UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CROSLEY ALEXANDER GREEN,	)	
	)	
Appellee	)	
	)	
v.	)	
	)	No. 18-13524
SECRETARY, DEPARTMENT OF CORRECTIONS, et al.,	)	
	)	
	)	
Appellant.	)	

BRIEF OF APPELLEE CROSLEY ALEXANDER GREEN

Dated: April 18, 2019

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-2(a), the undersigned hereby certifies that the following persons may have an interest in the outcome of the case:

Anstead, Harry Lee, Judge

Antoon, John II, Senior United States District Judge

Baker, Hon. David A., United States Magistrate Judge

Baker, Shane, Warden, Hardee Correctional Institution

Bell, Kenneth B., Judge

Bondi, Pam, Attorney General, State of Florida

Cantero, Raoul G., Judge

Cohen, Jay P., Judge

Conway, Anne C., Judge

Crews, Michael D., Secretary, Florida Department of Corrections

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Dalton, Hon. Roy B. Jr., United Sates District Judge

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Dugan, W. David, Judge

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No publicly traded company or corporation has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellee desires oral argument in this case because issues regarding the evidence that was and was not presented to the trial court, and the extent to which the prosecution's suppression of exculpatory evidence would have changed the outcome the trial, involve a complex procedural and factual record. Oral argument may significantly aid the Court in its consideration of this case.

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STATEMENT OF ISSUES

1. Whether the district court properly granted Crosley Green's 28 U.S.C. §2254 petition for a writ of habeas corpus based on the State's willful suppression of the fact that the initial responding officers evaluated the totality of the evidence as suggesting that the investigation should be directed toward someone other than Petitioner, the withheld evidence was clearly material, and the failure to disclose it was a *Brady* violation which undermines confidence in the outcome of the trial.

2. Whether the other Claims in the Petition provide alternative grounds upon which this Court could affirm the Order under 28 U.S.C. §2254.

STATEMENT OF FACTS[1]

On April 4, 1989, after smoking marijuana and having sex with his ex-girlfriend, Kim Hallock, in an abandoned orange grove, Charles "Chip" Flynn was shot in the chest with a .22 caliber bullet. Hallock then drove Flynn's pick-up truck out of the orange grove, leaving the mortally wounded Flynn behind. Hallock drove to the home of Flynn's friend, passing on the way a hospital and numerous homes where she could have sought help, including that of her parents. Hallock told Flynn's friend that "Chip got shot." Flynn's friend convinced her to

[1] For a more detailed description of the procedural history of this case, *see* Supp._Appx._Green's_Initial_Appeal_Brief, *Crosley Green v. Sec'y Dep't of Corr.*, No. 16-10633 (11th Cir. Aug. 8, 2016); *see also* Supp._Appx._Opinion, *Crosley Green v. Sec'y Dep't of Corr.*, No. 16-10633 (11th Cir. Dec. 15, 2017).

call 911. Hallock later told the police that she and Flynn had been robbed and kidnapped by "a black guy" with a gun. Hallock described the man as having "kind of a big build," not quite as big as a body builder, but he was "just big."[2] In addition, Hallock said that the perpetrator had a distinctive hair style: "curled like a permanent" with "a little bit of an afro" that was "greasy," possibly with afro-sheen in it.[3]

The first police responders to arrive, Sergeant Diane Clarke and Deputy Mark Rixey, attempted to speak with the injured Flynn and examined the crime scene. Each concluded that Hallock killed Flynn—a conclusion that each maintains to this day.[4] Clarke and Rixey, who had more than 14 years of investigatory experience between them, both told Assistant State's Attorney ("ASA") Christopher White that, based on their crime-scene observations, they believed that Hallock killed Flynn; this conclusion is clearly documented and underlined in White's own August 28, 1989 handwritten notes.[5] White, however,

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[2] App._I_Vol._12_Doc._3-14 at 64-65. All citations in this Brief to the Appendix cite to the page number of the Volume of the Appendix in which the document is located. Thus, the previous citation to pages "64-65" is to pages 64-65 of App._I_Vol._12.

[3] Supp._App._Doc._3-19 at 74:15-19; App._I_Vol._12_Doc._3-14 at 66.

[4] App._I_Vol._12_Doc._3-23 at 121-123; App._I_Vol._12_Doc._3-27 at 135-36; App._I_Vol._12_Doc._3-30 at 138-40.

[5] App._I_Vol._12_Doc._3-30 at 139 ("Mark [Rixey] & Diane [Clarke] suspect girl did it. . . .").

concealed this exculpatory information: he failed to disclose Clarke's and Rixey's investigatory conclusions and failed to turn over his notes to the defense. Had White disclosed this exculpatory information as well-settled law requires, it would have had a seismic impact on Green's trial.

The suppression of Clarke's and Rixey's observations and conclusions was devastating to the fairness of Green's trial because there was no physical evidence introduced at trial that tied Green to the alleged robbery, kidnapping, and murder. Investigators did not find a single fingerprint of Green's on the truck that he supposedly got into, out of, and drove for several miles.[6] Moreover, neither Green's physical build, nor his hairstyle or its length, fit the characteristics of the "black guy." In stark contrast to Hallock's description, Green has never been big or muscular and has never had a "geri-curl," a permanent with ringlets, or worn gel in his hair.[7] Instead, Green has always had a slight build and very short hair.

Hallock's first identification of Green resulted from a photographic lineup calculated to result in her selection of Green. First, the photo array directed Hallock to Green's photo, which was undeniably the smallest, the darkest, and most conspicuous—and in the center of the top row. Second, Hallock picked out

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[6] App._I_Vol._12_Doc._3-32 at 97-102; Supp._App._Doc._3-33.

[7] App._B_Vol_1 at 1295-96, 1306-07 (T. 1278:18-1279:3, 1289:25-1290:12); App._I_Vol._12_Doc._3-85 at 130-31.

Green only *after* the police told her that their suspect was in the photo lineup.[8] The police also told Hallock after she picked out Green that she had picked the right person.[9] Hallock initially only tentatively indicated that Green's photo was that of the "black guy," saying she was "pretty sure" and then eventually saying she was "sure" that her identification was correct.[10]

Otherwise, the only evidence introduced by the State to connect Green to the crime was the testimony of a dog tracker who supposedly followed shoe prints of the perpetrator. The shoe prints—from Win Streak tennis shoes matching neither the work boots allegedly worn by the "black guy" nor Green's *only* shoes (Reebok sneakers)—were located in a public park where many people had watched a baseball game earlier on the day of the crime.[11] The dog tracker followed the Win Streak shoe tracks to the vicinity of Green's sister's house. The trial court allowed this completely unreliable evidence to be admitted at trial, despite its determinations that: (1) the State did not recover any shoes that matched the tracks followed by the dog; (2) the perpetrator was reported to have been wearing heavy work boots, not tennis shoes; and (3) there was no evidence whatsoever that the

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[8] Supp._App._Doc._3-19 at 61:6-25, 65:10-15; Supp._App._Doc._3-10 at 132:25-134:21; App._B_Vol._1 at 640, 772-73 (T. 623:6-19, 755:23-756:7).

[9] App._B_Vol._1 at 641 (T. 624:12-16); Supp._App._Doc._3-10 at 134:23.

[10] Supp._App._Doc._3-19 at 64:5-14; App._B_Vol._1 at 641 (T. 624:3-11).

[11] Supp._App._Doc._3-88 at 6:21-23.

shoe prints tracked belonged to Green, and the dog could have been tracking anyone at all.[12] According to the Supreme Court of Florida, this "scent tracking was the only evidence that established Green's identity." *Green v. State*, 641 So. 2d 391, 394 (Fla. 1994).

Even with the dog-tracking evidence, the State's case was weak— until three witnesses falsely testified that Green had spontaneously confessed to them. But each of the State's three confession witnesses—Jerome Murray,[13] Lonnie Hillery,[14] and Sheila Green[15]—has recanted, citing the State's coercion as the reason they lied. More recently, a fourth key State witness, Laymen Layne, recanted his "spontaneous confession" testimony at one of Green's post-conviction hearings, also citing coercion by the State.[16]

Green's court-appointed trial counsel was John Roberson Parker. Green's case was Parker's first and last defense of a death penalty case. Parker began his career alongside White and Phil Williams at the Brevard County State Attorney's

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[12] App._B_Vol._1 at 1380, 1384 (T. 1363:2-18, 1367:13-17).

[13] *See* App._I_Vol._13_Doc._3-55, at 6-8 (7:20-9:22), 12-15 (13:11-16:7), 17-18 (18:24-19:4), 20 (21:8-20), 24 (25:14-17).

[14] *See* Supp._App._Doc._3-52; App._I_Vol._12_Doc._3-49, at 221 (19:1-6), 233 (31:15-18), 251-52 (49:20-50:4); Supp._App._Doc._3-37 at 79:8-20.

[15] *See* Supp._App._Doc._3-37 at 18:19-19:4, 21:2-8, 63:16-19, 64:18-19; Supp._App._Doc._3-53.

[16] Supp._App._Doc._3-64.

Office—the same office to which he returned following Green's trial. Parker utterly failed to investigate Green's alibi defense, interview key witnesses, or retain either ballistics or dog tracking experts. Parker also failed to discover that Green did not know how to drive a manual-transmission vehicle, discrediting Hallock's claim that Green drove Flynn's manual-transmission truck prone to stalling, while simultaneously holding a gun on Hallock and Flynn.

Finally, newly discovered evidence includes a post-trial analysis by the Florida Department of Law Enforcement concluding that the .22 caliber bullet recovered from Flynn "was compared to Flynn's H&R revolver and was determined to have 'similar characteristics'."[17] This is contrary to the prosecution's main theory at trial that there were two guns and that Flynn was shot with a gun Hallock described as an automatic weapon. Instead, it demonstrates that Flynn was shot with his own .22 caliber handgun, consistent with the conclusions of the first police officers on the scene that Hallock, not Green, shot Flynn.

STANDARD OF REVIEW

In reviewing the District Court's grant of a petition for a writ of *habeas corpus*, the findings of fact are reviewed for clear error, and legal conclusions are

[17] Supp._App._Doc._3-77 at 65.

reviewed *de novo*. *Hurley v. Moore*, 233 F.3d 1295, 1297 (11th Cir. 2000) (per curiam); *McNair v. Campbell*, 416 F. 3d 1291, 1297 (11th Cir. 2005). The District Court's conclusions on mixed questions of law and fact are also reviewed *de novo* by this Court. *See, e.g,. Pardo v. Sec'y, Fla. Dep't of Corr.*, 587 F.3d 1093, 1098 (11th Cir. 2009).

The statutory authority of federal courts to issue habeas relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). To qualify for relief under § 2254(d), the state court must have adjudicated the petitioner's claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 92 (2011). This means "that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

A habeas petitioner need only state his claim with sufficient particularity to "fairly present" his claim to the state courts. Even when a petitioner's state court claims were "less refined than they are" in federal court, it is sufficient that the petitioner asserted the claims in a way that a "reasonable reader would understand the claim's particular legal basis and specific factual foundation" to be the same in federal court as in state courts. *Willacy v. Sec'y Fla. Dep't. of Corr.*, 703 Fed. Appx. 744, 747 n.5 (11th Cir. 2017).

Under 28 U.S.C. § 2254(d)(1), a federal court may grant the writ with respect to a claim adjudicated on the merits in state court proceedings where the adjudication of the claim "resulted in a decision that was contrary to… or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States[.]" Under the "contrary to" prong, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J.). The "unreasonable application" prong "permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts' of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citation omitted).

"'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). These principles need not be highly specific to justify habeas relief, nor need the Supreme Court have previously addressed the facts presented. *Panetti v.*

Quarterman, 551 U.S. 930, 953 (2007) ("The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.").

While the habeas standard is deferential, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review… Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 324, 340 (2003) ('*Miller-El I*'). "[W]here a legal standard requires a state court to review all of the relevant evidence to a claim, the state court's failure to do so is an unreasonable application of law under AEDPA." *See McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1262 (11th Cir. 2009).

Alternatively, under 28 U.S.C. § 2254(d)(2), a federal court may grant the writ where the adjudication of a claim adjudicated on the merits "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Here, too, deference does not imply abandonment or abdication of judicial review. *Miller-El I*, 537 U.S. at 340. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable…." *Id.*. "The Supreme Court has found state factual findings unreasonable under § 2254(d)(2) when the direction of the evidence, viewed cumulatively, was 'too powerful to conclude anything but [the petitioner's factual claim],' and when a state court's finding was 'clearly erroneous.'" *Landers v.*

Warden, 776 F.3d 1288, 1294 (11th Cir. 2015) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (*'Miller-El II*'), and *Wiggins*, 539 U.S. at 528-29). As with the application of law, where a court is required to consider all relevant circumstances in making its ultimate factual determination but overlooks material facts in its fact-finding, it unreasonably determines the facts within the meaning of AEDPA. *See Adkins v. Warden*, 710 F.3d 1241, 1254-55 (11th Cir. 2013).

"Where we have determined that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d), we are unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *McGahee*, 560 F.3d at 1266. Likewise, where the state court "unreasonably determined the facts relevant to [the petitioner's constitutional] claim, we do not owe the state court's findings deference under AEDPA. We therefore apply the pre-AEDPA *de novo* standard of review to [the petitioner's] habeas claims." *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (*en banc*).

SUMMARY OF ARGUMENT

This case presents precisely the type of evidence suppression that the *Brady* rule was intended to prohibit. The prosecution's suppression of powerful exculpatory and impeachment evidence in the form of prosecutor's notes of police witness identification of an alternate perpetrator was *Brady* material that should have been disclosed prior to trial. The District Court properly held that the Florida

state court's determination that suppression of the evidence was not material "was contrary to, or an unreasonable application of *Brady*" (App._N_Vol._15 at 305), and therefore was not entitled to deference under AEDPA. The District Court also properly found in its *de novo* review that "It is difficult to conceive of information more material to the defense and the development of defense strategy than the fact that the initial responding officers evaluated the totality of the evidence as suggesting that the investigation should be directed toward someone other than Petitioner. Thus, the withheld evidence was clearly material and the failure to disclose it was a *Brady* violation which undermines confidence in the outcome of the trial." App._N_Vol._15 at 302-03. This Court should affirm.

In addition, while the District Court found that only one portion of Green's *Brady* claim merited habeas relief, the other claims provide alternative grounds upon which this Court could affirm the Order.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE STATE'S SUPPRESSION OF CREDIBLE ALTERNATIVE PERPETRATOR EVIDENCE CONSTITUTES A *BRADY* VIOLATION.

A. The Florida Court Dismissed the Materiality of the Suppressed Evidence by Limiting Its Assessment to Admissibility as an "Opinion" of Green's Innocence.

The state failed to turn over notes from prosecutor White's interview of Diane Clarke and Mark Rixey, the first police offices at the crime scene, which contain the following statements:

> Found gun on ground around 4-5 ft. from W/M. There was no indication he had moved.
>
> Did see puddle of blood right under the V. Also saw clothes near the victim & another location saw blood on ground a foot or two from the gun. …
>
> ***Mark & Diane suspect girl did it, She changed her story couple times… She … said she tied his hands behind his back***.
>
> Thinks that she gave them very general directions (J.J. & U.S. 1) and had driven all the way to Oak. Park. Tr. Pk.
>
> Also, noticed she never asked how victim was while at homicide.
>
> Didn't see any footprint – didn't see any casings.
>
> She wouldn't go down there to the scene.

> Why wouldn't guy say who shot him. Just said "I wanta go home." Was fairly calm while there.[18]

In addition to reflecting Clarke's and Rixey's conclusions, the notes list a number of eyewitness observations leading them to suspect that Kim Hallock had killed Chip Flynn.

As detailed below, the police investigation evolved to focus on Crosley Green, not Hallock, as the prime suspect, based on Hallock's account of the killing, Hallock's description of the killer, and Hallock's identification of Green from a suggestive photo lineup procedure. At trial, Hallock was the State's star witness, providing the only direct evidence that Green had shot Flynn. In closing, the prosecutor referred to defense counsel's implication that Hallock might have been Flynn's killer as "ludicrous… the grasping of maybe no straws at all" and something "he doesn't have the courage just to come right out and say."[19]

On post-conviction review, the Florida trial court[20] found no prejudice from the suppression because each of the facts observed by the detectives "was

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[18] App._I_Vol._12_Doc._3-3 at 139-140 (emphasis added).

[19] App._B_Vol._2 at 376-77 (T. 1875:9-1876:3).

[20] As the U.S. Supreme Court has held, when there are orders or decisions that affirm the decision of the court below with no explanation, federal courts should "'look[] through' them to the last reasoned decision[.]" *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

disclosed and known by defense counsel before trial."[21] In doing so, the Florida court dismissed the materiality of the paragraph emphasized above, which was not disclosed or known to the defense, because "[t]he purported opinion of Deputies Rixey and Clark that they suspected that Hallock murdered Flynn would not have been admissible at trial."[22]

The state court therefore did not consider the contents of the notes except as substantive evidence of the facts observed and of a "purported opinion" of Green's innocence. It failed to consider the context and significance of the fact that the officers at the crime scene reported these observations to the prosecution and disclosed their suspicion and supporting evidence that Hallock committed the crime at that point in the investigation. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 173 (1988) ("[T]he purpose [. . .] was not to elicit Rainey's opinion on the cause of the accident. Rather, Rainey was asked, in effect, whether he had made a certain statement in his letter.").

As a result, the Florida court did not consider whether disclosure of this evidence might have led to the discovery of other admissible evidence, for example through use of the notes in the depositions of the officers and other investigators. It did not consider the value of the notes as impeachment evidence with respect to

[21] App._H(Ex. AA)_Vol._9 at 157.
[22] *Id.*

Hallock, a witness whose reliability was almost certainly determinative of guilt or innocence. The Florida court did not consider whether disclosure of these prior statements would have led the defense to call Clarke and Walker as trial witnesses, knowing their testimony to be favorable and armed with the notes to discipline that testimony. It did not consider whether the fact that the police initially regarded Hallock as the prime suspect, along with a list of supporting facts, would be admissible or might allow the defense to argue the investigation was limited by the police's subsequent uncritical readiness to accept her account and identification. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [*Brady*]."); *Kyles v. Whitley*, 514 U.S. 419 (1995) ("The jury would have been entitled to find [. . .] that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent [. . .] and whose own behavior was enough to raise suspicions of guilt."). In fact, the Florida court did not even address whether the other statements in the paragraph it dismissed as an "opinion"—namely that Hallock "changed her story couple times" and "said she tied his hands"—had been disclosed or would have been admissible.

B. Petitioner's Claim Regarding the Prosecutor's Handwritten Notes of Police Statements Is Not Procedurally Barred.

Appellant's procedural default arguments are baseless. Green exhausted his *Brady* claim in Florida state court post-conviction proceedings.

The trial court ordered the notes disclosed after a post-conviction *en camera* review under Chapter 119 because they were "potentially Brady material," despite the prosecution's improper assertion of attorney-client privilege.[23] Green raised the *Brady* claim based on the prosecutor's handwritten notes in state court three times: in his first state post-conviction motion on November 30, 2001,[24] in his second post-conviction motion on August 2, 2006,[25] and in his second amended successive motion for post-conviction relief filed on February 2, 2011.[26]

Appellant claims that Green never appealed an Order dated July 22, 2002. Appellant argues that "Green did not challenge any of these factual findings on appeal in state court, nor did he raise this as an independent claim of error on appeal." App. Brief at p. 26. Nothing could be further from the truth.

While the July 22, 2002 Order, denied certain claims, it granted Green an evidentiary hearing. Therefore, the July 22, 2002 Order was *not an appealable*

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[23] App._D._Vol._3 at 175.

[24] *See generally id.* at 119-274.

[25] *See generally* App._C(E)_Vol._2 at 624-743.

[26] *See generally* App._I_Vol._12 at 20-46.

order.[27] The subsequent evidentiary hearings were held over the next two years. It was during those evidentiary hearings that Parker testified about the impact the prosecutor's notes and the inconsistent statement that Hallock, and not "the black guy," tied Flynn's hands would have had if disclosed. Those evidentiary hearings culminated in an appealable Order on Motion for Post-Conviction Relief dated December 22, 2005, which incorporated the previous July 22, 2002, Order by reference. That Order was timely appealed to the Florida Supreme Court, and Green filed his initial Brief of Appeal on August 2, 2006.[28]

In Green's 2006 Florida Supreme Court Appeal Brief, under a heading stating "The Court Erred in Denying Green's Claim For Relief Based on …NonDisclosure of Exculpatory Evidence," Green devoted three pages of argument to both the law and facts related to very issue Appellant claims now was defaulted. As for the law, Green asserted, "[w]here exculpatory evidence was suppressed or concealed, Green is entitled to relief under *Brady* and/or *Giglio*." This Claim was plead as Claim III in the motion for postconviction [sic] relief." App._C(E)_Vol._2 at 712. As for the facts, under the heading "Exculpatory and

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[27] *See* Fla. R. App. P. 9.020(h)(2)(A) (deeming an order final only when the court rules on the entirety of the issues raised in post-trial motions); Fla. R. App. P. 9.030(a), (b) (limiting the appellate jurisdiction of the Florida Supreme Court and District Courts of Appeal).

[28] *See generally* App._C(E)_Vol._2 at 624-743.

impeaching evidence relating to the initial police investigation," Green specifically identifies the suppressed notes: "Mark and Diane suspect girl did it, she changed her sorry a couple of times…[?] She [?] said that she tied his hands behind his back." *Id*. at 715. Green's 2006 Florida Supreme Court Appeal Brief then argues at length that the prosecutor's notes and other suppressed facts constituted exculpatory evidence that went to the "heart of" the defense strategy. *Id*. at 716-18. Indeed, Green's 2006 Florida Supreme Court Appeal Brief quoted the *exact same testimony* from Parker as was quoted by the District Court in support of its habeas finding that the notes "went to the heart" of the defense strategy. *Id*. at 716-17. Thus, Parker's evidentiary hearing testimony about the dramatic impact disclosure of the *Brady* material would have had at trial was presented to *both* the Florida Supreme Court in Green's 2006 Florida Supreme Court Appeal Brief, and the District Court to demonstrate that the suppressed notes went to the heart of the defense case. Appellant's sleight-of-hand argument that Green never appealed a non-appealable order to the Florida Supreme Court is wholly without merit.

Appellant's second procedural default argument is equally meritless. Appellant claims that the arguments that were successful in Issue One of Claim One were "not even raised in Green's federal habeas petition." But Green's habeas petition clearly identifies all of the key facts underlying that claim, including quoting the handwritten notes and the facts reflected in the officers' affidavits. *See*

App._L_Vol._14 at 69-71. Nothing more is required to satisfy habeas procedural requirements.

C. Appellant's Default Argument Relies on Fundamental Misinterpretations of the Record.

In arguing for reversal, Appellant relies on significant misinterpretations of the record below.

- Appellant argues that Green did not appeal the state court's findings on his *Brady* claim, and thus that argument is procedurally defaulted. Appellant Brief ("App. Brief") at 24-31.
    - Green clearly raised the argument in his appeal of the state court's findings, claiming "[w]here exculpatory evidence was suppressed or concealed, Mr. Green is entitled to relief under *Brady* and/or *Giglio*. This Claim was plead as Claim III in the motion for postconviction [sic] relief." App._C(E)_Vol._2 at 712. The Brief quoted not only the note, but Parker's testimony concerning the impact of the suppression of the note on the trial, "Q. If you had known this information at the time of trial, would you have used it? A. Oh, yea, because that went to the heart of my defense…." *Id*. at 717.
- Appellant asserts that Green never claimed in state court proceedings that the suppressed evidence "would have led to other relevant evidence or theories of defense." App. Brief at 41.
    - In Green's state post-conviction motion, he argued that "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." App._D_Vol._3 at 132 (citing *Bagley)*.
- Appellant claims that Green "has never alleged … that the state court acted contrary to or unreasonably applied clearly established Supreme Court law" regarding his *Brady* claim. App. Brief at 39.

- The first sentence of Ground One of Green's federal habeas petition states that "[t]he State improperly suppressed exculpatory evidence … in violation of *Brady*, which was clearly established federal law…" Supp._App._Memo_of_Law at 16; *see also id.* at 20 ("The State's failure to turn over White's notes, and in particular the conclusions of Clarke and Rixey contained therein, was a violation of *Brady*, which was clearly established Supreme Court law at the time of Mr. Green's trial.")

D. The District Court Properly Found the Florida Court's Decision to Be Contrary to or an Unreasonable Application of Clearly Established Federal Law Because It Ended Its *Brady* Prejudice Inquiry Upon Finding the Evidence Inadmissible.

1. Clearly established law requires a court to consider the materiality of suppressed exculpatory evidence even if the evidence is inadmissible.

The U.S. Supreme Court plainly requires that a reviewing court's analysis of materiality under *Brady* consider more than the admissibility of the suppressed information. In *United States v. Bagley*, 473 U.S. 667, 669-71 (1985), the Supreme Court established the definition of materiality for *Brady* purposes. Addressing "evidence that could have been used to impeach Government witnesses," the Court adopted "the *Strickland* formulation" for materiality, holding, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 669-71, 682 (opinion of Blackmun, J.); *accord id.* at 685 (White, J., concurring in part and concurring in judgment).

The Court specified, "under the *Strickland* formulation, the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case" considering "the course that the defense and the trial would have taken." *Id.* at 683 (opinion of Blackmun, J.).

In *Wood v. Bartholomew*, the Court applied this test to a witness' polygraph results that were "inadmissible under state law both for substantive purposes as well as for impeachment." 516 U.S. 1, 2 (1995). The Court considered "[t]o begin with" that the results were inadmissible, and then analyzed how, if at all, disclosure of the results would have affected "the respondent's [trial] strategy" and presentation of his case. *Id.* at 6-8. The Court held that it would not in fact have had a material effect, because there was abundant evidence the information would not have changed the defendant's strategy or cross-examination of the witness at issue, would not have resulted in effective impeachment even if used, and would not have undermined the case against the defendant. *See id.*

The Supreme Court's holdings require a court's *Brady* analysis to look beyond admissibility, and in particular to consider the effect of suppression of inadmissible evidence "on the preparation or presentation of the defendant's case." *Bagley*, 473 U.S. at 683 (opinion of Blackmun, J.). A court must consider, as did the Supreme Court in *Wood*, whether the disclosure of information that is itself

inadmissible would nonetheless have been reasonably likely to result in a different outcome at trial. *See* 516 U.S. at 2-8.

Appellant asserts that the state court correctly determined the notes were not material because they are, in part, inadmissible hearsay. But as this Court has noted, "*Brady* evidence often comes in the form of written statements that appear to be hearsay evidence on their face. Indeed, the Supreme Court has routinely found material such as notes in a police investigation file [. . .] to be subject to *Brady*, its apparent hearsay qualities notwithstanding." *Waldrip v. Humphrey*, 532 Fed. Appx. 878, 885 (11th Cir. 2013) (unpublished). *See also Smith v. Cain*, 565 U.S. 73, 75-76 (2012) (investigating detective's notes containing witness statements); *Strickler v. Greene,* 527 U.S. 263, 284-85 (1999) (materials in police files, including notes by a detective and letters from a witness); *Kyles* , 514 U.S. at 441-43 (witness and informant statements to the police, both written and oral); *cf. Brady v. Maryland*, 373 U.S. 83, 84 (1963) (witness' out-of-court statements); *Moore v. Illinois*, 408 U.S. 786, 791-93, (1972) (out-of-court witness statements, picture of alleged suspect, extrajudicial statement of prosecutor, and out of court written statements and drawing by witness).

To hold, as the Florida state court did here, that no prejudice can result unless the suppressed information is both exculpatory *and admissible* would dramatically rewrite the scope of the *Brady* doctrine and be plainly incompatible

with Supreme Court precedent. In order "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations," a *Brady* materiality standard that allows prosecutors to withhold exculpatory evidence based on admissibility alone must be rejected. *Kyles*, 514 U.S. at 439. Such a rule defeats the purposes of *Brady*, instead "cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice[.]" *Brady*, 373 U.S. at 88.

First, it deprives the defense of the ability to investigate and develop its case. As *Bagley* and *Wood* make clear, along with decades of case law under *Strickland*, the value to competent defense counsel of a piece of information goes beyond its introduction at trial. Here, but for the suppression of the notes, all three Officers likely would have provided exculpatory testimony favorable to the accused. The prosecutor's notes were the key to unlocking this favorable police testimony.

Second, it usurps the province of the court as the gatekeeper of evidence in criminal trials. Under the Florida court's interpretation of *Brady*, a prosecutor would simply withhold such items and then fight over admissibility in post-conviction litigation given the extraordinary efforts required to discover suppressed evidence and greater burden of proving both admissibility and prejudice without having laid the groundwork at trial for either. The purpose of *Brady* is to require the prosecutor to disclose exculpatory information so the trial court, not the

prosecutor, may decide whether it is admissible and the defense can properly investigate and prepare its case regardless of admissibility.

Third, it replaces the orderly resolution of admissibility questions in the trial process with their resolution in post-conviction litigation. Admissibility is a determination largely within the trial court's discretion that often turns on the context of the trial as it has developed and whether the proponent has established preliminary facts. *See, e.g.*, Fed. R. Evid. 104, *advisory committee note*; Fla. Stat. § 90.105 (2018). It is far more efficient and administrable for the trial court to determine admissibility as the case unfolds in the first instance than a post-conviction court that must speculate how the trial court would have made discretionary evidentiary rulings based on "the course that the defense and the trial would have taken." *Bagley*, 473 U.S. at 683. Post-judgment review of a prosecutor's admissibility assessment is no substitute for the pre-trial disclosure of exculpatory evidence.[29]

The Eleventh Circuit, like many others, has consistently interpreted Supreme Court precedent to hold that the *Brady* materiality analysis does not stop with admissibility, but must go further. The Eleventh Circuit has repeatedly held that the *Bagley* standard applies: "[t]he crucial inquiry is whether there is evidence in

[29] Moreover, in the habeas context, the entire *Brady* materiality determination would be subsumed by an effectively unreviewable question of state law.

the record that establishes a 'reasonable probability' that the production of the inadmissible evidence would have resulted in a different outcome at trial." *Wright v. Hopper*, 169 F.3d 695, 703-04 (11th Cir. 1999) (internal citations omitted). Admissibility alone is inadequate under a *Brady* analysis because, "[i]nadmissible evidence may be material [under *Brady*] if the evidence would have led to admissible evidence." *Id.* at 703.

Evaluating the admissibility only of a particular item of evidence impermissibly narrows the *Brady* rule by ignoring the possibility that "the evidence—although itself inadmissible—would have led the defense to some admissible evidence." *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000); *accord Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994); *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1362 (11th Cir. 2004); *Bradley v. Nagle*, 212 F.3d 559, 567 (11th Cir. 2000).[30] Likewise, this Court has long held that

[30] Binding Fifth Circuit case law is equally explicit regarding the materiality under *Brady* of a defendant's ability to investigate his case and acquire admissible evidence. *See Sellers v. Estelle*, 651 F.2d 1074, 1077 n. 6 (5th Cir. July 1981) (rejecting argument evidence was inadmissible therefore immaterial because information was "material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not" and could be used to "produce witnesses whose testimony or written statements may have been admissible"); *Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980) (inadmissible document "would have provided the defense the ability to … acquire [additional evidence] which would have been admissible.").

Bagley's holding requires a finding of materiality where disclosure "could have fundamentally altered the defense's strategy." *United States v. Spagnoulo*, 960 F.2d 990, 993-94 (11th Cir. 1992) (explaining *Bagley* calls for consideration of the preparation or presentation of the defendant's case).

In applying AEDPA, courts have explicitly held that a state court's "characterization of admissibility as dispositive under *Brady* was an unreasonable application of, and contrary to, clearly established law as defined by the United States Supreme Court." *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 307 (3d Cir. 2016). There, the court stated that "making *Brady* disclosure depend on a prosecutor's own assessment of evidentiary value, as opposed to the benefit to defense counsel, is anathema to the goals of fairness and justice motivating *Brady*." *Id.* The court further explained that the inclusion of an admissibility requirement is contrary to Supreme Court precedent in *Wood*, where the court proceeded to discuss the impact the evidence might have had on the defense's trial preparation, despite the evidence in question being wholly inadmissible; to *Kyles*, where the Court made clear that evidence is material under Brady when the defense could have used it to "attack the reliability of the investigation"; and to *Strickler*, where the Court made clear that impeachment material falls under *Brady*. *Id.* at 307-08.

Following this same Supreme Court precedent, many Circuits, including this Circuit, have expressly held that inadmissible material evidence must be disclosed under *Brady* if it could lead to admissible evidence. *See DeCologero v. United States*, 802 F.3d 155, 162 (1st Cir. 2015); *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003; *United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012); *Johnson v. Folino*, 705 F.3d 117, 130 (3d Cir. 2013); *Dennis*, 834 F.3d at 310; *Felder v. Johnson*, 180 F.3d 206, 212 (5th Cir. 1999); *Spence v. Johnson*, 80 F.3d 989, 1005 n. 14 (5th Cir. 1996); *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998), *cert. denied*, 525 U.S. 908 (1998); *Coleman v. Calderon*, 150 F.3d 1105, 1116-17 (9th Cir.), *cert. granted, judgment rev'd in part*, 525 U.S. 141 (1998); *Paradis v. Arave*, 240 F.3d 1169, 1180 (9th Cir. 2001); *Banks v. Workman*, 692 F.3d 1133, 1142 (10th Cir. 2012); *United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999). For example, the Second Circuit explicitly includes inadmissible evidence which "would be an effective tool in disciplining witnesses."[31]

[31] *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (To be satisfied that a memo which contained hearsay had been impermissibly withheld under *Brady* the court must find "that: [1] either all or part of the Bradford memo is admissible; [2] the memo could lead to admissible evidence; or [3] the memo would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise."); *see also Mahaffy*, 693 F.3d at 131 (2d Cir. 2012) (where knowledge of the contents of withheld material may have changed the defense strategy with regard to a witness it may have called at trial and examination of such witness, withholding that material was a violation of *Brady*
(Continued...)

2. The District Court correctly found that the State Court's Brady *holding was contrary to or involved an unreasonable application of clearly established law.*

In light of this clear line of Supreme Court precedent, the District Court correctly found it "contrary to established federal law, as set down in *Brady*, and objectively unreasonable for the state court to end the prejudice inquiry once it made an admissibility determination on the prosecutor's notes …"[32] As the District Court held, "[o]f course, it is not only the admissibility of the note itself that determines the materiality of the withheld information, but what use might be made of its contents if known to the defense."[33]

The state court performed almost no analysis of materiality under *Brady*. With regard to the statement in the August 28, 1989 handwritten notes that "Mark & Diane suspect girl did it," the court stated only that "[t]he purported opinion of Deputies Rixey and Clark that they suspected that Hallock murdered Flynn would not have been admissible at trial."[34] Contrary to well-settled precedent, the state court took the question no further, not inquiring as to whether the withheld

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because "[a]side from exculpatory material, Brady applies to material that 'would be an effective tool in disciplining witnesses during cross-examination.'"); *United States v. Ballard*, 885 F.3d 500, 507 (7th Cir. 2018) ("[defense] counsel might make use of the [withheld material] to cross-examine [witnesses] at a new trial.").

[32] App._N_Vol._15 at 302.

[33] *Id*.

[34] App._H(Ex. AA)_Vol._9 at 159.

statement could have led to admissible evidence, could have been useful in selecting, examining, or impeaching witnesses, or could have had an impact on the development of the defense case and outcome of the trial. Therefore, the District Court was correct to find that such a conclusory analysis with no further reasoning was contrary to or an unreasonable application of the requirements of *Brady*.

The Appellant argues that, "*Brady* does not set a point where the prejudice inquiry ends, and a court reviewing a *Brady* claim must consider the totality of the circumstances in the entire record." App. Brief at 41. That is wrong as a matter of law: the prejudice inquiry *is* the assessment, in the context of the entire record, of whether there is a reasonable probability that disclosure would have resulted in a different outcome. *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017). By abruptly ending its *Brady* analysis at admissibility of the so-called opinions and failing to consider the extent to which the suppressed notes could have led to the discovery of admissible evidence or could be used for impeachment purposes, the state court's conclusion was directly contrary to *Bagley* and an objectively unreasonable application of the law.

Appellant also argues that Green never claimed that the prosecutor's notes "would have led to other relevant evidence or theories of defense, so it is **only** the potential use of these opinions at trial, that can be considered." App. Brief at 41 (emphasis in original). Here, again, Appellant misinterprets the record. In the

"*Brady* error" section of Green's state post-conviction motion, he argued that "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case. *See United States v. Bagley*, 473 U.S. 667, 683 … (reviewing court may consider directly any adverse effect that prosecutor's failure to respond to request for information from defendant might have had on preparation or presentation of defendant's case)." App._D_Vol._3 at 132-33. Not only was the state court required to consider the full scope of prejudice under well-settled law, Green specifically raised it in his argument. Appellant's suggest that Green somehow waived the argument is belied by the record.

E. The District Court Properly Conducted *de novo* Review.

Having found that the Florida court's decision was contrary to established federal law and objectively unreasonable because the Florida court ended the prejudice inquiry once it made an admissibility determination, the District Court properly undertook a *de novo* review of the record to determine if there had been a *Brady* violation. *McGahee*, 560 F.3d at 1266. Because materiality under *Brady* is a question of law, courts are required to review *de novo*. *United States v. Straker*, 800 F.3d 570, 603 (D.C. Cir. 2015 (citing *United States v. Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007)). Appellant's repeated claims that the District Court erred by

conducting a "sua sponte" de novo review and should have given deference to the state court holding[35] is contrary to established law.

Further, as part of the *de novo* review, the court is required to consider the totality of the evidence. *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1346 (11th Cir. 2009) (citing *Kyles*, 514 U.S. at 436 (holding that the materiality analysis must be conducted in a way that considers the cumulative impact of all of the undisclosed evidence favorable to the defense)). Put simply, this court must evaluate the "tendency and force of the undisclosed evidence item by item; there is no other way." *Smith*, 572 F.3d at 1346 (quoting *Kyles*, 514 U.S. at 437 n.10); *see also Brown v. Head*, 272 F.3d 1308, 1316 (11th Cir. 2001) (holding that in performing a cumulative materiality analysis, "the collective impact of all of the suppressed evidence must be considered against the totality of the circumstances") (citing *Kyles*, 514 U.S. at 441).

The determination of whether the sum of the withheld evidence favorable to the defense is enough to create a reasonable probability that the jury would have acquitted depends on two factors. *Smith*, 572 F.3d at 1346. The first factor is the net inculpatory weight of the evidence on both sides that actually was presented at trial, and the second factor is the aggregate effect that the withheld evidence would

[35] App. Brief at 39-41, 46.

have had if it had been disclosed. *Id.* at 1347. With these factors, a court can then begin "putting on the scales the evidence that was presented at trial-evidence favoring the prosecution on one side, that favoring the defense on the other." *Id.* Once the evidence is on the scales, and adjusted to take into account the combined force and effect of the undisclosed evidence favorable to the defense, the standard is "not one of sufficiency of evidence to convict." Instead, it is "whether what is left on both sides of the scale after adjusting for the withheld evidence creates a reasonable probability that a jury would acquit, and a reasonable probability is one sufficient to undermine our confidence in the guilty verdict." *Id.* (citing *Kyles*, 514 U.S. at 453 ("[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same.")).

F. The District Court Correctly Determined There Was a Reasonable Probability the Result of Green's Trial Would Have Been Different but for the *Brady* Violation.

The failure of the prosecution to turn over White's notes from his interview of Clark and Rixey was material to the development and presentation of Green's defense in a number of ways that, as the District Court found, "went to the heart of the defense strategy." App._N_Vol._15 at 302. There is no question that the notes are exculpatory and were willfully suppressed by the State. It is difficult to conceive of evidence more exculpatory than the first responders' suspicion that

another individual committed the crime.[36] Further, had the notes been disclosed, they would have had a transformative impact on the development of the defense and presentation at trial. Indeed, as the District Court found, "[i]t is difficult to conceive of information more material to the defense and the development of defense strategy than the fact that the initial responding officers evaluated the totality of the evidence as suggesting that the investigation should be directed toward someone other than Petitioner." *Id*. at 302. This is particularly true where, as here, there is no physical evidence implicating Green and the alternative perpetrator identified by the first responders was indisputably at the crime scene during the shooting.

As the District Court correctly found, the question of materiality is "what use might be made of its contents if known to the defense." *Id*. at 301. In addition

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[36] Eyewitness identification of an alternate perpetrator "is the type of exculpatory information that courts have long recognized as core *Brady* material, where the danger of a denial of due process of law is great." *Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind. 2000) (citing, *inter alia, United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964) (Marshall J.); *see Kyles*, 514 U.S. at 420 (evidence of key eyewitness' "affirmatively self-incriminating assertions" supporting the theory of an alternative perpetrator was material under *Brady);* accord *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *DiSimone* v. *Phillips*, 461 F.3d 181, 195 (2d Cir. 2006); *Mendez* v. *Artuz*, 303 F.3d 411, 415-17 (2d Cir. 2002) (per curium); *Clemmons* v. *Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997); *United States* v. *Robinson*, 39 F.3d 1115, 1116-19 (10th Cir. 1994); *Cannon* v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977); *Floyd* v. *State*, 902 So. 2d 775, 785-86 (Fla 2005); *Harrington* v. *State*, 659 N.W.2d 509, 524-25 (Iowa 2003).

to laying a meaningful foundation for the possibility that someone else committed the crime, see *Kyles*, 514 U.S. at 441-42, alternative perpetrator evidence can be used to uncover leads and various defense theories, *see Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995), question the certainty of prosecution witnesses on cross-examination, *see Kyles,* 514 U.S. at 441-45, and impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, *see Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *affd,* 291 F.3d 380 (6th Cir. 2002). Evidence of alternative suspects also allows the defense to attack the "reliability of the investigation" and the State's overall theory of the case. *See Kyles*, 514 U.S. at 446; *Trammell* v. *McKune*, 485 F.3d 546, 551 (10th Cir. 2007); *Artuz,* 303 F.3d at 416. The crime scene observations in the suppressed notes also could have been used to impeach Hallock on the inconsistencies in her stories.

For example, if the notes had been disclosed, when Parker deposed Clarke and Rixey, as well as Officer Walker who had the first communications with Hallock the night of the crime, he could have explored questions about conversations among them relating to inconsistencies in Hallock's various stories. He could have explored the bases for Clarke's and Rixey's opinion that Hallock "did it." He could have explored who they told about their suspicion other than White, and what they knew about why the police did not investigate Hallock as a suspect. Record facts demonstrate that Rixey indicated that he told every

investigator involved in this case, including lead homicide Agent Tom Fair, that Hallock was the murderer.[37] Rixey's statements to Fair would have been non-hearsay, because it would have been offered not for the truth, but for its effect on the investigation and what steps Fair took as a result of Rixey's report.[38] Indeed, echoing the teachings of *Kyles*, the District Court reasoned that, "[g]iven the prosecution's failure to disclose its notes, it is unknown and unknowable whether counsel could have elicited the essence of the testimony from either of them in a fashion to avoid the 'opinion of innocence' issue, by framing the question 'isn't it true you believed the investigation should have focused on Hallock,' or something to that effect.'" App._N_Vol._15 at 302. Attacking the "reliability of the investigation" was yet another way in which the disclosure of the notes would have enabled the defense to change the result of Green's trial.

Just as importantly, it would have been devastating impeachment material at trial. Rixey testified at trial. Had the defense been aware of his conclusion based

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[37] App._I_Vol._12_Doc._3-23 at 121-23.

[38] For example, had the exculpatory alternative perpetrator evidence been disclosed, the cross-examination of Agent Fair may have included the following: "Didn't you have evidence suggesting that Hallock shot Chip Flynn?" "What efforts did you undertake based on Deputy Rixey's crime scene observations regarding Hallock?" "What investigation did you undertake of Hallock as a suspect based on Deputy Rixey's report of his crime scene observations?" "Given Deputy Rixey's crime scene observations, why weren't Hallock's hands and clothing tested for gunshot residue?" Each of these questions would have been proper impeachment on cross-examination.

on his crime scene observations, it would have dramatically changed entirely the nature of his cross-examination. Moreover, Deputy Clarke did not testify at trial—probably due to this very statement. However, if these suppressed witness statements had been disclosed, she may have been called as a defense witness. In fact, disclosure of these exculpatory statements would have converted these prosecution witnesses into witnesses for the defense, which is obvious from their affidavits obtained during post-conviction proceedings.[39] In this racially-charged trial, with an all-white jury, disclosure would have provided the defense with two credible white officers testifying to support the narrative that Hallock, not Green, shot Flynn.

In addition to finding suppression of the officers' opinions in those notes to be a *Brady* violation, the District Court found the notes' reference to Hallock tying Flynn's hands to be material. App._N_Vol._15 at 304. Hallock testified that Green tied Flynn's hands, and the statement in the notes that Hallock reported she tied his hands would have been material impeachment evidence. Parker testified during the post-conviction evidentiary hearing that if he had the information contained in the suppressed notes at the time of trial he would have used it to impeach Hallock:

[39] App._I_Vol._12_Doc._3-23 at 121-23; App._I_Vol._12_Doc._3-27 at 135-36.

> A. …..[T]here was an issue regarding who actually tied Mr. Flynn. It was my recollection, and my whole theory was that she, indeed, tied his hands. As I recall her testimony, she said that the defendant tied his hands, was in the process of tying his hands, and as a result of that process, the gun inadvertently fired into the ground. . . . a projectile was never found
>
> Q. This was your theory that she was the one that tied him, correct?
>
> A. Absolutely.
>
> Q. Which would indicate that these documents, apparently stemming from what Deputy Walker has to say, would support your theory?
>
> A. Absolutely.
>
> ***Q. If you had known this information at the time of trial, would you have used it?***
>
> ***A. Oh, yea, because that went to the heart of my defense***. The heart of it that this was not a man who did this. She couldn't describe who this person was. She said it was a blur. She said there was no way.[40]

Like Sergeant Clarke, Deputy Walker did not testify at trial, but based on Parker's testimony both Officers almost certainly would have been called by the defense if the notes had been disclosed. Thus, but for the suppression of the notes, all three Officers would have provided exculpatory testimony favorable to the

[40] App._G_Vol._7_Doc._3-39 at 299-300 (259:11-260:8). Defense counsel was being questioned about a 1999 FDLE report in which Deputy Wade Walker corroborated Rixey and Clarke's statements to the prosecutor concerning Hallock's initial statement that she, and not the black guy, tied Flynn's hands.

accused. The prosecutor's notes were the key to unlocking this favorable police testimony.

Appellant argues that the District Court made a clear error of fact because Deputy Walker's police report contained a reference to Hallock's initial statement that she tied the victim's hands, thus the suppression of the notes was not prejudicial.

First, this argument was not previously raised in the State's Response to the Petition, and should not be considered for the first time on appeal. Nowhere in the State's 50-page Response to Petition is there any mention or reference to the argument on which it now so heavily relies—that the inconsistent statement reflected in the prosecutor's notes was known to the defense through Deputy Walker's police report.[41] It is well-settled that "an issue not raised in the district court and raised for the first time in an appeal will not be considered." *Access Now, Inc. v. S.W. Airlines Co.* 385 F.3d 1324, 1331 (11th Cir. 2004) *quoting Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994); *Progressive Emu Inc., v. Nutrition & Fitness, Inc.*, 655 F. App'x. 785, 796 (11th Cir. 2016), citing *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991).

[41] *See generally* App._M_Vol._14 at 100-150.

Second, the Court's ruling that the notes were exculpatory and prejudicial was not based on Hallock's statement that she tied the victim's hands. The Court's methodical analysis concluded that a *Brady* violation occurred based on the fact that the interview notes identified two law enforcement witnesses whose testimony would have been exculpatory and went to the heart of the defense case—the officers' initial suspicion that Hallock was the shooter.

Third, it is one thing for the defense to have Walker's police report, but another to have corroborating evidence that Walker conveyed that exculpatory evidence to other police officers early in the investigation and that it contributed to their conclusion that Hallock committed the crime. As such, the suppressed evidence influenced the development of the defense and witness selection in addition to depriving the defense of additional impeachment evidence regarding Hallock's testimony.

Finally, the District Court made no finding as to whether Parker was aware of Walker's report. To the contrary, the factual findings made by the District Court on this issue were (1) that the trial court's listing of facts known to the defense and contained in the notes omitted the fact that Hallock initially said that she tied Flynn's hands; (2) that Hallock was never cross-examined about this prior inconsistent statement; (3) that this issue went to the core of the defense strategy; and (4) the initial suspicion that Hallock was the shooter coupled with this

significant inconsistency in her story would have provided powerful impeachment material. App._N_Vol._15 at 304. None of these findings are inaccurate, much less clearly erroneous. What the Appellant is actually arguing is that the District Court failed to consider an argument that the State *never* raised below.

Despite being denied this critical evidence, Parker nevertheless attempted to argue to the jury that Flynn's hands appeared to have been tied "for comfort."[42] In rebuttal, the prosecutor took full advantage of his *Brady* violation. As the prosecutor put it, defense counsel was "alluding" to the theory that Hallock was the real killer[43] and, in his closing to the jury, mocked such a conclusion:

> Mr. Parker, though for the first time, came forward with some and alluded to, alluded to, the fact that the killer in this case may have been Kim Hallock herself, a jealous lover of Chip Flynn; but why wouldn't he say it? Why wouldn't he say it? Because it doesn't make any sense. It's ludicrous, and he doesn't have the courage just to come right out and say it. I think she killed. We all heard the expression "grasping at straws." Ladies and gentlemen, I submit to you that that's the grasping of maybe no straws at all. That is the final floundering and an argument of an individual who has seen day after day the evidence in this case mount and mount and mount against his client.[44]

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[42] App._B_Vol._2 at 360 (T. 1859:9-18).

[43] *Id*. 1875:11-13 at 376.

[44] *Id*. 1875:9-1876:3, at 376-77.

Ironically, the prosecution argued to the jury that the suggestion that Hallock shot Flynn was "ludicrous" while suppressing the statements of not one, but two experienced officers who came to exactly the same conclusion. Rixey and Clarke had credible eyewitness evidence based on their crime scene observations and other evidence to back up their conclusion that the "girl did it." The prosecution would have hardly been in the position to argue to the jury that the defense was "grasping at straws" if they had disclosed their own police witness interview notes.

II. ALTERNATIVE GROUNDS TO SUSTAIN THE GRANT OF HABEAS RELIEF.

If the Court disagrees that the District Court properly granted Green's writ of *habeas corpus* on Issue One of Claim One, the Court should sustain the District Court's grant of habeas relief below on alternative grounds improperly rejected by the District Court. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015); *Robertson v. United States*, 749 F. App'x 914, 916 (11th Cir. 2018).

A. The Identifications of Green Violated His Due Process Rights.

Green's Fifth, Sixth, and Fourteenth Amendment rights were also violated when the trial court failed to suppress the improper out-of-court photographic and subsequent in-court identifications.[45]

1. Hallock's identification of Green was not reliable.

[45] App._N_Vol._15 at 312.

Hallock's low level of confidence in her identification further undermines the validity of Green's conviction. As discussed above, she was only "pretty sure" that the photo depicted the "black guy" she saw at Holder Park.[46] It was only after she was asked several times by the police that she finally gave in and told police that she was sure she had identified the "black guy."[47] Moreover, it was very dark on the night of the crime.[48] Only a few hours later, when Hallock's recollection should have been the most accurate, Hallock told the police she was "really scared" and that she "really didn't even get a good look at [the 'black guy']."[49] The darkness of the crime scene, Hallock's mental state, and her testimony that she may have squarely seen the "black male's" face only for a brief ten to fifteen second period with little or no light call into question the conclusion that there was sufficient light or time within which to identify Green, let alone any suspect, on the night Flynn died.

If Hallock can even be believed to have seen a perpetrator, the description she provided to law enforcement for a sketch shows that the perpetrator bore no

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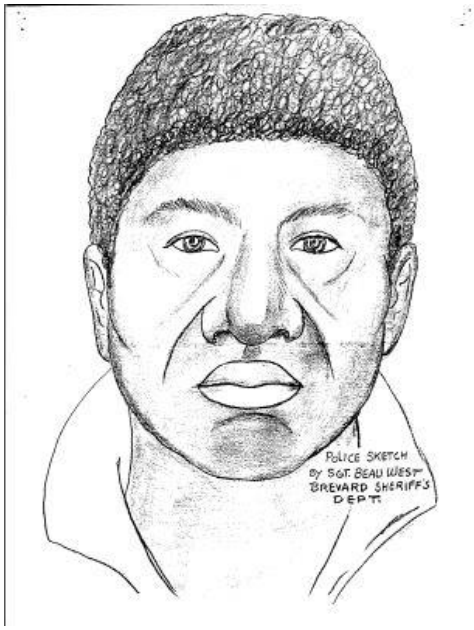
[46] App._B_Vol._1 at 641 (T. 624:8-9).
[47] *Id*. (T. 624:3-11).
[48] *Id*. at 538-859 (T. 521:21-522:2).
[49] App._I_Vol._12_Doc._3-14, at 66.

resemblance to Green, as a photo of the "sketch" next to a then contemporaneous photo of Green amply demonstrates:



The description Hallock gave was just as far off as the sketch. Hallock described the assailant as having "kind of a big build," not quite as big as a body builder, but he was "just big" with a distinctive hair style "curled like a permanent" with "a little bit of an afro" that was "greasy," possibly with afro-sheen in it.[50] Yet neither Green's physical build, nor his hairstyle or its length, fit the characteristics of Hallock's description of the "black guy." In stark contrast, Green has never been big or muscular and has never had a "geri-curl," a permanent with ringlets, or worn gel in his hair. Instead, Green has always had a slight build and very short

[50] Supp._App._Doc._3-19 at 74:15-19; App._I_Vol_12_Doc._3-14 at 65-66.

hair. Hallock's initial description of the perpetrator is entirely inconsistent with Green's physical characteristics.

As before, the District Court's findings to the contrary are incorrect and belied by the facts in the record.[51]

2. The photographic lineup was impermissibly suggestive.

The photographic lineup used to identify Green is below:

The darkness of Green's picture (#2) compared to the other men in the photo array is improper and was central to Hallock's identification of him. In fact, this feature

[51] App._N_Vol._15 at 316 (finding that Hallock "was 'absolutely sure' that [Green] was the perpetrator" and that "there was sufficient time and light for [Hallock] to view [Green] at the crime scene"); *id.* at 316-17 (finding that Hallock "was able to provide law enforcement with a physical description of the perpetrator, a description of the perpetrator's clothing, and assist in putting together a sketch").

was decisive: "Q. Of the features in this picture […] what are the points of concentration when you knew that was the man you saw that night? A. His nose, *how like the complexion – how dark* and his eyes."[52] Green's features are also less clearly discernible than the other men's. This recalls the dark night of the crime, on which it was essentially impossible to see anything, let alone facial features.[53] The District Court's conclusion to the contrary is incorrect,[54] especially considering the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972).

The State's conduct leading up to the photographic lineup was also impermissibly suggestive. Law enforcement officers "told Hallock that a suspect was in the lineup before she viewed it"[55] and told her that she had correctly chosen their suspect after selecting Green. Unlike the District Court here, numerous other courts have consistently found an identification procedure impermissibly suggestive when the police tell the witness that a suspect is among the lineup's photographs, particularly where they also show distinctive photographs or tell the witness afterwards that they had chosen correctly. *See Grubbs v. Hannigan*, 982

[52] Supp._App._Doc._3-30 at 84:16-21 (emphasis added).
[53] App._B_Vol._1 at 538-39 (T. 521:21-522:2).
[54] App._N_Vol._15 at 313, 315.
[55] *Id*. at 316.

F.2d 1483, 1490 (10th Cir. 1993) ("S.S. admitted that this information caused her to assume that one of the individuals in the lineup was the suspect."); *United States v. Lewin*, 900 F.2d 145, 149 (8th Cir. 1990) ("Telling the undercover officers that the photo spread contained the photographs of individuals who had been arrested… was impermissibly suggestive.").

Moreover, law enforcement's praise of Hallock's selection of Green tainted Hallock's ability to provide a fair, impartial identification both at the time of the photo array and later at trial. *See, e.g., Pineda Oliva v. Hedgpeth*, 375 F. App'x 697, 698 (9th Cir. 2010) (praise by detectives immediately after photo identification "effectively eliminated the persons in the remaining photographs and signaled to [the witness] that she had made the 'right' choice").

Even after all of this, Hallock was only "pretty sure" in her identification, and it was not until after repeated requests from the detective the she confidently expressed Green's photo represented her assailant.[56] *See Biggers*, 409 U.S. at 199-200 (listing as a factor to be considered, the level of certainty demonstrated by the witness at the confrontation).

[56] App._B_Vol._1 at 614 (T. 624:3-11).

B. Additional *Brady* and *Giglio* Grounds to Sustain the Grant of Habeas Relief.

In addition to the *Brady* claim the District Court found meritorious, the State violated Green's Fifth, Sixth, and Fourteenth Amendment rights by suppressing evidence demonstrating that it coerced key prosecution witnesses into testifying, in violation of *Brady,* and then eliciting or allowing to go uncorrected false testimony from these key witnesses, in violation of *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

1. The State improperly suppressed impeachment evidence.

Neither Green nor the jury were aware that the prosecutors threatened, bribed, and lied to Hillery, a key witness for the State, to induce him to testify against Green.[57] Further, there is no dispute that the State failed to disclose that special privileges Hillery and Sheila Green (who was Hillery's fiancée, mother of his children, and a federal prisoner at the time) received included repeated opportunities to speak privately and coordinate their testimony before they testified.[58] Where, as here, the State withholds information of special treatment for a key witness in exchange for testimony, a petitioner is entitled to relief. *See*, *e.g.*, *Douglas v. Workman*, 560 F.3d 1156, 1176-83 (10th Cir. 2009) (finding a *Brady*

[57] Supp._App._Memo_of_Law at 26.
[58] *Id*. at 25.

violation where the prosecution did not disclose favorable treatment to its "linchpin" witness); *United States v. Boyd*, 55 F.3d 239, 244 (7th Cir. 1995) (new trial granted where prosecution suppressed the "continuous stream of unlawful" favors provided to key witnesses).

The District Court incorrectly rejected this claim because certain—very limited—references to the witnesses' motives for testifying were presented at trial.[59] The State's production of *some* evidence, however, does not excuse the State from withholding *other* critical impeachment evidence.

The State also failed to disclose evidence in its possession that Murray was a daily crack user when he allegedly heard Green confess.[60] Not only is such a drug habit an independent ground for impeachment, it is especially crucial information here, as Murray falsely testified under oath that he did not use any drugs.[61] The prosecution violated *Brady* by withholding this crucial impeachment evidence from the defense. *See Boyd*, 55 F.3d at 243-44 (new trial granted in part because prosecution failed to disclose information about key witness's drug use).

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[59] The District Court relied solely on trial testimony regarding the prosecutor's agreement to speak on Sheila Green's behalf at sentencing for a drug charge. *See* App._N_Vol._15 at 306-07.

[60] App._I_Vol._13_Doc._3-55 at 9-11 (17:23-24); Supp._App._Doc._3-28 at 124:4-7.

[61] App._B_Vol._1 at 1256, 1275 (T. 1239:6-16, 1258:15-16).

The District Court waived off this issue by relying on Murray's irrelevant admission that he was drunk at the time of the alleged confession.[62] Knowledge of Murray's lawful alcohol use does not relieve the State of its Constitutional duty to disclose completely independent information regarding his illicit drug use at the time of the events as to which he testified.

2. The State knowingly relied on false testimony.

The State elicited or failed to correct at least two types of testimony that it knew or should have known were false: (1) denials by key witnesses that they were induced by the State to testify against Green; and (2) substantive testimony regarding Green's alleged confession to the crime. On the first point, Sheila Green, Hillery, and Murray falsely testified that they had not been induced to testify against Green.[63] In fact, the State well knew that these witnesses had been offered significant leniency in various pending legal matters, offered special treatment and benefits, threatened with punishment, or all three, to convince them to testify against Green.[64] *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008) ("[T]he undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the

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[62] App._N_Vol._15 at 307 n. 8.

[63] App._B_Vol._1 at 877-79, 896-97, 903, 1254 (T. 860-61, 862:8-14, 879-80, 886, 1237:4-8).

[64] *See* Supp._App._Memo_of_Law at 23-27.

perjury."). Even worse, the prosecution emphasized Murray's false testimony during closing arguments, asserting, "Jerome Murray wasn't offered any deals to get him to come in."[65] This is a clear violation of *Giglio* and compels reversal. *See Williams v. Griswald*, 743 F.2d 1533, 1543 (11th Cir. 1984) (noting that undisclosed intimations that charges will either be brought or dropped depending on testimony support a constitutional claim under *Giglio*). Green's case is even more compelling than *Williams*, where this Court found a *Giglio* violation where only one of the four witnesses to a murder was induced to testify against a defendant. Here, *every* person who testified that Green had confessed to the crime was induced by the prosecution to do so, and the jury should have been informed of the complete circumstances by which the State secured their false testimony.

Sheila Green[66], Hillery[67], and Murray[68] have also since recanted their testimony. Taking the three recantations cumulatively, they support the credibility of each other, especially due to the similarity of the State's tactics in procuring the false testimony of all three. The cumulative effect of all of the recantations cannot

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[65] App._B_Vol._1 at 339 (T. 1838:11-16).

[66] Supp._App._Doc._3-37 at 18:19-19:4, 63:16-19, 64:18-19; Supp._App._Doc._3-53.

[67] Supp._App._Doc._3-52; App._I_Vol._12_Doc._3-49 at 221 (19:1-6), 233 (31:15-18), 251-52 (49:20-50:4); Supp._App._Doc._3-37 at 21:2-8, 79:8-20.

[68] App._I_Vol._13_Doc._3-55, at 6-8 (7:20-9:22), 12-15 (13:11-16:7), 17-18 (18:24-19:4), 20 (21;8-20), 24 (25:14-17).

be considered "harmless beyond a reasonable doubt," as would be required to sustain the decision. *Smith*, 572 F.3d at 1333. The District Court failed to consider the cumulative impact of the recantations of Sheila Green, Hillery, and Murray, but instead considered each only in isolation.[69] *Id.* at 1334 (the court must "[c]onsider[] the undisclosed evidence cumulatively [by] adding up the force of it all"). The credibility of Sheila Green, Hillery, and Murray's recantations is further bolstered by Layman Layne's subsequent recantation, in which Lane also cites similar inducement tactics by the State.[70]

C. Green's Trial Counsel Was Constitutionally Ineffective.

Green's Sixth and Fourteenth Amendment rights were violated by the ineffective assistance of his trial court counsel, John Parker. Among the cumulative effect of his many deficiencies, Parker failed to investigate and present alibi witnesses Tyrone Torres, Cheryl Anderson, and Lori Rains and failed to challenge Juror Guiles.

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[69] App._N_Vol._15 at 307-10.

[70] App._I_Vol. 13_Doc._3-64 at 60-61; It is irrelevant that Layne did not testify at trial but at a post-conviction proceeding because his recantation confirms the State's consistent tactics in inducing Sheila Green, Hillery, Murray, *and* Lane to testify against Green regardless of venue.

1. Parker was ineffective for failing to investigate and present alibi witnesses.

Parker was ineffective for failing to investigate and present specific alibi witnesses Torres, Anderson, and Rains.[71]

Parker knew of Torres from three people: Green, Carn, and Brothers. This Court has found such a failure in itself to fall "below established competency standards" and to be "inadequate." *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986); *see also Miller v. Singletary*, 958 F. Supp. 572, 577 (M.D. Fla. 1997) (considering importance of witness's testimony and the gravity of the charges, holding that failure to interview witness was unreasonable). Both Torres and Anderson would have supported Green's alibi that they were at Rains' home the night of the murder and thus could not have been present at the murder scene at the time of the murder.

On Rains, the District Court approved of Parker's single attempt to find her,[72] but one attempt to find key alibi witness Rains is legally insufficient to be effective assistance of counsel. *See Berryman v. Morton*, 100 F. 3d 1089, 1100 (3d Cir. 1996) (finding ineffective assistance where trial counsel's investigation of a key witness was limited to one attempt to subpoena that witness).

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[71] *See* Supp._App._Memo_of_Law at 39-42.

[72] App._N_Vol._15 at 320-21.

Moreover, Parker's actions cannot be excused (as the District Court reasons) by the trial testimony "meltdown" of the single alibi witness presented at trial.[73] By the time of Carn's "meltdown," it was far too late for Parker to investigate Torres, Anderson, and Rains, even if he had wanted to. Had Parker lined up Torres, Anderson, and Rains to testify, it is likely that Carn's "meltdown" would have had little effect, if any, at trial. At the very least, its effect would have been diminished by three additional alibi witnesses, all of whom would have placed Green in the same place at the same time—far away from the murder scene. Thus, Parker's assistance in this regard was Constitutionally ineffective.

The District Court's analysis here was insufficient because it concluded that Parker was not ineffective because he generally "presented [one] alibi witness, investigated other alibi witnesses, and then made a strategic decision not to present further alibi witnesses."[74] But analyzing the issue at this level of generality avoids rather than addresses the actual, narrower, issues raised by Green discussed above. The District Court wholly failed to consider that Parker did not even attempt to investigate Torres or Anderson.

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[73] *See* App._N_Vol._15 at 323-24.

[74] *Id*. at 323.

2. Parker was ineffective for failing to strike juror Guiles, and even admitted to his own ineffectiveness in post-conviction testimony.

Juror Guiles's niece had recently been murdered, yet Parker inexplicably failed to challenge him.[75] The District Court excuses this behavior as a "strategic decision,"[76] but nothing could be further from the truth. Parker himself admitted in post-conviction deposition testimony that he "can't tell you why" he did not strike Juror Guiles with his available peremptory challenge.[77] Parker also essentially admitted to his own ineffectiveness, conceding that "if I didn't make a motion to excuse [Juror Guiles] for cause because of a family member['s murder], ***I should have***."[78]

D. To the Extent Any Claims Are Procedurally Defaulted, Green Is Actually Innocent and Thus Is Entitled to the Gateway Exception to Any Procedural Default Bar.

If the Court finds that any of Green's *habeas* claims are procedurally defaulted, Green is entitled to the gateway exception to that default because he is actually innocent. The District Court's analysis on this point was legally

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[75] App._B_Vol._1 at 136-37 (T. 118-120); Supp._App._Memo_of_Law at 47-9.
[76] App._N_Vol._15 at 327.
[77] App._G_Vol._7 at 282 (242:18-19).
[78] *Id*. (242:16-18) (emphasis added).

insufficient because it consisted of little more than a single conclusory sentence appended to each ground the Court found to be procedurally barred.[79]

1. Legal standard.

A petitioner who makes a sufficient showing of actual innocence is entitled to have his *habeas* claims heard even if they would otherwise be procedurally defaulted. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (recognizing that this principle is "grounded in the 'equitable discretion' of habeas courts to see that . . . constitutional errors do not result in the incarceration of innocent persons" (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). To support a claim of actual innocence, a petitioner "must present 'new reliable evidence' such that it is more likely than not that 'no reasonable juror would have convicted him in light of the new evidence.'" *Rozzelle v. Sec'y, Florida Dep't. of Corr.*, 672 F.3d 1000, 1017 (11th Cir. 2012) (citing *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995)).

2. Green presented unusually compelling new evidence of actual innocence.

In this one eyewitness case, where there is no physical evidence linking Green to the crime[80], the jury did not consider the plethora of newly presented evidence.

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[79] App._N_Vol._15 at 305-6, 321-22, 324, 326-27, 329.

[80] *See generally* App._I_Vol._12_Doc. 3-52 at 97-102.

First, each and every one of the State's witnesses who testified at trial that Green confessed to the murder—Jerome Murray, Lonnie Hillery, Sheila Green—has recanted their testimony and sworn that the State's threats and manipulation were the reason for his or her original false testimony.[81]

Second, the State also failed to disclose: (1) the audio tape of Hallock recounting her version of events to Flynn's father soon after Flynn was killed, which contained statements materially different from Hallock's police interviews, deposition, and court testimony (impeachment evidence);[82] and (2) evidence that the State's three key witnesses, other than Hallock, were coerced by the State to testify through prosecutorial threats, offers of leniency in pending criminal proceedings, and other enticements (impeachment evidence).[83]

Third, three alibi witnesses, Brandon Wright, Reginald Peters, and Randy Brown, were never presented to the jury. All three alibi witnesses would have testified that Green never left Lori Rains' home on the night Flynn was killed, which was nearly two miles away from the crime scene.

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[81] *See* Section (II)(B)(2), *supra.*

[82] Supp._App._Doc._3-46. The beginning of the recording contains a voice self-identified as BCSO homicide detective Scott Nyquist, which proves that Flynn's father turned the recording over to police before Green's trial.

[83] *See* Section (II)(B)(2), *supra.*

Finally, post-trial analysis by the Florida Department of Law Enforcement concluded that the .22 caliber bullet recovered from Flynn had "similar class characteristics" to Flynn's revolver, which disproves the prosecution's main trial theory that Flynn was shot by the "black guy's" weapon.[84] This post-trial analysis also revealed numerous fingerprints on the truck of Hallock, Flynn, and Flynn's friend, all of whom would have touched the truck that night, but found not a single print from Green.[85]

CONCLUSION

Appellee Crosley Green respectfully requests this Honorable Court affirm the District Court's Order granting relief as to Issue One of Claim One of his habeas petition, and reverse the Order denying relief as to the other claims.

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[84] Supp._App._Doc._10-3; Supp._App._Doc._3-77 at 65.

[85] *See generally* App._I_Vol_12_Doc._3-52 at 97-102.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of 11th Cir. R. 27-1(a)(10) and Fed. R. App. P. 32(a)(7)(B) as the brief contains 12,879 words, excluding those parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2019 the foregoing Certificate of Interested Persons and Corporate Disclosure Statement and Appellee Answer Brief was filed using the CM/ECF system, which will send an electronic notice of the filing to Kellie Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, crimappdab@myfloridalegal.com.

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