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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.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appeal from the Circuit Court of Fayette County, West Virginia

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PETITIONER'S REPLY BRIEF

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A criminal conviction must be reversed and a new trial awarded where exculpatory evidence provided by the State to the defendant before the trial is not presented to the jury as a result of the defendant being denied effective assistance of counsel. (Proposed Syllabus Point consistent with this Court's holding in *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013)).

I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court:

Prior to the trial in the underlying case, Petitioner Kevin Goodman, Jr., had never seen the West Virginia Turnpike videos that were recorded by multiple cameras on January 9, 2015, when Rashod Wicker and Kentrell Goodman[1] admitted that they had traveled from South Carolina to Oak Hill, West Virginia, to rob a person named Andrew Gunn, and then, after committing the robbery,

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[1]To avoid any confusion, Kentrell Goodman will be referenced by his first name, Kentrell.

went back to South Carolina on the same date. Until he viewed the videos[2] in connection with this habeas corpus action, Petitioner had no idea that the State had in its possession video evidence showing, consistent with Petitioner's own testimony and the testimony of his alibi witness, that he was not in the vehicle driven by Mr. Wicker because Petitioner never left South Carolina on that date. When the jury returned its verdict, it was denied the opportunity to consider this exculpatory video evidence in the context of the other evidence admitted during the trial.

Although Petitioner's appointed counsel had reviewed the videos before trial, he acknowledged in the evidentiary hearing held below that he had failed to appreciate the exculpatory value of at least one of the videos, where the video shows the six foot four inch tall Petitioner was not seated behind Mr. Wicker, who was the driver. In a case where there was no forensic or physical evidence connecting Petitioner to this crime and the State's case against him came from the testimony of two people who had admitted their own guilt and had cut deals with the State, this type of objective video evidence not only corroborated Petitioner's claim of innocence, but also would have been invaluable in confronting his accusers. Finally, when this Court issued its decision affirming Petitioner's convictions, this critical evidence was not available to the Court.

Despite these facts, Respondent Tom Harlan, Interim Superintendent for the Huttonsville Correctional Center, wants to persuade this Court that the Turnpike videos have little or no exculpatory value, Petitioner's counsel provided effective assistance of counsel, despite his own

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[2]Petitioner included multiple copies of the videos in the Joint Appendix so that each member of the Court had his or her own copy to review. Although Respondent asserts at various times in **RESPONDENT'S BRIEF** that Petitioner only is interested in certain still shots taken from these videos (*Id.* at 7), Petitioner had the videos, that were attached to his petition, admitted into evidence and made it clear below and in his brief that the entirety of all of the Turnpike videos need to be reviewed in connection with the ineffective assistance of counsel claim.

testimony to the contrary, and there was nothing wrong with the State first obtaining significant perjured testimony from Mr. Gunn, who identified Petitioner in the courtroom as one of the perpetrators when he had never before identified anyone involved in this crime, and then telling the jury in closing argument that the jury should disregard Mr. Gunn's testimony because even the prosecutor did not believe him. Later in closing argument, the State made matters worse by asserting Mr. Gunn's testimony probably was true. Contrary to the prosecutor's comments at trial, Respondent on appeal even cites and relies upon Mr. Gunn's perjured testimony as "evidence" in support of Petitioner's conviction: "Gunn, who was present during the robbery, positively identified Petitioner as one of those four individuals." (**RESPONDENT'S BRIEF** at 2).

This Court's decisions demonstrate that when exculpatory evidence consistent with the accused's claim of innocence is not presented to the jury as a result of the ineffective assistance of counsel, the conviction must be reversed and a new trial awarded. *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013). The Court also has explained the actions a prosecutor must take when the prosecutor knows that a witness has committed perjury. Petitioner respectfully submits the decisions by this Court are controlling and that justice requires the reversal of Petitioner's convictions and the awarding of a new trial as the only remedy available to protect and enforce Petitioner's constitutional rights.

II. Reply to statement of facts

The parties largely are in agreement with respect to their summaries of the evidence presented at trial, although Petitioner disputes the accuracy of the testimony of Mr. Wicker and Kentrell to the extent they falsely implicated him in this crime. There are two other factual issues Petitioner will address here, while additional factual matters will be mentioned in response to the arguments.

First, Respondent cites Kentrell's testimony where, consistent with the testimony of Mr. Wicker, Kentrell claimed Petitioner was seated behind Mr. Wicker in the 2003 Acura owned by Kentrell's girlfriend. (JA at 334 and 625). Respondent suggests the record is not clear on where Petitioner supposedly was seated in this car and asserts "Petitioner's representation that the evidence established that Petitioner was definitively sitting behind the driver's seat is disingenuous, at best, and constitutes a gross, if not blatant, mischaracterization of the evidence adduced at trial." (**RESPONDENT'S BRIEF** at 21). To the contrary, both Mr. Wicker and Kentrell are in agreement, at least based upon their testimony, that Petitioner sat behind Mr. Wicker, the driver. To suggest otherwise would be a mischaracterization of the record.

The Court will see from the video that this Acura is a small to medium-sized sedan as opposed to a large sports utility vehicle.[3] According to the documents included in the record, Petitioner is six foot four inches tall, Mr. Wicker is five foot nine inches tall, Kentrell is six foot one inches tall, Radee Hill is five foot nine inches tall, and Antwyn Gibbs is five foot eleven inches tall. (JA at 1205-09). Thus, based upon the testimony of Mr. Wicker and Kentrell, it is not disputed that the State's theory was that Petitioner was seated in the Acura behind Mr. Wicker, the driver.

Second, with respect to the perjured testimony of Mr. Gunn, Respondent asserts that in the underlying habeas corpus hearing, Petitioner failed to develop this evidence of Mr. Gunn's lies and also did not call the prosecutor as a witness. Petitioner had no such obligation. It was the prosecutor

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[3]Respondent suggests in his brief that there is some question that the Acura seen in the videos is the same Acura driven by Mr. Wicker. (**RESPONDENT'S BRIEF** at 19). The investigating officer obtained the Turnpike videos from January 9, 2015, and pulled the ones showing this Acura first traveling north and then south. One of the videos, where the camera was situated inside the tollbooth, clearly shows Mr. Wicker as a payment was made. Obviously had these videos been admitted at trial, there would be several witnesses who would verify that the Acura in the videos is the Acura used in the crime committed by Mr. Wicker and Kentrell.

who first identified for the jury that Mr. Gunn was lying and should not be believed. It was the prosecutor who later told the jury that Mr. Gunn probably told the truth. From Petitioner's perspective, there was no other evidence needed to develop this issue, which addresses the responsibilities of a prosecutor when the prosecutor knows one of the State's witnesses committed perjury at trial.

III. Reply to arguments

A. Failure to admit and use the exculpatory Turnpike video constitutes ineffective assistance of counsel

Petitioner and Respondent are in agreement with respect to Petitioner's burden in establishing he was denied his constitutional right to effective assistance of counsel. However, these parties disagree in the application of these decisions to the facts in the present case. In his brief, Petitioner asserted he was denied effective assistance of counsel because his appointed counsel did not present the exculpatory Turnpike videos into evidence and he failed to ask the trial court for two cautionary instructions that this Court's decisions hold must be given upon request.[4] Furthermore, most notably, Respondent does not cite or attempt to distinguish the *Ballard* decision, which Petitioner respectfully submits is controlling in this case.

In *Ballard*, this Court held that a very experienced and skilled criminal defense lawyer had failed to provide effective assistance of counsel where he had in his possession a statement asserting that another person was guilty of the crime charged, but he failed to further investigate that allegation or to interview that potential witness. Because the opportunity to use and develop this exculpatory evidence was based upon trial counsel being ineffective, the Court reversed the conviction and

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[4]Petitioner relies upon the arguments made in his initial brief regarding the failure of his trial counsel to request these instructions and will not repeat them here.

remanded the case for a new trial. Respondent did not discuss the *Ballard* decision because the facts supporting Petitioner's claim of ineffective assistance of counsel in the present case are so much stronger and more compelling.

Instead of acknowledging the similarities between the present case and *Ballard*, Respondent argues the Turnpike videos, or at least the specific one identified by Petitioner, "does not **clearly show** an empty back seat." (Emphasis added). (**RESPONDENT'S BRIEF** at 19). Even the trial court, which "meticulously reviewed" the videos concluded, "At best, the videos are **inconclusive as to the occupancy** of the subject vehicle." (Emphasis added). (JA at 1241-42). Thus, while both Respondent and the trial court concede there is some exculpatory value in this video, they nevertheless suggest that unless the exculpatory evidence **conclusively** proves the accused is innocent of the crime, then the failure of the lawyer to present that evidence to the jury is insignificant and cannot be the basis for an ineffective assistance of counsel claim.

Thankfully, this Court has never required any criminal defendant to meet such an exacting standard where exculpatory evidence was not presented at trial as a result of ineffective assistance of counsel. In *Ballard*, the statement implicating some other person in the crime certainly was not conclusive evidence that the petitioner in that case was innocent. However, the exculpatory value of that evidence was so great that the criminal conviction had to be reversed and a new trial awarded to protect the petitioner's constitutional right to effective assistance of counsel.

"Exculpatory evidence has been defined to be `that which would tend to show freedom from fault, guilt or blame.' *United States v. Blackley*, 986 F.Supp. 600, 603 (D.D.C.1997)." *Buffey v. Ballard*, 236 W.Va. 509, 524, 782 S.E.2d 204, 219 (2015). Most of this Court's decisions addressing exculpatory evidence occur in the context of the State failing to meet its obligations to

produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).[5] In Syllabus Point 2 of *State v. Youngblood*, 221 W.Va. 20, 650 S.E.2d 119 (2007), the Court explained what is meant by exculpatory evidence when a *Brady* violation is asserted:

> There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982):(1) **the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence**; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial. (Emphasis added).

Thus, in the *Brady* context, the evidence withheld by the State merely has to be "favorable to the defendant as exculpatory or impeachment evidence." In the present case, where the failure to present the jury exculpatory evidence resulted from ineffective assistance of counsel, the same definition of exculpatory evidence applies.

In his initial brief, Petitioner already cited in the record the testimony of Petitioner's counsel acknowledging the exculpatory value of this video as well as the statement from the prosecutor stating "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). The significance of the fact that two officers of the court who viewed the video acknowledged its exculpatory value was ignored by Respondent, but should not be overlooked by this Court. Respondent then goes on and argues "no one at the omnibus hearing could agree on whether or not the still frame in question (or the video, for that matter) showed an empty back seat." **RESPONDENT'S BRIEF** at 19).

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[5]*Brady* is not at issue in this case because the State did provide these videos to Petitioner prior to trial. Had the State failed to provide these videos, there absolutely would have been a *Brady* violation.

Respondent's argument actually proves Petitioner's point–the fact that different people viewing the same video may see something different is exactly why the jury should have been presented with this evidence to reach a decision with respect to its exculpatory value. Petitioner respectfully submits that no person who watches this video will conclude there is a person seated behind the driver–there simply is no person visible there. When you play the video, you clearly can see one adult male seated in the back seat, who is shorter than Petitioner and whose skin tone is darker, and you can see him move his head as the car travels forward through the tollbooth. Considering that this small to medium-sized sedan allegedly had five adult men in it, meaning three of them were supposed to be seated in the back, the fact that one man is so clearly visible, but no other person can be seen beside him, is favorable evidence consistent with Petitioner's claim of innocence. Moreover, this video evidence provides valuable impeachment material that can be used to cross-examine Mr. Wicker and Kentrell.

Respondent suggests the trial court's conclusion that the cited video is not exculpatory, which is contradicted by Petitioner's trial counsel, the prosecutor, and by the video itself, somehow is controlling in this appeal. This Court will have the opportunity to view the video and will need to ascertain how this video would be evaluated by twelve different jurors. The briefs filed in this case, including **RESPONDENT'S BRIEF**, already establish that different people may reach a different conclusion on what they are seeing in this video. Even the trial court found the video was "inconclusive," which means some people may conclude no person was seated behind the driver while others may disagree with that conclusion. Where the reaction to this video is so varied, it is fundamentally unfair and a violation of Petitioner's constitutional right to the effective assistance of counsel for his convictions to affirmed in light of this exculpatory evidence.

In a new trial, the State would be free to make whatever arguments it deems to be appropriate to explain away the exculpatory Turnpike video while Petitioner will use this video to corroborate his testimony that he was not involved in this crime and will have a chance to confront Mr. Wicker and Kentrell in cross-examination to further impeach their own testimony. Only after a new trial where the jury is presented all of the evidence, including the exculpatory video, can it be concluded that Petitioner has received a trial that can "be relied on as having produced a just result." *Ballard*, 232 W.Va. at 208, 751 S.E.2d at 728.

B. The prosecutor failed to carry out his obligations to address perjured testimony

This second issue raised regarding the failure of the prosecutor to take the appropriate actions when the prosecutor himself recognized that Mr. Gunn had lied under oath will be mooted in the event the Court sets aside Petitioner's convictions and awards a new trial based upon the first issue. However, some guidance from this Court on what a prosecutor should do when placed in this same circumstance will be helpful to other prosecutors in the future.

In his brief, Respondent has headed the argument regarding the prosecutor's failure to address testimony that he knew was false by saying "Petitioner's conviction is not based upon perjured testimony." However, in summarizing the facts, Respondent specifically cites and relies upon Mr. Gunn's false testimony as part of the evidence in support of Petitioner's conviction. (**RESPONDENT'S BRIEF** at 2). The inherent inconsistency in Respondent's arguments further proves Petitioner's point that his conviction was based, in part, upon false testimony.

Respondent then argues Petitioner has failed to show the prosecutor actually presented false and perjured testimony. Prior to trial in the statements he gave to the police, Mr. Gunn had never identified any of the five defendants arrested and convicted in connection with this robbery. (JA at 313). In fact, 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, including Petitioner. (JA at 315-16). However, at trial, in a surprise to the prosecutor, Petitioner, and the other two defendants, Mr. Gunn decided to identify Petitioner as one of the robbers when all of the other witnesses in the house testified that all of the intruders had their faces covered and could not be identified.

Linda Knight testified the intruders' faces were covered by their jackets. (JA at 231-32). At trial, when she was asked if she recognized any of the defendants on trial as being one of the intruders, she specifically did not identify Petitioner. (JA at 243). Edward Knight said the intruders wore masks and he was unable to identify any of them. (JA at 257). Thus, the fact that Mr. Gunn at trial, contrary to his prior statements as well as the testimony from Mrs. and Mr. Knight, identified Petitioner as one of the intruders is not a mere inconsistency in his statements, but is simply a bold-faced lie under oath.

Furthermore, it was the prosecutor who dramatically told the jury something he had never told a jury in all his fifteen years as a prosecutor: disregard Mr. Gunn's testimony about identifying Petitioner as being in the house. To further make the point, he said, "I don't believe that. I don't believe that." (JA at 931-32). The prosecutor actually knew Mr. Gunn had perjured himself. Thus, based upon the trial record, Petitioner has, in fact, met his burden of showing the prosecutor actually presented false and perjured testimony.

But then, in his next few breaths, the prosecutor made matters worse by telling the jury, "Did he see Kevin Goodman? Yeah, probably did. Did he see Kentrell Goodman? Yeah, he probably did. But you can't take–you can't take that identification as being the truth. So I urge you not to. You can. I just wouldn't do it." (JA at 931-32). What was the jury supposed to think at that time? How were the jurors supposed to interpret and apply what the prosecutor was telling them?

Pursuant to this Court's holding in *State ex rel. Franklin v. McBride*, 226 W.Va. 375, 379, 701 S.E.2d 97, 101 (2009), to eliminate even a "'reasonable likelihood that the false testimony could have affected the judgment of the jury,'" the State should have approached the trial court as soon as Mr. Gunn committed perjury to give the trial court and counsel the opportunity to decide how best to proceed. By failing even to do that, the State failed to meet its obligations spelled out in *Franklin*.

Respondent then asserts even if Mr. Gunn committed perjury, which perjury was acknowledged and recognized by the prosecutor, his perjured testimony "did not have a material effect on the jury's verdict." (**RESPONDENT'S BRIEF** at 27). Respondent now has gone full circle in his arguments on this point. First, Respondent asserts Petitioner's guilt is established, in part, based upon Mr. Gunn's positive identification of Petitioner at trial as being the only intruder he could identify. (**RESPONDENT'S BRIEF** at 2). Now, Respondent asserts Mr. Gunn's admitted and acknowledged perjury did not have a material effect on the jury's verdict.

Hmmmmmm, the alleged victim of a robbery points to Petitioner from the witness stand and tells the jury, under oath, that Petitioner is the only intruder he was able to identify as being involved in the robbery. Respondent actually wants this Court to believe that such a "positive identification" cannot possibly have had any material effect on the jury. Petitioner respectfully submits Respondent's own circular arguments combined with old fashioned common sense establish for purposes of meeting the requirements of *Franklin* that this perjured positive identification of Petitioner was material and had an effect on the jury. Fundamentally, this Court is faced with "a conviction [obtained] through the use of evidence that its representatives know to be false, [therefore] the conviction violates the Due Process Clause of the Fourteenth Amendment." *Franklin*, 226 W.Va. at 379, 701 S.E.2d at 101.

IV. Conclusion

For the foregoing reasons, as well as the reasons stated in **PETITIONER'S APPEAL BRIEF**, 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)

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Certificate of Service

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S REPLY BRIEF** was hand-delivered to counsel of record on the 21st day of August, 2020, through the United States Postal Service, to the following:

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