NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

PAULIUS TELAMY,

***Petitioner*,**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, reasonable jurists could debate whether, under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution suppressed favorable evidence at Petitioner's trial.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

Paulius Telamy v. Florida Dept. of Corrections, No. 23-11491 (December 19, 2023)

United States District Court (S.D. Fla.):

Paulius Telamy v. Florida Dept. of Corrections, No. 16-62309-Cv-KMW (April 3, 2023)

Florida Fourth District Court of Appeal:

Paulius Telamy v. State, No. 4D15-3145 (Jan. 14, 2016) (denial of third postconviction motion)

Paulius Telamy v. State, No. 4D10-2275 (Nov. 23, 2011) (affirmance on direct appeal)

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Paulius Telamy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 23-11491 in that court.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit denying Petitioner a certificate of appealability is unreported but reproduced in Appendix A-1. The district court's final judgment and decision denying Petitioner's

28 U.S.C. § 2254 petition for writ of habeas corpus are also unreported and reproduced in Appendices A-2 and A-3, respectively.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On December 19, 2023, the court of appeals denied Petitioner a certificate of appealability to appeal the district court's denial of Petitioner's habeas corpus petition. This petition is timely filed under Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner intends to rely on the following constitutional provision:

U.S. Const., amend. XIV, § 1

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Factual Background.

In May 2003, a woman called the Fort Lauderdale Police Department to report that a man unknown to her entered her residence while she was sleeping and raped her. She was taken to a sexual assault treatment center where physical evidence was taken from her person. The Broward Sheriff's Office (BSO) Crime Lab submitted the physical evidence to a private DNA testing facility for testing, and in December 2003, vaginal swabs taken from the victim were found to contain a male DNA profile. In August 2004, Lynn Baird, DNA Specialist for the BSO Crime Lab, searched the Broward County DNA database but failed to detect any similar male profiles, and so forwarded the DNA profile for the suspect to the Florida and national DNA databases.

Petitioner's DNA was submitted to the DNA database of the Florida Department of Law Enforcement and uploaded into CODIS in 2007. In May 2008, DNA Specialist Baird notified Fort Lauderdale Police Detective Lisa Cahir that there was a hit to the CODIS DNA database which identified Petitioner's DNA profile as similar to the profile from the unsolved 2003 rape, and requested that an oral sample be obtained from Petitioner for confirmation. The BSO Crime Lab's internal identifier for Petitioner's case was Lab No. 03-11550. A "carbon copy" of Baird's report was sent to Assistant State Attorney Jeff Marcus, who participated in the prosecution of Petitioner. In June 2008, the Fort Lauderdale Police

Department showed the victim a photo of Petitioner, but she was unable to identify him as the perpetrator.

The next day, DNA Specialist Baird sent a "Crime Laboratory Analysis Report" (hereinafter "Cadet Report") to a BSO officer regarding a separate Lauderdale Lakes offense identified as Lab No. 03-8437. The Report identified the suspect in Lab No. 03-8437 as Kerby Cadet. The Report stated that "[s]wabs from right shoe" had been submitted to the BSO Crime Lab. *Id*. It stated further that "[d]uring a routine search of the Broward County DNA Investigative Support Database, a case-to-case match occurred." The "related case" was identified as Lab. No. 03-11550 – Petitioner's case – and stated that the "[s]uspect *previously* associated" with case No. 03-11550 was Petitioner. Handwritten on the Report was the phrase: "New case 03-8437 hit to DNA obtained from 03-11550." The Report was carbon-copied to, *inter alia*, Assistant State Attorney Marcus and Detective Cahir.

The pertinent portions of the Report are replicated here:

Broward County Sheriff's Office	Lab Number:	03-8437
Crime Laboratory	Agency Case:	LL03-04-1073
201 SE 6th Street, Room 1799	Date:	06/19/2008
Fort Lauderdale, FL 33301	Page	1 of 2

CRIME LABORATORY ANALYSIS REPORT

To:	Sgt. Rossman	[handwritten:
	BSO District 04 (Lauderdale Lakes)	*New case 03-8437*
	4300 NW 36th Street	*hit to DNA*
	Lauderdale Lakes, FL 33313	*obtained from 03-11550*]

SUSPECT: **KERBY CADET**

VICTIM: [Redacted]

The following evidence was submitted to this laboratory:

ICM-B. Swabs from right shoe

During a routine search of the Broward County DNA Investigative Support Database, a case-to-case match occurred. The related case and the associated information is provided below. Further follow-up should be done with the agency involved in the hit. For comparison purposes, oral swabs are required to be submitted from the individual listed below:

BSO Laboratory #:	03-11550; #1-5 (vaginal swabs)
Agency:	Ft. Lauderdale Police Department
Agency contact:	Detective Lisa Cahir
	954-828-5964
Agency Case #:	03-68357
Type of offense:	sexual assault

Suspect previously associated with case 03-11550:

Name:	Paulius Telamy
Dept. of corrections:	#L58906
Date of birth:	[redacted] 1971

REMARKS:

Submit the oral standard "to the attention of Lynn Baird as confirmation of a CODIS hit."

Our laboratory is tracking follow-up on CODIS hits. If you will not be submitting a standard for comparison, please contact Lynn Baird at 954-831-6409 or at lynn_baird@sheriff.org.

* * *

Cc: Major DeFuria (BSO, Office of the Majors)
ASA Jeff Marcus
Detective L. Cahir (Ft. Lauderdale Police Dept.)

Police arrested Petitioner in February 2009, and he was charged with burglary with a battery, in violation of Fla. Stat. § 810.02(2), and sexual battery, in violation of Fla. Stat. § 794.0211(5). Pretrial, defense counsel filed a Demand for Discovery ("Demand"), demanding that the prosecutor, *inter alia*:

> [D]isclose to defense counsel and permit defense counsel to inspect, copy, test and photograph the following information and material within the State's possession or control:
>
> 1. The names and addresses of all persons known to the prosecutor to have information that may be relevant to the offense charged, and to any defense with respect thereto.
>
> * * *
>
> 12. Whether any physical . . . examinations or any scientific tests were made by experts in connection with this case.
>
> 13. Reports or statements of experts made in connection with this case, including results of physical . . . examinations and or scientific tests, experiments or comparisons.
>
> * * *
>
> 16. Any and all evidence favorable to the accused on the issues of guilt, or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *Giles v. Maryland*, 386 U.S. 66 (1967).
>
> WHEREFORE, said Demand for Discovery by the Defendant being material and relevant to the proper defense of Defendant under applicable rules, cases and constitutional provisions, Defendant requests that this demand be answered in all respects.

Soon thereafter, the prosecution filed its first discovery response. Among those persons listed as "known to the prosecutor to have information which may be relevant to the offense charged" was DNA Specialist Baird. And listed among the "[R]eports or statements of experts" is "Chemist Lab #03-11550." The discovery response also stated that "[a]t this time the State in unaware of any evidence which

falls within *Brady v. Maryland*." Nowhere listed on the State's discovery response was Cadet Report, nor the name "Kerby Cadet."

After the trial court granted the prosecution leave to obtain a DNA swab from Petitioner, DNA Specialist Baird sent a "Crime Laboratory Analysis Report" to the Fort Lauderdale Police Department Sex Crimes Unit. This report compared a sample from Petitioner to results previously obtained by the private DNA facility that tested the evidence obtained from the victim, and concluded:

> A DNA profile from the sperm fraction of the vaginal swab indicated the presence of a mixture with at least two contributors. Assuming [the victim] is one of the contributors, Paulius Telamy [] cannot be excluded as a possible contributor to the major DNA profile detected in this mixture sample. The odds of randomly selecting an unrelated individual who can be included as a possible contributor to this evidentiary mixture profile are approximately 1 in 1.6 million.
> . . .
> The population statistics are estimates with a confidence level of plus or minus a factor of 10. The reported odds are derived from the Federal Bureau of Investigation DNA population databases of the following major populations: Caucasians, African-Americans, Southeastern Hispanics and Southwestern Hispanics. Frequency dates for loci D19S433 and D2S1338 are not included in these statistical calculations. The odds are calculated after a comparison of the evidentiary profile(s) to the known (victim and/or suspect) standard profiles. Loci that are marked with no results or are deemed inconclusive in the report table are not included in statistical calculations. When applicable, the most common odds are reported.

Soon thereafter, the State filed its first supplemental discovery response, which listed "DNA Reports" as an addition to its previous discovery submission. The supplemental response, however, did not mention the name "Kerby Cadet" nor contain a copy of the Cadet Report.

B. Petitioner's trial.

At trial, only evidence presented that linked Petitioner to the offense was DNA evidence presented by DNA Specialist Baird. She did not mention, nor was she questioned, about Kerby Cadet or the Cadet Report. The defense rested without presenting any witnesses. In closing, the prosecutor argued that the DNA mixture taken from the victim contained Petitioner's DNA, and therefore he was guilty. He argued, "How do we know he sexually battered her? His DNA in in her vagina. That is what this case is about. It is not about serology tests or whether or not you saw a picture. This is what it is about. His DNA, and her vagina. . . . Justice would be guilty as charged for burglary with a battery [] with the intent to commit the sexual battery. Again, how do we know that? Because he did it. His DNA is in her vagina." The jury convicted Petitioner of both counts.

Although the low end of the applicable sentencing guidelines was slightly more than nine years, the trial court imposed a life sentence stating, that "this was a brutal crime. . . . And I found the evidence more than convincing. This was a positive DNA match to you." Petitioner's conviction and sentence were affirmed on appeal. *Telamy v. State*, 75 So.3d 746 (Fla. Dist. Ct. App. 2011).

C. Petitioner Seeks State Postconviction Relief Based on the State's Failure to Turn Over the Cadet Report.

After two unsuccessful state motions for postconviction relief, Petitioner filed a third state postconviction motion which included a claim of prosecutorial misconduct premised on newly discovered evidence, actual innocence, and a

miscarriage of justice, and stated, *inter alia:*

> -- "On June 19th, 2008, A Crime Laboratory Analysis Report was sent to: Sgt. Rossman; BSO District 04 (Lauderdale Lakes) 4300 NW 36 Street Lauderdale Lakes, FL 33313. The report is about a Sexual Assault, case #03-11550 the victim is [redacted] and the suspect is Kerby Cadet, Mr. Cadet and the Defendant appear to have the same DNA."
>
> -- "As the DNA of the Defendant is the only link to the accused crime there is a very large problem here. Not only has this information never been given to the Defendant or his attorney (Discovery violation), but he was convicted of a crime someone else committed."
>
> -- "To say he was prejudiced by this material evidence is an understatement, as the DNA analysis report is how the Defendant is linked to the crime. The State could not even bring charges against him without it. Forget about a jury hearing this evidence, because there never would have been a trial."

Petitioner attached the Cadet Report to the motion as an exhibit.

The State's response raised various procedural defenses to Petitioner's prosecutorial misconduct claim, but did not mention the Cadet Report. The trial court summarily denied the motion, and the state court of appeal summarily affirmed. *Telamy v. State*, 189 So.3d 790 (Fla. Dist. Ct. App. 2016) (No. 4D15-3145).

Petitioner moved for rehearing stating, in pertinent part:

> 7. In his Motion, Telamy identifies a notice from Lynn Baird, the CODIS Manager of the Broward County Sheriff's Office Crime Laboratory, dated June 19, 2008, and addressed to Sgt. Rossman, indicating that a suspect named Kerby Cadet, involved in another sexual assault case, also matched the forensic DNA evidence of Telamy's case. See "Exhibit C" attached to the Motion. This notice was "carbon copied" to Fort Lauderdale Police Detective Lisa Cahir, the investigator in Telamy's case. In other words, [a] person in there who could have been a contributor to the mixed DNA had been identified as a *second* suspect to the investigator in this case, less than a month after Telamy was identified, *yet the State never disclosed the notice of Kerby Cadet's identity prior to trial.*

> 8. The evidence suggesting Telamy's guilt in the burglary/sexual assault case was extraordinarily weak, and another suspect associated with another sexual assault was known to be at least as probably the actual perpetrator. It seems elementary that, had Kerby Cadet's identity and the fact that his DNA also matched the crime scene evidence been disclosed to Telamy before trial, he could have presented a very compelling defense argument that he was not the assailant in the State's case – at least compelling enough to give the jury reason to doubt his guilt. Such doubt would have demanded a verdict of not guilty on both charges.
>
> 9. Telamy discovered Lynn Baird's notice to Lisa Cahir through an ordinary public records request to Broward County's Sheriff's Office. Whether the State's failure to disclose Kerby Cadet to Telamy in discovery was deliberate or inadvertent, the suppression of this evidence is clearly a violation of Fla. R. Crim. P. 3.220 and *Brady*, *supra*. . .
>
> 10. Telamy concedes that his claim for relief, presented in the Motion, is anything but clear and straight-forward. However, all the facts restated here are laid out in his pleading below. The State appears to have been confused by the Kerby Cadet notice, believing it to be a notice identifying Telamy as a suspect. See State's Response at 10, paragraph 19 ("Defendant even attaches to his motion as Exhibit C copies of the Broward County Sheriff's Office Crime Law reports confirming that the DNA profile of Defendant Telamy was obtained from evidence submitted to the lab in his sexual assault offense . . . Defendant further asserts prosecutorial misconduct . . . that DNA information linking him to the offense has never been given to the Defendant or his attorney.")
>
> 11. From that misunderstanding, the State posited that Telamy's claim had no merit. . .

The state appellate court summarily denied rehearing. *See id.*

D. District Court Proceedings.

In 2016, Petitioner sought federal habeas corpus relief in the Southern District of Florida. His *pro se* 28 U.S.C. § 2254 petition alleged that the State failed

to turn over material evidence of an exculpatory nature or would have been useful for impeachment purposes in violation of *Brady v. Maryland*, 373 U.S. 83 (1963):

> On August 30, 2011, Telamy made a public records request to the Broward County Sheriff's Office ("BSO") for any material related to the DNA analysis BSO conducted in his criminal investigation. About four months later, Lynn Baird, the serologist who had testified at Telamy's trial, responded to the request by providing several documents. Among the documents sent to Telamy was a Crime Laboratory Analysis Report dated 6/19/2008 by Baird addressed to BSO Sgt. Rossman. In her report, Baird notified Sgt. Rossman that there had been a potential DNA match to a case he had investigated, BSO Lab #03-8437 in which one Kerby Cadet is the suspect, with the DNA collected from Vaughn. In other words, Kerby Cadet was identified as a potential suspect in the crimes for which Telamy was charged and prosecuted.
>
> Lisa Cahir, the investigator in Telamy's case, along with Jeff Marcus, the Assistant State Attorney who prosecuted him, were listed as a "carbon copy" recipient of Baird's report. Yet the State declared in its Discovery Statement filed in trial court on March 24, 2099, in paragraph 2.(h) 4, that it was "unaware of any evidence which calls within the purview of *Brady v. Maryland*, and/or FRCP 3.220(b)(4).' (R.10). The State never disclosed to the defense that Kerby Cadet had been linked to the case.
>
> The DNA comparison between Telamy and the mixed DNA is a positive match of allele values in only four of 15 chromosomal loci. Although there is no allele value eliminating Telamy as a suspect, the statistical odds of another person's DNA matching the crime scene DNA is fairly good. By the BSO's own report, the odds were "1 in 1.6 million," "plus or minus a factor of 10." In other words, in the greater metro area surrounding Fort Lauderdale, containing roughly 5.7 million residents, the DNA profile of more than 30 other people would match the crime scene DNA sample obtained from Vaughn's vaginal swab, as well as, or better than, Telamy.
>
> [The victim] herself could not identify her assailant and could not identify Telamy at trial. Telamy has vehemently professed that he was not the perpetrator of the charges against him. Identity was the hotly-debated issue in Telamy's case. DNA evidence is a species of

> circumstantial evidence, and the marginal DNA match in this case is the only evidence linking Telamy to the crime. Although [the victim] alleged that her assailant broke into her house through either of two locked entries – one of which could be opened only from inside – there were no signs of entry and no fingerprints obtained from her home.
>
> Consequently, any evidence to suggest another suspect had been identified by DNA as Vaughn's attacker was relevant and material. The evidence was favorable to the accused, either because it was exculpatory or impeaching, the evidence was suppressed by the State either willfully or inadvertently, and Telamy was prejudiced because, had he been able to present evidence to the jury that the State had identified at least one other suspect, the jury would have had a reason to doubt whether Telamy was the perpetrator of the crime, and that reasonable doubt would have demanded a verdict of not guilty.
>
> Petitioner's convictions must be vacated and this case set for a new trial or Petitioner ordered released.

Litigation ensued on several procedural questions unrelated to the question presented here except for the district court's order appointing counsel for Petitioner, wherein it noted that, "the state seems to concede that the [Cadet] '[R]eport was not turned over.'" Thereafter, in March 2023, the district court denied Petitioner's § 2254 petition and a certificate of appealability, and entered final judgment. App. A-2; App. A-3.

Turning to the merits of Petitioner's *Brady* claim, the district court first explained the three components of a *Brady* claim a petitioner must demonstrate to establish entitlement to relief: "(1) the evidence at issue is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the [petitioner] incurred prejudice." App. A-3: 20-21. The district court considered whether the

Cadet Report was exculpatory or impeaching, and determined it was not. *Id.* at 21. It noted that "[t]he Cadet Report identified Kerby Cadet as the suspect in an unrelated investigation involving a different victim, A.C., and revealed that 'during a routine search of the Broward County DNA Investigative Support database, a case-to-case match occurred' between DNA taken from the right shoe of the offense involving A.C. and Petitioner's DNA." *Id.* Specifically, the district court determined, "the Cadet Report did not link Kerby Cadet to the 2003 burglary and sexual battery of H.V.; rather, it linked Petitioner to the offense involving A.C." *Id.* at 21 (internal citations omitted). Because "Kerby Cadet's DNA was never detected in DNA samples from the 2003 burglary and sexual battery and never linked in any way to that case," the district court concluded, "the Cadet Report does not offer exculpatory evidence in the 2003 burglary and sexual battery of which he was convicted, but appears to inculpate Petitioner in another, separate offense." *Id.*

The district court then recounted the evidence presented at trial, and determined that, in light of that evidence, "even if the defense would have had the Cadet Report prior to trial and cross-examined the State's DNA experts regarding its findings, . . . the Cadet Report would not have exonerated or otherwise impeached the testimony of the State's witnesses regarding the fact that Petitioner's DNA was found in the 2003 burglary and sexual battery victim's vaginal swabs." *Id.* at 24. "Because the evidence at issue is not exculpatory or impeaching," the district court concluded, "Petitioner fails to satisfy the first component of a *Brady* violation." *Id.*

Without considering the other two components of a *Brady* claim, the district court denied the petition, and in the same order, summarily denied a certificate of appealability. *Id*. at 25.

E. The Decision Below.

Petitioner timely appealed, and the Eleventh Circuit also denied a certificate of appealability. App. A-1. Its order states, in pertinent part:

> Here, reasonable jurists would not debate the denial of Telamy's petition. Telamy cannot meet the first *Brady* prong because the evidence was not exculpatory, as it appeared to connect Telamy to another crime, not another offender to Telamy's crime. *See Strickler* [*v. Greene*], 527 U.S. [263,] 281-82 [(1999)]. Accordingly, even if the report had been disclosed to the defense during Telamy's proceedings, it would not have proven useful or exonerative, as it connected Telamy to another incident of criminal activity and did not connect another person to Telamy's crime.

Id. at 3.

REASONS FOR GRANTING THE WRIT

Reasonable jurists could differ as to the resolution of Petitioner's *Brady* claim.

Reasonable jurists could debate the resolution of Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963). The court below therefore erred in failing to grant a certificate of appealability on Petitioner's *Brady* claim. This Court should therefore grant the instant petition.

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. A COA may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

A petitioner need not establish that he will win on the merits in order make the "substantial showing" required to obtain a COA; he need only demonstrate that the questions he raises are debatable among reasonable jurists. A court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, this Court "do[es] not require petitioner to prove,

before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Here, reasonable jurists could debate the resolution of Petitioner's *Brady* claim. The right protected by the rule in *Brady* is "the defendant's right to a fair trial mandated by the Due Process Clause of the Fourteenth Amendment to the Constitution." *United States v. Agurs*, 427 U.S. 97, 107 (1976). Under *Brady*, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87. There are three components to a "true" *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

Reasonable jurists could debate whether Petitioner satisfied all three of these components. Contrary to the findings of the Court below, reasonable jurists could debate whether the Report was favorable to the defense. "Favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the

verdict.'" *Cone v. Bell*, 556 U.S. 449, 470 (2009) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

Reasonable jurists could also debate whether the State suppressed the Cadet Report. A state's failure to disclose favorable evidence constitutes suppression of evidence under *Brady*. A prosecutor's duty to disclose under *Brady* applies regardless of whether there has been an explicit request from the accused. *See Agurs*, 427 U.S. at 107. Regardless, Petitioner's trial counsel made a very explicit request for evidence favorable to the accused under *Brady*. Yet the State still failed to disclose the Cadet Report.

Specifically, Petitioner's trial counsel filed a discovery request demanding that the prosecutor:

> disclose to defense counsel and permit defense counsel to inspect, copy, test and photograph the following information and material within the State's possession or control:
>
> 1. The names and addresses of all persons known to the prosecutor to have information that may be relevant to the offense charged, and to any defense with respect thereto.
>
> * * *
>
> 12. Whether any physical . . . examinations or any scientific tests were made by experts in connection with this case.
>
> 13. Reports or statements of experts made in connection with this case, including results of physical . . . examinations and or scientific tests, experiments or comparisons.
>
> * * *
>
> 16. Any and all evidence favorable to the accused on the issues of guilt, or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *Giles v. Maryland*, 386 U.S. 66 (1967).

> WHEREFORE, said Demand for Discovery by the Defendant being material and relevant to the proper defense of Defendant under applicable rules, cases and constitutional provisions, Defendant requests that this demand be answered in all respects.

Although the prosecution provided various discovery documents to the defense, the State did not disclose the report that named Kerby Cadet as a suspect. The Cadet Report must have been known to the prosecution. The face of the Cadet Report itself indicates that a carbon copy of it was provided to Fort Lauderdale Police Detective Lisa Cahir, who investigated Petitioner's case, and to Assistant State Attorney Jeff Marcus, who assisted in the prosecution of Petitioner's case. Moreover, even if the Cadet Report was not known to the prosecutor, "the individual prosecutor has a duty [under *Brady*] to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. There can be no doubt that BSO Crime Lab DNA Specialist Lynn Baird, who prepared the Cadet Report, was acting "on the government's behalf in this case." *See id*. She conducted the DNA analysis presented as evidence at Petitioner's trial, and testified as a witness for the prosecution. The prosecution had a duty to disclose the Cadet Report to the defense, but it did not.

Petitioner never saw the Cadet Report until two years after trial, when he made a simple public records request to the BSO Crime Lab. Review of defense counsel's file reveals no copy of the Cadet Report. At no time during either the state or federal proceedings on this claim has the State argued that the Cadet Report was turned over to the defense. In fact, as the district court noted that, "the state seems

to conceded that the '[R]eport was not turned over.'" Thus, "there is no dispute about the fact that [it was] known to the [State] but not disclosed to trial counsel." *Strickler*, 527 U.S. at 282.

The State argued below that suppression cannot be found here because Petitioner "failed to establish that he could not have possessed [the Report] with the exercise of reasonable due diligence." That it incorrect. The fact that Petitioner's counsel made an explicit request for *Brady* material and yet the State did not disclose the Cadet Report is sufficient to show that the Report was suppressed for purposes of *Brady*. This is especially true given that Florida is an "open records" state. *See Strickler*, 527 U.S. at 283 (noting that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*"). Petitioner has unquestionably shown that reasonable jurists can debate whether the Cadet Report was suppressed for purposes of *Brady*.

Petitioner has also shown that reasonable jurists can debate whether he was prejudiced by the State's failure to disclose. To establish prejudice, the defendant must show that the suppressed evidence was material. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The evidence rises to the level of materiality within the meaning of *Brady* when there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different. *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). "A 'reasonable probability' of a different result'

is one in which the suppressed evidence 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 433-34; *see United States v. Bagley*, 473 U.S. 667, 682 (1985).

In determining whether disclosure of the suppressed evidence might have produced a different result, the Court must consider the "totality of the circumstances." *Bagley*, 473 U.S. at 683. The Court "must examine the trial record, 'evaluat[e]' the withheld evidence 'in the context of the entire record,' and determine in light of that examination whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' " *Turner,* 137 S. Ct. at 1893 (internal citations omitted) (quoting *Agurs*, 427 U.S. at 112, and *Cone*, 556 U.S. at 470).

Here, reasonable jurists can debate whether there is a reasonable likelihood that evidence would have changed the outcome of the trial. The only evidence linking Petitioner to the offense was the DNA evidence. The victim never identified him. There were no other witnesses. There were no fingerprints or any other physical evidence. At closing, the prosecutor repeatedly told the jury that Petitioner was guilty because of the DNA evidence.

In sum, because the State's failure to disclose the suppressed Cadet Report prejudiced Petitioner, it violated due process under *Brady*.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

HECTOR A. DOPICO
INTERIM FEDERAL PUBLIC DEFENDER

By: *s/Janice L. Bergmann*
JANICE L. BERGMANN
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
March 7, 2024