BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0169

KEVIN GOODMAN, JR.,

Petitioner Below, Petitioner

v.

TOM HARLAN, Interim Superintendent,
Huttonsville Correctional Center,

Respondent Below, Respondent.

Appeal from the Circuit Court of Fayette County, West Virginia

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PETITIONER'S APPEAL BRIEF

J. Timothy DiPiero (W.Va. I.D. No. 1021)
Lonnie C. Simmons (W.Va. I.D. No. 3406)
Luca D. DiPiero (W.Va. I.D. No. 13756)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
P.O. Box 1631
Charleston, West Virginia 25326
(304) 342-0133
tim.dipiero@dbdlawfirm.com
lonnie.simmons@dbdlawfirm.com
luca.dipiero@dbdlawfirm.com

Counsel for Petitioner Kevin Goodman, Jr.

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EXCULPATORY VIDEO, NOT OFFERED INTO EVIDENCE, SHOWING NO PERSON BEHIND THE DRIVER, WHERE PETITIONER SUPPOSEDLY WAS SEATED:

"It's clear someone is sitting behind the passenger seat and it's clear that nobody's sitting behind the driver seat....This [video] is extremely valuable." (Defense counsel Brandon Steele, JA at 1135). EXCULPATORY

"The State contends that it could fairly be argued that there is probably only one person in the back seat of the vehicle in question." (Assistant Prosecuting Attorney Jeffery T. Mauzy, JA at JA at 1099-1100). EXCULPATORY

"[W]hile the Petitioner asserts the video affirmatively shows that he did not participate in the crime he was convicted of and directly contradicts the trial testimony of Rashod Wicker and Kentrell Goodman, the Court FINDS that the Petitioner places far more weight and exculpatory value on the video tape than it actually warrants." (Judge Paul M. Blake, Jr., JA at 1241). NOT EXCULPATORY ENOUGH

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court:

In this case, defense counsel conceded that his failure to offer the above-referenced video into evidence at trial denied Petitioner Kevin Goodman, Jr., effective assistance of counsel because the video supported Petitioner's testimony that he was innocent, corroborated Petitioner's alibi witness, and counsel could have used the video effectively to impeach the State's critical witnesses. Under the State's theory, Petitioner, **who is six feet four inches tall**, allegedly was in the car behind the driver, with two other men seated beside him. (JA at 1205). Even the assistant prosecutor in answering the amended habeas corpus petition acknowledged the exculpatory value of the video. The judge concluded the video was not exculpatory enough to justify a new trial and denied all habeas corpus relief. As a result, Petitioner remains incarcerated serving a fifty year sentence for first degree robbery, one to five years for conspiracy to commit first degree robbery, and one to ten years for entry of a dwelling, all sentences running consecutively.

In light of the different conclusions reached by these three officials involved in the trial, this case raises the question, **"Shouldn't this Court set aside Petitioner's convictions and remand for a new trial so that a jury, which never saw this video in the first trial, can reach its own conclusions about the exculpatory value of this evidence?"**

Generally speaking, a video showing that the accused was not present when a crime was committed is very compelling exculpatory evidence that should have been presented to the jury. Unfortunately, the jury in the underlying criminal case did not have the opportunity to view the West

Virginia Turnpike tollbooth video of the Acura[1] used in the crime as it stopped to pay the tolls while it traveled north and then south on the day in question. In reviewing the record, counsel noticed a brief reference to the existence of tollbooth recordings by the officer testifying before the grand jury.[2] (JA at 83). The State provided a copy of the CD with the relevant tollbooth video.[3] The CD included multiple recordings from different angles, capturing the Acura as it headed north to Oak Hill, West Virginia, where the crime was committed, and then back to South Carolina. From the first time habeas counsel for Petitioner viewed all of the videos, it was clear one particular video showed no person was seated behind the driver, which contradicted the State's main witness and was consistent with Petitioner's trial testimony that he never left South Carolina, had no involvement in this crime, and was innocent.

After Petitioner filed his amended habeas corpus petition, a hearing was held on August 27, 2019, in which Petitioner's trial counsel testified. Following the submission of proposed findings of fact and conclusions of law, the Honorable Judge Paul M. Blake, Jr., issued an order on February

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[1]This Acura was owned by Lindsay Hess, Kentrell Goodman's girlfriend. (JA at 336).

[2]Although the video would have corroborated some of the State's evidence by showing the Acura was in West Virginia on the date and time in question and also clearly showed the car was driven by Rashod Wicker, for reasons not apparent in the record, the State did not offer this video as evidence at trial.

[3]Multiple copies of the CD have been included in the record so that each member of the Court can view the video. On January 9, 2015, the subject Acura was filmed on tollbooth cameras on four distinct occasions--twice traveling northbound at approximately at 5:52 a.m. and 6:14 a.m., and twice traveling southbound at approximately at 9:16 a.m. and 9:40 a.m. Petitioner respectfully submits that all of the videos are informative and should be reviewed, but the clearest recording showing no person is seated behind the driver can be found in the video labelled "Lane 7-8 North 2015-01-09_09_15_00_000" and the Acura appears from 9:16:58 to 9:17:07 a.m.

13, 2020, denying all habeas corpus relief. This appeal seeks to correct this injustice by reversing this final order and remanding this case for a new trial, where the jury will be able to consider all of the relevant evidence.

II. Assignments of error

A.

Whether the trial court erred in concluding Petitioner was not denied effective assistance of counsel, in violation of his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article III, Sections 1, 5, 10, and 14 of the West Virginia Constitution, where:

1. **Trial counsel failed to present into evidence the exculpatory tollbooth video showing Petitioner was not seated behind the driver, which evidence corroborated his trial testimony that he was innocent, supported his alibi witness, and which would have been effective in impeaching and cross-examining the State's main witnesses; and**

2. **Trial counsel failed to offer cautionary instructions, which were mandatory upon request, explaining how to consider the testimony of alleged accomplices, both of whom had entered guilty pleas?**

B.

Whether the trial court erred in holding that Petitioner's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article III, Sections 1, 5, 10, and 14 of the West Virginia Constitution were not violated when the State presented false testimony from a witness, who lied at trial and identified Petitioner as one of the perpetrators, told the jury that it could believe this perjured testimony, and the State failed to take appropriate action to correct the admission of this perjured testimony?

III. Statement of the case

A. Procedural history

On March 9, 2017, this Court issued a decision in a case styled *State v. Gibbs*, 238 W.Va. 646, 797 S.E.2d 623 (2017), affirming the convictions of co-defendant Antwyn Gibbs and Petitioner.[4] On or about July 5, 2017, Petitioner filed an initial *pro se* habeas corpus petition, which was dismissed without appointing counsel. On or about December 5, 2017, Petitioner filed a second *pro se* habeas corpus petition. The trial court appointed counsel to represent Petitioner in this proceeding and present counsel were appointed on or about June 26, 2018, to replace the original counsel. Because the issues raised in this appeal must be evaluated in the context of the record developed in the underlying criminal trial as well as the habeas corpus hearing, a detailed statement of facts is required.

B. Statement of the facts developed at trial

1. State's theory of the case

The State's theory in this case was that in the early morning of January 9, 2015, Petitioner, his brother Kentrell Goodman,[5] Defendant Antwyn Gibbs, Defendant Radee Hill, and Rashod Wicker traveled from South Carolina to Oak Hill, West Virginia, where an armed robbery was committed in a house owned by Linda and Elwood Charles Knight.[6] According to the State's theory,

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[4]This Court affirmed the convictions against the third co-defendant Radee Hill in *State v. Hill*, ___ W.Va. ___, ___ S.E.2d ___, 2016 WL 6678997 (No. 16-0138, 11/14/16).

[5]To avoid any confusion between Petitioner, his brother Kentrell Goodman, and his father Kevin Goodman, Sr., Petitioner's brother will be referred to as Kentrell and his father as Kevin, Sr.

[6]During the hearing and attached to Petitioner's proposed order were printouts of the public information provided by the West Virginia Division of Corrections on the height of the five men allegedly packed in this one car. According to this documentation, Petitioner is six feet four inches

the genesis for this crime occurred when Kentrell learned that his friend Andrew Gunn, a drug dealer who was residing in the Knight house, kept a safe with some of his drug money. The State contended that this group, after arriving in Oak Hill, managed to steal Mr. Gunn's safe, which contained about $10,000, as well as a pair of Mr. Gunn's tennis shoes and a crossbow. Soon after these items were taken, this group immediately traveled back to South Carolina. This group traveled north and then south on the West Virginia Turnpike. In an effort to minimize their own involvement in this crime, Kentrell and Mr. Wicker entered into plea agreements and testified in the joint criminal trial involving Petitioner, Defendant Gibbs, and Defendant Hill.[7]

2. Armed robbery committed in an Oak Hill house

In the pretrial discovery, Petitioner was never identified by any of these robbery victims as being one of the perpetrators. In January, 2015, Linda Knight lived in a house in Oak Hill, West Virginia, with her husband, Elwood Charles Knight, her five-year-old granddaughter Da-maya, and her nineteen-year-old grandson Alexandro. (JA at 219-20). Also living in the house at that time was Andrew Gunn, her grandson, who had been living there on home confinement for about six months. (JA at 220-21; 293). In the morning of January 9, 2015, two men came into her house through the front door, one with a shotgun or rifle and the other one with a handgun. (JA at 225, 228). From what she could see, the two men appeared to be black. (JA at 230). Andrew Gunn then came into the livingroom and sat in a chair. (JA at 231). Then two more men, whose faces were covered by their jackets, came into the house and headed directly to Mr. Gunn's bedroom. (JA at 231-33).

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tall, Rashod Wicker is five feet nine inches tall, Kentrell Goodman is six feet one inch tall, Radee Hill is five feet nine inches tall, and Antwyn Gibbs is five feet eleven inches tall. (JA at 1205-09).

[7]Kentrell and Mr. Wicker pleaded guilty to first degree robbery. (JA at 615, 734).

There was a safe in this bedroom, which was missing after these intruders left the house. (JA at 235-36). She also noticed a new pair of tennis shoes was missing along with a crossbow. (JA at 236). In the trial, she was able to identify the safe, the tennis shoes, and the cross bow. (JA at 236-38). The intruders were in the house for about fifteen minutes. The first two left through the front porch while the second two must have left out of Mr. Gunn's bedroom window. (JA at 239). Mr. Gunn was friends with Kentrell and Kentrell even stayed at this house at some earlier time. (JA at 240). When the intruders left, she called the police. (JA at 242).

At trial, Ms. Knight appeared to identify Mr. Gibbs, when she was unable to do so prior to trial, but was unable to identify Petitioner or Mr. Hill. (JA at 243). Although prior to trial Ms. Knight explained she was unable to identify any of the intruders, during the trial, she claims Mr. Gibbs is the person who pointed the long shotgun at her face and she identifies him in court. (JA at 251). The safe belonged to Mr. Gunn. (JA at 245). According to Ms. Knight, all four intruders were about five foot five or six inches tall, but she stated it was kind of hard to judge their height. (JA at 247). Petitioner is listed by the West Virginia Division of Corrections as being six feet four inches tall. Edward Knight, who is married to Linda Knight, was present in the home during the armed robbery, but he was not able to identify any of the intruders nor was he able to describe their heights. (JA at 256-57, 263).

Lindsay Hess, Kentrell's girlfriend, was living with Aunt Benita in her house in Newberry, South Carolina. Kentrell also lived there at that time, as well as a friend named Tamika and Mr. Wicker. (JA at 328-30, 331). Petitioner visited the house every other day. (JA at 330). Ms. Hess claims she overheard Petitioner and Kentrell discuss robbing Mr. Gunn. (JA at 332-33).

On January 9, 2015, Ms. Hess discovered her Acura was missing when she woke up and also noticed Kentrell was not there. (JA at 335). After receiving a text from Petitioner's girlfriend asking where he was, Ms. Hess learned from Tamika that Petitioner supposedly was in West Virginia. (JA at 336). The text from Petitioner's girlfriend was received on January 9, 2015, at 12:58 a.m. (JA at 338). Ms. Hess responded to the text at 1:04 a.m. (JA at 339). Around noon, Ms. Hess saw her car in the parking lot, along with Kentrell, Petitioner, and Mr. Wicker. (JA at 340-41). About a day later, Petitioner bought a car seat for Kentrell. (JA at 343). A television and a game system also was purchased a few days later. (JA at 344).

3. Testimony provided by Mr. Gunn, Mr. Wicker, and Kentrell

As is often the case, the State relied upon the testimony of criminal defendants, who cut deals in an effort to lessen their own criminal exposure. Thus, the most critical evidence supporting the State's theory came from Mr. Wicker and Kentrell.

The testimony of Mr. Gunn, who in this case allegedly was a victim, presented some credibility issues for the State, which felt compelled to take the unusual step during its closing argument of specifically asking the jury to disregard Mr. Gunn's testimony that he had identified Petitioner as one of the individuals involved in this crime. Specifically, Mr. Gunn testified, "I saw them (indicating)–Kevin and some other boy come in the house." (JA at 298). On January 9, 2015, Mr. Gunn was getting ready to report to the Day Report Center due to his own criminal convictions when masked intruders came into the Knight house in Oak Hill. (JA at 294). At trial, Mr. Gunn identified a crossbow and tennis shoes gathered by law enforcement as belonging to him. (JA at 295-96). Mr. Gunn explained his safe, which he also identified, contained about $10,000 in cash from his marijuana sales and he also confirmed that Kentrell knew about money in his safe. (JA at 302). All four of the intruders wore hoodies and three of them wore masks. (JA at 303).

Despite his surprise identification of Petitioner at trial, which identification was rejected in an ambiguous manner by the State in its closing, Mr. Gunn acknowledged giving a statement to the police after the intruders had left. In this statement, Mr. Gunn did not identify Petitioner as one of the intruders, but instead said he recognized someone who looked similar to a person named Robert Lee. (JA at 312). In the entire time he spoke with the police, Mr. Gunn never identified any of the four intruders. (JA at 313). On January 12, 2015, Mr. Gunn was presented with a photo lineup, in which he identified a person named Robert Lee as one of the intruders, but did not identify any of the defendants. (JA at 315-317). In fact, Mr. Gunn actually identified Petitioner's father, Kevin Goodman, Sr., from a photo lineup as being one of the intruders involved. (JA at 35). Mr. Gunn acknowledged that he guessed he was lying to the police when he identified Robert Lee in the photo lineup. (JA at 317). Mr. Gunn denied ever knowing that Kentrell was in his house during the crime. (JA at 321).

In January, 2015, Rashod Wicker was living in his mother's house in Little Mountain, South Carolina. Her name is Benita Goodman Wicker. (JA at 714). Kentrell and Petitioner are his cousins. (JA at 715). On January 8, 2016, Mr. Wicker received a call from Kentrell asking him to drive because Kentrell did not have a license. (JA at 716). Mr. Wicker drove Lindsey Hess's Acura, picked up Kentrell and Petitioner and eventually the other defendants. (JA at 717).

One of the most critical parts of Mr. Wicker's testimony was his statement regarding where the various individuals were seated in the Acura. According to Mr. Wicker, Petitioner was seated directly behind the driver's seat, Kentrell was in the front passenger's seat, and the remaining defendants were seated in the rear beside Petitioner. (JA at 718, 720).

Mr. Wicker testified he understood the purpose of the trip was to pick up some money in West Virginia, but he had not been told there would be a robbery and he had not seen any guns

initially. (JA at 719). They arrived in Oak Hill, West Virginia, around 7:30 or 8:00 a.m. (JA at 722). Mr. Wicker claimed he thought Petitioner might be in charge because he was the person who left the car and said, "Let's go." (JA at 723).

Mr. Wicker popped open the trunk and Mr. Gibbs, Mr. Hill, Petitioner, and Kentrell went to the back of the car. (JA at 724). Mr. Wicker has cerebral palsy and was told by Kentrell to stay in the car. (JA at 725). Mr. Wicker saw one long gun, a shotgun, removed from the trunk, but did not see any handguns. (JA at 726-27). After about fifteen minutes, all of the group returned to the car, with Petitioner carrying a safe and he thinks Kentrell was carrying a pair of shoes and a crossbow. (JA at 728). All of these items were put into the trunk and Mr. Wicker was told to go after they got back into the car. (JA at 729).

After they returned to the car, Mr. Wicker heard the members of this group mention there were people in the house, including an old lady and some kids. On the way back to West Virginia, they stopped at a house, where Petitioner and Kentrell got out of the car. (JA at 730). On the way back, the only other stop was to get gas. (JA at 731). Kentrell gave Mr. Wicker $2,000. (JA at 733). Mr. Wicker entered a guilty plea to first degree armed robbery, but was charged with a total of four crimes. (JA at 734). Mr. Wicker claimed he was testifying of his own free will and it was not a part of his plea agreement. (JA at 736). Under his plea agreement, the State was going to recommend a youth camp. (JA at 735).

Kentrell was born in South Carolina, but grew up in Oak Hill, West Virginia. (JA at 614). Kentrell entered a guilty plea to the armed robbery in this case. (JA at 615). As a result of this plea agreement, Kentrell, who was nineteen years old, was hoping to be sentenced to the Anthony Center. There was nothing in this plea agreement requiring Kentrell to cooperate with the State. He and Mr. Gunn have been friends since high school. (JA at 616). Kentrell knew Mr. Gunn had about $10,000

in cash that he kept in his safe in his bedroom. (JA at 617). Kentrell claims a few days prior to January 9, 2015, he told his brother Petitioner about the money in the safe. (JA at 619-620).

In January, 2015, Kentrell's girlfriend Lindsey Hess was eight months pregnant and generally did not leave their home at that time. (JA at 621). After telling Petitioner about Mr. Gunn's money, Petitioner allegedly told Kentrell let's go get the money. (JA at 623). Around midnight or 1:00 a.m., of January 9, 2015, Petitioner allegedly told Kentrell it is time to go on a road trip. Rashod Wicker got involved as the driver because none of the other people involved had driver's license. (JA at 624). Kentrell, Petitioner, Antwyn Gibbs, Radee Hill, and Rashod Wicker were in the car for this trip to Oak Hill, West Virginia. (JA at 624-25). They left in Lindsey's car around 1:00 a.m., from South Carolina. (JA at 625). Lindsey was not told that they were going to use her car. Around 8:00 a.m., Kentrell called his brother Corey to find out the hours for the Day Report Center, because Mr. Gunn was supposed to be there. (JA at 626). Corey and Mr. Gunn were in the same Day Report Center program. They thought the Knights would be gone because normally they work. (JA at 627).

Mr. Wicker parked the Acura at a Domino's in Oak Hill that has a path leading to the back of the Knights' house. (JA at 628). Mr. Wicker stayed with the car, but Kentrell, Petitioner, Mr. Gibbs, and Mr. Hill got out and headed to the Knights' house. After getting out of the car, Mr. Gibbs and Mr. Hill opened the trunk and retrieved some guns, including a shotgun. (JA at 629).

As they approached the house, Mr. Gibbs carried the shotgun. (JA at 630). Mr. Gibbs and Mr. Hill went into the house first. (JA at 630). Kentrell went to Mr. Gunn's bedroom window, where the safe, tennis shoes, and a crossbow were thrown out. (JA at 632). Kentrell took the crossbow and the tennis shoes and placed them in the house where he lived in South Carolina. (JA at 633-34). When the safe was thrown out of the window, Petitioner jumped out of the same window and carried the safe to the car with Mr. Gibbs. After everyone got to the car and the stolen items

were placed in the trunk, they took off. (JA at 636). They arrived back in South Carolina around noon or 1:00 p.m., and went to Mr. Gibbs' residence to pop the safe open. (JA at 638). The safe opened when Petitioner shot it with a gun. (JA at 639). Kentrell received about $1,000, Mr. Wicker received some money, and the rest was divided between Petitioner, Mr. Gibbs, and Mr. Hill. (JA at 641). When they returned to Aunt Benita's house, they removed the safe from the trunk and placed it outside behind a shed. (JA at 642).

4. Forensic evidence from the State

No forensic evidence from the State linked or implicated Petitioner in this crime. Blake Reta is a toolmark examiner employed by the West Virginia State Police and was qualified as an expert witness in this area (JA at 266, 270). He was asked to see if some pieces of plastic could be matched to missing parts from the safe. (JA at 274). In his expert opinion, the pieces of plastic he examined were from this safe. (JA at 276-77). Some of the pieces of plastic were so damaged, he could not match them with the safe. (JA at 279).

Stephen Epps is employed by the Newberry County South Carolina Sheriff's Department and was involved in investigating this robbery. (JA at 401). On January 15, 2015, he went to the house of Mr. Gibbs, based upon information given by Kentrell and Mr. Wicker. (JA at 402, 404). In the backyard, he found 410 shell casings and wadding or pellets from inside the shells. The day before, the safe had been found, which appeared to have been shot with bird shot. (JA at 405). The damaged safe had been recovered at Aunt Benita's house the day before. (JA at 406). In Mr. Gibbs' backyard, he also found what appeared to be pieces of the safe. (JA at 407). Officer Epps explained that no evidence was found in the possession of Petitioner nor were any fingerprints found. (JA at 446).

Garrett Lominack is a lieutenant of investigations for the Newberry County South Carolina Sheriff's office. He was contacted by Oak Hill police department to assist in an investigation. (JA at 454). He said it takes about five or five and one-half hours to travel from Aunt Benita's house in South Carolina to Fayetteville, West Virginia. (JA at 455). Mr. Gibbs had more hair, either dreadlocks or knots, at the time of his arrest than he had at the time of the trial. (JA at 464).

The crossbow was found in the closet in a back bedroom of Aunt Benita's house, where the tennis shoes in question also were found. (JA at 479-80). He also found a wallet with Petitioner's driver's license and Social Security card in it as well as a handgun and shotgun. (JA at 482, 484-85). These items were found in the same bedroom. (JA at 492). He also obtained two cell phones, one belonging to Lindsey Hess and the other to Mr. Wicker. (JA at 492). The silver or nickel plated .25 caliber pistol found in Aunt Benita's residence was not tested for fingerprints. Lieutenant Lominack did not know of any evidence connecting this gun with Petitioner. (JA at 511). Detectives Pack and Young from West Virginia were present for both searches in South Carolina. On the two days of these searches, the police did not locate or see Petitioner. (JA at 513). On January 14, 2015, he arrested Kevin Goodman, Sr., Defendant Kevin's father. (JA at 514). While Kevin, Sr., was arrested for charges unrelated to this case, he did deny having any involvement in this particular crime. (JA at 515).

Mason Hine is a crime scene investigator employed by the Oak Hill Police Department. (JA at 542). In the morning of January 9, 2015, he was dispatched to the home where the robbery occurred. Once he arrived, he was the person who photographed the crime scene. He was able to get a palm print from a window and some shoe prints. The palm print was never identified. (JA at 543). There were shoe impressions in the snow outside of the house that he photographed. He also photographed tire tracks leaving the vacant lot above Domino's Pizza along Route 16. (JA at 544).

A search warrant was obtained before getting the data off of the Mr. Gibbs' cell phone. (JA at 553). Mr. Wicker's cell phone had a photo of the Tamarack sign taken on January 9, 2015, at 9:25 a.m. (JA at 557-558). Mr. Gibbs' cell phone had a text discussion with a person named Devon about needing a gun with papers. (JA at 559). Some calls from Mr. Gibbs' cell phone were pinged from towers in Oak Hill and Flat Top. (JA at 571-72). A fingerprint inside the safe was identified as belonging to Mr. Gunn, but no other fingerprints were identified. No information was obtained from any of Petitioner's cell phones because one was broken and one was not accessible. (JA at 592).

Sergeant Chris Young is employed by the Oak Hill Police Department and he joined Officer Pack on the date of the crime to go to Newberry, South Carolina. Kevin Goodman, Sr., was a person of interest and Sergeant Young was involved in interrogating him. (JA at 600). Sergeant Young was able to verify that Kevin Goodman, Sr., was at work at the time of the crime. (JA at 601). Kevin Goodman, Sr., became a person of interest based upon Mr. Gunn identifying him in a photo lineup. (JA at 602). Captain Dennis from South Carolina conducted the actual interview. (JA at 604). When the alibi for Kevin Goodman, Sr., first was checked by a telephone call to his boss, the boss stated Kevin Goodman, Sr., had not been at work at the time of the crime. A second call made to the same employer involved a discussion with the office manager, who then stated Kevin Goodman, Sr., had been at work. (JA at 606-07).

5. Petitioner testifies and denies any involvement in this crime

Petitioner testified that on the evening of January 8, 2015, he was at Aunt Benita's house in South Carolina with his brother Devon, brother Kentrell, cousin Rashod Wicker, and girlfriend Courtney Curry and they were having a family get together. Ms. Curry left around 1:00 a.m., on

January 9, 2015. Petitioner was drunk and crashed at the house on a couch. (JA at 816). Petitioner testified he woke up the next morning, went outside to smoke, and Ms. Curry came by to pick him up. She got into an argument with Petitioner about a text she had received from Ms. Hess saying Petitioner had gone to West Virginia. (JA at 818). Petitioner specifically denied having any part in this crime. (JA at 820). When he saw Kentrell later that day, Kentrell had a new futon bed, television, and X box game system. (JA at 821). Kentrell never explained to Petitioner what he had done. Petitioner did not know about him being a suspect until he met with the South Carolina police in March, 2016. (JA at 822). Petitioner explained he did not have a relationship with the rest of his family in West Virginia and further denied receiving $2,000 from Kentrell. (JA at 824-25).

Courtney Curry testified she lived with Petitioner in South Carolina. Ms. Curry and Petitioner had been living together in her house in Newberry, South Carolina, from June, 2014, until January, 2015. (JA at 795-96). Ms. Curry testified to sending texts to Lindsey asking if she had seen Petitioner. (JA at 791). Ms. Curry was with Petitioner at Aunt Benita's house until about 12:30 or 1:00 a.m., on January 9, 2015. She left while Petitioner stayed. (JA at 792). The next morning, Ms. Curry texted Ms. Hess, who texted back and said Petitioner had gone to West Virginia. That morning, Ms. Curry went over to Aunt Benita's house in the Chapin area, where she ran into Petitioner and had a conversation with him discussing why Ms. Hess was lying about his whereabouts. This meeting occurred after her son was on the bus, so it would have been after 8:30 a.m. (JA at 792). The rest of the day, she and Petitioner stayed at Aunt Benita's house until the kids got off of the bus. At that time, Ms. Curry was employed at an elementary school as a janitor, who worked in the evening. (JA at 794). Thus, from just after 8:30 a.m., to the time she went to work at 5:00 p.m., Ms. Curry was with Petitioner. (JA at 795).

6. Evidence developed in habeas corpus hearing

Brandon Steele, who was the lawyer appointed by the Court to represent Petitioner, testified at the hearing. Mr. Steele graduated from Marquette Law School and was licensed by the West Virginia State Bar as a lawyer in April, 2014. On or about February, 2015, the Court appointed Mr. Steele to represent Petitioner. (JA at 1127).

Prior to this case, although he had handled multiple criminal cases resulting in plea agreements or bench trials, Mr. Steele had never tried a criminal case resolved by a jury. During the pretrial phase of the case, the State had an open file policy, permitting defense counsel access to all statements and evidence developed during the criminal investigation. (JA at 1127-28). After meeting with his client and investigating the facts produced by the State, Mr. Steele stated that the defense to these charges was that Petitioner did not commit this crime, did not travel to West Virginia, and, in fact, remained in South Carolina when the crime was committed. (JA at 1129). Furthermore, because Petitioner was not guilty of this crime, the testimony provided by Mr. Wicker and Kentrell implicating Petitioner was false. Petitioner testified at trial in support of his innocence and also presented an alibi witness corroborating his own trial testimony that he had remained in South Carolina and never traveled to West Virginia at the time of this crime. There was no physical or scientific evidence connecting Petitioner to this crime. The only evidence against Petitioner was from two individuals, Mr. Wicker and Kentrell, who had admitted they were involved in this crime and who had entered into plea agreements prior to testifying at this trial.

During pretrial discovery, Mr. Steele recalls the State providing him with four CD's containing videos taken near the West Virginia Turnpike toll booths on January 9, 2015. These videos from different angles captured the silver Acura driven by Mr. Wicker as the car headed north and several hours later headed south. (JA at 1130).

Mr. Steele testified that when he first viewed these CD's, the evidentiary significance of what the videos showed was not apparent to him at that time. To a certain extent, the videos confirmed that the Acura driven by Mr. Wicker actually did travel north and then south on the date of the crime at the approximate times testified to by Mr. Wicker. Because Mr. Steele did not find these CD's to contain any significant evidence, he did not play the CD's for Petitioner before or during the trial. Thus, Petitioner never had an opportunity to view the CD's until the CD's were produced by the State to Petitioner's habeas corpus counsel. (JA at 1132-33). The video on one of the CD's did not work. (JA at 1130). However, after Mr. Steele completed his testimony, he went to his office and returned with the CD's he had been provided by the State. These CD's were viewed by counsel for Petitioner and Respondent. Three of the CD's were operational, including the video showing no person was seated behind Mr. Wicker. Counsel stipulated that the one CD that did not work did not contain any significant video information.

During the trial, Mr. Wicker testified to the seating arrangement in the car. Mr. Wicker testified that Petitioner, who is listed by the Division of Corrections as being six feet four inches tall, was seated behind Mr. Wicker, who was driving the Acura. According to Mr. Wicker, Kentrell sat in the front passenger seat while Petitioner, Antwyn Gibbs, and Radee Hill sat in the back seat area.

In light of Mr. Wicker's testimony, some of the Turnpike videos became of significant evidentiary value because they show Petitioner was not seated behind the driver, Mr. Wicker. In fact, one of the videos very clearly shows that no person is seated behind Mr. Wicker. Mr. Steele had no recollection of seeing this particular video before trial and did not recall seeing any videos that were as clear as the videos he viewed in connection with this proceeding. (JA at 1134-35). However, as noted above, when the CD's in Mr. Steele's possession were viewed by counsel for

Petitioner and Respondent, it cannot be disputed that Mr. Steele had in his possession, prior to trial, the CD containing the relevant Turnpike video, which was very clear. At the hearing, Mr. Steele testified that the video in question was very clear and extremely valuable. In the **ANSWER TO AMENDED HABEAS CORPUS PETITION**, p. 3-4, even Respondent recognized the exculpatory value of this video by conceding, "The State contends that it could fairly be argued that there is probably only one person in the back seat of the vehicle in question." (JA at 1099-1100). Mr. Steele acknowledged that had he realized the exculpatory value of this video before trial, he absolutely would have introduced it into evidence, would have used it in cross examining Mr. Wicker and Kentrell, and would have incorporated this video in his closing argument. (JA at 1135-36). Furthermore, this video was of such exculpatory value that had the State not produced it during pretrial discovery, the failure to do so would have been a violation of the State's obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

The remaining part of Mr. Steele's testimony addressed the fact that he did not offer two separate cautionary instructions that the trial court would have been required to give upon request. First, during the trial, the jury was informed that Mr. Wicker and Kentrell had entered into guilty pleas prior to their testimony. Under Syllabus Point 3 of *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982), and Syllabus of *State v. Flack*, 232 W.Va. 708, 753 S.E.2d 761 (2013), when the jury learns that an alleged accomplice has entered a guilty plea, upon the request of the defendant on trial, the trial court is required to give a cautionary instruction explaining that the alleged accomplice's guilty plea "cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness' credibility." Neither Mr. Steele nor counsel for the other defendants in this trial sought to have this cautionary instruction given. (JA at 1138).

Second, Mr. Wicker and Kentrell testified as alleged accomplices and implicated Petitioner in the crime they committed. Under Syllabus Point 1 of *State v. Humphrey*, 128 W.Va. 370, 36 S.E.2d 469 (1945), and Syllabus Point 2 of *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978), upon the request of the defendant, a trial court is required to give an instruction that the testimony of alleged accomplices must be received by the jury with caution. Neither Mr. Steele nor counsel for the other defendants in this trial sought to have this cautionary instruction given. (JA at 1140).

In a case where there was no physical or scientific evidence connecting Petitioner to the crime and where the State's main evidence against Petitioner was through the testimony of Mr. Wicker and Kentrell, the trial court would have been required to give this cautionary instruction as well as the earlier guilty plea cautionary instruction upon request. Mr. Steele could not explain why he did not ask for these two cautionary instructions, which would have explained to the jury the care required in evaluating the testimony of Mr. Wicker and Kentrell. He also testified that these two cautionary instructions were important for all of the defendants, including Petitioner. Mr. Steele noted he relied, in part, on the experience of counsel for Mr. Gibbs and Mr. Hill, and neither of these lawyers offered the two cautionary instructions described above. (JA at 1143-44).

IV. Summary of argument

Petitioner's counsel, who was trying his first criminal jury trial, failed to recognize the exculpatory value of the tollbooth videos, did not permit Petitioner to see the videos, and did not present the videos into evidence. Any reasonable lawyer viewing the video carefully would have noted Petitioner was not seated in the car as alleged by the State's witness. This video corroborated Petitioner's testimony that he was not involved in this crime, which testimony was further supported by his alibi witness. The video also would have provided significant evidence to use in confronting, impeaching, and cross-examining the State's key witnesses.

Video evidence is highly persuasive because a video tends to be more vivid than verbal evidence and thus more likely to attract and hold viewers' attention, generate more related thoughts, and be better remembered. The picture superiority effect confirms that visual evidence tends to be better remembered than verbal evidence. Seeing video can give jurors an even more intense sense of being in the presence of the real than they would have had as live witnesses. This feeling of presence would be predicted to enhance not only the perceived probative value of the evidence but also the intensity of jurors' emotional responses to it.

Additionally, Petitioner's trial counsel failed to ask for two cautionary instructions, which the trial court would have been required to give upon request because two of the State's witnesses were accomplices and had entered guilty pleas. Fundamentally, the benchmark for judging any claim of ineffective assistance of counsel must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Under these facts, Petitioner has established his trial counsel failed to provide effective assistance of counsel because his performance was deficient under an objective standard of reasonableness and there is a reasonable probability that but for these errors, the result of the proceedings would have been different. Without the exculpatory evidence and cautionary instructions, Petitioner's trial cannot be relied upon as having produced a just result.

What actions is a prosecutor required to take when one of the State's witnesses, contrary to all prior statements, gets on the witness stand and tells the jury that he identified Petitioner as one of the criminals who invaded the house where the robbery occurred? Here, the false testimony was from the alleged victim, who made this unanticipated court room identification of Petitioner. The prosecutor knows this identification is false because the witness never identified Petitioner in any

earlier statements and the testimony was that the people who had invaded this house had concealed their identities.

A criminal conviction obtained through the use of evidence that the State knows to be false is a violation of the Due Process Clause of the Fourteenth Amendment. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

When the State presents testimony that it knows is false, for Petitioner to get a new trial, he must prove that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.

Based upon the State's ambiguous and confusing arguments, the jury could have relied upon this false identification of Petitioner in deciding his guilt. Thus, the efforts by the State to correct the damage caused by this false identification were woefully inadequate to cure the violation of Petitioner's constitutional rights.

V. Statement regarding oral argument and decision

Because this appeal raises two critical issues–first, when is trial counsel ineffective for failing to present exculpatory evidence and seeking cautionary instructions that are mandatory upon request, and second, what actions must be taken when the State presents knowingly false testimony--Petitioner respectfully submits oral argument under either Rule 19 or 20 would be beneficial to the Court to address any questions the Court may have about the factual or legal issues raised. A decision from this Court authored by one of the Justices, as opposed to a memorandum opinion, could be used to provide helpful guidance to criminal defense counsel as well as prosecutors who may be faced with similar facts.

VI. Argument

A. Petitioner was denied effective assistance of counsel when his trial counsel failed to introduce into evidence the exculpatory video showing that Petitioner was not in the vehicle used in the crime, which video corroborated the testimony of Petitioner and his alibi witness and contradicted the State's main witnesses, and failed to offer cautionary instructions, which are mandatory upon request, explaining how to consider the testimony of alleged accomplices, both of whom had entered guilty pleas

Petitioner sought to prove that his trial counsel's actions and inactions denied him effective assistance of counsel, under *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In rejecting Petitioner's arguments, Judge Blake found, "[A]t best, the videos are inconclusive as to the occupancy of the subject vehicle and are of no significant exculpatory value." (JA at 1241). Even if Petitioner could have met this initial element, Judge Blake concluded, "Petitioner is unable to establish that had counsel entered the videos into evidence or utilized them to attempt to impeach and discredit the testimony of Rashod Wicker and Kentrell Goodman, there is a reasonable probability that the jury would not have convicted the Petitioner based upon the presentation of this video evidence." (JA at 1242).

In Syllabus Points 5 and 6 of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), this Court established the following standard for evaluating an ineffective assistance of counsel claim:

> 5. In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

> 6. In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

In *Scott v. Mohn*, 165 W.Va. 393, 397, 268 S.E.2d 117, 119-20 (1980), the Court developed six areas of inquiry for a trial court to review in evaluating an ineffective assistance of counsel claim. Included in this inquiry are the following two areas:

> 3) counsel promptly conferred and **thoroughly discussed the facts and the law with the client,** including but not limited to advising him of his rights, matters of defense, etc.;
>
> 4) **counsel conducted any investigation of the facts and the law** in preparation for trial. (Emphasis added).

Thus, there can be no dispute that an essential part of a lawyer's duties in providing effective assistance of counsel is to investigate the facts competently to discover exculpatory evidence and to discuss those facts with the client in making decisions regarding what evidence should be presented at trial. Furthermore, counsel is required to research the law applicable to the facts of the case and to propose instructions available under the facts and consistent with the theory of defense.

This Court is not required to defer to counsel's failure to investigate or research the applicable law where such failure to investigate or research is not based upon sound reasoning. The United States Supreme Court made this point in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, ___ (1984):

> The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of

> reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, **counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.** (Emphasis added).

In *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 320, 465 S.E.2d 416, 422 (1995), the Court echoed this point by holding, "Courts applying the *Strickland* standard have found no difficulty finding ineffective assistance of counsel where an attorney neither conducted a reasonable investigation, nor demonstrated a strategic reason for failing to do so." *See also State ex rel. Myers v. Painter*, 213 W.Va. 32, 576 S.E.2d 277 (2002).

The most similar ineffective assistance of counsel decision by this Court that Petitioner has been able to find is *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013). In *Ballard*, trial counsel had a statement asserting that another person was guilty of the crime charged, but he failed to further investigate that allegation or interview that potential witness. Instead, trial counsel relied upon information from the police that this witness had failed a polygraph examination, which suggested the statement was false.

In affirming the trial court's conclusion that this lawyer had provided ineffective assistance of counsel, the Court cited a number of different decisions in other jurisdictions where the failure of the trial counsel to investigate and present exculpatory evidence was found to violate both the objective standard of reasonableness and also that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Essentially, when trial counsel fails to investigate exculpatory evidence, fails to discuss exculpatory evidence with the client, and fails to present exculpatory evidence at trial, the *Strickland* test for ineffective assistance of counsel is met.

The most factually similar case Petitioner has found involving the failure of counsel to present an exculpatory video is *People v. Canales*, 110 A.D.3d 731 (N.Y. App. Div. 2013). In *Canales*, the defendant was convicted of second degree murder. This defendant argued that his trial counsel provided ineffective assistance of counsel for failing to investigate and discuss critical video footage with his client prior to trial. The defendant was charged with intentionally killing a victim in an altercation between two groups of friends, but the defendant maintained that the shooting was accidental and that the gun unexpectedly discharged in the ensuing scuffle. One of the prosecution's primary pieces of evidence was a video that displayed the defendant chasing another person that the prosecution identified as the victim, which would evince the defendant's intent to kill. Trial counsel arbitrarily accepted the prosecution's identification of the victim and failed to investigate or discuss the video with his client. During jury deliberations, the defendant personally addressed the court and stated that he could demonstrate that the person being chased in the video **was not** actually the victim. Despite the defendant's last minute effort to remedy his trial counsel's mistake, the jury rendered a guilty verdict.

Following the defendant's post-judgment motion to vacate on the grounds of ineffective assistance of counsel, the New York Supreme Court, Kings County determined that the defendant "was clearly denied the effective assistance of counsel under both the federal and state constitutions." *Id.* at 733. The court determined that trial counsel had provided ineffective assistance by [1] failing to investigate the video, [2] failing to discuss the video with the defendant prior to trial, and [3] conceding, without any basis, to the prosecution's portrayal of the video. This decision was affirmed on appeal on state grounds in *People v. Canales*, 110 A.D.3d 731 (N.Y.Sup.Ct. 2013).[8]

[8]In the appellate decision, the court found trial counsel was ineffective under the applicable standard in New York, which is somewhat broader than the standard established by the United States

Petitioner's trial counsel's failure to investigate thoroughly and appreciate the exculpatory significance of the tollbooth footage is even more damning given the unique persuasive value of video evidence. Research has demonstrated that video evidence is one of the most powerful tools available to attorneys in creating meaningful impressions upon jurors:

> [T]he nature of evidentiary videos as representations at trial tends to make them highly persuasive. First, like much visual evidence, video tends to be more vivid than verbal evidence and thus more likely to attract and hold viewers' attention, generate more related thoughts, and be better remembered (*see, e.g.,* Bell & Loftus, 1985). The picture superiority effect (Stenberg, 2006) confirms that visual evidence tends to be better remembered than verbal evidence. [...] Second, seeing video can give jurors an even more intense sense of being in the presence of the real than they would have had as live witnesses. This feeling of presence would be predicted to enhance not only the perceived probative value of the evidence but also the intensity of jurors' emotional responses to it (Lombard & Ditton, 1997).

Cynthia Najdowski & Margaret Stevenson, *Criminal Juries in the 21st Century: Psychological Science and the Law: American Psychology-Law Society Series*, Oxford University Press (2018), https://books.google.com/books/about/Criminal_Juries_in_the_21st_Century.html?id=YB5pDwAAQBAJ.

In fact, studies have also shown that jurors perceive video evidence as having significantly greater persuasive value than other categories of non-visual evidence. In a recent empirical study, three hundred mock jurors were asked to indicate which of 41 different types of evidence would be most important when deciding the verdict in a homicide case. Video record evidence was determined to be the fourth most important type of evidence to jurors, lagging closely behind DNA (1st), fingerprint evidence (2nd), and the murder weapon (3rd). In contrast, jurors attributed

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Supreme Court. After applying the New York standard, the appellate court did not go further to address whether the facts also constituted ineffective assistance under the federal standard.

significantly less persuasive value to eyewitness testimony (10th), the timeline of the crime (13th), written confessions (19th), and alibi witness testimony (26th). As there was no physical or scientific evidence linking Petitioner to the crime and the State's primary evidence was the testimony of two dubious witnesses, Petitioner's trial counsel deprived him of presenting the jury the most compelling evidence of his absence from the crime. Kimberly Schweitzer and Narina Nuñez, *What Evidence Matters to Jurors? The Prevalence and Importance of Different Homicide Trial Evidence to Mock Jurors,* PSYCHIATRY, PSYCHOLOGY AND LAW, Vol. 25, No. 3, 432-451 (2018), https://doi.org/10.1080/13218719.2018.1437666.

Mr. Steele stated that he had no knowledge of the tollbooth video showing that only one individual, not three, was visible sitting in the rear seat of the subject vehicle. Mr. Steele evidently performed only a cursory review of the footage as he later acknowledged that he would have introduced the video had he investigated it in greater detail. As such, his failure could not have been a *strategic* decision because he failed to investigate the footage sufficiently to appreciate that the videos directly contradicted Mr. Wicker's testimony and supported his client's nonparticipation and innocence defense. Moreover, a reasonably competent attorney would have, at minimum, examined the footage in detail given that no other video or photographic evidence existed to prove Petitioner participated in the crime. Having undertaken no such investigation, assessing Mr. Steele's mistake is not a matter of second-guessing reasonable trial strategy; it was an oversight that cost Petitioner an invaluable piece of recorded, visual evidence within a defense otherwise consisting of only witness testimony.

The critical video is labelled "Lane 7-8 2015-01-09 09_15_00." In this video clip, as the Acura passes under the roof of the toll booth, the glare on the slanted back windshield disappears, showing there is no person seated in this car directly behind the driver. In fact, only one person can

be seen seated in the back of this Acura. During the hearing, Petitioner admitted into evidence a color photo taken from this video. Mr. Wicker testified that Petitioner, who is listed by the West Virginia Division of Corrections as being six feet four inches tall, was seated behind Mr. Wicker, the driver. (JA at 718, 720). Mr. Wicker also claimed that Mr. Gibbs was seated in the back of the Acura, but this video only shows one African American man seated in the back with a relatively short haircut, which is inconsistent with the hair style worn by Gibbs at that time. According to Lieutenant Garrett Lominack, who was a lieutenant employed by the Newberry County South Carolina Sheriff's office, when Mr. Gibbs was arrested a few days after this incident, his hair was styled either as dreadlocks or knots. (JA at 464). Once again, this inconsistency would have provided additional material to challenge the credibility of the testimony of Mr. Wicker and Kentrell. Thus, Petitioner was denied effective assistance of counsel in connection with the failure of his trial counsel to admit into evidence the exculpatory video of the Acura traveling north and then south through the toll booths on the West Virginia Turnpike on January 9, 2015.

Because Petitioner's trial counsel failed to admit or otherwise use this exculpatory video at trial, the jury was denied the opportunity to consider significant evidence that not only corroborated Petitioner's testimony that he was not involved in this crime, but also which contradicted the testimony of the State's main witnesses, Mr. Wicker and Kentrell. At the hearing, Mr. Steele acknowledged that had he appreciated the exculpatory value of this video, particularly in light of Mr. Wicker's undisputed testimony that Petitioner supposedly was seated behind Mr. Wicker, he absolutely would have introduced the video at trial and would have used it in multiple ways both to attack the State's theory of the case and to bolster Petitioner's claim of innocence. Under step one of *Strickland* and *Miller*, the failure of Mr. Steele to present this exculpatory evidence "was deficient

under an objective standard of reasonableness." In other words, any defense lawyer who had this exculpatory video would have used it as evidence in the trial and from an objective viewpoint, the failure to do so is not reasonable.

Step two of *Strickland* and *Miller* requires the Court to determine if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." This video, by itself, would be sufficient for a jury to conclude, at a minimum, that there is reasonable doubt regarding whether or not Petitioner had any involvement in this crime. The jury in this case never had the opportunity to evaluate the substance of this video or the cross-examination of Mr. Wicker and Kentrell based upon this video or the arguments that would have been made by Petitioner's counsel relating to this video. With Petitioner's conviction resting on the credibility of Mr. Wicker and Kentrell, video evidence that Petitioner was not in the Acura would have been very powerful, creating a reasonable probability that Petitioner would have been acquitted.

In concluding that the facts in *Ballard v. Ferguson* met both steps of the ineffective assistance of counsel analysis, this Court explained, 232 W.Va. at 208, 751 S.E.2d at 728:

> The United States Supreme Court has stated that **"[t]he benchmark for judging any claim of ineffective[ ] [assistance of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."** *Lafler v. Cooper*, — U.S. —, 132 S.Ct. 1376, 1388, 182 L.Ed.2d 398 (2012) (internal quotations and citation omitted). The compelling testimony of Ms. Linville and Ms. King which was unjustifiably kept from the jury because of Mr. Zimarowski's ineffectiveness, conclusively demonstrates that the adversarial process in this case was undermined. The best evidence Mr. Ferguson had to defend his claim of innocence at trial was suppressed through Mr. Zimarowski's constitutionally deficient performance. (Emphasis added).

Similarly, in the present case, the failure of Mr. Steele to recognize the exculpatory value of the Turnpike video prevented the jury from evaluating Petitioner's best evidence that he was innocent of this crime. The only reason why this video was not shown to the jury was the ineffective assistance of Petitioner's counsel.

Compounding the ineffectiveness of counsel received by Petitioner is the fact that Mr. Steele failed to request two instructions, which the trial court would have been required to give and which would have instructed the jury to view the testimony of Mr. Wicker and Kentrell with caution. In the Syllabus of *State v. Flack*, 232 W.Va. 708, 753 S.E.2d 761 (2013), this Court explained what cautionary instruction must be given, upon request, when an accomplice witness testifies after pleading guilty to the same crime for which the defendant is being tried:

> An accomplice who has entered a plea of guilty to the same crime charged against the defendant may testify as a witness on behalf of the State. However, if the jury learns of the accomplice's guilty plea, then upon the motion of the defendant, **the trial court must instruct the jury** that the accomplice's plea of guilty cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness' credibility. The failure of the trial court, upon request, to give such a limiting jury instruction is reversible error. To the extent that Syllabus Point 3 of *State v. Caudill,* 170 W.Va. 74, 289 S.E.2d 748 (1982) is inconsistent, it is hereby modified. (Emphasis added).

Similarly, in Syllabus Point 2 of *State v. Bolling*,

> "Conviction for a crime may be had upon the uncorroborated testimony of an accomplice; but in such case the testimony must be received with caution and **the jury should, upon request, be so instructed**. . . . " Syllabus Point 1, *State v. Humphreys*, 128 W.Va. 370, 36 S.E.2d 469 (1945). (Emphasis added).

Both of these cautionary instructions, which the trial court would have been required to give under the facts of this case, were critical because the main evidence against Petitioner was the testimony of two alleged accomplices, who had pleaded guilty to the crimes Petitioner was facing. Without these two helpful and critical cautionary instructions, the jury was provided no guidance on how it should evaluate the testimony of Mr. Wicker and Kentrell. Under the objective test, a reasonable attorney would have sought these instructions under these facts and there is a reasonable probability that this deficiency, combined with the failure to present the exculpatory video, would have resulted in a different outcome. Under these facts, "the adversarial process was so undermined" that the trial received by Petitioner "cannot be relied on as having produced a just result."

B. Petitioner's constitutional rights were violated when the State presented false testimony from a witness, who lied at trial and identified Petitioner as one of the perpetrators, told the jury that it could believe this perjured testimony, and failed to take appropriate action to correct the admission of this perjured testimony

What actions is a prosecutor required to take when one of the State's witnesses, contrary to all prior statements, gets on the witness stand and tells the jury that he identified Petitioner as one of the criminals who invaded the house where the robbery occurred? The prosecutor knows this identification is false because the witness never identified Petitioner in any earlier statements and the testimony was that the people who had invaded this house had concealed their identities. In this case, the prosecutor attempted to address this perjured testimony, but Petitioner respectfully submits these efforts were woefully inadequate and contrary to this Court's decisions.

At the trial, Mr. Gunn surprised everyone by testifying that he identified Petitioner as being one of the persons involved in this crime, when prior to trial, Mr. Gunn had never provided any statement identifying Petitioner as being involved. The only thing Petitioner's counsel could do at

that point in the trial was to confront Mr. Gunn with his previous inconsistent statements. The State recognized the perjured nature of this testimony, but waited until closing argument to instruct the jury to disregard Mr. Gunn's testimony identifying Petitioner. (JA at 931). Specifically, the prosecutor stated:

> I am telling you something I have never told a jury in all my fifteen years as a prosecutor. He [Andrew Gunn] picked out Kevin Goodman, Jr., as being in that house. **I am asking you to disregard that testimony. I don't believe that. I don't believe it.** I don't want you folks to believe a lie. Is it convenient? Sure. But I'm not going to sit here and tell you to believe something I don't believe. I don't believe it.
>
> **Did he see Kevin Goodman? Yeah, probably did.** Did he see Kentrell Goodman? Yeah, he probably did. But you can't take–you cant' take that identification as being the truth. So I urge you not to. **You can.** I just wouldn't do it. (Emphasis added)(JA at 931-32).

While Petitioner appreciates the prosecutor's half-hearted attempt to lessen the damage caused by Mr. Gunn's perjured testimony, Petitioner respectfully submits this late attempt simply was insufficient and very ambiguous. First, the prosecutor told the jury that despite the fact that he did not believe Mr. Gunn's testimony on this point, the jury still had the right to believe him ("You can."). Furthermore, the prosecutor weakened his attempt to challenge this perjured testimony by asserting Mr. Gunn "probably" identified Petitioner and Kentrell, as opposed to meeting the beyond a reasonable doubt standard. Thus, rather than addressing and correcting the admission of knowingly perjured testimony, the prosecutor, at best, ambiguously and ineffectively muddied the water.

Once the prosecutor realized that Mr. Gunn had committed perjury, he had a couple of options. First, he could have moved for a mistrial because once the jury heard this false testimony from Mr. Gunn purportedly identifying Petitioner, a mistrial would have been the only remedy to

ensure that Petitioner received a fair trial, particularly since one of the main issues the jury had to decide was whether or not Petitioner was even present in West Virginia at the time this crime was committed. Second, the prosecutor could have moved immediately to have all of Mr. Gunn's testimony stricken and for the jury to be given a cautionary instruction to completely disregard his testimony. Whether this remedy would have been sufficient under these facts first would have to be resolved by this Court. However, the prosecutor did not seek either of these options and instead confused the jury in his closing argument by suggesting that Mr. Gunn had committed perjury, but that Mr. Gunn probably was telling the truth.

In *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 379, 701 S.E.2d 97, 101 (2009), the Court engaged in a discussion of the State's obligation not to present perjured testimony:

> It is a basic principle of law that "[prosecutors have a duty to the court not to knowingly encourage or present false testimony." *State v. Rivera*, 210 Ariz. 188, 109 P.3d 83, 89 (2005). It has been correctly observed that "[W]hen the state obtains a conviction through the use of evidence that its representatives know to be false, the conviction violates the Due Process Clause of the Fourteenth Amendment." *State v. Wilkerson*, 363 N.C. 382, 683 S.E.2d 174, 187 (2009). *See also People v. Diaz*, 297 Ill.App.3d 362, 231 Ill.Dec. 523, 696 N.E.2d 819, 827 (1998) ("The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law."). This Court has previously held that "[a]lthough it is a violation of due process for the State to convict a defendant based on false evidence, such conviction will not be set aside unless it is shown that the false evidence had a material effect on the jury verdict." Syl. pt. 2, *Matter of Investigation of W. Va. State Police Crime Lab., Serology Div.*, 190 W.Va. 321, 438 S.E.2d 501 (1993). *See also United States v. Bagley*, 473 U.S. 667, 678-79, 105 S.Ct. 3375, 3381-82, 87 L.Ed.2d 481 (1985) (" `**[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.**' *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976)."). (Emphasis added).

In formulating how a claim of perjured testimony should be analyzed in a habeas corpus action, the West Virginia Supreme Court, 226 W.Va. at 379-80, 701 S.E.2d at 101-02, provided the following analysis:

> Other courts that have addressed the issue take the position that, in order to succeed on a claim that the prosecutor presented false testimony at trial, a defendant "must demonstrate (1) that the prosecutor presented false testimony, (2) that the prosecutor knew or should have known it was false, and (3) that there is a reasonable likelihood that the perjured testimony could have affected the verdict." *O'Brien v. United States*, 962 A.2d 282, 315 (D.C.2008). *See also Jones v. State*, 998 So.2d 573, 580 (Fla.2008) ("[T]he defendant must demonstrate that (1) the prosecutor presented or failed to correct false testimony; (2) the prosecutor knew the testimony was false; and (3) the evidence was material."); *Gates v. State*, 252 Ga.App. 20, 555 S.E.2d 494, 496 (2001) (similar test); *State v. Hebert*, 277 Kan. 61, 82 P.3d 470, 487 (2004) (similar test); *Howard v. State*, 945 So.2d 326, 370 (Miss.2006) (similar test); *State v. Allen*, 360 N.C. 297, 626 S.E.2d 271, 279 (2006) (similar test); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701, 708 (2006) (similar test); *Teleguz v. Commonwealth*, 273 Va. 458, 643 S.E.2d 708, 729 (2007) (similar test). **Based upon the foregoing, we now hold that in order to obtain a new trial on a claim that the prosecutor presented false testimony at trial, a defendant must demonstrate that (1) the prosecutor presented false testimony, (2) the prosecutor knew or should have known the testimony was false, and (3) the false testimony had a material effect on the jury verdict.** (Emphasis added).

The critical holding in bold above was the basis for Syllabus Point 2. As applied in the present case, the prosecutor realized in listening to Mr. Gunn's testimony that he had perjured himself on a very critical issue–an in court identification of Petitioner as being one of the people who entered the house where the robbery occurred. The prosecutor made it clear in his closing argument that he knew or should have known Mr. Gunn's testimony was false. Thus, the final issue is whether the false testimony had a material effect on the jury. The fact that Mr. Gunn, one of the alleged

victims of this crime, specifically identified Petitioner as being one of the intruders involved, contrary not only to the statements he gave prior to trial but also to Petitioner's own testimony as well as the testimony of his alibi witness, was very powerful evidence in the context of this case. The prosecutor's ambiguous and contradictory attempt to unring this bell during closing argument was too little too late.

VII. Conclusion

For the foregoing reasons, Petitioner Kevin Goodman, Jr., respectfully asks the Court to issue a decision reversing the final decision by the Circuit Court of Fayette County, to grant habeas corpus relief on the grounds asserted, to reverse Petitioner's criminal convictions, and to remand this case for a new trial. Further, Petitioner seeks such other relief as the Court deems appropriate.

KEVIN GOODMAN JR., Petitioner,

–By Counsel–

J. Timothy DiPiero (W.Va. I.D. No. 1021)

Lonnie C. Simmons (W.Va. I.D. No. 3406)

Luca D. DiPiero (W.Va. I.D. No. 13756)

DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC

P.O. Box 1631

Charleston, West Virginia 25326

(304) 342-0133

tim.dipiero@dbdlawfirm.com

lonnie.simmons@dbdlawfirm.com

luca.dipiero@dbdlawfirm.com

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0169

KEVIN GOODMAN, JR.,

Petitioner Below, Petitioner

v.

TOM HARLAN, Interim Superintendent,
Huttonsville Correctional Center,

Respondent Below, Respondent.

Appeal from the Circuit Court of Fayette County, West Virginia

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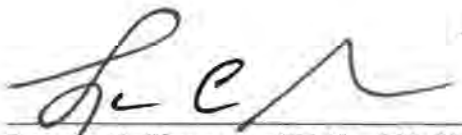
Certificate of Service

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S APPEAL BRIEF** was hand-delivered to counsel of record on the 12th day of June, 2020, through the United States Postal Service, to the following:

Gordon L. Mowen, II
Office of Attorney General
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301



Lonnie C. Simmons (W.Va. I.D. No. 3406)