No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ALVIN HERRON,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his counsel rendered ineffective assistance of counsel by failing to object to the introduction of the unredacted recording of the Petitioner's interrogation, which resulted in the jury hearing (1) that the Petitioner had a prior record involving possession of a firearm and illegal drug activity; (2) that "people" had placed the Petitioner at the scene of the murder holding a gun (i.e., hearsay testimony that violated the Petitioner's Confrontation Clause rights); and (3) the interrogating officer's repeated opinion that the Petitioner was lying when he asserted his innocence.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

A. QUESTION PRESENTED FOR REVIEW ii

B. PARTIES INVOLVED iii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iv

1. Table of Contents iv

2. Table of Cited Authorities v

D. CITATION TO OPINION BELOW 1

E. BASIS FOR JURISDICTION 1

F. CONSTITUTIONAL PROVISION INVOLVED 1

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS 1

H. REASON FOR GRANTING THE WRIT 8

The question presented is important 8

I. CONCLUSION 24

J. APPENDIX

2. TABLE OF CITED AUTHORITIES

a. Cases

Barnes v. State, 576 So. 2d 439 (Fla. 4th DCA 1991) 19

Charles v. State, 683 So. 2d 583 (Fla. 4th DCA 1996) 16

Commonwealth v. Kitchen, 730 A.2d 513 (Pa. Super. Ct. 1999) 18

Crawford v. Washington, 541 U.S. 36 (2004) 14-15

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) 20

Herron v. State, 267 So. 3d 357 (Fla. 1st DCA 2019) 2

Herron v. State, 107 So. 3d 409 (Fla. 1st DCA 2013) 2

Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991) 20

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) 20-21

Lawhorn v. Allen, 519 F.3d 1272 (11th Cir. 2008) 20-21

Lopiano v. State, 164 So. 3d 82 (Fla. 4th DCA 2015) 16-17

Martin v. Rose, 744 F.2d 1245 (6th Cir. 1984) 20

Martinez v. State, 761 So. 2d 1074 (Fla. 2000) 16-17

McFadden v. State, 732 So. 2d 412 (Fla. 3d DCA 1999). 14

McMann v. Richardson, 397 U.S. 759 (1970) 1

Miller-El v. Cockrell, 537 U.S. 322 (2003). 22-23

Putman v. Head, 268 F.3d 1223 (11th Cir. 2001) 20

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). 20

State v. Cordova, 51 P.3d 449 (Idaho Ct. App. 2002) 17-18

State v. Elnicki, 105 P.3d 1222 (Kan. 2005) 17-18

State v. Jones, 68 P.3d 1153 (Wash. Ct. App. 2003) 18

b. Statutes

§ 90.610, Fla. Stat. 14

28 U.S.C. § 1254 1

28 U.S.C. § 2253(c) ii

28 U.S.C. § 2253(c)(2) 8, 22

28 U.S.C. § 2254 . . . . . 2, 8

c. Other Authority

Fla. R. Crim. P. 3.850. 2

U.S. Const. amend. VI 1, 14

The Petitioner, ALVIN HERRON, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on September 21, 2020. (A-3)[1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

In 2010, the Petitioner was charged in Florida with first-degree murder. The

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

case proceeded to trial in 2012. At the conclusion of the trial, the jury found the Petitioner guilty as charged and the Petitioner was sentenced to life imprisonment. The Petitioner appealed the judgment and the Florida First District Court of Appeal affirmed the conviction and sentence. *See Herron v. State*, 107 So. 3d 409 (Fla. 1st DCA 2013).

Thereafter, the Petitioner timely filed a state court postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. The Petitioner raised two claims in his rule 3.850 motion, one of which is the subject of the instant proceeding: defense counsel rendered ineffective assistance of counsel by failing to object to the introduction of the unredacted recording of the Petitioner's interrogation. An evidentiary hearing on the Petitioner's rule 3.850 motion was held on October 18, 2017. At the conclusion of the evidentiary hearing, the state postconviction court orally denied the rule 3.850 motion. On appeal, the Florida First District Court of Appeal affirmed the denial of the Petitioner's rule 3.850 motion. *See Herron v. State*, 267 So. 3d 357 (Fla. 1st DCA 2019).

The Petitioner subsequently raised his ineffective assistance of counsel claim in a petition filed pursuant to 28 U.S.C. § 2254. On December 9, 2019, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-17). On February 21, 2020, the district court denied the Petitioner's § 2254 petition. (A-14, A-16).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit. On September 21, 2020, a single circuit judge denied a certificate

of appealability on the Petitioner's § 2254 claim. (A-3).

2. Statement of the facts (i.e., the testimony from the October 18, 2017, state court postconviction evidentiary hearing).

The Petitioner. The Petitioner stated that prior to his trial, he had not seen and his attorney (David Collins) had not shown him the video of his interrogation, and he said that Mr. Collins had not discussed with him the contents of the video. (A-128-130). The Petitioner testified that at the time of the trial in this case, he had two previous charges (a possession of a firearm charge and a drug charge), but he said that the possession of a firearm charge was resolved by him receiving a withhold of adjudication, and he said that the drug charge was only a misdemeanor charge. (A-149).

David Collins. Mr. Collins, the Petitioner's trial attorney, stated the following about his pretrial discussions with the Petitioner:

> I would place Mr. Herron probably one of the most less-sophisticated clients that I've ever represented. I don't mean that as a personal insult, it's the truth. He just, I don't believe, comprehended a lot of what was actually taking place. He wasn't – he wasn't dysfunctional. He was certainly not incompetent legally; I'm not suggesting that.
>
> I just think the combination of the stress that he had upon him, his hopes and desires to be free, probably clouded a lot of his understanding. And then again, I don't know how much I actually explained to him because, you know, I don't believe he really understood a lot of it anyway. And that's a fact.

(A-155-156). Mr. Collins testified that during the trial, the prosecutor presented the testimony of Investigator James Besse, the investigator who interrogated the Petitioner, and Mr. Collins said that he was concerned that the prosecutor intended to

"cherry-pick portions of the transcript of the" interrogation and therefore he insisted that the entire interrogation video be played for the jury:

> Q Now, did Mr. Bauer attempt to get what Mr. Herron said during his interrogation out solely through the officer?
>
> A Yes. After now looking at the transcript, I believe that Mr. Bauer's intent was to cherry-pick portions of the transcript of the video at issue and have the officer read those. I don't know if that was legal or not. I think I objected on the basis that it was not a complete representation of what the video stated.
>
> There were some discussions, if I recall – and I recall this now because I'm trying to remember what I just read; I have no reason to believe that the transcript is incorrect that the video also obtained – or contained otherwise inadmissible evidence regarding possible drug usage or sales and a gun charge that had been previously attributed to Mr. Herron.
>
> And certainly that might be objectionable. So some people might say, why would you ever let that in or why would you agree to let that in? And it appears from the record that it was a concern of the Court's also. And I basically said, as the record reflects, this is a strategic decision of mine.

(A-156-157). Mr. Collins stated the following about his strategy for requesting that the entire interrogation video be played for the jury:

> All right. After reading this, my strategy, whether it was a good one or not, obviously now it wasn't a good one because of the verdict, but I read the entire transcript and it refreshed my recollection that there was another gentleman named Mr. Cosby. Mr. Cosby, if I recall, was also allegedly in the vehicle with Mr. Herron and allegedly may have been involved in the crime that Mr. Herron was accused of. I now know, as I remembered from the transcript, that Mr. Cosby was not allowed by the court to become a witness because he was incompetent. That was proven both through a deposition and through the proffer that Mr. Bauer presented to the court.
>
> I objected under some rules, the court sustained my objection and I think, for lack of better words, would not allow him to testify. His testimony, whether it was truthful, feigning or whatever, just consistently said he didn't remember.
>
> So with that being said, I now knew I had someone to hopefully

convince the jury was the shooter. Okay. So the video was an opportunity to hopefully convince the jury of my client's innocence because in the video, he denies he does it. He denies he does it. Those bad things come in; they do. But it's an opportunity for my client to testify without him testifying.

And I'm looking at it, trying to weigh it out, and going, I'm going to be able to have him give evidence that he did not do this. And, you know, hopefully the jury won't hold those other things, those collateral things against him. If they're following the rules of the law, what real evidence is that of anything?

And I weighed that versus his testimony, what I believe was a pretty good demeanor on the video, that can be argued, and said, you know, he can get to say through the video he didn't do it. I now have someone that I believe we can blame it on.

And if we remembered – because that also made me remember of a witness named Mr. chambers, who was an eyewitness to the shooting. And he was a little sketchy, but he was your witness that you decided – or not yours, but Mr. Bauer's witness who he decided not to call, who said, under oath, that Alvin Herron did not do this.

So I had a witness that said Alvin Herron did not do this, I had a video where Alvin Herron denied doing it, and I had a person on the scene who we could blame it on. I thought maybe that was a reasonable strategy.

But one other thing. I don't want people to judge the GPS cell phone tower through now 2017 through 2010 technology. Today, GPS error is a margin of 30 meters. That's because in 2011, they sent up another satellite. In 2010, it was a much larger error. So the testimony that came out on the video of them talking about, well, we have your phone there, was much more arguable in 2010 because there was a wider range. So for them to say he was there was subject to an attack, well, no, you can't really prove that.

So that's my thoughts on my strategy.

(A-157-159). Mr. Collins was asked whether the Petitioner agreed with his decision to play the entire interrogation video, and he gave the following answer:

Q Now, part of the record indicates that the defendant – the defendant was part of the discussions and part of the agreement that the tape would come in, warts and all.

A Well, if the record says that, it does. But I will say this, I don't really think that Mr. Herron really understood much of what I was trying

> to tell him. I mean, I'm not just saying that to throw a bone, I'm just telling you the truth. I never thought he really got a whole lot of what I tried to tell him. And, again, I'm not going to sit there and listen to him tell me what to do.
>
> Q In the end, it was your decision?
>
> A I would say it's more my decision than an informed, intelligent agreement that he understood. That's what I would say. I'm not saying he wasn't told, I'm not saying he didn't agree. But how much he actually comprehended, I don't know.

(A-160-161).[2]

On cross-examination, Mr. Collins stated that he is not aware of any law that prohibits the prosecution from playing for the jury an interrogation recording where the officer calls the defendant a liar:

> I did not know then, nor do I know now, that it is per se impermissible to do such. I'm not saying it isn't, but I don't know of any law that per se precludes that from happening under the circumstances that we had. Mr. Bauer [the prosecutor], again, it wasn't his intention to play those portions. It was basically my intention. So if there's any fault, it falls on me. If you look back at the transcript, which I just saw today, you'll see I wanted the complete video in.

(A-162-163). On redirect examination, Mr. Collins conceded that the objectionable portions of the interrogation recording would not have been presented to the jury had

---

[2] Mr. Collins later conceded that he failed to properly explain to the Petitioner the importance of the decision to request that the entire interrogation recording be played for the jury:

> You know, and that's the problem here. I don't think that – if I failed, I failed in not properly communicating to him what these crucial decisions were. I don't think it was his fault.

(A-165).

he not insisted that the entire recording been played for the jury:

> [The prosecutor] was intending to put certain portions of testimony from the video into evidence through an officer reading a transcript of that video.
>
> And I do not believe that those contained any references of my client being a liar or guns or drug references of evidence. I don't believe he was intending to do that. I don't think that would have been admissible.

(A-163). At the conclusion of Mr. Collins' testimony, the state postconviction court asked Mr. Collins whether the Petitioner would have been a good witness at trial and Mr. Collins gave the following answer:

> I have a mixed opinion, Judge. On one hand, I don't think he would have been a very good witness. On the other hand, he may have been sympathetic.

(A-166).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claim. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In his § 2254 petition, the Petitioner alleged that defense counsel rendered ineffective assistance of counsel by failing to object to the introduction of the unredacted recording of his interrogation. At trial, the State presented the testimony of Investigator James Besse – the investigator who interrogated the Petitioner. (A-53). During Investigator Besse's testimony, the following occurred:

> Q [by the prosecutor]: And all this occurred on video?
>
> A: That's correct.
>
> Q: What did you ask him, and what –
>
> THE COURT: Are we going to play a video, Mr. Bauer?
>
> MR. BAUER [the prosecutor]: No, sir.
>
> THE COURT: We're not going to present the jury with a video?
>
> MR. COLLINS [defense counsel]: Your Honor, I'm going to object, then.
>
> THE COURT: All right. Let's go sidebar.
>
> (Sidebar discussion concluded.)
>
> THE COURT: What's your plan, Mr. Bauer?

MR. BAUER: I'm going to have him testify as to statements, because he made statements about possession of firearm. He talks about his criminal history. So counsel isn't going to stipulate to that. I can't redact that at this point. So I – I told counsel that we weren't going to play it because it's going to put me in a Catch-22. *I'm going to infringe on his rights. He knows I can't play that part.* So I don't know why he's objecting.

MR. COLLINS: I'm objecting, Your Honor, because the best evidence, the complete evidence is the recorded video. It acknowledges the correct waiver of rights, the manner in which they were waived. And anything short of that, I would object to. If there's other inadmissible evidence, well, that's the State's problem. But I would object to this manner of –

THE COURT: What's your legal objection?

MR. COLLINS: Completeness.

THE COURT: All right. I'll overrule that objection. Do you agree there is inadmissible evidence that you object to in the tape?

MR. COLLINS: Your Honor, there are some things that are brought forward by law enforcement that probably shouldn't be presented to the jury. I would agree to that, yes, sir. But – but the best evidence is –

THE COURT: Well, I mean, I'm prepared – if you want, we'll play the whole tape. But if there are portions you're objecting to, then I guess we're going to be in the posture of having to do it as proposed by the State.

MR. COLLINS: Well, I'm not going to object, Your Honor. I'm going to make a strategic decision to let that other stuff come on in. And I would require the complete video be played.

MR. BAUER: Judge, he can play that on his own.

THE COURT: I'll sustain his objection, if you're not objecting to any portions. It's going to take a minute to get that set up?

(A-54-55) (emphasis added). Pursuant to *defense counsel's request*, the entire

unredacted interrogation recording was played for the jury. (A-66-114).[3] During the interrogation, the following was said:

> INVESTIGATOR BESSE: Okay. You ever been in any trouble before?
>
> THE DEFENDANT: Yeah. I done been in trouble before.
>
> INVESTIGATOR BESSE: For what?
>
> THE DEFENDANT: One time drugs, and then another time for a pistol.
>
> INVESTIGATOR BESSE: What happened with that pistol charge?
>
> THE DEFENDANT: I did county time.
>
> INVESTIGATOR BESSE: County time?
>
> THE DEFENDANT: Yeah, because that was my first charge. I got adjudicated withheld.
>
> INVESTIGATOR BESSE: Okay. What was it? Carrying a concealed weapon or something, or what kind of charge was it?
>
> THE DEFENDANT: Possession of a firearm, I think.
>
> INVESTIGATOR BESSE: By delinquent or convicted felon or what?

---

[3] The state trial court gave the jury the following instruction prior to the interrogation recording being played:

> I have not listened to this tape, but I understand from the attorneys that you may hear some information during the course of this statement that could be construed by you as involving other crimes or wrongs by the defendant. He is not on trial for any crime or wrong or act not contained in the indictment, and you should disregard any such mention.

(A-56).

THE DEFENDANT: No. I wasn't no convicted felon. I got adjudicated withheld because they said it was my first charge.

INVESTIGATOR BESSE: Okay. How old were you when that happened?

THE DEFENDANT: Eighteen.

INVESTIGATOR BESSE: That was your first adult charge?

THE DEFENDANT: Yes. Yes. Yes, sir.

INVESTIGATOR BESSE: Okay.

THE DEFENDANT: First adult charge.

. . . .

INVESTIGATOR BESSE: Uh-huh. So when you have the opportunity right now to – to, you know, explain yourself and give your side of the story as to what's going on, but – I mean, I've got people putting you there on scene –

THE DEFENDANT: Definitely can't put me –

INVESTIGATOR BESSE: – a gun in hand arguing with her.

. . . .

THE DEFENDANT: So how long will it take for y'all to get this squared away?

INVESTIGATOR BESSE: Well, you telling the truth would have done it.

THE DEFENDANT: Well, I already did it then.

INVESTIGATOR BESSE: No, you didn't.

THE DEFENDANT: Who didn't?

INVESTIGATOR BESSE: You didn't. I mean, you didn't tell the truth.

. . . .

INVESTIGATOR BESSE: I want you to tell me the truth and help yourself out.

THE DEFENDANT: I just told you the truth.

INVESTIGATOR BESSE: That's not the truth.

. . . .

INVESTIGATOR BESSE: Are you honestly sitting there and just do that when you know you are sitting across from a cop and lying your ass off to him?

(UNINTELLIGIBLE).

THE DEFENDANT: All right, sir. I'm telling you, you got the wrong dude, sir.

INVESTIGATOR BESSE: Well, let me tell you something from just sitting here watching you. As soon as I brought her up –

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: Your whole body language changed immediately. (UNINTELLIGIBLE). It was – it was just it was kind of interesting to watch. I mean, your lips started quivering. Things you can't – you can't control. But I can tell by sitting across that as soon as I mentioned the name Monica, your – I mean, your level just went up.

THE DEFENDANT: I'm still here.

INVESTIGATOR BESSE: I know you're still here, but I'm saying your body language, things you don't realize, things that I watch –

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: – after doing this job for eight years –

THE DEFENDANT: Uh-huh.

INVESTIGATOR BESSE: – and sitting across from people like you

> for eight years, I mean, you learn lots of body language and stuff like that. And when I mention specific things they're involved in, man, it's like a immediate –
>
> THE DEFENDANT: Oh, yeah. That doesn't mean nothing. I have been sitting here chilling, sir. I told y'all the information.
>
> INVESTIGATOR BESSE: You're not helping yourself by lying to me. I'll tell you that.
>
> . . . .
>
> INVESTIGATOR BESSE: I'm telling you you're making a mistake by lying to me.
>
> THE DEFENDANT: I'm not lying to you, sir.
>
> INVESTIGATOR BESSE: Yeah, you are.

(A-74-75, A-92, A-96, A-104, A-106-107, A-111). Because defense counsel insisted on the entire unredacted interrogation recording being played for the jury, the jury heard the following information that it otherwise would not have heard: (1) the Petitioner had a prior record involving possession of a firearm and illegal drug activity; (2) hearsay testimony that "people" put the Petitioner at the scene of the murder holding a gun; and (3) Investigator Besse's opinion that the Petitioner was lying.

First, because defense counsel insisted on the entire unredacted interrogation recording being played for the jury, the jury heard that the Petitioner had a prior record involving possession of a firearm and illegal drug activity. Had the Petitioner testified, the jury would not have learned about the Petitioner's prior record (because adjudication of guilt was withheld for the firearm charge and the drug charge was a

misdemeanor).[4] In a case involving a murder caused by a firearm, it was extremely prejudicial to allow the jury to hear that the Petitioner had a prior record for illegally possessing a firearm.

Second, because defense counsel insisted on the entire unredacted interrogation recording being played for the jury, the jury heard hearsay testimony that "people" put the Petitioner at the scene of the murder holding a gun:

> INVESTIGATOR BESSE: Uh-huh. So when you have the opportunity right now to – to, you know, explain yourself and give your side of the story as to what's going on, but – I *mean, I've got people putting you there on scene* –
>
> THE DEFENDANT: Definitely can't put me –
>
> INVESTIGATOR BESSE: *– a gun in hand arguing with her*.

(A-92) (emphasis added). No one at trial testified that the Petitioner had a gun in his hand arguing with the victim in this case. Investigator Besse's statement during the interrogation video was hearsay and resulted in a violation of the Petitioner's constitutional confrontation rights. The Sixth Amendment to the Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." In *Crawford v. Washington*, 541 U.S. 36, 51-69 (2004), the Court held that when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements

---

[4] Pursuant to Florida law, a defendant cannot be impeached with a misdemeanor offense not involving dishonesty or a false statement or a felony offense for which adjudication of guilt was withheld. *See* § 90.610, Fla. Stat.; *McFadden v. State*, 732 So. 2d 412, 413 (Fla. 3d DCA 1999).

constitute "testimonial hearsay," the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant. Investigator Besse's statement in the instant case regarding the out-of-court "testimonial hearsay" of "witnesses" putting the Petitioner at the scene of the murder holding a gun violated *Crawford*. It was extremely prejudicial for the jury to hear that unnamed witnesses placed the Petitioner at the scene of the murder holding a gun.

Third, because defense counsel insisted on the entire unredacted interrogation recording being played for the jury, the jury heard – on numerous occasions – Investigator Besse's opinion that the Petitioner was lying. In fact, the jury heard Investigator Besse assert that he is an expert on "body language" and that he could tell from Mr. Herron's body language that the Petitioner was lying when he was claiming that he was not the person who committed the murder:

> INVESTIGATOR BESSE: Well, let me tell you something from just sitting here watching you. As soon as I brought her up –
>
> . . . .
>
> INVESTIGATOR BESSE: Your whole body language changed immediately. (UNINTELLIGIBLE). It was – it was just it was kind of interesting to watch. I mean, your lips started quivering. Things you can't – you can't control. *But I can tell by sitting across* that as soon as I mentioned the name Monica, your – I mean, your level just went up.
>
> . . . .
>
> INVESTIGATOR BESSE: I know you're still here, but I'm saying your body language, things you don't realize, things that I watch –
>
> . . . .
>
> INVESTIGATOR BESSE: *– after doing this job for eight years –*

. . . .

INVESTIGATOR BESSE: *– and sitting across from people like you for eight years, I mean, you learn lots of body language and stuff like that. And when I mention specific things they're involved in, man, it's like a immediate –*

. . . .

INVESTIGATOR BESSE: *You're not helping yourself by lying to me.* I'll tell you that.

(A-106-107) (emphasis added). During the trial, it would have been impermissible for Investigator Besse to tell the jury that it was his opinion that the Petitioner was lying when he asserted his innocence. *See Charles v. State*, 683 So. 2d 583, 584 (Fla. 4th DCA 1996) ("Clearly, police officers, as well as other witnesses, are prohibited from offering opinions as to the truthfulness of a witness or a defendant."). And without question, Investigator Besse was not qualified – and would not have been able – to tell the jury that he believed the Petitioner was lying based on the Petitioner's body language. It was extremely prejudicial for the jury to hear that an experienced law enforcement officer believed that the Petitioner was lying when he stated that he did not commit the murder in this case.

In *Lopiano v. State*, 164 So. 3d 82, 84 (Fla. 4th DCA 2015), the Florida Fourth District Court of Appeal stated the following:

> Furthermore, the admission of the officer's repeated statements that he did not believe Appellant's denials was also erroneous. A police officer's testimony or comments suggesting a defendant's guilt invades the province of the jury to decide guilt or innocence. *Martinez v. State*, 761 So. 2d 1074, 1079-80 (Fla. 2000) (stating that, generally, "a witness's opinion as to the guilt or innocence of the accused is not admissible . . . on

> the grounds that its probative value is substantially outweighed by unfair prejudice to the defendant").

Numerous other courts in this country have also concluded that these types of statements made by law enforcement officers during interrogations are inadmissible at trial. For example, in *State v. Elnicki*, 105 P.3d 1222, 1229 (Kan. 2005), the Kansas Supreme Court conducted a thorough review of the positions taken by courts across the country on this matter and the Kansas Supreme Court concluded:

> A synthesis of the referenced case law leads us to conclude that it was error for Detective Hazim's comments disputing Elnicki's credibility to be presented to the jury. *The jury heard a law enforcement figure repeatedly tell Elnicki that he was a liar; that Elnicki was "bullshitting" him and "weaving a web of lies."* The jury also heard the same law enforcement figure suggesting he could tell Elnicki was lying because Elnicki's eyes shifted. *A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.* As far as context for Elnicki's answers are concerned, the State could have safely accomplished its goal simply by having Detective Hazim testify and point out the progression of Elnicki's various stories as the tape was played – *minus Hazim's numerous negative comments on Elnicki's credibility*. The absence of a limiting instruction merely compounded the already serious problem, misleading the jury into believing that Hazim's negative comments carried the weight of testimony.

(Emphasis added). Similarly, in *State v. Cordova*, 51 P.3d 449, 455 (Idaho Ct. App. 2002), the Idaho appellate court concluded:

> Thus, an interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect. *Otherwise, interrogator comments that result in an irrelevant answer should be redacted.*

(Emphasis added).[5] As in *Elnicki*, the jury in the instant case heard a law enforcement figure *repeatedly* tell Mr. Herron that he was a liar.

It was improper for the jury to hear all of the comments quoted above. And as explained above, the comments were presented to the jury because *defense counsel* insisted that the entire unredacted interrogation recording be played for the jury.[6] Defense counsel should have either (1) allowed the prosecutor to question Investigator Besse about the interrogation – which would have served the purpose of informing the jury that the Petitioner was questioned and he denied committing the crime; (2)

---

[5] Other courts have concluded that it is error to introduce an interrogating officer's opinion that a defendant was lying. *See Commonwealth v. Kitchen*, 730 A.2d 513, 521 (Pa. Super. Ct. 1999) ("When the troopers stated to Appellee, 'You're lying,' or 'We know that you're lying' or phrases to that effect, their statements were akin to a prosecutor offering his or her opinion of the truth or falsity of the evidence presented by a criminal defendant, and such opinions are inadmissible at trial. The troopers statements could also be analogized to a prosecutor's personal opinion, either in argument or via witnesses from the stand, as to the guilt or innocence of a criminal defendant, which is inadmissible at trial.") (citations omitted); *State v. Jones*, 68 P.3d 1153, 1155 (Wash. Ct. App. 2003) ("We find no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him. In either case, the jury learns the police officer's opinion about the defendant's credibility. And clothing the opinion in the garb of an interviewing technique does not help. . . . [A]n officer's accusation that a defendant is lying constitutes inadmissible opinion evidence. Here, the jury heard that [Officer] Wilken did not believe Jones' comment that the gun was not his and that he did not know it was under the seat. This was a comment on Jones' credibility.") (citations omitted).

[6] A review of defense counsel's closing argument establishes that defense counsel spent a significant amount of time trying to defend things that the Petitioner stated during the interrogation – things that defense counsel acknowledged the Petitioner was lying about. (A-58, A-59, A-60-62, A-63, A-64, A-65). Yet it was defense counsel who insisted on introducing the entire interrogation recording. Had defense counsel not insisted on introducing the entire interrogation recording, defense counsel would not have been in such a position.

presented a *redacted* interrogation recording that excluded all of the improper comments cited above; or (3) presented the Petitioner as a witness. Counsel's failure to pursue one of these two options amounts to an egregious act of ineffective assistance of counsel (one that was highly prejudicial to the Petitioner). *The jury was repeatedly told that (1) the Petitioner had a prior record for possessing an illegal firearm; (2) "people" had placed him at the scene of the murder holding a gun; and (3) a law enforcement figure believed that the Petitioner's assertion of innocence was a lie.*[7]

In denying this claim, the state postconviction court concluded that defense counsel had a "strategy" for introducing the entire unredacted interrogation recording. (A-198).[8] However, the state postconviction court overlooked that defense counsel also conceded that he was not aware of any law that prohibits the prosecution from playing

---

[7] It was for the jury to decide whether the Petitioner's assertion of innocence was true or false – Investigator Besse's opinion regarding whether the Petitioner was lying was irrelevant and unduly prejudicial (because a jury is likely to give credence to a law enforcement officer's opinion). *See Barnes v. State*, 576 So. 2d 439, 439 (Fla. 4th DCA 1991) (recognizing that law enforcement officers are "generally regarded by the jury as disinterested and objective and therefore highly credible"). Furthermore, if these types of statements are deemed admissible, then law enforcement officers will be encouraged to make such statements during taped interrogations – knowing that such improper opinions will later be heard by a jury when the interrogation recording is introduced at trial.

[8] Undersigned counsel also notes that the postconviction court recognized that the Petitioner has a potentially meritorious postconviction claim:

> I think there are issues here that I would – I am willing to give him an attorney on appeal, if you choose not to represent him.

(A-203).

for the jury an interrogation recording where the officer calls the defendant a liar. (A-162-163).

In *Horton v. Zant*, 941 F.2d 1449, 1461 (11th Cir. 1991), the federal appellate court stated that "merely invoking the word strategy to explain errors was insufficient since particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances." (citation omitted) (alterations in the original). "'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 1037 (2000)). Most importantly, in *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008), the federal appellate court explained that "[t]actical or strategic decisions based on a misunderstanding of the law are unreasonable." (citation omitted). *See also Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) ("[A] tactical or strategic decision is unreasonable if it is based on a failure to understand the law.") (citation omitted); *Martin v. Rose,* 744 F.2d 1245 (6th Cir. 1984) (finding that counsel's strategic decision not to present any defense or challenge the prosecution's case in order to preserve rejected pretrial objections that would have required dismissal of the prosecution was not professionally competent assistance as it was based on a misreading of state law); *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996) (holding that defense counsel's tactical decision to delay filing of meritorious suppression motion in order to obtain more favorable perspective of federal courts was "objectively unreasonable" in light of counsel's failure to recognize default

bar to federal habeas review).

Pursuant to *Lawhorn*, defense counsel in this case was ineffective. Defense counsel's alleged "strategy" was based on his misunderstanding of the law regarding the admissibility of Investigator Besse's numerous improper assertions that the Petitioner was lying. If defense counsel did not properly understand the law in this regard, then defense counsel could not make a proper determination as to whether the entire unredacted interrogation recording should be played for the jury. As explained above, despite defense counsel's misunderstanding of the law – several parts of the recording were inadmissible and allowing the jury to hear the entire unredacted recording was extremely prejudicial to the Petitioner. No reasonable attorney – i.e., an attorney with a proper understanding of the law – would have allowed the jury to hear the entire unredacted interrogation recording.

Notably, in the report and recommendation, the magistrate judge agreed with the Petitioner that "[u]nder Florida law, it is not likely that Investigator Besse would have been allowed to testify at trial that Petitioner was lying when he said he did not shoot Anderson and that he was not in the area where the shooting occurred." (A-40). Similarly, in the Eleventh Circuit's order denying a certificate of appealability, the circuit judge conceded that "[o]f course, the interrogation video was detrimental to Mr. Herron's case because it depicted a law enforcement officer repeatedly calling him a liar, and because it revealed Herron's criminal history." (A-12). However, both the magistrate judge and the circuit judge concluded that the Petitioner cannot establish prejudice. (A-43-49; A-12-13). Undersigned counsel respectfully disagrees. As stated

in the § 2254 petition and reply, *this was a close case.* The prosecution was unable to present one of its key witnesses (Sam Cosby). (A-52). The case ultimately rested on identification, and the prosecutor acknowledged that if a particular photograph regarding hairstyles was not introduced, the State would not be able to prove its case:

And if I can't get this on, *I frankly don't have a case*, Judge.

(A-57) (emphasis added). There was conflicting testimony at trial about who the shooter was and what clothing the shooter was wearing. It is likely that the prejudicial interrogation video is what tipped the scales in favor of the State.[9] Had the video – and all of the inadmissible statements in the video – not been played for the jury, there is a reasonable probability that the jury would have returned a not guilty verdict.

For all of these reasons, the Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Petitioner's claim is a matter debatable among jurists of reason. Therefore, the Eleventh Circuit should have granted a certificate of appealability for this claim.

To be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate

---

[9] At trial, defense counsel spent a substantial portion of his closing argument defending/responding to the statements that the Petitioner made during the interrogation – statements that were only played for the jury because *defense counsel insisted* that the video be played for the jury (i.e., DEFENSE COUNSEL: "He wasn't completely honest in that video" and "He lied, he lied, he lied, but that lie does not make him the shooter."). (A-58; A-60). But for defense counsel's error, defense counsel could have spent his closing argument pointing out the discrepancies in the prosecution's case and arguing that there was reasonable doubt.

to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER