

No.23-5861

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JOSEPH PIERRE-Petitioner,

VS.

RICKY D. DIXON, FLORIDA DEPARTMENT OF
CORRECTIONS-Respondent.

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Supreme Court of the United States
JAN 03 2024
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order
(1) vacating its denial of the petition for writ of certiorari, entered on
December 11, 2023, and (2) granting the petition. As ground for this
Petition for Rehearing, Petitioner states the following:

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PETITIONER WAS ENTITLED TO CERTIFICATE OF APPEALABILITY ON THE VIOLATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PERTAINING TO DISCOVERY AND/OR BRADY VIOLATION.

Petitioner was entitled to certificate of appealability on the violation of his right to the effective assistance of counsel when counsel failed to investigate exculpatory evidence in the form of videotapes that would have shown that Petitioner was not the perpetrator of any of the charges insinuated by the State of Florida.

Counsel's ineffectiveness on the above stated issue was Ground One on Petitioner's section 2254 petition in the United States District Court. Petitioner asserts that other jurists of reason, namely the Second District Court of Appeal of Florida, have found similar failures of the trial court to amount to unconstitutional denial of a Defendant's Sixth Amendment Right to the effective assistance of counsel and due process. The Second District Court of Appeal of Florida has "held that evidentiary hearing would be required on defendant's claim that he was denied effective assistance of counsel when his attorney did not request *Richardson*¹ hearing on grounds that State had failed to disclose change in police officer's testimony" *Collins v. State*, 671 So.2d 827 (Fla. 2nd DCA 1996). In *Collins*, the State Second District Court of Appeal reversed and remanded for an evidentiary hearing to determine if defendant's trial counsel was ineffective by not seeking *Richardson* hearing to determine if there had been a discovery violation when police

¹ *Richardson v. State*, 246 So.2d 771 (Fla. 1971)

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, counsel's failure to seek Richardson hearing amounted to deficient performance and trial counsel's failure to seek Richardson hearing was prejudicial to Petitioner. 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 the above stated facts, counsel was ineffective for failing to object and move for mistrial based on a discovery and/or Brady² 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.

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

² Brady v. Maryland, 383 U.S. 83 (1966)

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. Again, based on the above stated facts and law, the trial court denied this ground, without conducting an evidentiary hearing to pursue this issue. Based on The Constitution of The United States, Petitioner suffered a substantial Constitutional Violation.

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. Here, reasonable jurists would debate the denial of this claim. The United States Court of Appeals and the United States District Court incorrectly concluded that Petitioner had not shown that State court unreasonably found that the state never possessed the video at issue. It seems that the officers mishandled the video footage of the entrance of the Mayfair gated community at the time of the offense.

The lower courts apparent determination otherwise was an unreasonable determination of fact.

Clearly, competent counsel would have addressed the video at issue through a Richardson hearing. The video in question was the single most important piece of evidence of the case, and the lack of a Richardson hearing was a serious weakness in that evidence. Petitioner believes that there is a reasonable probability that if a Richardson hearing being made, the jury would have harbored reasonable doubt about Petitioner's culpability.

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).

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).

In addition 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.

Furthermore, 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).

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~~/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.

Petitioner asserts that on the above stated facts and law submitted to this honorable Court, it should grant rehearing and reverse for the United States Court of Appeals to grant certificate of appealability, because the combination of circumstances is so grossly violative of the principles of *Strickland v. Washington*³ as to call for a reevaluation of the denial of certiorari. Petitioner's denial of certificate of appealability has been appraised on an incorrect application of Federal law in this cause. to the facts of Petitioner's case.

³ *Strickland v. Washington*, 466 U.S. 668 (1984)

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.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the Petitioner and review the judgment denying certificate of appealability below. *Petitioner also asks this Court to give him whatever relief deems necessary or proper.*

Joseph Pierre
Joseph Pierre DC# 151938
Everglades Correctional Inst.
1599 S.W. 187 Ave.
Miami, Florida 33194

Dated: 12-28-2023

Certificate of Petitioner Pro se

As being unrepresented by counsel, I hereby Certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

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PROOF OF SERVICE

I, Joseph Pierre; DC# 151938, do swear or declare that on this date 12-29, 2023, as required by U.S. Supreme Court rule 29, I have served the enclosed petition for rehearing on each party on the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3-calendar days.

The names and addresses of those served as follows:

Office of the Attorney General, at Criminal Appeals Division,
1515 N. Flagler Dr., Suite 900, West Palm Beach, Florida 33401-3432.

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

Executed on 12-28, 2023.

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