NO.: 20-8205

IN THE

SUPREME COURT OF THE UNITED STATES

In re: JOHN L. McKENZIE

ON

PETITION FOR WRIT OF HABEAS CORPUS

ORIGINAL JURISDICTION

28 U.S.C. § § § 1651(a), 2241, 2254(a)

PETITION FOR WRIT OF HABEAS CORPUS

John L. McKenzie DC# 930334
Okeechobee Corr. Inst.
3420 N.E. 168th Street
Okeechobee, Fl. 34972

Pro se

QUESTIONS PRESENTED

1. Whether Petitioner is illegally confined where confinement is due solely to the irrefutable fact that police fabricated the only evidence used to convict him, and the prosecutor presented false testimony at trial that resulted in conviction of an actually innocent person, creating a fundamental miscarriage of justice in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution?

2. Whether the 11th Circuits denial of leave to file a numerically second § 2254 denied access to the court and due process because it endorses a fundamental miscarriage of justice by requiring an actually innocent person to remain in prison where conviction rests solely on the false evidence and perjured testimony?

LIST OF PARTIES

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:

State of Florida
Office of the Attorney General
1515 N. Flagler Dr., Suite 900
West Palm Beach, Fl 33401

Governor DeSantis
Office of the Governor
The Capitol Pl-01
Tallahassee, Fl. 32399

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

NO.:_____

IN THE

SUPREME COURT OF THE UNITED STATES

In re: John L. McKenzie

PETITION FOR WRIT OF HABEAS CORPUS
ORIGINAL JURISDICTION
28 U.S.C. § § § 1651(a), 2241, 2254(a)

OPINIONS BELOW

1. (A) Fla. R. Crim. P. 3.850(b) was filed on January 25, 2017. No.: 50-2010-CF-010417 Based on new evidence discovered in 2016. Grounds raised (1) violating *Giglio*, State knowingly presented false testimony; (2) violating *Brady*, State withheld impeaching document of 17 year custody gap of sole evidence. Petition was summarily denied without hearing on February 14, 2018. Appendix "A".

(B) Fourth District Court of Appeals affirmed without opinion March 24, 2018. No.: 4D18-708. Appendix "B".

(C) Attorney Deana Marshall, P.O. Box 158, Riverview, Fl. 33568 filed a timely rehearing on or about August ___, 2018, replying to State response; arguing that State law consistently holds: unless a petitioners sufficiently plead claims are refuted by the record, he is entitled as a matter of law, to an evidentiary hearing. Appendix "C", Rehearing was denied without opinion.

2. (A) A third postconviction habeas corpus was filed to Fifteenth Judicial Circuit on April 30, 2019. It was treated as a 3.850 motion and summarily denied without hearing as untimely for failure to state new evidence, on September 12, 2019. Appendix "D".

(B) Timely filed rehearing pointed to the new evidence and facts overlooked. Contemporaneously, amended postconviction was filed September

26, 2019. February 19, 2020 Amended Petition was summarily denied as successive, without hearing and threatened sanctions if claims are ever raised again. Appendix "E".

(C) Appeal to Fourth District Court of Appeal, No.: 4D20-862 by Attorney Ponal, 253 W. Orlando Ave., Ste. 201, Maitland, Fl. 32751, argued: "A defendant is entitled to an evidentiary hearing unless his claims are conclusively refuted by the record. Fla. R. Crim. P. 3.850(d). Fourth DCA October 29, 2020 Order denied w/o opinion. Appendix "F".

3. (A) Other state remedies: McKenzie filed habeas corpus direct to Fourth District Court of Appeal, No.: 4D19-3927. It was dismissed as unauthorized, and also threatened sanctions; January 13, 2020. Appendix "G"

(B) A letter to Florida Supreme Court Justice, Peggy Quince, Retired, In her capacity on newly formed Conviction Review Unit was treated as habeas corpus, but dismissed due to pending habeas corpus above. No.: SC19-461. Appendix "H".

4. November 17, 2020, a 28 U.S.C. 2244(b) to Eleventh Circuit Court of Appeal alleged *Brady v. Maryland*, 373 U.S. 83 (1963) violation where State with held material evidence that would have led to discovery of false rape kit; and *Giglio v. U.S.*, 405 U.S. 150 (1972) violation where a former BRPD officer lied under oath to authenticate false evidence. This was discovered through new credible and reliable evidence; had jurors known these truthful facts, as well as the fact that BRPD charged another crime from 1987 based on same matching fraudulent DNA, when McKenzie was 1,600 miles away at time of 1987 crime - `no juror would have found guilt beyond a reasonable doubt.

In its Order of denial December 10, 2020, the panel found that: "... he has not shown that, but for constitutional error no reasonable factfinder would have found him guilty." Appendix "I", Order at page 3.

JURISDICTION

This Petition invokes the Court's Original Jurisdiction under Article III, section 2 of the United States Constitution in aid of the Court's appellate jurisdiction. This Court also has jurisdiction under *Felker v. Turpin*, 518 U.S. 651, 652 (1996) concluding this Court retains "jurisdiction to entertain habeas corpus petitions filed as original matters pursuant to 28 U.S.C. § § 2241 and 2254."

Petitioner (McKenzie) in custody of the State of Florida at Okeechobee Corr. Inst., Warden Henderson, in violation of the Constitution and laws of the United States seeks relief to this Court as a Court of last resort because constitutional claims have been exhausted in all lower courts. All attempts at relief have failed; State Courts have threatened sanctions and 11th Circuit has denied leave to file second habeas corpus. Thus, there is no other remedy or court available with which to obtain relief.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amendment V ... nor be deprived of life, liberty, or property, without due process of law.

U.S. Const., Amendment XIV, ... No state shall make or enforce any law which shall bridge 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 AND FACTS

5. A sexual assault occurred in daylight March 15, 1989 in Boca Raton, Florida. The case went cold. On September 8, 2010 Boca Raton Police Dept. (BRPD) arrested McKenzie based solely on DNA test results from an alleged rape kit claimed to be the same as recovered in 1989. But as McKenzie shows here, it was not the same one. Additionally, BRPD charged McKenzie with a second unrelated sexual assault from 1987 based solely on DNA test results from a washcloth. Appendix "Q" But also shown below, the DNA could not possibly belong to McKenzie because he was undergoing surgery 1,600 miles away at time of '87 crime.

6. BRPD officer Darcy Tyson (Tyson) drove the victim to Bethesda Mem. Hospital (Bethesda). Dr. Franklin and nurse Donley performed a forensic examination using a required prepackaged Sexual Assault Evidence Collection Kit (SAECK), supplied by Bethesda. Also known as "Vitullo Kits". [1] After exam, Dr Franklin sealed the rape kit and released it to Tyson with his 2 page medical report. See Tyson's 1989 report. Appendix "J".

7. Dr. Franklin signed a BRPD "Vehicle Tow/Property Receipt" form and "Relinquished" it to Tyson. She signed the form at "Received" on March 15, 1989 at 8:05 pm. See Appendix "K". But the SAECK released by Dr. Franklin disappeared and was replaced by a police evidence bag. It was alleged to be the same "Rape Kit", as recovered in 1989. It was not. It was in fact created by BRPD in 2006 and official documents were falsified to conceal this fact.

8. Tyson attached Dr. Franklin's 2 page medical report to the property receipt form and identified that form as "Page 1of 3". See Appendix "K". However, pages 2 and 3 are missing and BRPD confirms they cannot produce them. Appendix "L".

---

[1] Sgt. Louis R. Vitullo, headed a Chicago crime lab and created these kits in the 1970's to standardize exam procedures and evidence collection. By 1989 Vitullo Kits were mandated for sexual assault exams and routinely used by examiners and hospitals throughout the United States as standard protocol. Fla. Stat. §395.102(2)(3) (1983) required hospitals to employ specially trained personnel to administer the kits. Franklin and Donley were trained in these procedures. A Vitullo Kit comes pre-sealed-opened only by examiner at time of exam-resealed and initialed by examiner after exam - then released to police.

9. The Rape kit property receipt custody log shows it was never signed into property by anyone in 1989. The first person to sign the chain of custody log is Farrah Pearson ID#A461. She signed the alleged rape kit out on "6/28/06" to "TOT PBSO Lab" at "0925". But this evidence was never signed into property - so Pearson could not have received it from property. See Appendix "K". Thus, this evidence is unaccounted for 17 years.

10. **Tyson's False Trial Testimony**. At trial, the required procedures for conducting sexual assault exams, or that special SAECK's were required *using specially trained personnel* was not known. Neither Dr. Franklin or Nurse Donley testified. Tyson's testimony was solely relied on for authentication. She testified in part as follow:

Q. And what was your role in assisting the examination?
A. My role was taking all of the components of a Rape Kit, handing each component to the doctor, opening them, watching him after he's inserted the parts of the kit, came back to me, I put them in the original and put them back in the bag.
Q. Okay. So you were wearing gloves when you did this?
A. Yes.
Q. And you had a rape kit --was it prepackaged?
A. It's a prepackaged kit, yes.
Q. And what was in that kit?
A. It was a paper bag. There is a vaginal swab, there's an oral swab, I believe an anal swab, there is a comb and I believe a scraper for your nails.
Q. And you recognize this bag in which you placed all of the swabs that were taken from the rape exam that night?
A. Yes, my initials are here as well.
Q. And were you the one who actually placed the swabs as the doctor handed them to you, inside their containers and placed them in this bag?
A. Yes.
Q. Did you seal the bag and turn it into evidence?
A. Yes.

(Appendix "M", pages 4-6)

Without this false testimony prosecution could not proceed. Dr. Franklin, Nurse Donley, and Bethesda Administrators are available and will confirm testimony as false. Tyson's '89 police report also contradicts her testimony. See Appendix "J".

11. On cross by defense, Tyson testified as follows:

Q. What was your reason for placing them in individual bags?
A. So I can label them so we know what it was used for.
Q. Okay. And did you do that in this case?
A. Yes.
Q. Okay, now on the outside of this envelope which is in evidence as State's 22, there is labeling.
A. Yes.
Q. Did you put any of that handwriting on there?
A. No, just my signature where it says sealed by.
Q. Okay, so the rest of the entries were made by someone else, do you who?
A. I have no idea, No I do not.
Q But when you sealed it up and turned it in, it would have been blank up at the top?
A. I did not -- that's not my handwriting. I did not write that, No.

(Appendix "M" pages 5-8)

For a clearer picture, See Appendix "N", alleged rape kit.

According to Tyson's testimony, not only did she recover all forensic evidence, handling each swab, labeling them etc.; but notably, she claimed she turned an otherwise blank and unidentifiable bag into property. Confirming that some unknown person had to tamper with this evidence because no one could fill in blank information, including Rape Kit in contents and David Miller at suspect (when he didn't become a suspect until 2006) - without consulting Tyson first. Proving the person who entered all identifying information was the one who created this fabricated evidence in 2006. And the same one who tampered with the contents when creating this new rape kit.

BRPD Fabricated Evidence And, Bag As Rape Kit

12. The Case went cold for 17 years until victim called BRPD in 2006 positively identifying David Miller as her assailant - who she saw on news being

sentenced for similar crimes in her area.

13. According to BRPD property receipt Appendix "K", BRPD officer Farrah Pearson was first to sign the chain of custody log on "6/28/06" seventeen years after recovery. But no one knows where this alleged rape kit came from because for 17 years it cannot be accounted for.

14. The alleged rape kit Appendix "N", is in fact a police evidence bag, manufactured well after 1989, which can be verified by the manufacturer and lot#. Contents and all identifying information were added by an unknown person in 2006 when the case reopened. Therefore, former BRPD officer Tyson[2] had to sign the bag at "Sealed By" after 1989.

Improper Evidence Transfer Without Custody - Falsified Property Receipt

15. Thomas Messick was BRPD evidence custodian in 1989. Jenny Hernandez was custodian from 2000 to 2012. Farrah Peason was BRPD crime scene investigator in 2006. [3]

16. Thomas Messick was a meticulous evidence custodian. He signed each property receipt custody log; assigned it PR#11153 and placed it in bin 106; noting this information on each property receipt and the evidence log. For example: Messick received a pair of panties on "3/16/89" by Id. #216. He assigned PR# 11153 and placed them in Group 1 (a brown box containing all other evidence in this case), located in bin 106. See Appendix "O", page 1. He then logged it on the evidence log. See par. 28 B below, and Appendix "R", page 2. Review of all other property receipts reveal Messick assigned PR#11153 to <u>all</u> '89 evidence, placing each item in Group 1 in bin 106. <u>Except the rape kit</u>, which he never signed for, never assigned a PR#, or placed it in any bin - because he never received it. See Appendix "O", pages 1-10.

17. Palm Beach Sheriff's Office (PBSO) lab protocol require all agencies submitting evidence for testing, to ensure the evidence is properly sealed with a

---

[2] In 1992 Tyson left BRPD employ and moved to Colorado and returned to Florida prior to 2006. Upon her return, her employment with BRPD did not resume; instead she took employment with Delray Beach as a Code Enforcement Officer.

[3] These people are no longer employed by BRPD.

completed property receipt attached. On "6/28/06" BRPD Officer Pearson [4] signs the BRPD properly receipt at "0925" to "TOT PBSO Lab". Appendix "K". However, this receipt was not attached to the evidence when submitted to PBSO lab an hour and a half later. According to PBSO records, a falsified PBSO property receipt was attached, and they have no record of the BRPD property receipt. This was an attempt to conceal custody gap.

18. BRPD Evidence Custodian Jenny Hernandez, and Pearson both drove to PBSO where they obtain and falsify a PBSO property receipt. Hernandez signed the PBSO receipt as having "submitted" the rape kit to Pearson who "Received" it at "0925" to "TOT PBSO lab" on "6/28/06". See Appendix "P". Pearson entered this identical information on the BRPD property receipt Appendix "K". It should be noted, PBSO is at least a 45 minute drive from BRPD. Pearson could not take custody again on a PBSO form as she already had custody from BRPD. Hernandez could not "submit" custody to Pearson because: (1) Hernandez never had custody; (2) She never worked for PBSO; and (3) PBSO property never had custody. Compare Appendix "K" to Appendix "P".

19. The PBSO form attempts to give proper custody with false information where Hernandez released the rape kit from PBSO property to Pearson, who in turn released it to PBSO lab. Thus, giving an illusion of custody where rape kit is transferred internally from PBSO property to PBSO lab. When in fact, PBSO property never had custody. Attaching a false PBSO property receipt shows intentional concealment.

20. This falsified PBSO property receipt was then attached to the sealed evidence bag per protocol and submitted to PBSO Lab. Overa, ID 4222 signed for it at 10:55 am, Notably, an hour and a half after Pearson claimed she received it from Hernandez at "0925" from PBSO property; when the lab is just upstairs in the same building. After testing, this rape kit was returned to BRPD on "8/23/06" with copy of the falsified PBSO property receipt attached.

---

[4] Pearson left BRPD on 9/27/06.

This evidence was then effectively "laundered" into BRPD evidence and property.

21. In 2010, four years after testing, McKenzie was identified in error, as a "possible investigative lead". No other evidence ever developed. Mckenzie asserts original SAECK released by Dr. Franklin in 1989 was opened by BRPD and a new rape kit created to facilitate insertion of fabricated contents.

BRPD Fraudulently Charges Another Cold Case Same Matching DNA

22. BRPD sent a washcloth and panties from an unrelated 1987 sexual battery to PBSO lab. Within days McKenzie's DNA was matched to the washcloth, but excluded from a DNA mixture on the panties. Appendix "Q". BRPD presented test results to prosecution. Within days of trial, McKenzie was charged with an additional sexual assault and the State moved to introduce it as evidence in the 1989 case under Williams Rule. [5] The State concluded that Appendix "Q" was sufficient as the sole evidence to charge the 1987 crime; just as they did in this 1989 case.

23. **The 1987 DNA evidence was fabricated**. McKenzie's wife produced irrefutable alibi evidence he was undergoing 3 life threatening major surgeries in an Illinois hospital at the time of '87 crime. After presenting the alibi evidence, which exposed beyond doubt BRPD's fabrication of evidence, i.e. McKenzie's DNA on the washcloth, prosecution was forced to drop the '87 charges and withdraw their *Williams Rule* attempt to influence jurors in the '89 case with false evidence of the '87 case. Evidence that could only have been fabricated by BRPD officials as they had exclusive custody of it where it sat on a BRPD property room shelf for 24 years.

24. Because BRPD had access to McKenzie's DNA since 2000, they had opportunity and motive to have manipulated the 1987 evidence, just as they did in the 1989 case. No other plausible explanation exists.

25. BRPD had a **financial incentive** for cold case files. Senator Joe Biden sponsored the "Violence Against Women Act", in the 1980's. Among

---

[5] *Williams v. State*, 110 So.2d 654 (Fla. 1059)(allowing evidence of similar crimes).

many other things, it calls for federal funding to agencies who open and investigate cold cases; a second round of funding is provided for an arrest; and a third round for conviction. McKenzie was BRPD's first cold case, as publicly announced on their web page.

New Evidence

26. All BRPD property receipts were obtained in 2016. Appendix "O" and "K". They show each piece of evidence - except the alleged rape kit - signed into property by evidence custodian Thomas Messick, See paragraph 20-21 above. But according to the property receipt for alleged rape kit, it was never signed into property in 1989. This document was never given to defense. Appendix "K". According to the State Attorney file, it was not there either.

27. McKenzie then received copy of PBSO property receipts that revealed a falsified receipt by BRPD evidence custodian Jenny Hernandez and officer Pearson. Appendix "P". Those records also show PBSO was never provided copy of BRPD property receipt for alleged rape kit. See par. 19 above. New evidence motion alleging *Brady/Giglio* violations was filed January 25, 2017, but denied without hearing. See par. 1 above.

27. State responded to above motion on January 11, 2018 and submitted additional new evidence of documents never seen before but which support claims of custody gap, and tampering; described and addressed as follows:

A. Computer generated BRPD P an E Inventory Report dated 11/30/2005 showing handwritten alteration: "1989-11084 Rape kit that was not listed" on bottom of page.
Appendix "R", page 1.

BRPD installed a computerized Property and Evidence Tracking program used by police nationwide, sometime in the 90's. It automatically assigns a PR# to each item. Protocol requires all property be entered into the program. Evidence "not listed" means it is not in custody. Property cannot be in custody without being documented, inventoried and assigned a PR#. The program does not permit unassigned property.

B. Handwritten 1989 Property & Evidence Report shows alteration by unknown handwriting.

Appendix "R", page 2.

This document shows someone crossed out bin ~~106~~ and wrote "100 - fridge" above. This unauthorized alteration makes it appear as if Tyson submitted a rape kit in 1989 that was placed in refrigerated bin 100. An email (explained in detail par. D. below), from Dana Nietz confirms that neither bin 106 or 100 are refrigerated, that 142 is refrigerated. A meticulous custodian as Messick would not log evidence he never signed for without documenting or memorializing it.

C. An Evidence Custody Card shows alteration by unknown handwriting.

Appendix "R", page 3.

Once again, someone crossed out ~~106~~ and wrote "100 -Fridge". This card was created in 1989 but the alterer would have one believe that ID# 216 (Tyson) submitted all the evidence. But, records show that Tyson only submitted the "Clothing", a pair of shorts and panties. See Appendix "O" page 1 and 2. The other items were all submitted by various other BRPD personnel.

D. A January 4, 2018 email from evidence custodian Dana Nietz in response to Asst. State Attorney Renelda Mack's request for documents showing custody of false rape kit.

Appendix "R", page 4.

The email refers to two documents submitted here as Appendix "R", pages 1 and 2. Nietz attempts to show custody of alleged rape kit by submitting and describing documents clearly altered by handwriting, with no explanation as to who, why, or when they were altered. Stating in part:

> "On the bottom of page 135 under 142 which is the bin number for the fridge, you will see the case number and the words rape kit, the words not listed just means it did not have a PR number listed at that time. So the inventory log (page 18) can place the sexual battery kit into evidence by ID#216 whose supplement we have stating she collected it."
>
> (Appendix "R", page 4)

This email is false and misleading. First - Nietz claims "Not listed", handwritten on the 11/30/2005 report ("R", page 1), "just means it did not

have a PR number listed at that time". She then relies on the 1989 property log ("R", page 2) to "place the sexual battery kit into evidence". But the '89 property log clearly shows that PR# 11153 was assigned to evidence submitted on 3/16/89 ID#216 and placed in bin 106.

Second - Appendix "O", pages 1 and 2, show that only "clothing" a pair of panties (page 1), and blue shorts (page 2), were placed into evidence on 3/16/89 by ID#216. Evidence custodian Messick signed the custody log for each receipt; Assigned PR#11153 to each item; and placed both in Group 1 bin 106.

Third - The 1989 property log has been altered by someone who crossed out ~~106~~ and added ""100 - Fridge" above it. The unaltered version is consistent with above described property receipts reflecting ID#216 placing panties and shorts into evidence. Appendix "O" pages 1 and 2. The altered version is inconsistent because the rape kit was never given a PR# until 2006. Messick would not log evidence without a property receipt showing he had signed for the property and placed it in evidence.

Accordingly, these documents submitted show an attempted cover up. They were submitted by the State in response to McKenzie's new evidence: *Brady/Giglio* claims, and support those claims by calling into question the sole evidence used against McKenzie.

29. A Property Report Number is essential for tracking evidence. Every item in custody is assigned a PR#. This nationwide protocol is used by BRPD and shown here by the 1989 property log (page18), Appendix "R", page 1 - and all property receipts received by an evidence custodian. Appendix "O", pages 1-10. These alterations of official documents show attempt to conceal false evidence.

30. The computer Property and Evidence Inventory Tracking program automatically assigns a random PR# to each item entered. The PR# assigned can be reused for multiple pieces of evidence in the same case provided evidence is continually entered at the time. However, once the assigned PR# is

retired, it can never be reused; it will never be regenerated; and any new evidence cannot be entered under the retired number.

31. Further evidence this alleged rape kit never existed before 2006 is shown by the fact that when all evidence in this case was entered into the new program in the ' 90's, PR#11153 assigned by Messick, was replaced by the program with PR#117882. This new PR# was assigned to all 1989 evidence indicating that all case evidence was entered together - except the rape kit. The rape kit was assigned PR#120601 indicating it was entered at a later date after PR#117882 had been retired and no longer useable. This is shown by comparing the property report stickers attached to all other property receipts for 1989, with the sticker attached to the rape kit property receipt. Compare Appendix "K", alleged rape kit receipt, to Appendix "O", all other 1989 property receipts. McKenzie asserts that evidence custodian Jenny Hernandez "laundered" this false rape kit into BRPD evidence in 2006 as shown herein, to conceal the fact it had been created with manipulated contents.

32. After all evidence in this case was entered, PR#117882 was retired and could not be used again. Therefore, when evidence custodian Hernandez entered the false rape kit in 2006, it was assigned PR#120601. Hernandez simply forgot or failed to change the bin # to 142, [6] so subsequent alterations were made consistent with bin 100.

33. The above evidence indisputably shows the original 1989 SAECK released by Dr. Franklin was replaced by a new police created rape kit that was sent for testing and presented to jurors. Through all of BRPD's sleight of hand, McKenzie's DNA appeared - just as it did in the 1987 case when he was 1,600 miles away. If given these facts, no juror would fail to have reasonable doubt.

---

[6] BRPD letter dated January 8, 2018 confirms Jenny Hernandez as full time evidence custodian from June 5, 2000 to April 20, 2012. Appendix "S".

REASONS FOR GRANTING THE WRIT

McKenzie is actually and factually innocent of this crime. What makes this case extraordinary justifying exercise of this Court's power is that it involves false DNA manipulated by police officials and used in two separate cold cases as the sole evidence. Both cases involve the same corrupt official (no longer with BRPD) who used the same lab for testing. In both cases the DNA was falsified, manipulated or fabricated to match McKenzie.

New evidence caused McKenzie to locate original 1989 attending doctor and nurse, and obtain information from Bethesda Administrators. They all confirmed that the rape kit presented at trial and alleged to contain McKenzie's DNA, was **not** the same one recovered by Dr. Franklin and released to police in 1989. Other evidence revealed it was in fact created by police in 2006 to conceal the fact the original kit had been opened, contents tampered with, then destroyed and repackaged in a police evidence collection bag that was labeled "Rape Kit" by a BRPD official.

Significantly, attempting to bolster this 1989 case and obtain more federal funds for cold cases - police charged another cold case from 1987. Claiming McKenzie matched DNA on a washcloth in their exclusive custody since 1987. However, unbeknown to police, he was hospitalized 1,600 miles away; undergoing major life threatening surgeries at time of the 1987 crime. Therefore, his DNA could not possibly appear on evidence used as basis for charging him with the '87 case (a washcloth) without someone other than McKenzie having put it there. The State was forced to drop that charge.

The 1987 case is significant because it is not merely a case of alibi thus mistake - it undeniably shows police had to manipulate the evidence never suspecting major surgeries would provide an irrefutable alibi.

The same official, who fabricated the 1987 washcloth evidence, also had access to McKenzie's DNA as well as the 1989 evidence. This same official altered official property room documents and falsified a PBSO property receipt to conceal false evidence. Jenny Hernandez was the full time BRPD evidence custodian from 2000-2012. See Appendix "S". See also Appendix "P", falsified

PBSO property receipt; and "R", various altered BRPD property room documents.

Two cold cases. Both with no other evidence but falsified DNA alleged to match McKenzie. In both cases there is clear evidence of tempering by police. The victim's refusal to identify McKenzie (see below), and fingerprints that do not match, are both exonerating. Thus, there is no reliable evidence to justify McKenzie's continued imprisonment; made possible only by egregious violations of due process and fundamental fairness that resulted in a miscarriage of justice.

Brady/Giglio Violations

McKenzie was convicted on the DNA Test results alone. There is no other inculpatory evidence.

At trial, Tyson authenticated this false evidence by lying to the court and juror's regarding her role in the 1989 forensic exam. Dr. Franklin or Nurse Donley were never called. Had they been called, they would have exposed the false rape kit. Defense relied on Tyson's testimony as truthful.

Tyson's lies would not be possible had state not withheld the BRPD property receipt because it would have triggered an investigation uncovering facts that were never intended to be uncovered. Evidence shows Jenny Hernandez went to great lengths to alter and falsify official documents intended to prevent discovery. A federal hearing would establish this.

Regarding these serious constitutional violations this Court in *Mooney v. Holohan,* 294 U.S. 103, 112 (1935) (cited in both *Brady* and *Giglio*), said:

> " such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with rudimentary demands of justice as is the obtaining of a like result by intimidation."

Records show Tyson's 2011 trial testimony contradicts her '89 police report. The '89 report states Dr. Franklin assisted by Nurse Donley performed the exam. Tyson took possession of a sealed rape kit from Dr. Franklin. But her trial testimony claims she collected the forensic evidence - handing swabs

to the doctor, she then collected them, labeled each swab, put them in the evidence bag, sealed it, signed it, and then turned in an otherwise blank unidentifiable bag into property. Trial testimony Appendix "M". Compare "M" to '89 police report "J". Jurors never heard about Tyson's contradictions or heard her lie exposed, or heard about false DNA on an ' 87 washcloth. Thus, conviction rests solely on a lie and false evidence.

Tyson took possession of a sealed rape kit (SAECK) from Dr. Franklin along with panties and shorts. See Appendix "J". What happened to the original rape kit after Tyson took custody at Bethesda, is unknown. The panties and shorts however, were received by BRPD Custodian Messick (Appendix "O" pg. 1 and 2). But alleged rape kit was never received and only "laundered" into evidence in 2006 by then custodian, Jenny Hernandez.

For seventeen years, from 1989 until 2006, there is not accountability for a rape kit. Reliable evidence and credible testimony will establish that the rape kit presented to jurors as the original one recovered in 1989, that had not been tampered with, was in fact created by BRPD in 2006. And its contents were compromised at that time, before it was sent to PBSO lab for testing. The falsified PBSO property receipt was attached to conceal the fact this alleged rape kit was not authentic which would have precluded further prosecution. McKenzie was convicted on the DNA test results alone. There is no other inculpatory evidence.

Habeas Corpus has always been considered as governed by equitable principles to "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." "...to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay v. Noia,* 372 U.S. 391, 423 (1963).

McKenzie never had a fair trial as guaranteed by the United States Constitution; an adversarial process where true evidence is weighed and a verdict reached by reasonable fact finders fully informed in the truth of the facts. Rather, conviction rests entirely on false evidence and false testimony.

When a government brings to bear its unlimited power against a person and the very police empowered and trusted to serve and protect - lie to the Court and jurors, fabricate evidence, and falsify official documents solely to convict – And Courts refuse to correct the injustice, the United States is no longer "one nation under God, indivisible, with liberty and justice for all."

BRPD Charges 1987 Cold Case Based on Falsified DNA

Prior to trial, BRPD charged McKenzie with a separate 1987 cold case based entirely on same false DNA claimed to match McKenzie. But hospital records proved he was in surgery 1,600 miles away at time of '87 crime. See par. 22-23 above. Therefore, it is beyond deniability that DNA on a 1987 washcloth had to be manipulated, fabricated, or altered by a BRPD official because no other reasonable theory explains how McKenzie's DNA appeared on evidence that only BRPD had access to. They also had access to McKenzie's DNA since 2000. They had both motive and opportunity shown by the fact the State dropped those charges and withdrew their *Williams Rule* Motion when shown beyond doubt that he was in Illinois at the time. Otherwise, he would have been convicted of the '87 case as well. Thus, his DNA could not be on a washcloth through any other means but fabrication or alteration of evidence by BRPD.

Vindicated of the '87 case by virtue of an alibi; likewise, McKenzie must also be vindicated of the 1989 case by the fact the victim positively identified Miller and could never identify McKenzie; as well as the fact prints found where victim said assailants prints, should be, did not match McKenzie or anyone belonging to her apartment. It is significant that D. Miller's name appears on the fabricated rape kit. Because he didn't become a suspect until 2006.

For whatever reason, BRPD fabricated evidence to solve cold case files without any regard to illegal deprivation of life, liberty, and pursuit of happiness to a person innocent of these charges. McKenzie asserts the person responsible was evidence custodian Hernandez. No longer at BRPD.

Victims Inability to Identify McKenzie

Shortly after McKenzie's arrest, the victim was called to BRPD to identify him by viewing his interrogation video. She was never shown a photo array, perhaps one including David Miller, McKenzie and several others. BRPD detectives tried to lead her into making a false identification.

Instead of a photo array, the victim was shown only McKenzie's interrogation video and **told** he was the one because they had DNA. But when asked to identify him she declined. BRPD detectives told her to view the video again carefully. Again, when asked to identify McKenzie, she would not. They asked her to watch it a third time, telling her an attorney might challenge the DNA, but a victim identification would be conclusive. For the third time, she could not identify McKenzie. She was also shown photos of McKenzie taken around the time of the crime. She said, "they have no meaning to [her]." The victim only believes McKenzie might be guilty because police told her they had DNA. But still, she will not identify him.

In front of the jury, the prosecutor asked the victim a leading question he already knew the answer to and led her into a false statement that she had never been able to identify her assailant. The prosecutor was fully aware of the fact the victim positively identified David Miller previously. This was intentional manipulation of the victim before the jury, to deflect prosecutor assertion that McKenzie was the assailant; and to diminish her refusal to identify him. The victim has *never* accused McKenzie of anything.

The credible facts and documents submitted here raise a sufficient doubt about guilt to undermine confidence in the result of the trial for the following reasons: 1) police and prosecutor claimed McKenzie's DNA established his guilt of the 1987 crime, the same as they did in this 1989 case, and would have used the '87 case as evidence in the '89 case but for the irrefutable alibi; 2) the alleged rape was manufactured by BRPD in 2006 to conceal the fact the original kit sealed by Dr. Franklin, had been opened and its contents compromised; 3)official documents show alteration to conceal this fact; 4) Tyson, a former BRPD officer, lied to the court and jurors in order to allow prosecution to introduce false evidence. Clearly showing the key evidence - the

only evidence in both the 1987 and 1989 cases was altered, tampered with, and manufactured. Therefore, McKenzie is actually innocent because he was convicted solely on false evidence. Once it is shown that serious and constitutional error occurred at trial; that he is more probably innocent than guilty, he has adequately demonstrated that his "case is truly extraordinary" and thus deserving of habeas corpus relief, not withstanding a procedural default. *Schlup v. Delo*, 513 U.S. at 316-17, 326-27 (quoting *McCleskey v. Zant,* 499 U.S. 467, 494(1991)).

Eleventh Circuit Panel Erred Denying McKenzie's Gateway Claim.

McKenzie sought leave to file a numerically second 2254. The panel decision in essence said:

> "While evidence that the State knowingly withheld knowledge of a fabricated rape kit and presented false testimony at trial would show constitutional violations, that is not enough. See *Davis*, 565 F. 3d at 818, 823; *Johnson*, 513 F. 3d at 1334."
>
> Appendix "I", Order at page 3.

Factual innocence means; "it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt." *Schlup*, Id, at 327. McKenzie meets this standard where false evidence is the sole evidence of guilt.

The Eleventh Circuit failed to consider that constitutional violations resulted in admittance of false facts and false evidence that prevented jurors from hearing truthful ones and would have precluded a finding of guilt. This fatally affected the fairness and integrity of the judicial proceeding. It denied due process of law and a fair trial.

The panel did not "assess the likely impact of the [New] evidence on reasonable jurors." *House v. Bell*, 547 U.S. 518 at 538 (2006). The constitutional violations demonstrate factual innocence because, as in House, id., no reasonably acting juror would be able to place any substantial reliability on test results from a rape kit created by police in 2006 and their subsequent

cover up to conceal it. Especially in light of facts regarding the false1987 charge.

The "prima facie showing" language of 28 U.S.C. 2244 (b) (3) (c), and this Court's interpretation of it, impose a "gate-keeping" task. *Felker v. Turpin*, 518 U.S. 651, 657 (1996) that strongly suggest the Circuit Court's review at this stage should not resolve the question whether the petition actually satisfies the second or successive petition standard or whether some affirmative defense to relief exists but only whether there is some reasonable likelihood that a petitioner perhaps aided by an evidentiary hearing that only the district court can conduct will be able to satisfy the standard.

The standard used to decide upon "prima facie showing" is set out in 28 U.S.C. 2244 (b) (2) and states:

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

The availability of clear and convincing evidence has been demonstrated here. A federal hearing is necessary to memorialize these facts because the State refused to address the claim;

Most circuits hold: "Prima facie showing means: reasonably likely, or a sufficient showing of possible merit to warrant fuller exploration in the district court." See e.g. *In Re Hoffner*, 870 F. 3d 301, 307 (3d Cir. 2017) ("In our gate keeping role, we assess whether the petitioner has satisfied the pre-filing requirements of section 2255 (h) at only a 'prima facie' level"); accord, *Quezadau v. Smith*, 624 F. 3d 514, 521 (2d Cir. 2010) ("We understand prima facie standard of section 2244 (b) (3) (c) to mean, as the phrase normally does, that the applicants allegations are to be accepted as true, for purposes of gate-keeping..."); Also, *U.S. v. Villa-Gonzalez*, 208 F. 3d 1160, 1164 (9th Cir. 2000) ("Summary denial of the motion is proper when the motion and the files and

records of the case conclusively show that the prisoners motion does not meet the second or successive motion requirements.")

McKenzie has never been allowed to establish facts and records in this case. Facts that only a full and fair hearing would establish. So there can be no record finding. McKenzie relied on and believed in decisional and statutory laws that federal judges, charged with upholding constitutional laws and rights would allow him to proceed, because here, evidentiary errors "so infused the trial with unfairness as to deny due process of law" habeas corpus relief is warranted. *Lisenda v. Califorina,* 314 U.S. 219, 228, 62 S. Ct. 280, 286 (1941) (quoted and applied in *Estelle v. McGuire,* 502 U.S. 62, 75, 112 S. Ct. 475, 484 (1991).

Preventing McKenzie from going forward would effectively estop him from ever addressing the serious constitutional violations here. That is fundamentally wrong because it would send the dangerous message that police, with impunity and complete immunity, can fabricate evidence, falsify official documents and lie to the court and jurors - or do whatever they deem necessary to obtain a conviction. This is contrary to a long line of this Courts decisional law. It offends constitutional standards elaborated by this Court. And has created a miscarriage of justice

Actual innocence means factual innocence. Not mere legal insufficiency. To meet this standard petitioner must show "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup,* Id. at 327; *Kuhlman v. Wilson,* 477 U.S. 436, at 454; *Bousley v. U.S.*, 523 U.S. 614, at 623.

Test results from the alleged rape kit was the very foundation of the guilty verdict. Had jurors known that test results were the product of a police manufactured rape kit 17 years after the fact, and all the deceit engaged in by BRPD personnel to conceal this, as well as facts regarding manipulated DNA on '87 washcloth no juror would have found guilt. Thus, McKenzie meets the actual-factual innocence standard.

An actual innocence claim must be supported by new reliable evidence whether it is exculpatory scientific evidence, trust worthy eyewitness accounts, or critical physical evidence that was not presented at trial. *Schlup* 513 U.S. at 324. McKenzie has such evidence, but thus far, has not been allowed to bring it forth. The original attending hospital personnel and hospital administrators are trustworthy eyewitnesses. They will confirm facts alleged herein and Dr. Franklin will not authenticate a police evidence bag lacking his signature or initials on the bag. Thus, McKenzie has been convicted solely on false evidence, manufactured by BRPD, authenticated by a lie.

"Critical physical evidence that was not presented at trial" consists of Official BRPD documents that establish: alleged rape kit has no accountability from 1989 until 2006; it was tampered with, not the same as released in 1989; it was created in 2006; official documents show tampering by handwritten alteration; and a PBSO property receipt was falsified. Photo copy of alleged rape kit Appendix "N", shows three things on its face: First, it is clearly a police evidence bag, not an authorized SAECK; Second, tampering is shown where someone added "D. Miller" as suspect, on evidence alleged to be untampered with since '89, when Miller did not become suspect until 2006; Third, the identifying information added by someone that never spoke to Tyson (who claimed she submitted a blank unidentifiable bag) shows intentional knowledge of tampering, because there would be no way to know bag contents without speaking to Tyson.

McKenzie's case is similar to *House v. Bell,* 547 U.S. 578 (2006). Where this court granted House leave to proceed in district court on his "actual innocence" claim because House called into question the forensic evidence linking him to the crime. Notwithstanding, the other evidence suggesting guilt, the Court said:

> "This is not a case of conclusive exoneration. Some aspects of the state's evidence - Lora Muncey's memory of a deep voice, House's bizarre evening walk - his lie to law enforcement, his appearance near the body, and the blood on his pants - still support an inference of guilt. Yet the central forensic proof

> connecting House to the crime-the blood and semen has been called into question and House has put forth substantial evidence pointing to a different suspect. Accordingly and although the case is close, this is the rare case where - had the jury heard all the conflicting testimony - it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *House,* 547 U.S. at 554.

The other evidence inferring guilt is what made House's case a "close" one. Such does not exist in this case. Therefore, in the absence of **any other evidence** reasonable doubt about the DNA evidence is necessarily, reasonable doubt regarding McKenzie's guilt.

This case is quite unique. Either the courts have misunderstood, overlooked, or intentionally circled the wagons. The Boca Raton Police Dept. or a rogue, fabricated DNA evidence in two cases. Both are undeniable and have irrefutable proof. Proof of DNA fabrication in the 1987 case is established by the fact that McKenzie was in Illinois undergoing major surgeries at the time of that crime. Undeniably, his DNA could not possibly have appeared on a washcloth maintained exclusively by the BRPD without having been manipulated in some way.

The 1989 case would be undeniably proved through attending hospital personnel, administrators and official document evidence that all irrefutably prove that the rape kit and contents submitted to jurors was fabricated. Thus, both cases - in different ways - establish fabrication of the DNA evidence.

These facts alone should merit relief. But there is more. Victim identification and fingerprints both exonerate McKenzie. There simply is no other evidence that remotely infers guilt except DNA that is un-redeemably tainted.

Courts have either ignored the claims and denied relief for some inapplicable procedural ground; glossed over the facts as if lacking merit; or got mired in the constitutional claims without looking at the bigger picture. Accordingly, McKenzie shows that "in light of the new evidence, it is more likely

than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

CONCLUSION

This Court's decisional laws hold that McKenzie is entitled to relief therefore; McKenzie respectfully asks this court to apply its decisional laws to the facts of this case and grant relief. Should this Court decline jurisdiction, McKenzie prays the Court will exercise its authority under § 2241(b) and transfer this petition for hearing and determination to the Southern District Court of Florida for hearing and disposition.

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

Dated: April 28, 2021.

Respectfully Submitted,

/s/ John L. McKenzie

John L. McKenzie 930334
Okeechobee Corr. Inst.
3420 N.E. 168th Street
Okeechobee, FL 34972