No. 23-5861

IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Pierre – Petitioner

vs.

Ricky D. Dixon,
Secretary, Florida
Department of Corrections– RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether the Courts below decided an important federal question in a way that conflicts with the relevant decisions of this court when they denied –without an evidentiary hearing – Petitioner's petition for writ of habeas corpus, which asserted trial counsel was ineffective for failing to object and move for mistrial based on a discovery and/or Brady violation, thus depriving Petitioner of his Sixth Amendment Right to the effective assistance of counsel.

A prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police, and failing to do so violates a defendant's constitutional due process right. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995). Mr. Pierre's prosecutor failed to learn of and disclose favorable video evidence possessed by the police. Was the reasoning of the State Court contrary to and an unreasonable application of *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995), where it concluded that since the prosecutor's office did not possess the favorable video evidence, due process was not violated?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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

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Cases **Page(s)**

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[X] For cases from **federal courts:**

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

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 2, 2023. Appendix A.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition rehearing was denied by the United States Court of Appeals on the following date: July 19, 2023, and a copy of the order denying rehearing appears at Appendix C.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI Ratified in 1791

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV Ratified in 1868

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions—28 U.S.C. § 2254

STATEMENT OF THE CASE

Through an Amended Information, the State charged Petitioner Joseph Pierre with the attempted first-degree murder of his ex-wife, Marie (R. 78-79). Petitioner proceeded to trial in the Seventeenth Judicial Circuit in and for Broward County, Florida. Petitioner was found guilty as charged (T. 106-07). The jury's verdict included finding that Petitioner possessed a firearm, that he actually discharged a firearm, and that he inflicted great bodily harm upon Marie as a result of discharging the firearm (R. 107). For this conviction, the trial court sentenced Petitioner to life imprisonment, on September 12, 2016. (R. 152-54). Petitioner filed a timely Notice of Appeal.

Petitioner appealed his judgment and sentence to the Fourth District Court of Appeal of Florida, which was per curiam affirmed on May 16, 2018, and mandated on June 25, 2018. 2018 Fla. App. Lexis 6888; 43 Fla. L. weekly D110.

On December 10, 2018, Petitioner filed a post conviction motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure claiming ineffective assistance of trial counsel. On April 4, 2019, the state filed its response to Petitioner's motion. On April 18, 2019, the Petitioner filed a Reply to the State's response to correct some inaccuracy.

On May 6, 2019, the Court summary denied the Petitioner's Motion for Postconviction Relief without an Evidentiary Hearing.

Petitioner filed a timely Notice of Appeal and the state appellate court per curiam affirmed the order of the lower court. See Pierre v. State, 288 So.3d

55 (Fla. 4th DCA 2019).

Petitioner filed his Federal petition for writ of habeas corpus timely in April 2020. The United States District Court denied Petitioner's section § 2254 petition and certificate of appealability on August 18, 2022.

On November 21, 2022, Petitioner requested Certificate of Appealability from the United States Court of Appeals for the Eleventh Circuit, which was denied on June 2, 2023. Petitioner filled a motion for reconsideration of certificate of appealability in the United States Court of Appeals, which was denied on July 19, 2023. The instant petition for writ of certiorari follows.

Petitioner's trial was centered on the identity of the assailant; whether the Petitioner was the masked man who twice shot Marie outside her home. Police did not find the weapon or the mask used in the shooting. When arrested, Petitioner was not wearing the same clothes as the shooter and, though he provided a statement, he did not make a confession. As a result, the state's case rested primarily upon the credibility of its witnesses' testimony, Petitioner's location at apprehension, and broken pieces of a vehicle's side mirror found outside Marie's residence.

Prior to the Petitioner's trial, his attorney deposed Detective Johnson an investigator who denied there was any video evidence relevant to this case. See pages three and four of Detective Johnson's deposition "no video, no video, no video, no relevant video."

While counsel was questioning Detective Johnson at trial, Mr. Johnson

testified that there was video-taped footage of the entrance of the Mayfair gated community. According to Detective Johnson, there was a surveillance camera near the entrance of the gated community, as well as a camera at the top of a building about two feet from the scene of the shooting. (T. 630). Police made efforts to retrieve videos from these cameras, but they ultimately "did not uncover any videos" useful to the prosecution. (T. 631). The video did, however, show that the video camera of the gate was working that evening. (T. 637).

During trial, the court on its own became involved stating the following:

The Court: Let's be clear about one point here, Detective, if you could. Did you receive any videotape from the camera at the gate of this complex?

The Witness: Yes.

The Court: What do you mean when you indicated earlier it wasn't relevant for your purpose?

The Witness: I was assigned the task --

The Court: Keep your voice up. Speak to the jurors.

The Witness: I was assigned the task of collecting videos to another detective. That detective made contact --

The Court: Don't tell us what the detective was told or what the detective told you. I just want to know why you said you didn't receive any videotapes that was relevant. What do you mean by that?

The Witness: What I meant was the video I did receive started without a crime scene person arriving at the scene. Meaning, this incident occurred hours

before that crime scene person arrived, and the video was not available at that point. There was no video to check hours prior to the crime scene being shown on the video.

The Court: Mr. Reyes, anything else on the witness?

Mr. Reyes? Just on the --

The Court: Go ahead. I just wanted to clarify that point.

Mr. Reyes: Thanks, Judge.

Trial transcripts at p. 637.

The above stated trial court's inquiry shows that there was video footage that would likely show other vehicles entering and exiting the community on the day events occurred.

The neighbor's video on the other hand would show any vehicles arriving at, and leaving from the victim's house. Either on the entrance camera, or the neighbor's video, Petitioner's vehicle would not be seen entering or leaving the scene of the offense imputed to him.

The exculpatory video evidence that the state has in its possession substantiates that the Petitioner is innocent and did not commit the crime.

REASONS FOR GRANTING THE PETITION

The decision of the United States Court of Appeals for the Eleventh Circuit conflicts with the relevant decision of this Court in Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052 (1984). This case is a timely opportunity to correct an injustice. Additionally, the decision below is erroneous, and the issue that it addresses is important.

Also the U.S. Court of Appeals erred by using the wrong case law to deny the Petition on Ground One. The exculpatory video because Petitioner does not have any issue of mental health and his cognitive thinking is perfect. The record speaks for itself. See *Pye v. Warden*, Ga. Diagnostice prison, 50 Fed. 4th 1025, 1034-35 (11th Cir. 2022) (en banc) for the case law. In addition, the case law is distinguishable from Petitioner's case and Petitioner's fact.

I I. The United States Court of Appeals held Petitioner to the standard prescribed in Strickland, supra, in the wrong way.

In Strickland, supra, this court stated that ineffective assistance of counsel has two components. 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. Second , the Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprived the Defendant of a fair trial.

In his Federal habeas corpus petition brought pursuant to 28 U.S.C. § 2254,

Petitioner Pierre asserted counsel was ineffective for failing to object and move for mistrial based on a discovery and/or Brady[1] violation. In this case, the prosecution failed to turn over exculpatory evidence in the form of a video tape, violating the Petitioner' Sixth Amendment Right to effective assistance of counsel and his due process under the Fourteenth Amendment. At the Petitioner's trial, it was undisputed that the prosecution did fail to turn over exculpatory evidence in the form of a video tape from the Mayfair gated community's entrance on the date of the crime. See Trial Transcripts at p. 637. The United States District Court denied this claim without an evidentiary hearing. The District Court also denied certificate of appealability on this claim as well.

In the United States Court of Appeals for the Eleventh Circuit, Petitioner asserted that other jurists of reason, namely the Second District Court of Appeal of Florida, had found similar failures of the trial court to amount to unconstitutional denials of a Defendant's Sixth Amendment Right to the effective assistance of counsel and due process. The Second District Court of Appeal held that an evidentiary hearing would be required on defendant's claim that he was denied effective assistance of counsel when his attorney did not request *Richardson*[2] hearing on grounds that State had failed to disclose change in police officer's testimony. See *Collins v. State*, 671 So.2d 827 (Fla. 2nd DCA 1996). In Collins, the State Second District Court of Appeal reversed and remanded for a an evidentiary hearing to determine if defendant's trial counsel

[1] Brady v. Maryland, 83 S. Ct. 1194 (1963)
[2] Richardson v. State, 246 So.2d 771 (Fla. 1971)

was ineffective by not seeking *Richardson* hearing to determine if there had been a discovery violation when police officer gave testimony tending to locate defendant at scene of robbery, which was contrary to what she had given at deposition.

In the instant case, the evidence at trial established that the State was in possession of the exculpatory video evidence. According to the lead detective in the case, Mr. Johnson, who testified during trial, there was overwhelming evidence that the State was in possession of the exculpatory video evidence. On this line, counsel was ineffective for failing to object and move for mistrial based on a discovery and/or Brady violation where the prosecution failed to turn over exculpatory evidence in the form of a video tape, violating the Petitioner's Sixth Amendment Right to effective assistance of counsel and his due process under the Fourteenth Amendment. At the Petitioner's trial, it was undisputed that the prosecution did fail to turn over exculpatory evidence in the form of a video tape from the Mayfair gated community's entrance on the date of the crime. See Trial Transcripts at p. 637.

A prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police, and failing to do so violates a defendant's constitutional due process right, *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 15555 (1995). Petitioner's prosecutor failed to learn of and disclose favorable video evidence possessed by the police.

Counsel has a duty to make reasonable investigation or to make

reasonable decision hat makes particular investigators unnecessary. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Petitioner's counsel did not move for continuance or mistrial to make a reasonable investigation after discovery during trial that police possessed undisclosed favorable evidence.

Defense counsel's (Mr. Reyes) performance was deficient for failing to move for mistrial and object to the prosecution's failure to turn over a video tape of the entrance of Mayfair, which is a gated community where the attempted murder of Marie Pierre (victim) took place, and the video tape that was withheld was exculpatory to the defense. The entrance of the Mayfair gated community was video taped 24 hours a day, 7-days a week and would have shown that the Petitioner was not the person who entered the Mayfair community gated community on December 22, 2015, in the early morning hours or at any time of the day or after the above referenced date.

Defense counsel's deficient performance is further apparent for failing to move for mistrial, where defense counsel argued to the jury during closing argument that this video "should have [been] turned...over to the defendant and that this failure was Brady violation, exculpatory evidence." (T.724). The record shows that defense counsel never alleged to the trial judge a discovery violation or a Brady violation. Counsel's deficient performance for failing to move for mistrial to allow further discovery did prejudice the Petitioner. Had counsel motioned for mistrial there is more than a reasonable probability the court would have granted counsel's motion to allow further discovery based on

Detective Johnson's surprising testimony during trial. Before trial Detective Johnson was deposed and at that time he testified there was no video, no video of the entrance of the Mayfair community. However, at trial, Detective Johnson testified that there was a working camera which video taped the entrance of the Mayfair gated community at the time of the offense. The tape was not turned over to the defense in the prosecution's discovery. Counsel never investigated whether there was a tape because of Detective Johnson, which prejudiced the Petitioner's defense. Thus the court would have granted mistrial for further discovery based on the above stated facts.

Additionally, had the court granted a continuance for further discovery based on the Brady violation, there is a reasonable probability the outcome of the trial would have been different because the jury would have had an opportunity to review the tape showing that neither the Petitioner nor his car was seeing entering or exiting the Mayfair gated community. Thus, the jury would have had reasonable doubt of the witness's identification of the Petitioner because neither the Petitioner nor his car was seeing entering or exiting the Mayfair gated community. Based on the above stated facts and law, the lower courts denied this ground, without conducting an evidentiary hearing to pursue this issue.

Petitioner submits to this honorable Court that he continued litigating his case looking to get the State to produce the videos in its possession under chapter 119, Florida Statute. Petitioner did not succeed in his efforts to obtain

the videos as the State produced an affidavit that they did not have them.

On appeal of Petitioner's petition for writ of mandamus seeking the above referenced video tapes, Petitioner stated that the facts stated in the affidavit of the custodian of records were insufficient to establish that the State did not have in its possession the exculpatory video evidence. See also *State v. Alfonso*, 478 So.2d 1119, 1121 (Fla. 4th DCA 1985)("Information within the possession of the police is considered to be in the possession of the prosecutor"). As previously stated on Petitioner's second petition for writ of mandamus on page 7, Petitioner was looking to get the State to produce the videos in its possession under chapter 119, Florida Statute. If the act sought to be compelled is indisputably required by a valid statute, the court is left with no room for the exercise of discretion and must grant the writ in keeping with the law. *Comcoa, Inc. v. Coe*, 587 So.2d 474 (Fla. 3rd DCA 1991). See also *Tweed v. Sistrunk*, 697 So.2d 888 (Fla. 5th DCA 1997); *Mattson v. Kolhage*, 569 So.2d 1358 (Fla. 3rd DCA 1990).

According to Detective Johnson, the video in question in this litigation was irrelevant. However, it is not the State or Detective Johnson only who should determine if the video was irrelevant for Petitioner's defense. The defense lawyer, the Petitioner more importantly, the judge, and the jury should have viewed the video to determine the outcome of the Petitioner's trial proceeding. If the video was redacted or lost, Petitioner can ask the judicial system to exonerate him because he is innocent of the imputed charges by the State.

Let it be known, the state did not conspire to not provide the exculpatory videos. But the exculpatory videos that the State withheld should further establish Petitioner's innocence. (see Motion For (COA) for more details)

By not having an evidentiary hearing and in camera inspection is like giving the State the green light to continue not producing material or exculpatory evidence and illegally incarcerating the Petitioner in the State of Florida.

Petitioner submits that the Circuit Court did not comply with the proper procedures for addressing Petitioner's writ by conducting an evidentiary hearing or in camera inspection. The State rejected Petitioner's requests for public records as exempt from disclosure pursuant to "Security video/surveillance - exempt § 281.301, F.S. and/or § 119.071(3)(a), F.S., which was incorrect, and later denied it again by indicating that "no such record exists within the State's file[.]" See Appellee's response to Petitioner's petition for writ of mandamus at p.2 in the lower court.

The custodian of records only looked in the box of the State Attorney Trial records and exhibits. The videos won't be there anyway because it was never made an exhibit. She needs to look where the Detective put the video after he viewed it. In addition, the State did not say in its response what it did with the videos that the Detective viewed. The State ignores that fact.

In fact, the State has the videos according to trial records and the testimony of Detective Johnson. That is the reason an Evidentiary Hearing and camera inspection is even more important so the truth can be revealed.

In fact, besides the evidence at trial records, the State acknowledged the existence of the videos in its response on April 4, 2019 to the Petitioner's Post

Conviction Motion on December 05, 2018, and its rehearing response on December 30, 2019, because the State stated that Detective said the video was irrelevant. See the State's response in L.T. Case No.: 15016328CF10A. Therefore, the State has recognized the video exists. Then the Custodian of Records stated on October 8, 2021, no such records found and before that, the State on January 2, 2020, stated the video was exempt from chapter 119.071(3)(a). The State has not been truthful or forthcoming about the videos and the writ of mandamus should have been granted for an evidentiary hearing and in camera inspection. In addition, on December 24, 2019, the Fourth District Court of Appeal recognized the video exist when it ordered the State to respond to the Motion for Rehearing. The response shall address how Officer Johnson's testimony or any other part of the record refutes the possible existence of other relevant video from earlier in the evening of the crime and whether the video disclosed is in fact irrelevant and would show nothing of value to the defense. (Case # 4D19-1802, L.T. Case 15016328CF10A).

The evidence is unambiguously established that the State withheld the alleged exculpatory videos (trial transcripts at page 637; see also Document # 47 in the District Court, case number 20-60760. CIV.RKA). Petitioner should have got relief in the U.S. District Court.

The following is what document #47 stated. Our Petitioner, Joseph Pierre, filed a petition for Writ of Habeas Corpus under 28 U.S.C. § § 2254, challenging his State Court conviction for attempted first degree murder. See petition (ECF

No. 1). One of Pierre's claims is that his trial counsel was "ineffective for failing to object and move for mistrial...where the prosecutor failed to turn over exculpatory evidence in the form of a video tape[.]" Id. at 3-4. On May 29, 2020, the Respondent submitted evidence that tends to rebut Pierre's contention on his claim. See generally response to Order to Show Cause. [ECF. No. 8]; Appendix to Response [ECF NO. 9]. When we reviewed Pierre's State Court docket. However, we discovered that Pierre had had subsequently filed in State Court a Petition for Writ of Mandamus, concerning the allegedly exculpatory video. Given what we've been able to glean on line, we think Pierre's petition (and the State Court's subsequent disposition of that petition) might well be relevant to our resolution of Pierre's Federal Habeas Corpus Petition.

In the document, it also stated: "It was perfectly appropriate for us to do this." See *Paez v. Sec'y Fla. Dept. of Corr.*, 947 F. 3d 649, 652 (11th Cir. 2020)("Federal Rule of Evidence 201 permits a Court to judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. State Court records...generally satisfy this standard.") (Cleaned up)). Again see document # 47, case number 20-60760 for the complete document.

People who followed the case, including friends and family thought Petitioner was going to get relief. Unreasonably, the District Court and the U.S. Court of Appeals misapplied the law and fact and denied the petition. People who were just mentioned including Petitioner were in shock when Petitioner got

denied in the U.S. District Court and the U.S. Court of Appeals because it was already established in document # 47 that Petitioner was going to get relief.

In addition, well established Federal case law stated: "A well developed body of Federal Court case law construing the habeas corpus statute recognizes that State proceedings are not sufficiently "full and fair" if an indigent prisoner was denied an adequate opportunity to adduce the relevant facts or legal claims, was obstructed by State officials in other ways, or was subjected to otherwise deficient or unconstitutional procedures, recall the videos would have exonerated Petitioner, had the jury seen them."

Also, well established case law stated: "Where no evidentiary hearing is held on a claim the factual allegations in a 3.850 Motion must be accepted as true to the extent they are not conclusively refuted by the record." *Tribbitt v. State*, 339 So. 3d 1029 (2d DCA 2022).

Furthermore, well established case law stated: ("Our own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial. Accordingly, the judgment below must be reversed.") See *Napue*, 360 U.S. at 264. The U.S. Court of Appeals unreasonably denied the petition or the exculpatory video for an evidentiary hearing for an in camera inspection.

Moreover, well established case law stated: *Hash v. Johnson*, 845 F. Supp. 2d 711, 751-52 (W.D. Va. 2012) Collecting cases where government misconduct including the failure to disclose 2017 U.S. Dist. LEXIS 31 exculpatory evidence,

justified 2254 relief.)

Based n the record, this Court will be able to establish that Petitioner had an unjust trial, unjust conviction, unjust incarceration and Petitioner also had a substantial constitutional violation due to the fact the State withheld the most important piece of evidence in the trial, the exculpatory video evidence which should have exonerated Petitioner, had the videos presented to the jury. Petitioner would never have been indicted, had the videos been revealed since the beginning. The videos would have further established Petitioner's innocence. Petitioner would never have gone to trial or prison. The record unambiguously speaks for itself.

"More likely than not no reasonable juror would have found Petitioner/Petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

According to the record and the testimony of Detective Johnson during trial, the exculpatory video evidence is real, true, clear and convincing. (T. 637). *Reed v. Quarterman*, 504 F. 3d 465, 49 (5th Cir. 2007).

Mr. Pierre's prosecutor failed to learn of and disclose favorable video evidence possessed by the police. Petitioner's 14th Amendment rights were violated when the prosecution failed to comply with discovery request[s] and withheld exculpatory evidence (video footages). Petitioner's due process rights under the U.S. Constitution were plainly violated when the withholding of the evidence prevented Petitioner from demonstrating his innocence, precluding

Petitioner from corroborating to the jury, with tangible evidence his account of the day of the incident. See also *State v. Alfonso*, 478 So. 2d 1119, 1121 (Fla. 4th DCA 1985)("Information within the possession of the police is considered to be in the possession of the prosecutor.")

This Court is put in place to correct the errors of the previous Courts to prevent a miscarriage of justice or manifest injustice.

Also the constitutional error had a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) because had the video presented to the jury, Petitioner/Petitioner would have been found not guilty and Petitioner suffered actual prejudice.

The *Brecht* harmless error requires habeas petitioner to prove that they suffered "actual prejudice." *Mansfield v. Sec'y Dep't of Corr.*, 679 F. 3d 1301, 1307 (11th Cir. 2012) Petitioner did suffer actual prejudice because had the videos presented to the jury Petitioner would have been found not guilty because Petitioner did not commit the crime Petitioner was falsely accused. Petitioner should be able to satisfy both AEDPA and *Brecht's*. Counsel was also ineffective for not getting the videos and his ineffectiveness prejudiced Petitioner.

Despite overwhelming evidence that Petitioner did not commit the crime and there is nothing that connected Petitioner to the crime except the false testimonies of the key witnesses, Petitioner's ex-wife and son who were deeply inconsistent throughout the trial and their testimonies were impeached,

Petitioner did not get relief in the State Courts, the U.S. District Court. and the U.S. Court of Appeal. Recall, too, Petitioner was falsely accused and the exculpatory video that the State withheld will further prove his innocence.

Petitioner was supposed to get relief in the U.S. District Court according to Document # 47 without the District Court applying Section § 2254(d). Also the U.S. District said Document # 24 includes some tangential argument. All the tests that were conducted did not reveal that Petitioner committed the crime. For sure, the exculpatory video would have exonerated Petitioner.

The Petitioner respectfully submits that jurists of reason could easily debate whether the Petitioner was denied his Sixth Amendment Right to the effective assistance of counsel on this claim. See McKeehan v. State, 838 So. 2d 1257 (Fla. 5th DCA 2003) in which Defendant appealed from his convictions of robbery with a firearm, grand theft, aggravated assault with a firearm and kidnapping with intent to commit a felony by a jury in the Circuit Court for Orange County (Florida). Defendant's convictions were reversed where the admission of oral testimony as to the contents of a video tape violated the best evidence rule. The error was not harmless given the jury's questions indicating that the jury relied on the evidence. See also United States v. Nelson, 2022 U.S. Dist. Lexis 65962, United States District Court of the Eleventh Circuit (2022), Defendant moves the Court to dismiss count Two of the Indictment as a sanction for the government's willful failure to provide discovery pursuant to Federal Rule of Criminal Procedure 16, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963),

Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972), and the standard pretrial order issued by this court on April 13 , 2021. The government does not deny its dereliction in providing the requested discovery material. However, the government contends that dismissal is not warranted because the Defendant cannot establish a Brady violation since the surveillance video is not in the government estimation, favorable to defendant and because the government provided other evidence relating to the allegations contained in count two, including police reports and witness statements. The Court finds the government arguments unavailing. Recall, Detective Johnson stated the video was irrelevant.

In U.S. v. Bagley, 773 U.S. 667 (1985) this Court affirmed that constitutional guaranteed are provided by the due process requirement requiring that criminal prosecutions comport with prevailing notions of fundamental fairness. Thus, the prosecution has a duty to disclose evidence favorable to the accused that if suppressed would deprive the Defendant of a fair trial. (Quoting California v. Trombetta, 467 U.S. 479 (1984)

Once the prosecution discloses knowledge of exculpatory evidence to the defense, the fundamental duty of trial counsel to reasonably investigate the evidence is invoked under the right to counsel and the due process clause. Hence, if trial counsel fails to investigate or present the exculpatory evidence, the Defendant is denied both the right to effective assistance of counsel and the constitutional guarantee of access to favorable evidence. Sears v. Upton,

561 U.S. 945 (2010) (counsel failed to investigate mitigating and unreasonably limited the investigation).

Most importantly in the present case, the prosecution did not disclose the existence of video evidence until after trial had begun, which led to trial counsel failing to investigate or present the video at trial. The failures denied the Petitioner the opportunity to present the video showing he did not enter the community in or around the time of the alleged murder, and therefore did not have the opportunity to commit the crime.

Thus, the failures to correct the errors of the prosecutor not timely disclosing favorable evidence would result in a manifest injustice in this and similar circumstantial cases which is why this court should grant this petition, answer the constitutional question presented herein and vacate the judgment of conviction. See Sears v. Upton, 561 U.S. 945 (2010) (Counsel failed to investigate mitigating evidence and limited investigation).

("to uphold the trial court's summary denials of claims raised in a 3.850 motion, the claims must be, either facially invalid or conclusively refuted by the record.") (quoting Foster v. State, 810 So. 2d 910, 914 (Fla. 2002), and Peede v. State, 748 So. 2d 253, 257 (Fla. 1999). In Petitioner's case, the claim is facially valid or not conclusively refuted by the record.

Besides the reasons already mentioned, the petition should also be granted for the following compelling reasons. The State was supposed to present the videos to the jury and provided them to the defense before trial. The

State violated the discovery rule and the 14th Amendment Right of Petitioner. This is a substantial constitutional violation.

The exculpatory videos that the State withheld are real and convincing according to detective Johnson who testified during trial. See State v. Alfonso, 478 So. 2d 1119, 1121 (Fla. 4th DCA 1985) ("Information within the possession of the police is considered to be in possession of the prosecutor.")

Detective Johnson admitted to the trial Judge that he received the videotape from the camera at the gate of the complex (T. 637). Recall Detective Johnson also said the video was irrelevant. It is clear the video was not relevant to detective Johnson or the State but it was relevant for the defense. The video would have exonerated Petitioner, especially Petitioner was falsely accused by the false testimonies of the key witnesses, Petitioner's ex-wife and son. Petitioner has never been in prison before and he is now in prison for a crime he has no knowledge about. Petitioner is confident that this Court will exonerate Petitioner to prevent a manifest injustice or miscarriage of justice from taken place. See Selno v. Ladouceur, 2022 U.S. Dist . Lexis 168406 (United States District Court of the First Circuit, 2022) Opinion: Although a due process violation occurs whenever material exculpatory evidence is withheld, a different violation ensues when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have. . . . exonerated the Defendant[.] Mr. Pierre was entitled to the videos. More importantly, he was falsely accused. Mr. Pierre suffered a substantial constitution violation. Recall.

See trial records at page 637 in the U.S. District Court and this Court will find out that Petitioner should have got relief.

The U.S. Court of Appeals of the Eleventh Circuit in Atlanta, Ga. erroneously denied ground one, the exculpatory video without an evidentiary hearing, without addressing the video that the State withheld. Instead, the court applied a case law that has nothing to do with the videos or the Petitioner. The case law mentioned mental health, difficult childhood and cognitive thinking. None of them applied to Petitioner. There is nothing in on the record stated that Petitioner has anything like that. See Rye v. Warden, Ga. Diagnostic prison, 50 Fed. 4th 1025, 1034-35 (11th Circuit 2022) (en bank). For the case law. The Eleventh Circuit misapprehended the law and the party's position.

Recall: according to Detective Johnson who testified during trial, video exists and the State has the videos Detective Johnson admitted to the to the trial Judge that he received the videos (T 637). Detective Johnson stated that the video was irrelevant. The video was irrelevant to Detective Johnson or the State but relevant to the defense or Petitioner because it would have shown Petitioner did not commit the crime. That is the reason the State kept the video quiet and did not show it to nobody.

The trial lawyer was ineffective for not objecting and declaring a mistrial when he discovered that the State was in possession of the exculpatory video. The exculpatory video would have impeached and derailed the State entire trial. the video would have exonerated Petitioner and would have shown Petitioner

was falsely accused. Had the grand jury seen the videos , Petitioner would never have been indicted. Petitioner would have never gone to jail or prison for the first time in his life at 64-years old. Now Petitioner is 72-years old. There was no DNA connecting Petitioner to the crime. There was no forensic evidence or gunpowder connecting Petitioner to the crime. Petitioner was wearing different clothes than what the key witnesses described. Petitioner's GPS phone did not put him at the crime scene.

Had the trial lawyer done his own investigation and retrieved the videos, Petitioner would never have been in jail or prison because the exculpatory videos would have exonerated him. Petitioner asks this Court to give him relief in order to avoid a manifest injustice or miscarriage of justice.

According to document #24 and more importantly document #47, Petitioner was supposed to get relief in the United States District Court.

The exculpatory videos are tangible evidence and they are more valuable than the false testimonies of the key witnesses. Petitioner, Petitioner's friends and families know, had the jury seen the videos that the State withheld, the jury would have exonerated Petitioner because Petitioner was not the person who committed the crime.

Petitioner's friends and families including Petitioner knew justice was not served in Petitioner's case and the trial was not fair because the video would have exonerated Petitioner. Instead of showing or presented the real evidence or tangible evidence in the case which was the exculpatory video, the State

chose to rely on the false testimonies of the key witnesses which was Petitioner's ex-wife and son to obtain a conviction. The State Courts, United States District Court and the United States Court of Appeals misapplied the law and fact of the case and unreasonably denied the petition.

Recall: According to detective Johnson, there was a surveillance camera near the entrance of the gated community, as well as a camera at the top of the building about two feet from the scene of the shooting (T 630). This videotape footage contains exculpatory information for vindication of Petitioner wrong conviction.

Petitioner's friends and families expected Petitioner to get relief especially when the District Court invoked document #47 and unfortunately and unreasonably denied the Petition.

Even if the State stated since the beginning in its first Public Records Request on January 2, 2020, without amending the Public Records Request form, it does not have the exculpatory video evidence it would not be believable due to the fact that there is overwhelming evidence that video exits according to Detective Johnson who testified during trial and the State itself in the post conviction response and the Motion for Rehearing acknowledged that video exists and it is irrelevant. This issue of the Affidavit and the amendment of the Public Records Request is just a way to stop an in camera inspection because the video will vindicate the Petitioner. Also the state had not amended the Public Records Request until Petitioner filed a Motion for Immediate Hearing.

IF innocence project expresses the willingness to help Petitioner, let it be known that Petitioner has already given the project authorization to do so.

The evidence Petitioner requested date back to 2016, when counsel was questioning Detective Johnson at trial; Mr. Johnson testified that there was video taped footage of the entrance of the Mayfair gated community. According to Detective Johnson, there was a surveillance camera near the entrance of the gated community, as well as a camera at the top of a building about two feet from the scene of the shooting. (T. 630). This video tape footage contains exculpatory information for vindication of Petitioner's wrongful conviction. This was the type of record that the State was required to retain from the sources that created them. Cf. Potts v. State, 869 So. 2d 1223, 1224-25 (Fla. 2 DCA 2004) (stating that Petitioner is entitled to evidence obtained at public expense.)

The evidence which convicted the Petitioner is false and fabricated and the exculpatory evidence that the State has in its possession will prove likewise. That is the reason the State did not show it to the jury and produced it to the Petitioner as part of the discovery. The video will also show that the Petitioner had a miscarriage of justice and the State prejudiced the Petitioner.

Had the Exculpatory videos presented to the jury, the videos would have derailed the States entire case. It comes to the conclusion that Petitioner did not receive a fair trial. Based on The Constitution of The United States, Petitioner suffered a substantial Constitutional Violation.

Petitioner asks this Court to review all the litigation of Petitioner's case in the lower courts, and grant the instant petition for writ of certiorari. Petitioner submits that the need for an evidentiary hearing and in camera inspection is

even more important to find out what the State did with the videos because according to trial records and the testimony of Detective Johnson, videos exist and the State had the videos.

Counsel was ineffective for not objecting to the discovery error on the basis that the State failed to comply with the discovery rules, and ask the court to grant a mistrial of the case. The lack of the video not showing to the jury affected the jury's verdict.

The Petitioner respectfully submits that jurists of reason could easily debate whether the Petitioner was denied his Sixth Amendment Right to the effective assistance of counsel on this claim. Therefore, this Honorable Court should grant the instant petition and reverse directing the United States Court of Appeals for the Eleventh Circuit to grant certificate of Appealability, and grant all relief to which the Petitioner may be entitled to in this proceeding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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