No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

JAMES STRICKLAND,
*Petitioner*,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
*Respondent*.

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

# PETITION FOR WRIT OF CERTIORARI

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

CRYSTAL MCBEE FRUSCIANTE
11110 West Oakland Park Boulevard
Suite 388
Sunrise, Florida 33351
(954) 495-7889/ Fax (866) 936-4546
FL Bar No. 80215
Email: crystal@frusciantelaw.com

COUNSEL FOR THE PETITIONER

## A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly applied the prejudice standard articulated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts of the Petitioner's case (i.e., "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," *see Strickland*, 466 U.S. at 696).

## B. PARTIES INVOLVED

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

## C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

### 1. TABLE OF CONTENTS

## 2. TABLE OF CITED AUTHORITIES

### a. Cases



### b. Statutes



### c. Other Authority

The Petitioner, JAMES STRICKLAND, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on December 15, 2021. (A-3).[1]

## D. CITATION TO ORDER BELOW

The opinion below was not reported.

## E. BASIS FOR JURISDICTION

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

## F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). The test to be utilized by courts in analyzing ineffective assistance of counsel claims is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.

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

> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Under the Due Process Clause of the Fourteenth Amendment to the Constitution, as interpreted by the Court in *Brady v. Maryland*, 373 U.S. 83 (1963), a prosecutor must disclose evidence that is favorable to a criminal defendant, notwithstanding the prosecutor's good faith and the defendant's failure to request such disclosure.

## G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns the Petitioner's 28 U.S.C. § 2254 claim of ineffective assistance of counsel. The underlying facts of this case – as set forth in the district court's § 2254 order – are as follows:

> Someone – the state says it was Mr. Strickland – robbed two victims on January 16, 2011 as they walked near a street. The victims provided this information to officers: the robber was driving a green truck, *was wearing a hoodie*, *said he lived in his truck*, asked for money, offered to sell the victims pornography, and finally, when the victims said no, robbed them at gunpoint. One victim said the green truck had a Florida license plate beginning with "BJM." The same victim later positively identified Mr. Strickland at a photo lineup and then at trial.
>
> Mr. Strickland committed an unrelated theft on the next day, January 17. A search of his green truck on that day *turned up no hoodie*, no pornography, and no gun. The truck had a Georgia license plate beginning with "BJM."
>
> Law enforcement did not immediately connect the January 16 robbery with the January 17 theft. It apparently was January 21 – five

> days after the robbery – when law enforcement focused on Mr. Strickland as the suspected robber. The investigating officer did not attempt to search Mr. Strickland's truck, even though the officer had been told that the robber claimed to live in his truck. If that was true, *the robber might well have had nowhere else to keep a hoodie*, pornography, or gun. But the truck was in Georgia, perhaps 30 miles away, and the officer apparently believed searching it would require a Georgia search warrant.
>
> The robbery and theft were charged in different cases. Mr. Strickland entered a guilty plea in the much-less-serious theft case. He went to trial in the robbery case. *The robbery prosecutor apparently did not personally know about, and thus did not disclose, the January 17 search that turned up no hoodie, pornography, or gun*. The officer's investigative report said – incorrectly – that there had been no such search.

(A-14-15) (emphasis added). As acknowledged by the district court, the Petitioner was represented by the *same* attorney in both the theft case and the robbery case – but the attorney *failed* to properly investigate the cases, and thus *failed to discover / realize that the Petitioner's truck had, in fact, been searched by law enforcement officials on January 17, 2011* (even though discovery documents received by counsel in the theft case clearly showed that the truck had been searched):

> As it turns out, Mr. Strickland was represented by the same attorney in both cases. The attorney apparently received discovery in the theft case that showed that the truck was searched on January 17 and that no hoodie, pornography, or gun was found. But with his focus on the January 16 robbery, the attorney did not connect the dots. This apparently was an oversight, perhaps attributable in part to the erroneous report that there had been no search. In any event, even good, experienced attorneys sometimes make mistakes. This was one.

(A-15). The district court therefore found that (1) defense counsel rendered ineffective assistance of counsel (i.e., the Petitioner satisfied the first prong of the *Strickland*

standard) and/or (2) the State violated *Brady* by failing to disclose the January 17th search in the robbery case:

> The state-court record establishes deficient performance by Mr. Strickland's attorney or the state's unconstitutional failure to turn over favorable information. Or both.
>
> If the robbery and theft cases are treated as related, so that the state's disclosure of the information in the theft case satisfied its duty to disclose in the robbery case, then the attorney rendered deficient performance by overlooking the information about the search.
>
> On the other hand, if the robbery and theft cases are treated as separate, then the state has no excuse for its failure to separately disclose the information in the robbery case – not just in the theft case. The state's duty to disclose favorable information is not limited to information known to the prosecutor personally. Officers made the connection between the two cases and were obligated to turn over the favorable information about the search as part of the discovery not only in the theft case but also in the robbery case.
>
> In any event, Mr. Strickland's expert testified in the state collateral proceeding, without contradiction, that in defending the robbery case, the attorney should have found and realized the importance of the information provided through discovery in the theft case, separate or not.

(A-16).

However, the district court determined that the Petitioner failed to establish prejudice under either the *Strickland* or *Brady* standard, and therefore the district court denied the Petitioner's § 2254 petition. (A-20).[2] The district court granted a

[2] The prejudice inquiry is the same for both an ineffective assistance of counsel claim and a *Brady* claim. *See United States v. Bagley*, 473 U.S. 667, 681-682 (1985) (opinion of Blackmun, J.) (adopting the *Strickland* prejudice standard for *Brady* violations). *See also id.* at 685 (White, J., concurring in the judgment and concurring in part) (same).

certificate of appealability on the following issue:

> [W]hether the petitioner is entitled to relief based on his attorney's ineffective assistance as to, or he state's failure to disclose, that the petitioner's truck was searched the day after the robbery at issue and no hoodie, pornography, or gun was found.

(A-20-21).

On appeal, the Eleventh Circuit Court of Appeals agreed that the jury in the Petitioner's case received "false testimony":

> On January 16, 2011, two Florida State University students – Emiloina Pantner and Todd Laycock – were robbed at gunpoint on their way home from a bar in Tallahassee. According to their testimony, they were walking to Pantner's car when an older, mustachioed white male wearing a hooded sweatshirt pulled up next to them in a green Ford Ranger pick-up truck. They testified that when the truck stopped, they were about an arm's length away from the passenger-side window and had a good view of the man inside the truck.
>
> The driver turned on the truck's dome light, told the students that he lived out of his truck, and asked them for gas money. The students told him that they didn't have any money, but the driver persisted, offering to sell them pornographic material. The students again declined. After being turned down twice, the driver stated: "[W]ell what if I show you a gun now." The driver then pulled out a gun, which prompted the students to fork over whatever cash they had on them – a total of $11. The driver took their money, told the students to walk away, and drove off.
>
> As soon as the robber left, the students found a university police officer, who called the Tallahassee police. Once Tallahassee police arrived, the students recounted what had happened and described the robber. One of the students – Laycock – informed police that he had been able to identify the first three letters of the license plate: "BJM." Laycock also told the officer that it was a Florida plate, but later said he hadn't been sure about that fact. Neither student noticed any other distinguishing features of the truck.
>
> Strickland was a resident of Cairo, Georgia, which is about 30 miles from Tallahassee near the Florida/Georgia line. He drove a green Ford Ranger carrying a Georgia license plate that began "BJM" and that had been in an accident that had not been repaired. Using the information the students provided and a database containing Georgia and

Florida license plates, the investigator identified Strickland as a suspect. Moreover, the investigator was able to determine that Strickland had been in Tallahassee when the crime occurred. Despite all of that information, the investigator testified that he did not go to Strickland's address or attempt to search his truck. The jury heard testimony that – due to a decision not to search the truck – the police never found a gun, hooded sweatshirt, or pornographic material connected to Strickland.

About a week after the robbery, police showed the students a photographic lineup of four suspects, which was compiled from the information the students provided and the investigation that followed. Pantner was able to narrow the selection to two people – in positions three and four of the lineup – but couldn't state with absolute certainty which one was the robber. Laycock was able to positively identify the suspect in position four as the robber. That suspect was Strickland, and Laycock identified him again at trial.

On that information, the jury found Strickland guilty of armed robbery with actual possession of a firearm. As a prison releasee reoffender, *see* Fla. Stat. § 775.082, the state court sentenced Strickland to life in prison.

Here's what the jury *didn't* hear: The day after the Tallahassee robbery, on January 17, 2011, Strickland had been arrested for an unrelated theft. When he was arrested, his truck was impounded and searched. An inventory of the search included a handful of random items – a Christmas tree, a weed eater, and other sundries – but it didn't include a hooded sweatshirt, gun, or pornographic material. For whatever reason, although the officer investigating the January 16th robbery in Tallahassee was aware of the January 17th arrest and that Strickland's truck had been impounded as a result, he was under the impression that the truck had not been searched.

Strickland had the same defense counsel for both criminal cases. But the attorney took at face value the investigator's report for the January 16th robbery, which stated that the truck was not searched in relation to the January 17th theft charge – the attorney didn't cross reference the two cases. Instead, because Strickland intended to enter a guilty plea on the theft charge, and because he was going to trial on the higher stakes robbery charge, the attorney focused his attention on the robbery case. In so doing, he ignored a material fact – it wasn't police incompetence that failed to uncover the pornographic material, hooded sweatshirt, or gun from Strickland's truck; instead, police had failed to uncover those items because they weren't in the truck when the police searched it.

So, turning back to the trial for the January 16th robbery, the jury received false testimony that the truck had never been searched. They

> were left with the impression that the incriminating items were never found due to a failure to search; not that the truck actually was searched but that the search was fruitless.

(A-4-7) (emphasis in the original). Nevertheless, the Eleventh Circuit affirmed the district court's order denying the Petitioner's § 2254 petition – finding that the Petitioner had failed to establish prejudice. (A-11).

## H. REASON FOR GRANTING THE WRIT

**The question presented is important.**

As explained below, both the district court and circuit court misapplied the *Strickland* prejudice standard to the facts of this case.

**1. The district court's prejudice analysis**.

In its order, the district court concluded that the Petitioner was not prejudiced – but the district court conceded that the issue is a "close question" and that the state court's ruling on this matter was "not ironclad":

> The issue, then, is prejudice.
>
> The subject of what was in Mr. Strickland's truck drew prominent attention during the trial. As it turns out, Mr. Strickland's argument was substantially weaker than it could have been. Mr. Strickland argued with vigor that officers never found a hoodie, pornography, or gun. But with no search to point to, the argument suggested officer negligence more than Mr. Strickland's innocence – there was no way to know whether the materials were or were not in the truck. The jury might have excused the officer for not conducting a search, reasoning the materials could easily have been moved in the five days or so between the robbery and Mr. Strickland's arrest. And more importantly, officer negligence was not the issue. The jury could have concluded that with no evidence of what was or was not in the truck, the defense argument about failure to locate a hoodie, pornography, or gun was nothing more than speculation.
>
> These arguments would have been different had the jury been provided truthful information about the results of the search that occurred one day after the robbery. *Whether the difference is sufficient to undermine confidence in the outcome is a close question*. Two critical points support the state.
>
> First, Mr. Strickland drove a green truck with a license plate beginning with "BJM." It was a Georgia plate, not a Florida plate, but the crime occurred perhaps 20 miles from the Florida-Georgia line; plates from both states are common in this area. That a witness focusing on the numbers might not accurately identify the state is hardly surprising. And the three-letter sequence on the plate, provided before there was a suspect, is highly incriminating. Eyewitnesses sometimes incorrectly

> identify faces. But the odds of hitting three successive letters on a green truck but getting the wrong green truck are surely long. It is not easy to undermine confidence in an outcome based on evidence of this kind.
>
> To be sure, the state did not take a screen shot when it pulled up information on other vehicles with these letters in sequence. Perhaps there were other vehicles, even green trucks, with these letters. But Mr. Strickland has not pointed to any, even today. The burden at trial was on the state. The burden on collateral review is on Mr. Strickland.
>
> Second, the search evidence is persuasive only if Mr. Strickland lived in his truck. If he lived there, and if he committed the robbery, one would expect the hoodie, pornography, and gun still to be in the truck the next day. Where else would he put them? But if he did not live in the truck, one would not be at all surprised if these items were removed and taken into his residence before the next day. Mr. Strickland did not allege or prove in his state collateral proceeding, and has not alleged in this federal habeas petition, that he in fact lived in his truck. That he told the victims he lived in his truck is scant evidence that he actually lived there; this might well have been a panhandler's ruse to obtain a voluntary payment or a robber's effort to have the victims pull out their wallets, thus making a robbery easier. Here, too, the burden of proof is now on Mr. Strickland.
>
> The state postconviction court ruled that the search evidence would not have made a difference. *The conclusion is not ironclad.* But the conclusion is not "contrary to" and did not involve "an unreasonable application of" clearly established federal law, and the conclusion was not "based on an unreasonable determination of the facts in light of the evidence presented" in state court. 28 U.S.C. § 2254(d)(1)-(2). Under the deferential standard applicable in this federal habeas proceeding, Mr. Strickland is not entitled to relief.

(A-16-19) (emphasis added). As explained below, the district court's conclusion regarding prejudice is erroneous.

In its order evaluating this "close question," the district court relied on two points: (1) the identification of the truck and (2) the statement by the perpetrator that he was living in his truck. Both of these points will be addressed in turn.

First, regarding the identification of the truck and the first three letters of the license plate, the district court noted that the Petitioner has failed to point to any

other trucks that might have met the description provided by the victims "even today." (A-18). The district court is incorrect. During the trial, Officer Wester testified that *there were other vehicles that came up* when he searched for the license plate beginning with "BJM":

> Q And you got a bunch of different pieces of cars?
>
> A Right, that's correct, yes, sir.
>
> Q Now, do you have a list of those cars that came up?
>
> A No, sir, I do not.

(A-63-64). Notably, Officer Wester conceded *that he chose not to record, document, or take a screen shot of other vehicles with a similar description and license plate*.

> Q *Did you write any of that down*?
>
> A *No, sir*.
>
> Q *Is there any way to recover that list*?
>
> A *No, sir*, I don't –
>
> . . . .
>
> Q Do you know how many automobiles came up with that letter B-J-N?
>
> A No, sir. I don't recall with any certainty.
>
> Q And you don't have a description of any of those?
>
> A No, sir. It – no, I don't.
>
> Q You don't know how many of them were pickups?
>
> A No, sir.

Q You don't know how many of them were green pickups?

MR. HUTCHINS [the prosecutor]: Objection. Cumulative, your Honor.

THE COURT: Overruled.

THE WITNESS: No, sir.

BY MR. CONRAD [defense counsel]:

Q You don't know how many of them were green pickups?

A No, sir.

Q You don't know how many of them were Florida pickups and how many of them were Georgia pickups?

A No, sir.

(A-64-66) (emphasis added).[3] As a result of Officer Wester's actions, the Petitioner was unable to make an offer of proof regarding the other vehicles that matched the license plate description because he does not have access to that type of information – *whereas the State was actually in possession of that information, but Officer Wester destroyed it/failed to preserve it*. The Petitioner further points out that although there were two

[3] This issue was raised by the Petitioner as a part of his § 2254 claim that the State failed to turn over exculpatory evidence, as "Officer Wester indicated that other vehicles came up when he searched for the license plates beginning with 'BJM.'" (A-26). The other vehicles that met the criteria for the search were exculpatory and should have been provided to the Petitioner. Had the jury been provided with a list of vehicles that matched the description provided by the victim(s), the jury would have been presented with other persons who could have committed the offense. As explained in the § 2254 petition, "[o]ther possible perpetrators equate to reasonable doubt and an acquittal for [the] Petitioner." (A-27).

robbery victims, only one of the victims (Todd Laycock) identified the licence plate and the Petitioner:

> One victim said the green truck had a Florida license plate beginning with "BJM." The same victim later positively identified Mr. Strickland at a photo lineup and then at trial.

(A-14). However, the record is clear that this victim had been drinking just prior to the incident:

> Q [I]t's your testimony you had one, maybe two drinks that were liquor, not beer?
>
> A Correct.

(A-62).[4] Finally, the Petitioner notes that the record establishes that his truck had significant damage on the date of the robbery (A-73; A-68-70), and neither victim alleged that there was damage to the truck that was involved in the robbery.

Second, regarding the statement by the perpetrator that he was living in his truck, the district court stated the following:

> [T]he search evidence is persuasive only if Mr. Strickland lived in his truck. If he lived there, and if he committed the robbery, one would expect the hoodie, pornography, and gun still to be in the truck the next day. Where else would he put them? But if he did not live in the truck, one would not be at all surprised if these items were removed and taken into his residence before the next day. Mr. Strickland did not allege or prove in his state collateral proceeding, and has not alleged in this federal

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[4] The victims had a very limited opportunity to view the suspect at the time of the crime. It was dark at the time of the incident, the victims did not give attention to detail, and they were inconsistent and inaccurate in their descriptions of the suspect – and only one positively identified the Petitioner (i.e., Mr. Laycock, who – as explained above– had been drinking just prior to the incident). Additionally, despite a description that the perpetrator was wearing glasses, none of the persons in the photo line-up were wearing glasses. (A-37).

> habeas petition, that he in fact lived in his truck. That he told the victims he lived in his truck is scant evidence that he actually lived there; this might well have been a panhandler's ruse to obtain a voluntary payment or a robber's effort to have the victims pull out their wallets, thus making a robbery easier. Here, too, the burden of proof is now on Mr. Strickland.

(A-18-19). The problem with this analysis is that it assumes guilt. *The Petitioner* did not tell the victims or the court that he lived in his truck – *the perpetrator* told the victims that he lived in his truck. So it was not the responsibility of the Petitioner to allege or prove that he lived in his truck. Rather, the point is that during the robbery, the perpetrator indicated he lived in his truck and showed the victims several items in his truck that appeared to support this contention, so the items shown to the victims during the robbery would likely have been in the truck that was used during the robbery on the day following the robbery. The fact that the Petitioner's truck was searched on January 17, 2011, *provided evidence of innocence* because the Petitioner's truck had a number of items in it (i.e., showing it had not recently been cleaned out), but the Petitioner's truck did *not* contain a hoodie, pornographic tapes or magazines and/or a gun.

In its order, the district court relied on the testimony of criminal law expert Michael Kessler in reaching its conclusion that defense counsel rendered ineffective assistance of counsel in this case. (A-16) ("In any event, Mr. Strickland's expert testified in the state collateral proceeding, without contradiction, that in defending the robbery case, the attorney should have found and realized the importance of the information provided through discovery in the theft case, separate or not.").

Undersigned counsel note that Mr. Kessler also opined that the Petitioner was prejudiced by defense counsel's ineffectiveness in this case. Mr. Kessler, a board-certified criminal trial lawyer with thirty years of experience and hundreds of trials, testified that:

> If [he had] been trying this case, knowing that the truck had in fact been searched, the fact it was searched and they didn't find these important items in the truck the day after the crime would have been a *main feature of the defense. It would have been the strongest point that the defense could have presented in the case*, apart from maybe putting the defendant on the stand. And if [the defendant] had a felony prior record, which [he] did, [he] wouldn't have wanted to put him on the stand.
>
> What you're talking about here is a difference between a speculative doubt, which the jury instruction says is not reasonable doubt. Maybe the police could have searched it if they should have. If they had, they wouldn't have found any of these things; that's speculation what the police might have found. But if you actually had affirmative proof that they did search, they did search the very next day and they didn't find these things, that would have been very very important and it would have been the main – it should have been the main feature of the defense presentation because it does tend to contradict or undermine the accuracy of the identification witnesses.
>
> And these people actually were robbed. They are basically telling the truth as they believe it to be, but that doesn't mean they are right. And here's important evidence that at worse, casts doubt on whether or not they are right. So yes, I'd have presented it a whole lot differently if I, as the trial lawyer, knew the truck had been searched.

(A-71-72) (emphasis added). As explained by Mr. Kessler, the fact that the items in question (i.e., a hoodie, pornography, or gun) were *not* located in the Petitioner's truck *was his best defense.* The State's failure to provide this exculpatory evidence, and the Petitioner's attorney's failure to notice and draw attention to it, deprived the Petitioner of his best chance of winning at trial.

Finally, with regard to the *Brady* issue, the State not only failed to provide the documentation regarding the search of the truck, but law enforcement officials *affirmatively* misled defense counsel that the Petitioner's truck had not been searched – and during the trial, law enforcement officials and the prosecutor asserted that the truck *was not searched. See, e.g.,* (A-67). Evidence which is so clearly exculpatory and materially favorable to the defense is required to be disclosed by both *Brady* and *Youngblood v. West Virginia*, 547 U.S. 867, 869-870 (2006), wherein the Court stated:

> A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See* [*Brady*,] 373 U.S. at 87. This Court has held that the *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985), and *Brady* suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles* [*v. Whitley*], 514 U.S. [419,] 438 (1995)]. *See id.* at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *Bagley*, *supra*, at 682 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles*, 514 U.S. at 434. *The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id.* at 435.

(Emphasis added). In this case, the previously-suppressed evidence could reasonably be taken to put the whole case in such a different light as to *undermine confidence in the verdict.* In its order, the district court cited defense counsel's argument at trial that

law enforcement officials were negligent for failing to conduct a search:

> Mr. Strickland['s counsel] argued with vigor that officers never found a hoodie, pornography, or gun. But with no search to point to, the argument suggested officer negligence more than Mr. Strickland's innocence – there was no way to know whether the materials were or were not in the truck. The jury might have excused the officer for not conducting a search, reasoning the materials could easily have been moved in the five days or so between the robbery and Mr. Strickland's arrest. And more importantly, officer negligence was not the issue. The jury could have concluded that with no evidence of what was or was not in the truck, the defense argument about failure to locate a hoodie, pornography, or gun was nothing more than speculation.

(A-17). But the district court specifically found the Petitioner's argument "was *substantially weaker* than it could have been":

> These arguments would have been different had the jury been provided *truthful information* about the results of the search that occurred one day after the robbery.

(A-17) (emphasis added). The favorable evidence – had it been known by defense counsel and presented to the jury – would have put the "whole case in such a different light." *Kyles*, 514 U.S. at 435.

**2. The circuit court's prejudice analysis**.

In its opinion, the Eleventh Circuit stated:

> The jury heard ample evidence supporting Strickland's guilt. For example, it heard: (1) eyewitness testimony from one of the victims identifying Strickland as the robber; (2) testimony from the other victim describing Strickland's physical appearance, and asserting that he had been able to identify Strickland as one of two possible suspects when he viewed a photographic line-up of possible suspects; (3) eyewitness testimony that the robber was driving a green Ford Ranger with a license plate bearing the same first three letters as the license plate on Strickland's green Ford Ranger; and (4) testimony that Strickland, who lived in Georgia, was in Tallahassee on the night of the robbery.
>
> Moreover, the jury heard testimony that the prosecutors had failed

> to uncover the gun, pornographic material, or hooded sweatshirt that were allegedly involved in the robbery – and it convicted Strickland anyway. It's unlikely that the jury's determination – in light of all of the facts listed above weighing in favor of Strickland's guilt – would have been different had it been informed that, more than simply not finding the incriminating items, the police had searched for and still not found them. And that's especially so given the roughly 34 hours that elapsed between the robbery and the search – ample time for Strickland to have moved the incriminating items out of his truck.

(A-10-11). As explained below, the Eleventh Circuit's prejudice analysis is also erroneous.

Regarding Todd Laycock's purported identification of the Petitioner, the record is clear that this victim had been drinking just prior to the incident:

> Q [I]t's your testimony you had one, maybe two drinks that were liquor, not beer?
>
> A Correct.

(A-62). Moreover, the other victim (Emiliano Diamante/Pantner) did *not* identify the Petitioner. Finally, the victims had a very limited opportunity to view the suspect at the time of the crime, the victims did not give attention to detail, and they were inconsistent and inaccurate in their descriptions of the suspect. And despite a description that the perpetrator was wearing glasses, none of the persons in the photo line-up were wearing glasses. (A-37).

Regarding the contention that the victims identified the vehicle in question, the record establishes that the Petitioner's truck had *significant* damage on the date of the robbery (A-73; A-68-70), and *neither victim* alleged that there was damage to the truck that was involved in the robbery.

Finally, regarding the assertion that the Petitioner was in Tallahassee on the night of the robbery, undersigned counsel note that the land area of Tallahassee – the eighth largest city in Florida based on population – is approximately 100 square miles. *See* Wikipedia, Tallahassee, Florida, https://en.wikipedia.org/wiki/Tallahassee,_Florida (last visited July 22, 2021). Tallahassee is approximately thirty miles from Cairo, and it is common for people from Cairo to shop and eat in Tallahassee. Thus, even if it "appeared" that the Petitioner was in Tallahassee on the date of the crime, that fact does *not* place the Petitioner at the scene of the crime.

**3. The *Strickland* prejudice standard – as articulated by this Court**.

Regarding the prejudice prong of the *Strickland* standard, the Court has clarified that a petitioner need not demonstrate it is "more likely than not, or prove by a preponderance of evidence," that counsel's errors affected the outcome. *Strickland*, 466 U.S. at 693-694. Instead:

> [t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Id.* at 694, 104 S. Ct. at 2068. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. In making this determination:

> a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. *Some errors will have had a*

> *pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture*, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . . *[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.*

*Id.* at 695-696 (emphasis added).

**4. Both the district court and the circuit court misapplied the *Strickland* prejudice prong to the facts of the Petitioner's case**.

Applying the proper prejudice standard to the facts of the Petitioner's case, the Petitioner has established that the "fundamental fairness" of his trial has been called into question due to counsel's ineffectiveness, and that counsel's error in failing to properly inform the jury about the exculpatory search (i.e., that a search of the Petitioner's truck one day after the robbery in question did not uncover a hoodie or gun) undermines confidence in the outcome of the Petitioner's trial. Contrary to the Eleventh Circuit's assertion at the conclusion of its opinion, there is a *substantial difference* in telling the jury that no search was conducted versus telling the jury that a search was conducted and no incriminating items were found.

In support of his argument, the Petitioner relies on *Higgins v. Renico*, 470 F.3d 624, 635-636 (6th Cir. 2006) – where the Sixth Circuit Court of Appeals held that the state court's denial of the petitioner's ineffectiveness claim for failing to cross-examine and impeach a key prosecution witness was based on an unreasonable application of

the prejudice prong of the *Strickland* standard:

> Higgins was not required to demonstrate how he "would probably have won." *He simply needed to present the factual basis for his contention that confidence in the outcome of his case was undermined by his counsel's deficient performance. Higgins did just that.*
>
> Higgins identified for the state appellate court the one critical error made by his attorney, and he identified some-albeit few-record facts to support his claim of prejudice. Specifically, he stated that his attorney failed to cross-examine the "key witness, Mr. Young, [] the person who made the identification of [M]r. Higgins as the shooter." Supp. J.A. at 135. Higgins went on to state that, by failing to cross-examine Young, his attorney left the jury "with essentially unrebutted, and untested, testimony that Mr. Higgins had the gun and shot the victim." *Id.* at 137. He pointed out that "[t]he evidence of Mr. Higgins' guilt was not overwhelming, and consisted of the testimony of Mr. Young;" and he argued that his "[c]ounsel 'dropped the ball' when it really mattered," *id.*, in effect providing Higgins with no defense at all. Higgins concluded his argument with the statement: "[T]he prejudice to this defendant is obvious." *Id.*; *see Berryman* [*v. Morton*], 100 F.3d [1089,] 1102 [(3d Cir. 1996)] (finding prejudice to the defendant "obvious" where defense counsel failed to cross-examine an identification witness whose inconsistent identification testimony from previous trials could have raised questions in the minds of the jurors regarding the witness's credibility and/or ability to identify the defendant).
>
> While Higgins presented his *Strickland* claim to the state appellate court in a skeletal manner, we think his presentation was sufficient to place the issue of prejudice squarely before that court. The state court nonetheless rejected Higgins's claim without discussion. As noted by the district court: "The State court of appeals' discussion of the prejudice prong of the *Strickland* test was truncated; that court simply stated that the petitioner failed to show prejudice." J.A. at 289. We assume, as did the district court, that the state court rejected – albeit in conclusory fashion – Higgins's prejudice claim on the merits. *Like the district court, we think this rejection represents an 'unreasonable application' of clearly established Supreme Court precedent. The state court may have correctly identified the governing legal principle from the Supreme Court's Strickland decision, but it unreasonably applied that principle to the facts of Higgins's case. Higgins is therefore entitled to conditional habeas relief.*

(Emphasis added). As in *Higgins*, in the instant case, the state court may have

correctly identified the governing legal principle from *Strickland*, but it unreasonably applied that principle to the facts of the Petitioner's case – and both the district court and the circuit court also misapplied *Strickland*. *See also Malone v. Walls*, 538 F.3d 744, 761 (7th Cir. 2008) ("Consequently, we must conclude that the state appellate court's determination that Mr. Malone was not prejudiced by his counsel's failure to call Villanueva was not a reasonable one."); *Bell v. Miller*, 500 F.3d 149, 155-156 (2d Cir. 2007) ("[T]here is a 'reasonable probability' that had trial counsel consulted with a medical expert, ]the result of the proceeding would have been different.' The prosecution's case against Bell was thin – there was no eyewitness other than Moriah . . . . Impeaching Moriah's memory was therefore all in all for the defense. Armed with the insight and advice of a medical expert, a lawyer could have vastly increased the opportunity to cast doubt on this critical evidence.") (citation omitted).

Due to counsel's ineffectiveness, the jury *never heard* that a search of the Petitioner's truck revealed no incriminating evidence. As explained by the criminal defense expert who testified during the postconviction hearing:

> If [he had] been trying this case, knowing that the truck had in fact been searched, the fact it was searched and they didn't find these important items in the truck the day after the crime would have been a *main feature of the defense. It would have been the strongest point that the defense could have presented in the case.*

(A-71-72). Clearly counsel's failure to introduce this powerful evidence resulted in a "pervasive effect" on the "inferences" to be drawn from the evidence and indeed did "alter[] the evidentiary picture" – thereby undermining confidence in the outcome of

this case as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 695-696. *See Higgins*, 470 F.3d at 635 ("He simply needed to present the factual basis for his contention that confidence in the outcome of his case was undermined by his counsel's deficient performance. Higgins did just that.").

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to further clarify the proper prejudice standard that applies to ineffective assistance of counsel claims. The issue in this case is important and has the potential to affect all criminal cases nationwide. Accordingly, for the reasons set forth above, the Petitioner prays the Court to grant this petition for writ of certiorari in order to address this important issue.

## I. CONCLUSION

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

Respectfully Submitted,

/s/ Michael Ufferman

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

CRYSTAL MCBEE FRUSCIANTE
11110 West Oakland Park Boulevard
Suite 388
Sunrise, Florida 33351
(954) 495-7889/ Fax (866) 936-4546
FL Bar No. 80215
Email: crystal@frusciantelaw.com

COUNSEL FOR THE PETITIONER