23-6696

Ind. No. #23-103

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
NOV 01 2023
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ANTHONY DANIELS, Petitioner

VS.

MARK ROYCE, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PRO SE PETITIONER
GREEN HAVEN CORRECTIONAL FACILITY
594 ROUTE 216/P.O. BOX 4000
STORMVILLE, NEW YORK 12582-4000

JANUARY 24, 2024

QUESTION(S) PRESENTED FOR REVIEW

1. Whether the District Court errored for denial of Petitioner's claim that the State Identification was suggestive, improper and the State Court conclusion that the victim's had an Independent Origin for their In-Court Identification of Petitioner was an Unreasonable Application of clear established law.

2. Whether the District Court errored for denial of Petitioner Dunaway Hearing, based on Petitioner's arrest without Probable Cause nor Miranda warning and basing Probable Cause on the alleged sufficiency of the Identification evidence.

3. Whether the District Court error for the denial of Petitioner claim for the State denial of the Petitioner's essential ingredient of the Sixth Amendment Right to Counsel is that Counsel provide Constitutional Effective Assistance.

4. Whether the District Court error for denial of Petitioner Claim that the State engaged in misconduct based on witnesses perjury testimony, which were relevant misstatements that were so egregious to tender the entire trial Fundamentally Unfair to a degree tetamount to a Due Process violation.

5. Whether the District Court error for denial of Petitioner Claim that the State Supreme Court held the suppression by the prosecution of evidence favorable to the accused upon request violated Due Process where evidence is material either to guilt or punishment Irrespective of the good faith or bad faith of prosecution.

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PETITIONER FOR WRIT OF CERTIORARI

Anthony Daniels, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Department in this case.

The decision of the Court of Appeals denying the Application for a Certificate, dated August 3, 2023, and cited as 2023 WL 9327625.

The decision of the District Court denying the Petition for a Writ of Habeas Corpus is Attached at Appendix CC.

On August 3, 2023, the Court of Appeals denied the Application for COA. The Jurisdiction of this Court is invoked under, 18 USC § 1254 (1).

Constitutional Probvisions:
28 U.S.C. § 2254(d)(1)
28 U.S.C. § 2254(d)(2)
28 U.S.C. § 225(c)

RELEVANT CONSTITUTIONAL PROVISION

1. The Fourteenth Amendment to the United States Constitution provides, in relevant part, "Nor shall any State deprive any person of life, liberty or property, without Due Process."
2. The Fourth Amendment to the United States Constitution provides, The right of the People to be secure in their person, house, papers, an effect, against unreasonable search and seizures, shall not be violated, and no warrant issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search and the person or thing to be seized.
3. The Sixth amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions the accused shall enjoy the right...to be informed of the nature and cause of the accusation... and to have the assistance of counsel for his defense."
4. Relates to the first relevant United States Constitution.
5. Relates to the first relevant United State Constitution.

STATEMENT OF FACTS

On these two separate days, April 6, and April 12, a Robbery was allegedly in Brooklyn by a suspect wearing a disguise. However, as for April 12, 2012, incident, Defendant was at least ten to twelve blocks away, walking down Wallabout St. towards Throop Ave. and Broadway. Defendant was on his way to McDonalds. Defendant notice someone peaking out from two park cars. Once Defendant got a little closer to the two parked cars, The individual came from between the two parked cars and dropped a bike and started speed walking to the other side of the street into the Projects on the corner of Throop Ave. Defendant than walks over to the bicycle and pick it up. As Defendant picks up the bicycle, a pipe falls off the bicycle that appeared to have been tide on the handle bars by a string.

However, the bicycle was not operable which Defendant guess it's the reason why the individual left it. Any event, Defendant pick up the pipe and threw it over the fence and fix the chain and breaks on the bike. Defendant than got on the bicycle and rode off. Just as Defendant started to ride off, P.O. Hughes pulls up on Defendant and said freeze. Honestly speaking, Defendant was startled and just took off.

For the record, defendant was initially observed on Wallabout St. and [Never] observed On Throop Ave. or Crossing Throop Ave.; 2.) Hughes [Never] observed Defendant in possession of no purse; 3.) Defendant [Never] fit SGT. Taveras Sprint Report's Description; 4.) Defendant had discarded his Brown hoody and Black Jacket and once they had found these items on the street, everyone view and allegedly identified these items before giving their initial description, which was "Suggestive," and which is why everyone's description was totally inconsistant with Sgt. Taveras sprint report.

They can lie and change their Description, but they can_[not] change the sprint report. Moreover, based on Sgt. Taveras experience and training, He would have gave the description of the [Outer] Garment [if the Suspect was wearing a Black Jacket] Instead of giving a Description of the [Under] Garment.

POINT ONE

WHETHER THE DISTRICT COURT ERROR FOR DENIAL OF PETITIONER'S CLAIM THAT THE STATE IDENTIFICATION WAS SUGGESTIVE AND IMPROPER AND THE STATE COURT CONCLUSION THAT THE VICTIM'S HAD AN INDEPENDENT ORIGIN FOR THEIR IN-COURT IDENTIFICATION OF PETITIONER WAS AN UNREASONABLE APPLICATION OF CLEAR ESTABLISHED FEDERAL LAW.

Petitioner states, Whether the District Court error for the denial of Petitioner's claim that the Identification was suggestive and improper and the In-Court Identification was an unreasonable Application of clear established federal law **Wade**, 388 U.S. at 241, 87 S.Ct. 1926.

Petitioner States, That he has been fighting for his Innocence through post-conviction motions after another for all these years, but not one Court has made no determination off of the Victim's testimony and based it on the Law and Facts. Based on the Law and the Facts, The victim's Testimony is what makes the case, not the Prosecutor and Police. As here, the Prosecutor and the Police have failed to listen to the victim and states their own fabricated allegation based on what they think and how they feel about the case. It should be determined on the victim's testimony and not determined on the evil influenced of the Prosecutor.

However, The victim testified that she was unable to make an Identification just by the Participants just sitting there, so she had everyone stand and walk to the mirror so that she could

[gage] in on their Height and Build. Victim also states they all were "Different in Height," and she [only] remembers Petitioner from the line up. see **Young v. Conway**, 968 F.3d 69.

Petitioner States, That anything other than the victim's Affirmation and testimony under Oath is Fabrication and Bolstering of the Identification by the Prosecution. Just to bring to the Courts attention, We have here is a case manager P.O. Bonilla that is clearly [Guilty] of Perjury testimony.

(see Ex. E,pg 35) Bonilla testified at Petitioner's hearing and stated that it's a [fact] that the victim saw Petitioner's face, than when Bonilla was asked by the hearing Court, "Did the victim say this to you?" Bonilla said, " No, No she did not."

(see Ex. E,pg 184) Contrary: Bonilla testified at Petitioner's trial and stated that, "The victim did tell her that she saw the petitioner's face and can identify him."

Furthermore, (see Ex. E,pg 192) Bonilla falsely states that she had no knowledge of mask and was never told by the victim.

(see Ex. G,DD5 #5) Bonilla personally interview P.O. Arias the initial responding officer and P.O. Arias specifically told Bonnilla that, "he did" [not] get a good look at the prep's face because it was [covered]."

(see Ex. E,pg 10) Bonilla falsely testified at Petitioner's Hearing by stating that P.O. Arias told her, "He never got to see the defendant's face, but it was a male [black]."

Petitioner States, Once Again, The whole Identification can be [Only] assessed and determined on the Victim's testimony. (see Ex. H,pg 58-62) Westfall testimony, also (see Judge Order, pg 10, Footnotes)

1. Bonilla Recanted at Petitioner's Wade Hearing, than knowingly and deliberately committed [Perjury] based on the same line of questioning at Petitioner's Trial.

2. P.O. Arias police report reveals that Bonilla did have knowledge of the [Mask], and it also reveals that Bonilla just lied about P.O. Arias allegedly telling her the suspect was a Male [Black].

Petitioner States, Furthermore, P.O. Bonilla personally conduct the Petitioner's Photo Array and failed to allow the Victim's to view it. Instead, she allowed her fellow officer P.O. Hughes to view the Photo Array and P.O. Hughes allegedly selected Petitioner out and it was Hughes selection that made the lineup possible although Hughes was [NOT] at the crime scene nor is he an "Eyewitness" to the crime.

Moreso, this illegal and improper police tactic effected the Judge as well as the Petitioner. (see Ex. E,pg 34-35);

> **The Court**: The Dunaway is really only as they're relying on Hughes and Westfall for the Dunaway.
>
> **Mr. Kirsch**: All Right.
>
> **The Court**: "She wasn't shown a Photo Array."

Petitioner States, The Hearing Judge was referring to Ms. Reardon that Judge stated "was not shown a Photo Array." However, Ms.Westfall/Victim was not shown a photo array as well. Judge Firetog denied Petitioner's Wade Hearing based on a presumption that Westfall selected Petitioner out of the Photo Array which was Court Error on the suppression Court. There was no difference in either victim where both victim's "wasn't shown a photo array." It was already a Court error for the Court relying on P.O. Hughes selection to make the line-up possible. The police action was totally improper and illegal because Hughes was not even at the crime scene nor is he an "eyewitness" to the crime and Hughes gave a description of a person with "pocked skin face," (Petitioner has a clear skin face.) Petitioner state, Westfall was used to bootstrap

Hughes photo array identification, which was more reason why the line-up identification should have been suppressed for this illegal and improper police tactics. Judge Firetog's decision was based on a "Presumption" which was a Constitutional Violation of Due Process and very "Prejudicial." **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824.

Petitioner States, The lineup was clearly suggestive and improper where the Victim's testimony under oath and affirmation states that she could [Not] pick anyone out of the lineup by them just sitting there – so she had them stand so she could [gage] in on their height and build – and they were all different in height – and she [Only] remembers the Petitioner from the lineup. Moreover, It is clearly impossible for the Prosecutor to make an In-Court Identification without violating Petitioner's Due Process where the Victim testified that she [Never] saw a face and Petitioner was selected out the lineup based on "height, build, complexion, how hard he hit her, and eyes. There is not one time in the record that the Court asked the Petitioner to stand to substantiate the In-Court Identification. Moreso, it is impossible for the In-Court Identification [Not] to be influenced by the Pre-Trial Identification where the Victim have already testified that "she [Only] remembers the Petitioner from the lineup." This Identification is clearly erroneous and absurd and should have been inadmissible at trial.

Hon. Judge Souter of the United States Supreme Court held in **Kyle v. Whitley**, 514 U.S. at 466;

To assert that unhesitant and categorical Identification by four witnesses who viewed the killer, Close-up and with the Sun High in the Sky, would not eliminate reasonable doubt if it were based only on [Facial] characteristics, and [Not] on "height and build," "Is Simply Absurd." Facial Features are the [Primary] means by which human beings [Recognize] one

another; It's why bank robbers wear stocking over their faces instead of [Floor Length] capes over their shoulders.

Petitioner States, whether the District Court ERROR for totally ignoring the flaws and misconduct in the Identification procedure and perjury testimony which not only an essential critical issue but was Prejudicial and a Violation of Due Process. **Chapman v. California**, 368 U.S. 18, 87 S.Ct. 824. The Identification testimony also had a Substantial and Injurious effect on the influence of the Judges decision. **Brecht v. Abrahamson**, 507 U.S. 619, 623, 113 S.Ct. 1710.

Moreso, Did the District Court ERROR for not applying the factor in Identification Reliablity held in United States Supreme Court case **Neil v. Biggers**, 409 U.S. 188, 201 93 S.Ct. 375. Also, Social Science which the Federal Courts has exepted, Weapon involved, Stress levels, Cross Racial and etc... see **Young v. Conway**, 698 F.3d 69; **United States v. Nolan**, 2020 WL 1870140.

Conclusion

Petitioner sates, based on the victim's own omission in regards to the Wade factors, all of them are in the Petitioner's favor and under all circumstances of the original viewing during the crime and for the subsequent Identification Procedure, it appears to be overwhelmingly suggestive, and Ms. Westfall alleged independent "recollection" of Petitioner's face was "irrevocably" tainted by her having viewed Petitioner in the lineup and by "having him [stand]" with [NO] independent basis whatsoever.

It is evident that under the totality of the circumstances, there was a "very substantial likelihood of irreparable misidentification." **Mason v. Brathwaite**, 432 U.S. 98, 116, 97 S.Ct.

2243. In all likelihood, Ms. Westfall In-Court Identification stemmed from a suggestive setting in which Petitioner was obviously the accused.

Moreover, Giving the factors as developed at the Suppressing Hearing and Trial, It was an Unreasonable Application of clear Established Supreme Court Precedent, e.g., Wade, for the State Court conclude that the victim's In-Court Identification was Independent Reliable, "This Constitution Error At Trial Was [Not] Harmless." **Brown v. Kean**, 355 F.3d 82, 91 (2d Cir. 2004). On Habeas review, "An Error is [Not] Harmless if it had a substantial and Injurious Effect Influence In Determining the Judge or Juries Verdict." **Raheem v. Kelly**, 257 F.3d 122, 142 (2d Cir. 2001)(quoting **Brecht v. Abrahamson**, 507 U.S. 619, 623, 113 S.Ct. 1710). And actually, The Victim's testimony contained material that would establish Petitioner's Actual Innocence.

Petitioner States, That its obviously clear in the record that the State Contradicted and Bolstered the Victim's In-Court Identification testimony which was illegal, Improper and the Introduction should have been Inadmissible. [Not Only] did the Victim testify that "she did [Not] observed the Suspect's Face," She Affirmed and Supported it by testifying Her Line-up selection was based on "Height, Build, Complexion, How hard she was hit, and eyes. United States Supreme Court Hon. Judge Souter, said best, "Facial Characteristics" are the [Primary] means how Human Beings [Recognize] one another, [Not] on "Height and Build," It's "SIMPLY ABSURD." Under these Circumstances, Fraud appears on its FACE of the record. Moreover, where neither Victim made a Photo Array Identification, The Prosecutor Relied on P.O. Hughes Photo Array Identification [Alone] to make the "Illegal and Improper"" line-up possible. P.O. Hughes is [Not] a Victim and was [Not] at the crime scene nor was he an eyewitness to the crime.

The Identification on its [Face] was [Fraud] and the Introduction of the Identification testimony should have been Inadmissible and clearly in Violation of Petitioner's 14th U.S.C.A. Rights to Due Process. See **Young v. Conway**, 698 F.3d 69. Where all the impairing Factors referred to in Young were "Present" Here... Technically, the Victim Never made no Identification of Defendant, [In, Or Out, Of Court].

POINT TWO

WHETHER THE DISTRICT COURT ERROR FOR DENIAL OF PETITIONER CLAIM FOR THE STATE DENIAL OF PETITIONER'S DUNAWAY HEARING, BASED ON PETITIONER'S ARREST WITHOUT PROBABLE CAUSE NOR MIRANDA WARNING AND BASING PROBABLE CAUSE ON THE ALLEGED SUFFICIENCY OF THE IDENTIFICATION EVIDENCE.

Petitioner States, In **Brown V. Illinois**, 442 U.S. 590; The Supreme Court Mr. Justice Blackman Held: The Miranda Warnings alone and Pro Se, Cannot always make act of confession sufficiently a product of free will to break, for Fourth Amendment purpose, the casual connection between illegality of arrest and confession; and that in custody statements which stemmed from and an illegal arrest were not rendered admissible merely because Defendant had been given Miranda warning prior to making statement.

Petitioner States, Whether the N.Y. State Court Errored in adopting a Pre Se rule that Miranda warnings in and of themselves broke the casual chain so that any statements and subsequent Identification, even them being unduced by the continuing effect of unconstitutional custody, was admissible so long as in a traditional sense, it is voluntary and not coerced in

violation both the Fifth and Fourteenth Amendment, Thus, even if the Petitioner allegedly made the statement under the Fifth Amendment, The Fourteenth Amendment still remains.

Wong Sun requires not merely that a statement meets the Fifth Amendment Voluntainess standard but that it be sufficiently an act of free will to Purge a Primary Taint in light of the distinct Policies and interest of the Fourth Amendment.

2. The question here is whether the statement Petitioner allegedly made (Turned Himself In) was voluntary under Wong Sun "[Must] be answered on the [Facts]" of the case. Though the Miranda Warning are an important factor in resolving the issue, other factors must be considered; and the burden of showing admissibility of in custody statements of person who have been illegally arrested on the Prosecutor.

3. The State failed to sustain its burden of showing that Petitioner statements and subsequent Identification were admissible under Wong Sun.

Petitioner States, Miranda warning nor an alleged statement does not resolves this issue here, where no Miranda was issued nor any statement was made by the Petitioner when he "Apprehended by the warrant Squad." Moreso, there was [NO] proof offered in regards to Petitioner being Mirandize or the alleged allegations of a statement. Petitioner was placed in custody in front of his Attorney's office and out of the sight of his Attorney without no question ask. The State have now by pass the sufficiency of Miranda and the alleged statement.

Now the State Court has applied an erroneous Constitutional Standard by using Wade to satisfy Probable Cause – By Petitioner being selected from the subsequent lineup, that gave Probable Cause.

Petitioner States, (see Appendix B) The Appellate Division did not acknowledge the fact that Petitioner's Omnibus Motion had consisted of a Dunaway claim or acknowledge it. See

Agee, 809 F.2d at 1490. (Federal Collateral Review was not barred by **Powell** because the state appellate court ignored Fourth Amendment claim in its written opinion), The State Court ignored it as well.

Furthermore, The Tenth Circuit has determined, therefore, that **Powell** did not bar Federal Review of Gamble's Fourth Amendment claim because "The State Court willfully refused to apply the correct and Controlling Constitution Standard." **Gamble**, 583 F.2d at 1165. The **Gamble** Court states that the "Opportunity for full and fair consideration [was] not limited to the procedure opportunity to raise or otherwise present a Fourth Amendment claim. It contemplated recognition and at least colorable application of the correct Fourth Amendment Constitutional Standard."

The District Court herein understands the Gamble Court's interpretation of **Powell** as permitting "Habeas review of Fourth Amendment claims when the State Court DECISIONS have prevented a petitioner legitimate effort to litigate fourth amendment claims." see **Capellan**, 779 F. Supp. at 733; see also **Tukes**, 911 F.2d at 514.

Petitioner States, whether the District Court was in error for not assessing and Denial of Petitioner's Claim where Petitioner has satisfied the United States Supreme Court's requirement – The State had provided a corrective procedure to redress the Fourth Amendment Claim where the State Court granted Petitioner's Omnibus Motion for a Dunaway/Wade Hearing but Petitioner was precluded from using this mechanism because of an Unconscionable break down in the underline process, Id. at 840; see **McPhil v Warden Attica Correctional Facility**, 707 F.2d 67, 70, (2d Cir. 1983).

Petitioner States that any opportunity which the State of N.Y. might have provided to Petitioner to litigate his Fourth Amendment Claim were clearly not "[FAIR]."

The State Judge and Prosecutor failed to "Explain" How and Why Petitioner was placed in "Hand Cuffs," and "Transported to the precinct." Moreso, Petitioner was [Locked] in a room for a couple of hours with one hand cuffed to a chair, and the Prosecutor has [Not] offered [No] "facts or proof" to the alleged allegations that Petitioner turned himself in.

CONCLUSIONS

The State Court erroneously applied the incorrect Constitutional Standard to the Dunaway and denied Petitioner a "FULL and FAIR" [o]pportunity to litigate his Fourth Amendment claim by satisfying the Dunaway based on the identification/Wade. The Petitioner's 4th. and 14th. Amendment Rights Violation still remains and the state has still failed to sustain it's burden in showing that Petitioner's alleged statement and subsequent lineup identification was admissible under **Wong Sun**, 371 U.S. 471, 83 S.Ct. 407; **Brown v Illinois**, 422 U.S. 590.

Moreso, Detective Bonilla has conceded to Petitioner's "Apprehended" – After Petitioner was searched and cuffed, No Statements, or confession was made, no Miranda Warnings, no Probable Cause, No Warrant and virtually Bonilla actions was for the purpose of "Investigatory." Moreover, as this Court reviews (**Ex.E, pg 34, line 11-12**), Judge States, "The question is, was the proceeding by the police unconstitutional?" [YES], it was "unconstitutional," because the Judge was under the presumption that Westfall/Victim made a Photo Array identification and was the "subject" for Dunaway. Which was false. Westfall [Never] made a Photo Array Identification – Hughes made a Photo Array Identification which is unconstitutional for the state to "RELY" on Hughes because Hughes is NOT a Victim here – and is Not an Eyewitness to the crime. The Procedure was totally "Unconstitutional" and "Constitutional Error" on the State. For all these actions, Petitioner should not be barred by **Stone v. Powell**, where the state has failed to

provide the Petitioner a Full and Fair Opportunity to legitimately litigate Petitioner's Fourth Amendment Claim...

POINT THREE

WHETHER THE DISTRICT COURT ERROR FOR THE DENIAL OF PETITIONER CLAIM FOR THE STATE DENIAL OF THE PETITIONER ESSENTIAL INGREDIENT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS THAT COUNSEL PROVIDED CONSTITUTIONAL EFFECTIVE ASSISTANCE

Petitioner states Whether the District Court was in Error for Denial of Petitioner's Claim Infective Assistance of Counsel.

Petitioner States, In case at bar, Although many typical causes of mistaken eyewitness Identification were apparent, the Defendant's Identification was the most obvious and erroneous to where Defendant's Trial Counsel did almost nothing to challenge or cambat the Identification.

More so, Given the obvious material of the Victim's testimony in this case failure amounted to ineffective Assistance of Counsel, (see Ex. H, pg 58 – 62) Westfall's Trial Testimony; also (see The Judge Order, pg 10 foot Notes) Where one Victim's Identification bore significant indica of "Unreliability", The robber were partially Disguised. The Victim were unable to give the Investigator a detailed description of the robber besides he was "Light Skinned". (Petitioner is [dark] skinned).

Petitioner States, The Two Victim's [Never] picked Petitioner out of any photo's or photo array. The primary victim Ms. Westfall testified that, "she never saw the suspect's face, and picked petitioner out of the lineup based on height, build, complextion, how hard he hit her, and

eyes"; The Victim also testified that she could not pick anyone by them just sitting there, So she had everyone stand so she could [Gage] in on their "Height and Build"; and they were all [different] in [height] ; also states that she [Only] remembers the Defendant from the lineup.

Petitioner States, That Defendant's Defense Counsel nonetheless did virtually nothing to contest the admission of the above In Court Identification testimony, and for these Error's Prejudiced the outcome of Defendant's Trial. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct.2052.

In the case at bar, Based on the basis that the Victim testified on how she selected Defendant out of the lineup was Erroneous and Absurd. However, Defense counsel knew this and made NO attempt to exclude this evidence, object to it, nor requested on reopening the Wade Hearing for an Independent Source Hearing. The Defense Counselor knows the Law and know enough to know that it would be "impossible" for the Prosecutor to make an In-Court Identification knowing that defendant was [NOT] Identified based on "Factual Characteristics." Furthermore, The In-Court Identification can [Only] be influenced by the Pre-Trial lineup. The Defense Counsel knew or should have known that the "Introduction" of the Identification was Inadmissible", "Unreliable", and Warranted an "Objection". Defense counsel knew under the above circumstances, The Identification was clearly a "mistaken" Identification. United States v. **Wade**, 388 U.S. 218, 87 S.Ct. 1926; also see **Simmon v United States**, 390 U.S. 377, 383-384, 88 S.Ct. 967; **Manson v Brathwaite**, 432 U.S. 98, 97 S.Ct. 2243.

> Petitioner states, according to the Innocence Project, eyewitness misidentification was present in an astonishing 71 percent of the cases in which subsequent DNA testing established the factual innocence of wrongful conviction defendant's. see **Innocence Project Eyewitness Identification Reform.**

Furthermore, Then or After the testimony had been introduced, Defense Counsel failed to call Mr. William Hair which is a Legal Aid Attorney in regards to rebuttal on the lineup because Mr. Hair was my attorney and was present for Defendant's lineup. Mr. Hair and Defendant had [NO] idea a mask was involved in the case. This was the reason the Investigating officer Bonilla act as if she had [NO] knowledge of the mask because of the illegal and improper way it was conducted and [Hind-sighted] it from Mr. Hair. For this police misconduct, Defendant's 4th. 6th. and 14th. Amendment Rights were totally violated where the essentially critical information about the [Mask] was withheld, and Mr. Hair was deprived of protecting my constitutional rights.

Moreover, Investigator Bonilla testified that she had spoke with Mr. William Hair, and Mr. Hair and her had made arrangements for Defendant to turn himself in. Defendant was deprived of a defense where Mr. Hair could have rebuttal to the identification as well as Defendant allegedly turning himself in because Defendant and Mr. Hair never spoke about Defendant turning himself in and if Mr. Hair would have mentioned anything in regards to Defendant turning himself in, "Honestly Speaking," Mr. hair would have never, ever heard from Defendant again because Defendant is Innocent and had NO knowledge to what Defendant was turning himself in for. However, Defendant was deprived of a defense which prejudiced the defense.

Strickland ordinarily does not require defense counsel to call any particular witness. See **United States v. Best**, 219 F.3d 192, 201 (2d Cir. 2000). But under unusual circumstances

presented here, as in **Bell**, Making every effort to eliminate the distorting efforts of Hindsighting, **Bell**, 500 F.3d at 156 (quoting **Strickland**, 466 U.S. at 689, 104 S.Ct. 2052) Moreso, Counsel could [Not] render effective assistance without input from Mr. Hair. Counsel therefore had a duty at least to consult Mr. Hair and consider whether to call Mr. Hair to the stand. Counsel strategy fell way outside "the wide range of reasonable professional assistance," **Strickland**, 466 U.S. at 689, 104 S.Ct. 2052.

Petitioner was clearly deprived of this witness, and deprived of the Sixth Amendment which could have been proven based on Mr. Hair's testimony where Investigator Bonilla "Hindsighted" the fact that a 'MASK' was involve, and Mr. Hair was deprived from Protecting Defendant's Rights. The Supreme Court held in **United States v. Wade**, 388 U.S. 218, 228-39, 87 S.Ct. 1926, that "the Sixth Amendment guarantees a Defendant the right to have counsel present during post-identification line-up," Identification Procedures, Id. at 228-39, 87 S.Ct. 1926.

In the event that defense counsel questions the victim and she clearly stated that she could [NOT] pick anyone out by them just sitting there and when she had everyone stand, "They were all different in height," and she [GAGED] in on there height and build and [only] remember Defendant from the lineup.

Petitioner states, the testimony in itself states "Suggestiveness" on its face, and defense Counsel failed to request for the Wade Hearing to be reopened on Suggestiveness where the victim clearly stated under oath that they were all different in height and furthermore, it's impossible to make an in-court identification if the victim [ONLY] remembers defendant from lineup. Defense Counsel failed to provide Defendant with the essential ingredient which is to provide Defendant Constitutional Effective Assistance. As here, counsel performance was

deficient and the Error was so serious that counsel was not functioning as counsel guaranteed the defendant by the Sixth Amendment, and counsel defenciences were prejudicial to the defense. see **Strickland**, 466 U.S. at 692, 104 S.Ct. 2052.

Petitioner states, Investigator P.O. Bonilla conducted a Photo Array including defendant's photograph. Bonilla failed to allow [BOTH] victim's, Ms. Westfall and Ms. Reardon, to view photo array. Instead, Bonilla allowed her fellow officer to view it and select defendant's out of the Photo Array which made the lineup possible.

Petitioner states, defense counsel failed to object to the photo array as well where this array was illegsal and improper for numerous of reasons; (1) P.O.Hughes was [NOT] a victim; (2) Hughes was [NOT] present at the crime; (3) Hughes was [NOT] an eyewitness to the crime; (4) Hughes description of the suspect had "Pocked skinned Face," and (5) Hughes credibility as well.

Moreover, The prosecutor falsely stated that they are "relying" on Hughes and Westfall for "Dunaway." (see Ex. E, pg 34-35);

The Court: The Dunaway is really only as they're relying on Hughges and Westfall for Dunaway

Mr. Kirsch: All Right.

The Court: "She wasn't shown a Photo Array."

Petitioner states, The hearing judge was referring to the victim Ms. Reardon that "Was [not] shown a photo array."

However, Ms. Westfall "Was [Not] Shown a Photo Array" either. So, the Prosecutor had Judge Firetog under the presumption that Ms. Westfall viewed the photo array, and selected the Defendant., The prosecutor was legally "relying" on P.O. Hughes photo array selection which was illegal because P.O. Hughes was not an eyewitness to the crime. Furthermore, Defense

Counsel was aware of this due to Defendant bringing this to his attention on the day of the hearing, and he did nothing about it. If Defense Counsel would have brought it to the judge's attention, Judge Firetog would have had to suppress the lineup because it could not stand on Hughes photo array selection alone, which makes this a constitutional error. If defense counsel would mention it to the judge, counsel may have been successful, and it would have appeared that the case would have been effectively over in light of the State heavy reliance on the identification. see **Strickland**, 466 U.S. at 689, 104 S.Ct. 2052.

Petitioner states, (see Ex. E, pg. 35) Defense Counsel cross examined P.O. Bonilla at the hearing; Bonilla stated that it's a fact Westfall "Saw the Defendant's face," because she told her this during their interview—the Judge ask Bonilla did she say this to you? Bonilla said, "NO, she did not."

Contrary; (see Ex. E., pg 184) Bonilla testified at trial and stated that the victim did tell her that "She saw the Defendant's face and can identify him."

Petitioner states, that Investigator P.O. Bonilla is clearly guilty of perjury. Where she knowingly and willfully gave false testimony, just to obtain a conviction. Nevertheless, if counsel's intentions or strategy was to impeach Bonilla, now would have been the best time of all because this same question was ask at the hearing, "now gave a totally different answer." Moreso, what was counsel purpose of asking this question without [NO] Purpose.

Furthermore, counsel allowed this essentially critical false statement go on uncorrected when it bores on the identity of the robber. It was essentially critical for counsel to allow it and essentially critical to prejudiced the defense.

> This is a basic Misunderstanding of Universal Trial and Evidence Principle fall well below an objective standard of reasonableness, 87 F.3d at 786 (stating that when counsel failed to object because of lack of awareness of the law (**Strickland** is violated); **Rachel**, 590 F.2d at 204 (concluding that the Sixth Amendment was violated because attorney inexperience, inattention or lack of knowledge of the law led to their failure to object to misconduct). For this reason and numerous of other instances counsel was constitutionally ineffective, and counsel's ineffectiveness and trial strategy was objectively unreasonable. **Strickland**, 466 U.S. at 689, 104 S.Ct 2052.

Furthermore, (see EX. E, pg 192) P.O. Bonilla falsely states that she had no knowledge of a Mask. Also (see Ex. E, pg 10) Bonilla falsely states that P.O. Arias told her that the suspect was [Black].

Contrary, (see Ex. G, DD5 #5) P.O. Arias was 'personally' interviewed by P.O. Bonilla and he 'specifically' told her that, "he could not get a good look at the Perp's face because it was [COVERED]," and it appears that P.O. arias [NEVER] mentioned anything about the Perp being black. However, defense counsel failed to review this because counsel would have known Bonilla did have knowledge of the [Mask] and officer Arias [NEVER] told her the perp was black.

Petitioner states, counsel's failure to investigate and review police reports, is just another instance where defense counsel sat silent, no objection and allowed the misconduct to go on without being corrected.

Moreover, (see Ex. B, DD5 #2); P.O. Hughes stated in his police report that he heard the Anti Crime Unit put out a pursuit of a male on a bike wearing a [Black Jacket] and a [Red] colored hoody, and they lost sight of the suspect on Lorimer and Throop.

Contrary; (see Ex. C, pg 72-73) Sgt. Taveras was the first responding officer and testified to his [exact] Sprint Report which was "Male Black, Red Sweat Shirt, Riding Bicycle down Manhattan from Mesrole," which is where they lost sight of the suspect.

Petitioner states, so as the Court has notice, based on the comparison of what Sgt. Taveras stated and what was stated by P.O. Hughes was extremely inconsistent with Sgt. Taveras Sprint Report. Sgt. Taveras never mentioned the suspect wearing a black jacket, never mentioned a hoody, and never mentioned they lost sight of the suspect on Lorimer and Throop.

Moreover, (see Ex. B, pg 97); On direct, Hughes was asked, "What was the description that you heard?" Hughes stated he heard "Male black, on a bike with a brown hoody, jeans, on a bike." Also (see Ex. B, pg 114-115); On cross, P.O. Hughes was asked, "What is the description that you heard?" Hughes stated he heard "Male black, on a bike with a brown hoody, and a 'Purple' bicycle."

Petitioner states, P.O. Hughes is clearly guilty of perjury. Where he knowingly and willfully gave this false evidence. Hughes was simply asked what description did he hear, not what he thinks or how he feels. However, This Honorable Court is well aware that "Black Jacket" was not mentioned nor "Brown Hoody" or "hood" for that matter. Furthermore, "Purple" bike was not mentioned nor was the location 'Lorimer and Throop. It appears that Hughes patently tailored the whole Sprint Report by changing the whole color of clothing description, and even the location to connect the Defendant to this crime.

Petitioner states, this is another instance where misconduct was present and defense counsel either did not 'object' or let it go uncorrected. What's Erroneous about this instance is that defendant "shouted out to counsel and said, "he is lying," and counsel said, "don't worry, the

judge knows he is lying." Counsel had clearly acknowledge that Hughes testimony was false but still refuse to object. Moreso, on cross examination, Hughes gave the same false statement and counsel allowed it. Counsel allowed Hughes to place Defendant at the crime scene based on patently tailoring the clothing description he allegedly heard and location, and counsel failed to object to this minconduct which clearly violated **Strickland**, 466 U.S. at 689, 104 S.Ct. 2052.

Moreso, (see Ex. D,pg 379-380); During closing arguments, the prosecutor states, "The Court also heard," – P.O. Hughes testify that within 20 to 30 seconds of hearing the broadcast, "He then saw Defendant [same] description, physical description and clothing description, on the purple bike."

Furthermore, (see Ex. D,pg 380-383); During closing arguments, prosecutor falsely states that, "P.O. Hughes identified defendant number four as the person he [observed] fleeing 155 Manhattan Ave."

Petitioner states, that while the defense counsel carried an inherent risk of prejudice, this added risk did not diminish the far greater prejudice that resulted from defense counsel inexplicable silence for the officer's misconduct and by the prosecutor misusing that same false evidence during closing argument for patently improper purposes. This misconduct in evidence implicitly recognize the fine yet vital distinction between the 'risk and prejudice' borne by evidence introduced for permissible reasons and the 'clear prejudice' that resulted from an uncured and flagrant improper use of that [same] evidence.

On the other hand, defense counsel's silence allowed the prosecutor's improper use of that evidence, as well as its improper suggestion to the judge how to consider that evidence, and go uncorrected.

Petitioner states, a minimally competent lawyer would have recognized these false statements to be blatantly improper and highly prejudicial, requiring an "Objection'" and defnse counsel did not say or do nothing. This clearly characterize as contrary to an "objectively Unreasonable Application" of **Strickland**, 466 U.S. at 690, 104 S.Ct. 2052.

Petitioner states, that the state court and appellate division held Petitioner's claim without merit because Defendant failed to demonstrate the absence and strategy or other legimate explanation for counsel alleged shortcomings.

However, Defendant is still claiming his actual innocence and Defendant claim did have merit, and Defendant has a Federal Constitutional Right as well and that right is the Sixth Amendment Right to counsel and that counsel provide constitutional assistance, **Strickland v Washington**, 466 U.S. 668.

Furthermore, The United States Supreme Court has held in **Engle**, "In appropriate cases," The principle of comity and finality that inform the concepts of cause and prejudice "Must yield to the imperative of correcting a fundamentally unjust incarceration" 456 U.S. at 135, 102 S.Ct. 1576. And for the most part, "victims of a fundamental miscarriage of justice will meet the cause and prejudice standard," see **Murry v. carrier**, 477 U.S. 478 (1986).

In addition, there is a safeguard against miscarriage of justice and that is a right to effective assistance of counsel which, as this Court has indicated may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. **United States v. Cronic**, 466 U.S. 648, 657, n.20, 104 S.Ct. 2039, 2046; see, **Strickland v Washington**, 466 U.S. 693-696, 104 S.Ct. at 2067-2069; (quoting, **Murry v. Carrier**, 477 U.S. 478).

Petitioner states, it was [NOT] the victim's erroneous in-court identification testimony that convicted Defendant, and **Lawfully,** there was [NO] in-court identification. However, there is no explanation why defense counsel failed to object to the introduction of the alleged in-court identification along with failing to object to the knowing and willful use of misrepresentation of the facts which misled the judge.

It appears on the record that the officers and prosecutor's omission of testimony alone tainted the whole trial; The investigator knowing and willfully stated, "she had no lnowledge of a [Mask];" The victim told her, "she saw the defendant's face and can identify him;" also, P.O. Aris=as told her that the suspect is [Black]. We also have P.O. Hughes who knowingly and willfully patently tailored Sgt. Taveras' 'Whole Sprint Report' by stating he heard "[Black Jacket], [Brown Hoody], [Purple Bike], and gave a total different location [Lorimer and Troop]."

We also have the prosecutor using the [Same] false evidence in their closing arguments, stating, "Hughes [observed] Defendant in the [same] description, physical description and [clothing] description," (which was known to be false); Prosecutor also placed Defendant at the scene by stating, "Hughes identified Defendant as the man he [observed] fleeing 155 Manhattan Ave...."

Moreover, the prosecutor "Relied" on Victim/Westfall for Probable Cause which Westfall [Never] made a photo array identification which the Hearing Judge was under the Presumption that Westfall had made one. This tactic was illegal on the prosecutor's behalf and constitutional error on the Court. In all these instances, defense counsel sat silent without no objection.

Petitioner states, it clearly appears on the record that it was not the victim's testimony that indicated Defendant's guilt or conviction, but well clear that the Officer's and Prosecutor's 'Misrepresentation of the facts is what misled the Judge.'

Moreso, it is well clear in the record, that this misconduct had a substantial and injurious influence on the Judge's Decision. **Brecht v. Abrahamson**, 507 U.S. 619, 623, 113 S.Ct. 1710, and defense counsel failed to object to any of it. **Strickland v. Washington**, 466 U.S. at 686, 104 S.Ct. 2052. Counsel failed to object compromised ineffective assistance of counsel provides the required "Cause," see **Gravley**, 87 F.3d at 785 (citing **Colman v. Thompson**, 501 U.S. 722, 753-54, 11 S.Ct. 2546.

CONCLUSIONS

Petitioner states, counsel decision in no way condones a lawyer failure to oject to plain misconduct as a legitimate trial strategy, where counsel sat silent and failed to object, the Court should have very little difficult concluding that counsel was ineffective where assistance was 'Warranted."

POINT FOUR

WHETHER THE DISTRICT COURT ERROR FOR DENIAL OF PETITIONER'S CLAIM THAT THE STATE PROSECUTOR ENGAGED IN MISCONDUCT BASED ON WITNESSES PERJURY TESTIMONY WHERE RELEVANT MISSTATEMENTS THAT WERE SO EGREGIOUS TO RENDER THE ENTIRE TRIAL FUNDAMENTALLY UNFAIR TO A DEGREE TANTAMOUNT TO A DUE PROCESS VIOLATION.

Petitioner states, whether the admission of the in-court identification is when the Prosecutor misconduct begins. Where the District Attorney "[Attempted]" to make an in-court identification after the victim's testimony that "she [never] observed the suspect's face," and stating that her lineup selection was based on "height, build, complexion, how hard he hit her and eyes." And the prosecutor made this alleged in-court identification "knowing that it can [only] be influenced by the pre-trial identification" and there is no where in the record where the prosecutor substantiated their alleged in-court identification by having the Petitioner [Stand]. See **Young v. Conway**, 698 F.3d 69.

However, the law states that the state should not be precluded from demonstrating that witness identification is derived from source independent of antecedent, illegal police activity; The burden is on the state to established by clear and convincing evidence that the in-court identification was comet by means sufficiently distinguishable to be purged of primary taint – As fo **People v Underwood**, 239 A.D.2d 366, 658 N.Y.S. 629. Where Defendant's faces were covered or disguised and complainant identified them [Only] by the coats that they wore. Also see, **Young v. Conway**, 698 F.3d 69; **United States v. Nolan**, ??? WL 1870140.

Petitioner states, the prosecutor knew or should have known that it is impossible to meet this burden. The victim did not pick Petitioner out of the lieup based on " Facial Characteristics" and ther is no where in the record to substantiate the victim in-court identification where

Petitioner was [Never] ask to stand. Based on the particular facts, the identification can only be very prejudicial and clearly a violation of petitioner's Due Process. This is clearly unheard of where an innocent man is being punished and illegally detained on being identified based on his height and build and etc...

Moreso, (see Ex.E, pg 38-39) P.O. Bonilla testified that she had [No] knowledge of a mask.

Contrary: (see Ex.G, DD5 #5) P.O. Bonilla 'personally" interviewed P.O. Arias and he "specifically" told Bonilla "He did [Not] get a good look at the perp's face because it was [Covered] up."

Moreover, (see Ex. E, pg 35) Bonilla testified at Petitioner's Wade H. and stated, the victim told her that "she saw his face." The judge asked Bonilla, "Did the victim say this to you?" Bonilla said, "No. No she did not."

Contrary: (see Ex. E, pg 184) Bonilla then testified at Petitioner's trial and stated, that the victim did tell her "she saw his face and can identify him."

Petitioner states, that based on the unquestionable documentation that Petitioner has presented, this Court is aware that Bonilla knowingly and deliberately committed [Perjury] and committed perjury on an essentially critical issue that bores on the identity of the robber and the fact that Petitioner's case rise and falls on identification. Bonilla clearly violated Petitioner rights to a fair trial because this false statement was very unfair and more likely than none, "the judge believed her because she's an officer." Moreover, the state is always viewing the evidence in the light most favorable to the prosecution (**People v. Contes**, 60 N.Y.2d 620).

Petitioner also states, whether the District Court error for not assessing or addressing this constitutional violation by this officer knowingly and deliberately committing "perjury." The District Court [ingored] and just went around this essentially critical issue which bores on the "identity of the robber." This perjury testimony was not only egregious, it was erroneous as well by Bonilla knowing the victim has already testified that "she never observed the suspect's face." She falsely states the victim told her "she saw the defendant's face and can identify him." This perjury effect the "trier of facts" and had an substantial and injurious effect influence on the judge's decision. See **Brecht v. Abrahamson**, 507 U.S. 619, 637-38, 113 S.Ct. 1710. The prosecutor made [No] attempt to correct this error and allowed it to go on uncorrected. See **Berger v. United States**, 295 U.S. 78, 84, 55 S.Ct. 629.

Furthermore, the Court is also aware that Bonilla did have knowledge about the suspect being [masked] because the first responding officer P.O. Arias had "specifically" told her during their interview see Ex.G, DD5 #5. More importantly, by Bonilla given false evidence and bolstering the identification based on facts that is not in evidence constitutions clear misconduct. Moreso, by Bonilla misrepresenting facts in evidence has amount to substantial error because doing so may profoundly impress the Judge and have had a significant impact on the Judge's Decision. **Donnelly v. DeChristoforo**, 416 U.S. 637, 646, 94 S.Ct. 1868. Consequently, asserting facts that were never admitted into evidence may mislead a Judge in a Prejudicial way **Berger v. United States**, 295 U.S. 78, 84, 55 S.Ct. 629.

Petititoner states, also (see Ex. E. pg 164) Bonilla states, Petitioner turned himself into his attorney's office and was "apprehended" by the Warrant Squad.

Petitioner states, did the prosecutor overstep the bounds of propriety and fairness which should characterize the misconduct of such officer's in the prosecution of a criminal offense is clearly sworn by the record. Bonilla is Guity of perjury by mis-stating facts in her testimony; Misleading the Judge stating things which the victim had not said; pretending statements have been made to her personally out of Court in respect of which NO proof was offered; Bonilla pretending to understand that the victim had said something which they had [NOT] said; Bonilla has assumed prejudicial facts not in evidence. **Berger v. United States**, 295 U.S. 78; **Chapman v. California**, 386 U.S. 18. And the prosecutor allowed this misconduct to go uncorrected.

> The United States Supreme Court has held; "that a conviction [Obtained] by the known use of perjury testimony is fundamentally unfair and [MUST] be set aside if there is any reasonable likelihood that the [False] testimony could have effected the judgment of the trier of facts, **Pyle v. Kansas**, 317 U.S. 213, 63 S.Ct. 177; also see **Mooney v. Holohan**, 294 U.S. 103, 55 S.Ct. 340.

Petitioner states, it is quit obvious that Bonilla mislead the states judge as well as the District Judge, (see Judge Order pg. 50); The District Judge States, (Daniels stated that he self surrendered to the police after detective visit his house) etc... Id. at 37.

Petitioner states, as Petitioner just previously stated, The District Judge was misled by the prosecutor's witness misstatement and has misstated Petitioner's words as well, where the Petitioner [never] stated "He self surrendered." Was this clear error on the District Court where they took [No] attempt to assess Bonilla's credibility which was warranted. See **Doe Menfee**, 391 F.3d at 163-164. Where there was [No] proof offered to Bonilla's hearsay, nor [No] one testified to this theory but Bonilla's own words – and the Prosecutor allowed it just to [Justify] Petitioner's Illegal Arrest, without no warrant, no probable cause, no Miranda Warning, which

neither of the above was produced when Petitioner was placed in "handcuff's" – Petitioner's Attorney was not even present.

Petitioner states, Bonilla conductefd a photo array with the Petitioner's photograph. However, Bonilla failed to allow both victim's view this photo array. This is where the illegality plays a big part in Petitioner's case. Instead, Bonilla uses her fellow officer P.O. Hughes to select Petitioner out of this photo array, which P.O. Hughes was [not] a eyewitness to the crime nor was Hughes present at the crime scene when it actually took place. P.O. Hughes also gave a description of Petitioner having "Pocked Skin Face," **[Which Petitioner Has Clear Skin Face]**.

In any event, Hughes photo array identification is what made the lineup possible which was improper and illegal because Hughes is not the victim here and did not witness the crime. This illegal and improper police tactics affected the Judge's Decision, and the Petitioner as well. This tactic was more reason why the lineup should have been suppressed.

However, (see Ex. E, pg 34-35)

The Court: The Dunaway is really only as they're relying on Hughes and Westfall for the Dunaway.

Mr. Kirsch: All Right.

The Court: She wasn't shown a photo array.

Petitioner states, the Hearing Judge was referring to one of the both victim's Ms. Reardon, which the Judge stated, "She was not shown a photo array." However, Ms. Westfall, "Was not shown a photo array either." So the Prosecutor "Bootstrapped" Hughes Photo Arrary Identification with Ms. Westfall knowing she was not shown a photo array as well. Petitioner's Suppression Hearing Decision was based on the Judge's Presumption that Westfall made a

"photo array identification." The judge clearly stated that the State is "relying" on Hughes and Westfall for Dunaway, which in regards to the identification, why would the state rely on Westfall and not Reardon when they both were never shown a photo array nor picked Petitioner out of any photos.

Petitioner states, that Hughes photo array identification was illegal and improper by itself; The prosecutor bootstrapped the illegal and improper photo array to the victim Ms. Westfall knowing it was illegal and improper. These actions by the prosecution was clear Constitutional error which was unjust, very prejudicial and clearly a violation of Petitioner's due process. **Berger v. United States**, 295 U.S. 78; see also **Champan v. California**, 386 U.S. 18, 87 S.Ct. 824.

Petitioner states, whether the District Court error for [NOT] assessing P.O. Hughes credibility as well because his credibility is suspect as well. P.O. Hughes trial testimony was extremely inconsistent with his police report and Sgt. Taveras sprint report. (see Ex. B, DD5 #2); P.O. Hughes stated in his report that he heard the Anti Crime Unit put over a pursuit of a "Male on a bike wearing a [Black Jacket], a red color hoody and [they] lost sight of suspect on Lorimer and Throop."

Contrary: (see Ex. C, pg 72-73); Sgt. Taveras was the first responding officer and testified to his "[Exact]" sprint report which was "Male Black, red sweatshirt, riding bike down Manhattan from Mesrole," which is where they lost sight of suspect.

Petitioner states, so as the Court have notice, Sgt. Taveras [never] mentioned the suspect wearing a [black jacket] or he would have mentioned it. Furthermore, Sgt. Taveras [never]

mentioned they lost sight of the suspect on Lorimer and Throop. These are two false and inconsistent statements made by P.O. Hughes and gets worst.

(see Ex. B, pg 97); On Direct, Hughes was asked, "what was the description that you heard?" Hughes stated he heard, "Male Black, on a bike with a Brown hoody, jeans and on a bicycle."

(see Ex. B, pg 114-115); On Cross, Hughes was asked, "what was the description that you heard?" Hughes stated he heard, "Male Black, on a bike with a Brown hoody, and a [purple] bicycle."

Petitioner states, THIS OFFICER Hughes is clearly [Guilty] of [Perjury]. Hughes was not asked how he feel or what he thinks; Hughes was simply asked "What was the description he heard," which the Court is well aware "Black Jacket, Brown hoody, nor purple bike" was [Not] mentioned in Sgt. Taveras Sprint Report and the location [Lorimer and Throop] was not mentioned as well. The prosecutor allowed Hughes to misrepresent the [trier of facts] and did not attempt to correct him. The prosecutor knew it to be false and allowed it to go uncorrected. It's obvious that the suspect was not wearing none of the items nor colors Officer Hughes had mentioned. Hughes patently tailored the whole description that he heard just to connect and innocent man to the Robbery and the Prosecutor allowed it to go on uncorrected, **Berger v. United States**, 295 U.S. 78.

Furthermore, P.O. Hughes also stated in his report that he, "first observed the [Petitioner] going N/B on Throop Ave." P.O. Hughes then testified at trial that he, "First observed the [Petitioner] cross Throop Ave., coming from Broadway."

Upon examination of the entire record, substantial Prejudice does appear in the record and these constitutional errors cannot be regarded as Harmless Error. **Champan v. California**, 386 U.S. 18, 87 S.Ct. 824; **Berger v. United States**, 295 U.S. 78. Petitioner would like for this Honorable Court to keep in mind that P.O. Hughes is that same officer the allegedly picked Petitioner out of the Photo Array and Investigator, P.O. Bonilla, conducting it.

Petitioner states, was the District Court in error for stating "Whether Hughes heard that the hoody was red, or instead, Brown is immaterial here, and was of no consequence." (see Judge Order, pg. 36).

Petitioner states, based on the rule of evidence, any evidence that is part of the investigation, is material evidence. It was clearly misconduct for P.O. Hughes to mislead the Judge by placing Petitioner at the scene of the crime based on the clothing he was wearing and knowing 'Black Jacket nor Brown Hoody was never in the Sprint Report,' this was clearly a flagrant, where the Sprint Report, along with description are given just for these reasons.

Moreso, (see Ex. D, pg 379-380) during closing argument, Prosecutor states, "The Court also heard Police Hughes testified that within 20 to 30 seconds of hearing the Broadcast, he then saw Defendant [same] description, physical description and [clothing] description, on the [Purple] bike.

Petitioner states, a substantial showing of P.O. Hughe's knowingly and willfully gave perjury testimony has already been made, and supported by exhibits which reveals Hughes evidence presented at trial is inconsistent with his police report and the Sprint Report as well. Moreover, when the Prosecutor stated the "Court also heard," the prosecutor knowingly and

willfully influencing the Judge during closing with Hughes willful false testimony, see **Brecht v. Abrahamson**, 507 U.S. 619, 637-38, 113 S.Ct. 1710.

The Prosecutor's actions here were highly prejudicial because the Prosecutor is now summing up their case based on misrepresentation of the facts. P.O. hughes patently tailored the facts of the case (changed them) and made up his own description and location to 'literally' place Petitioner at the crime scene, and now this misconduct has been cumulative and corroborated by the Prosecutor within the most important time of Petitioner's Trial, 'Closing Arguments.' Sgt. Taveras [Never] mentioned black jacket, brown hoody, purple bike nor the location Lorimer and Throop Ave... This description was not the same, and clearly inconsistent with Sgt. Taveras' Sprint Report. Petitioner has presented legitimate, unquestionable documentation in support of all these false allegations. This Prosecutorial Misconduct resulted in a violation of Defendant's due process rights, see **Washington v. Hofbauer**, 228 F.3d 689 (2000); also see, **Berger v. United States**, 295 U.S. 78. Furthermore, (see Ex. D, pg 380-383) where the Prosecitor falsely states during closing argument that P.O. Hughes identified Defendant, number four, "As the person [he] observed fleeing 155 Manhattan Ave."

Petitioner states, although the District Court states there was no need for curative instruction because it was a bench trial. A jury or Judge does not matter, anyone can be misled with the misrepresentation of facts. However, it was still prejudicial, was not corrected and was essentially critical to the Petitioner's case because it literally places Petitioner at the crime scene. This statement is just as bad as Bonilla stating, the victim told her, "she saw Petitioner's face and can identify him." And we have P.O. Hughes knowingly, willfully and falsely states, "he heard black jacket and brown hoody," in Sgt. Taveras Sprint report. And for the most part, the

misrepresentation of these facts and false allegations states, "Guilty," and more likely to none, the Judge presumed these statements to be true.

Please review (Ex. E, pg 34-35) the hearing Judge 'presumed' that Ms. Westfall made a photo array identification, which is a perfect example of a Judge making a wrong decision based on a 'presumption' which we all are human and can be misled on the misrepresentation of evidence. As Petitioner has stated already, all Petitioner exhibits are legitimately unquestionable, where this Court may review P.O. Hughes police report as proof to the Prosecutor false statement that Hughes observed Petitioner fleeing 155 Manhattan Ave. This statement was egregious and extremely prejudicial where this false statement convicted Petitioner and did not need a Judge decision. The Prosecutor clearly violated Petitioner's due process by making this false statement during closing argument and going on uncorrected. Furthermore (see Ex. D, pg 379-380), during closing argument, the Prosecutor also falsely stated Petitioner's clothing and firearm were [across] the street from one another and the red bag was a half a block away from these items.

Your Honor, these statements are totally false and egregious where the Prosecutor is trying to use the Petitioner's clothing to place Petitioner in possession of the victim's purse. (see Ex. G, DD5 #5) the initial responding officer P.O. Arias report will state where each and every item was found, and will also reveal the Prosecutor's statement was false.

In pursuant to 28 U.S.C.A. §2254, Habeas Petitioner "must" prove that a State Court trial error had denied him Federal Constitutional Right, and such denial has caused him 'actual prejudice,' and had substantial and injurious effect or influence in determining the Judge's Verdict, **Brecht v. Abrahamson**, 507 U.S. 619, 637-38, 113 S.Ct. 1710.

CONCLUSION

Petitioner states, Petitioner has made a clear substantial showing of the prosecutor's misconduct which is obviously apparent on the record and not just one single incident. The misconduct was pronounced and persistent with cumulative effect upon the influencing the Judge which cannot, and should not be disregarded as nonexistence or inconsequential. **Berger v. United States**, 295 U.S. 78.

POINT FIVE

WHETHER THE DISTRICT COURT ERROR FOR DENIAL OF PETITIONER CLAIM THAT THE SUPREME COURT HELD THE SUPPRESSION BY THE PROSECUTION OF EVIDENCE FAVORABLE TO THE ACCUSED UPON REQUEST VIOLATES DUE PROCESS WHERE EVIDENCE IS MATERIAL EITHER TO GUILT OR PUNISHMENT IRRESPECTIVE OF THE GOOD FAITH OF THE PROSECUTION.

Petitioner states, whether the District Court was in error for improperly assessing Petitioner's Brady Claim.

(see Judge Order pg. 31-33); The Judge states Petitioner does not point out to no evidence of bad faith on part of police, Petitioner does not point out to any Supreme Court Precedents.

(see Ex. C, pg 77) Sgt. Taveras testified that they "immediately" returned the victim's bag back to her.

Petitioner states, for start, Brady is a precedent Supreme Court case. Furthermore, it supports Petitioner's case where the Prosecutor suppressed and destroyed evidence that were favorable to Petitioner, and as for Petitioner pointing out bad faith on part of police, the police destroyed this evidence (bag) by immediately returning it back to the victim. The police knows

that they have a 'statutory obligation' to hold and voucher all evidence that has claim to be stolen irrespective of good faith or bad faith. As here, it was in bad faith because he knew the bag should have been voucher alone with everything else, see **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194.

Furthermore, Petitioner has fairly presented the substance of this federal constitutional claim to the State Court which was substantial equivalent of that of the Habeas claim. **Picard v. Connor**, supra, 404 U.S. at 278, 92 S.Ct. at 513 (quoting **Day v. Attorney General of State of N.Y.**, 696 F.2d 186.

> Destruction or non preservation of evidence by the Police is input to the People, since non-perservation taint's the trial no less than any action of the Prosecution, **Bagley v. U.S.**, 473 U.S. 666; **Gigilio v. United States**, 405 U.S. 150.

In examination of the victim's testimony, (see Ex. H, pg 40-41) Westfall/Victim testified, her bag had two [Handles] and her and the 'suspect was pulling' on these [Handles].

Petitioner states, there is [no] doubt that a sample of body fluids, finger prints or tissue sample could have been lifted off of these bag handles from the perpetrator, and the "presumption must be that it should have been preserved and subjected to testing." A comparable factor plays a big part here where some of the items that, "were tested had samples of more than one donor besides the Defendant."

> The Due Process requires when they deal with the failure of the state to preserve evidentiary material of which nothing can be said than it could have been subjected to test, the result of which might have exonerated the Defendant, **Trombette**, **supra**, 467 U.S. at 486, 104 S.Ct. at 2532; Bagley's touchstone of materially is a "reasonable Probability" of a different result, and the adjective is important. The question is not whether the Defendant would more likely than not have receive a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial, resulting in a verdict worthy of confidence. A reasonable probability of a different result accordingly show when the government evidentiary suppression undermine confidence in the outcome of the trial. **Bagley**, 473 U.S. at 678. 105 S.Ct. at 3381.

Petitioner states, Moreover, the state clearly violated their own State Law and now want Petitioner to demonstrate on their negligence, which is clearly unfair. However, a police [knows] that he or she has an obligation to hold and voucher all evidence which everything that was allegedly been stolen comes into their custody, a Police [must] hold it, **N.Y. McKinney' Law** §450.10; also see **Handy**, 20 N.Y.3d 663 (2013).

Handy states under New York Law of Evidence, "A permissive adverse inference charge [must] be given." Using reasonable diligence has requested evidence reasonable likely to be material and where the evidence has been destroyed by agents of the state, which the state clearly had full care, custody and control since the inception of the investigation of the crime scene, and the destruction for the material evidence can [not] be disputed, see **Handy**, 20 N.Y.3d 663 (263).

Petitioner states, that the Destruction of this bag was clearly prejudicial to the defence as well as [hindered] Petitioner's defense. The defense attorney could have done it's own independent testing on this exculpatory evidence (BAG) and compare it to the other [Donor] 'tissue' that were found on the bicycle and the sock. Petitioner never diputed touching the bike or sock but was under other circumstances other than a robbery. However, Petitioner was not the

only 'donor contributor' on these items, which an independent testing of this bag could have put the whole case in such a different light as to undermine confidence in the verdict. **Bagley**, 473 U.S. at 678, 105 S/.Ct. 3381.

CONCLUSION

Petitioner has made a substantial showing of a violation of Petitioner's due process right and how Petitioner has been prejudiced through the States own 'negligence.' The State negligence in the destruction of exculpatory evidence in favor of Petitioner, where there is nothing else that can be said but this particular item (BAG) should have been 'subjected to testing' as well as every other item. The law does [not] give the police the option what stay or what goes, This was clearly a violation of due process, and the victim's testimony validated the strong possibility of [retrieval] body fluids from the handles of the bag, which the victim testified that her and the suspect were pulling on the handles of this bag. Petitioner was not only deprived of presenting a defense, but due process as well.

(see Ex. M, pg 230-231) Mr. Rappa Jiovagnoli, medical lab examiner stated, based on comparison factor, all he needs is to receive a sample to compare and he can perform a comparison. Mr. Rappa further states that there were at least two to three unknown donors on each of these items.

According to Mr. Rappa, the bag could have been tested along with every other item and would have been extremely useful where each item contributed two to three donors to compare from and perform a comparison. So based on the bad faith of Sgt. Taveras by immediately returning the victim's bag back, clearly deprived Petitioner of due process, and ruled out 'potential' donors.

REASONS FOR GRANTING THE WRIT

(1) DID THE COURT OF APPEALS VIOLATE APPELLANT'S CONSTITUTIONSAL RIGHT TO DUE PROCESS BY NOT ISSUING A CERTIFICATE OF APPEALABILITY OR GRANT A HEARING; (2) WAS THE DISTRICT COURT CONFRONTED WITH SUBSTANTIAL CONSTITUTIONAL VIOLATION IN APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS, AND; (3) IF SO, DID THE DISTRICT COURT VIOLATE APPELLANT'S RIGHT TO DUE PROCESS BY FINDING THAT THERE WERE NO SUBSTANTIAL CONSTITUTION CLAIM MADE THEREIN.

An appeal to the United States Court of appeals is of the litigation in the District Court. Even so, in order for the Supreme Court to evaluate whether the Court of Appeals should have Granted a COA, as here, Petitioner has shown and satisfied the requirement of 28 U.S.C.A. §2253(c), which requires a COA may issue only the substantial showing of the constitutional right. In the case at bar, The Respondent will contend that it is the state's position that no appeal can be taken when the lower Court and District Court relied on procedural grounds to dismiss Petitioner's petition – and that only Constitution ruling can be appealed. The United States Supreme Court has held that "in setting forth the precondition for issuance of a COA under § 2253(c), Congress expressed no intention to allow trial Court procedure error to bar vindication of substantial conditional rights on Appeal." **Slack v. McDaniels**. 529 U.S. 473 (2000).

In the case at bar, The District Court was wrong summarily dismiss the Habeas Petition, The Court of Appeals should have granted the COA, and as result of both Court's erring, the request for hearing should be granted.

It bears repeating that high Court continually relies on construction of the AEPA that a COA may not issue unless "the application has made a substantisal showing of the denial of a Constitutional right." 28 U.S.C. §2253(c).

This being the case, Petitioner herein can demonstrate that he was convicted in violation of the constitution and demonstrate that the District Court was wrong to dismiss the Petition on procedure grounds. To that end, Appellant submits to the Court that (a) under AEDPA, your Petitioner was entitled to be issued a COA by the Court of Appeals since in his papers he made a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c). Also, the authority for this standard lies in the Court's ruling in **Barefoot v. Estelle**, 463 U.S. 880, 894 (1983). Congress adopted the meaning the **Barefoot,** ruling gave to the word in the standard, **William v. Taylor**, 529 U.S. 362 (2000).

With the extension of **Barefoot**, the standard also calls for the showing that reasonable jurists could debate that the petition should have been resolved in a different manner or that the issue presented were "adequate to deserve encouragement to proceed further," **Barefoot**, @ 893.

Petitioner's Due Process Right was violated y the District Court's failure to rule on the merits and basically foreclose Petitioner from proceeding further since it only ruled on procedure grounds and not the substantial, meritorious aspect of the petition.

The only recourse for Petitioner herein, was to demonstrate, as he did, to the Court of Appeals that jurists of reason would find it debatable whether his Petition states a valid claim of the denial of a constitutional right and jurists of of reason would find it debatable whether the District Court was correct in its procedural ruling. **Slack v. McDoniels**, @484. This constitution by the Court gives meaning to the requirenment that Petitioner show the substantial underlying

constitutional claims and is in conformity with the standard of "Substantial Showing," (**Barefoot**, @ 893) and the Statue (28 U.S.C. §2253(c)).

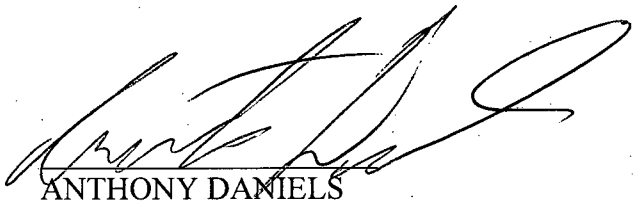
The reason set forth herein illustrate the underlying constitutional issue originally presented in the Petition. In conformity with the State, the application for COA and hearing contains illustrations of the procedural aspect. In this way, though apparently inarfully presented, both prongs are fully before Your Honor(s).

CONCLUSION

WHEREFORE, foregoing reasons, Your Honor should Grant the Writ of Certiorari so that Petitioner can fully brief the issues before the panel and any further or just relief deem proper by Your Honor.

DATED: December 12, 2023.

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.



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