version was also watched. It was the same video as the "five to five minutes and 30 seconds" one, and no other battery occurred thereon (T46, 47).

The State then introduced Exhibits 3 and 4 (T48). These were images from the video purportedly before the battery (R669-670).⁸ Detective Brady said they fairly and accurately repre-

FN8. Exhibit 4 is blurred and both pictures appear to a construct of four separate images, or four boxes,

sent the images on the video right prior to the battery. And testified he "observed Inmate Chapman sitting there on his bunk" (T49). And the other image, "Appears to be being struck in the face by Inmate Butler's left hand." (T50). Appellant objected arguing this testimony was speculative, but was overruled (T49). Detective Brady said John Chapman was transported to Largo Medical (T53). He interviewed Mr. Chapman there, and what Mr. Chapman told him was consistent with what he observed on the video. He said he'd had contact with Appellant 5 times and made an in-court identification of Appellant (T54).

On cross-examination, Detective Brady said Mr. Chapman did not give a written statement and was not under oath when he was interviewed (T58-59). He said Appellant had not made

a complaint of being threatened by any inmate to the detectives (T60-61).

Court was recessed (T62-63).

Thereupon, the Court asked Appellant whether he was arguing for a justifiable use of deadly force instruction. Appellant responded case law says he's entitled to both. The court wanted to know what deadly force Mr. Chapman used? Appellant said, "Well, he could have just easily did to me, if he had got off on me first, to what happened to him, to be honest with you." (T64). "It's his threats. He's threatening deadly force towards me."

Next Deputy Melissa Vanswearingen was also employed at the jail on July 22, 2016 (T67-68). At approximately 4:30 p.m. she was notified of a battery (T68). She met with Mr. Chapman and observed his injuries and photographed them. The State sought to introduce them as State's Exhibit 5A through E (T69). Appellant objected on the grounds that her identification of Mr. Chapman is based on inadmissible hearsay, (T70), but was overruled. She then said the photos fairly and accurately represented Inmate Chapman when she observed him on July 22. (T71). The photos were then admitted into evidence over Appellant's renewed objection.

Appellant moved for a judgment of acquittal arguing the State had not proven identity except for inadmissible hearsay or proven lack of consent (T74). The State countered that Detective Brady testified Appellant had identified both himself and John Chapman in the video to Detective Brady (T75). The court held the State had circumstantially established that John Chapman was the victim and was a detainee at the time of the incident, and "the only question is whether or not it's an aggravated battery. Appellant also argued the State had not proven he intentionally caused any injuries. The court said intent was a jury question when the victim was hit ten times in the head and body and denied the motion (T76-77).

For the defense, Appellant testified that he was arrested in February for drug charges and that he is a Rastafarian. In July he was moved into a cell with Mr. Chapman (T78). Mr. Chapman was already having problems with people inside the cell, and had a hard time dealing with time (T79).

Appellant said he did not have any problem with Mr. Chapman because he hadn't been in the

cell with him and tried to make him feel as though he didn't have anything to worry about, in effort to make peace. (T80). But Mr. Chapman started snapping at Appellant. He had a "Dr. Jekyll and Mr. Hyde type of an attitude," so Appellant started to just leave him alone. But that seemed to anger Mr. Chapman more. The situation escalated when one night, Appellant was laying on his bunk, and Mr. Chapman jumped out of his bunk and got into a fighting stance, saying, "Come on. Come on. I'll beat your butt." He was cursing (T81). Appellant asked him what was going on. What had he done. Mr. Chapman said nothing while remaining in a fighting stance. Eventually Mr. Chapman "just was able to talk and get over that and he went and laid down." But Appellant remained up and didn't sleep any more that night. Appellant said he'd be brushing his teeth and Mr. Chapman would come up and brush him and he was worried about what Mr. Chapman was going through.

On the day of the incident, Appellant was sitting on his bunk and Mr. Chapman came in and Kicked his feet. At first Appellant thought he was being careless (T82). But, Mr. Chapman Kicked him again going out and then came right back in and Kicked him again, then sat down with a smirk on his face. Later on, Mr. Chapman was blowing snot. And being ornery and belligerent. He got up behind Appellant and pushed him. (T83). Appellant told him, he need to stop. Mr. Chapman said, "F you. What do you want to do about it? He was balling his fists (hands) and coming at Appellant. Appellant said he acted in self-defense and stood his ground (T85). And that he was not trying to break Mr. Chapman's ribs, and was surprised that happened. He said Mr. Chapman left him no choice (T86).

On cross-examination, Appellant said that the video did not show everything that happened (T87). Appellant said Mr. Chapman did in fact raise his hands (T91).

Appellant renewed his motion for a judgment of acquittal (T93). He also argued he acted in self-defense. He said the video did not convey the threats Mr. Chapman had made to him. It did not show the earlier incidents of Mr. Chapman Kicking him (T94).

During the jury instruction conference, the court said it would not give an instruction on the justifiable use of deadly force as it would not fit under the facts and circumstances (T100). Appellant renewed his earlier objections (T63-65) (T98-99), and also argued he was entitled to a justifiable use of deadly force, because Mr. Chapman was

attempting to commit a battery on a detainee (T100).⁹ As a Festa argued "there's no evidence to any of that." The court agreed, "Yeah, there's just no evidence for justifiable use of deadly force." Appellant objected, arguing Mr. Chapman had conveyed he was going to commit a battery (upon a detainee) against him (T101). The court agreed Appellant's testimony arguably provided evidence of this belief (T102). The court also ruled it was not going to give a special instruction defining deadly force based on Stewart v. State that deadly force occurs when the natural, probable and foreseeable consequences of the defendant's acts are death, it is the nature of the force that must be evaluated, not the end result (T112-113).

FN9. The court earlier commented that Mr. Chapman was 68 years old (T65, 76). However, the only evidence purportedly establishing his age was Detective Brady's testimony he was 59 years old, given at the stand your ground hearing (T480).

Closing arguments were. The court then instructed the jury on the elements of

aggravated battery in a prison, jail or detention facility upon a detainee (T127).

However, although the lesser included crimes should be felony battery in a prison,

jail or detention facility upon a detainee; and battery in a prison, jail or detention

facility upon a detainee; the court only gave felony battery and battery.¹⁰ (T28-129).

FN10. Appellant alleges the court fundamentally erred in instructing the jury

because the lesser were inaccurate, confusing and misleading.

The jury found Appellant guilty of aggravated battery in a prison, jail or detention facility

upon a detainee (R147, T144).

The sentencing hearing was held on March 6, 2017 (R290-311). The court asked if Mr. Butler

had refuted or re-requested a Nelson or Faretta hearing for purposes of the sentencing hearing. Appellant

aid Ms. Pardo told him she was going to come see him in regards to filing a new trial motion but

he did not come see him. The court asked Ms. Pardo if she saw a basis for a new trial. She said she

did not (R292-293). Appellant said he told her the State had not disclosed to him that Detective Brady

was going to testify that Appellant had identified himself and the victim on the video. Appellant denied

ever having done that. And said if he had known he would have moved to suppress the identification.

Appellant claimed he was sandbagged and that this was a due process violation (R294).

The court said that would not be an ambush because the witness could have been deposed and that information discovered.

The court questioned Appellant about his desire to represent himself at his sentencing hearing (R295-296). Appellant said Ms. Pardo would not move for a new trial. The court said it saw no reason to provide substitute counsel as far as a Nelson hearing was concerned so the court moved to hold a Faretti hearing (R297). But Appellant said he did not want to represent himself for purposes of sentencing. The court found there were no grounds to remove Ms. Pardo as counsel for the sentencing hearing. And if Appellant wanted to file a motion for new trial he would have to represent himself (R298).

Appellant said he did not want to represent himself but alleged ineffective assistance of counsel on the face of the record because he had notified Ms. Pardo of his issues (R300). Mr. Butler then asserted the video had been doctored and that he had not had a fair shot (R301). The court said the jury had seen the video and it showed what happened and it was not more complicated than that. (R302).

The court adjudicated him guilty and sentenced him to 30 years in prison as an habitual offender with a 15-year minimum mandatory as a PRR (R258-259, 308).

REASONS FOR GRANTING THE PETITION

QUESTION 1.

This Court is asked to answer this question because it involves the scope of the 6th Amendment's guarantee. The facts here are not in dispute. Petitioner made numerous requests to obtain the video footage of the jail, one week prior to the fight, for which this conviction and sentence stems.

After initially assuring Petitioner that all efforts were being made to obtain the video, counsel appears in court and claims not have obtained this video because she didn't feel it was relevant; "So for me to try to search through days and days of video in the hopes that I can tell if some guy is messing with you in the pod, they're just not going to give me all of that."

Counsel made this decision of relevancy without actually reviewing the requested video footage, so as to have been in an informed position.

Under Florida law, prior acts of violence of a purported victim are relevant and admissible. *Mohler v. State*, 165 So.3d 773 (Fla. 2d DCA 2015).

On direct appeal, Petitioner argued that the trial court should have appointed substitute counsel, because counsel was constitutionally ineffective. The appeal was per curiam affirmed without a written opinion.

As trial counsel noted, "Ironically, Ms. Pardo advised the court, Appellant lost a chance at getting videos in the original case which was the basis for her appointment."

Given the rise of victimless prosecutions of jail fights in the nation, this Court should answer this question.

QUESTION 2.

Trial counsel lied to Petitioner and gave him false assurances that she was making all effort to obtain the requested video footage. Petitioner further alleged that trial counsel colluded with the State to suppress the video. Both the trial court and the appellate court denied relief. This Court should answer this question.

QUESTION 3.

Petitioner was given a Hobson's Choice of trusting his defense in trial counsel whom refused to obtain exculpatory video evidence; gave false assurances that she was and assisted the State in its suppression by her stonewalling efforts. Both the trial court and the appellate court denied relief. This Court should answer this question.

QUESTION 4.

Petitioner did all he could to obtain the requested video footage. He filed a letter with the trial court advising of the exculpatory nature and materiality of the video. The State was served a copy. Petitioner on numerous occasions requested trial counsel to obtain the video footage. Petitioner sought the appointment of substitute counsel who would have assisted him effectively by obtaining the video footage. And he elected to proceed pro se in effort to obtain the video by having filed a prose motion for the preservation and production of the video all to no avail.

Petitioner argued to the trial court and on direct appeal that the State violated his federal due process of law rights by not preserving and producing the video footage upon the defense's specific request.

Here, the State was without any doubt aware of the exculpatory nature of the requested video footage. As a result, Petitioner alleges bad faith on the part of the prosecution in failing

to preserve the video footage. This is so because Petitioner's request was very specific and not a general request for exculpatory evidence.

The trial court denied relief for the reasons already put forth in the statement of facts. The appellate court affirmed.

Given the temporalness of retention schedules of video surveillance, and the State of Florida's failure to have preserved the video footage, this Court should answer this question.

QUESTION 5.

The alleged victim did not testify or ever give any sworn testimony or statements. A January 6, 2017, Stand Your Ground immunity hearing was held. The trial court allowed the introduction of a DVD purportedly depicting an altercation between Petitioner and the alleged victim over the defense's authentication objection. In fact, Petitioner was very adamant that the DVD in question had been doctored and/or edited to have removed the alleged victim's aggressive and hostile acts.

In *Abney v. United States*, 431 U.S. 651, 655, 52 S. Ct. 651, 97 L. Ed. 2d 2034 (1977), this Court recognized, "On appeal the United States Court of Appeals for the Third Circuit reversed petitioner's convictions and ordered a new trial on the ground that the Key tape recording had been admitted into evidence without proper authentication." See *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975).

Otherwise, this Court has never decided a case involving the question, if the federal due process of law clause requires the authentication of video evidence.

A cursory review of federal case law reveals that often a criminal defendant's habeas claims that video evidence was altered and/or edited falls on deaf ears.

In *Grigsby v. Munguia*, 2017 U.S. Dist. 21598 Case No. 2:14-cv-0789 GEB ACP (E. D. Cal. 2-15-17) it was held:

"Plaintiff believes that the October 10, 2012 video was altered or edited because he made statements about his knee injury during the interview, which are not depicted in the video. As plaintiff has personal knowledge of what he said during the interview, these allegations provide some support for his contention that the

video was altered."

Petitioner submits that to the extent he is the only witness with personal knowledge of what happened, his contention that the State of Florida's DVD evidence was altered.

To be clear, at the immunity hearing the State tendered no witness who claimed to have made the DVD or attested to its accuracy. Accordingly, this DVD's admission into evidence violates Petitioner's federal rights to the due process of law. Without such, the trial court was required to have granted Petitioner's motion to dismiss based on statutory immunity. The Florida appellate court's per curiam affirmance conflicts with Stark's, supra.

This Court should answer this question.

QUESTION 6.

At the January 17, 2017 trial, the alleged victim did not testify nor did any witness for the State of Florida have personal firsthand knowledge of the events depicted in the DVD.

In a pre-trial motion in limine the trial court granted the defense's request that the investigating detectives be prohibited from testifying to the jury as to how the alleged victim was purportedly injured based on this Court's decision in Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Yet, at trial the investigating detective was allowed to testify that he went to visit with the alleged victim at the hospital. That based on this interview he returned back to the jail, reviewed surveillance video footage and made a DVD (not the one used at the immunity hearing). The detective testified also that what the alleged victim told him was consistent with what he observed on the video (as to how he received his injuries supposedly).

Under Florida law, a definitive ruling on the record admitting or excluding evidence is sufficient to preserve the issue for appellate purposes. Farrell v. State, 273 So.3d 43 (Fla. 4th DCA 2019).

On appeal, Petitioner argued that the admission of the DVD, for the truth of the matter asserted, deprived him of the right to confront the alleged victim. Petitioner argued that because the State of Florida had no first-hand personal eyewitnesses, the introduction of the video was based on the testimonial statements the detective learned from his hospital interview with the

alleged victim. And, further that the State of Florida's rebuttal of Butler's self-defense case was unconstitutionally based on the testimonial hearsay statements of the purported victim. All to no avail.

This question is of great importance to the Nation. Honorable Justice Kagan's dissent in *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221, 183 L.Ed.2d 89, 144 (2012), supports granting review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David L. Butler

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