No.

IN THE

SUPREME COURT OF THE UNITED STATES

STEVEN HATTON,
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

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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 ineffective assistance of counsel claims.

B. PARTIES INVOLVED

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

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The Petitioner, STEVEN HATTON, prays the Court to issue its writ of certiorari to review the order/judgment of the Eleventh Circuit Court of Appeals entered in this case on February 10, 2021. (A-3).[1]

D. CITATION TO OPINION 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.

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

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 2007, the Petitioner was convicted following a jury trial of three counts of lewd or lascivious molestation and sentenced to fifteen years' imprisonment. On direct appeal, the Florida Fourth District Court of Appeal affirmed the Petitioner's convictions and sentence. *See Hatton v. State*, 996 So.

2d 865 (Fla. 4th DCA 2008).

Thereafter, the Petitioner timely filed a state court motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The Petitioner raised several claims in his rule 3.850 motion – three of which are the subject of the instant petition: (1) defense counsel was ineffective when, after telling the jury to find the Petitioner guilty during opening statements, he failed to correct his misstatement before the jury by asking to address the jury to correct his mistake, to move for mistrial, or take other action to correct his misstatement; (2) defense counsel was ineffective by failing to file a motion in limine or otherwise seek to exclude from evidence those portions of the Petitioner's statement to law enforcement officials which were inadmissible character evidence and which bolstered the credibility

of the alleged victim and those portions of the statement which constituted evidence of other wrongs or bad acts, were not relevant to the charged offenses, and for which the prejudicial impact far outweighed any possible probative value; and (3) defense counsel was ineffective when he introduced into evidence a prior inconsistent statement of the alleged victim wherein the alleged victim had told a police officer that during the allegations that formed the basis of count 2 the Petitioner had told the alleged victim that he "wished he could put his penis inside me." An evidentiary hearing on the Petitioner's rule 3.850 motion was held on March 9, 2016. On September 1, 2016, the state postconviction court denied the Petitioner's rule 3.850 motion. On appeal, the Florida Fourth District Court of Appeal *per curiam* affirmed the denial of the Petitioner's state postconviction

motion. *See Hatton v. State*, 244 So. 3d 271 (Fla. 4th DCA 2018).

Subsequently, the Petitioner timely raised the claims set forth above in a petition filed pursuant to 28 U.S.C. § 2254. On December 2, 2019, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-30-134). Then, on May 14, 2020, the district court denied the Petitioner's § 2254 petition. (A-25-29). On February 10, 2021, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claims. (A-3).

2. Statement of the Facts – the State Court Postconviction Evidentiary Hearing.

Jack Fleischman. Mr. Fleischman, the Petitioner's trial attorney, admitted that his final statement to the jury during his opening statements

was a "misstatement" (i.e., when Mr. Fleischman told the jury "we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts"). (A-135). Mr. Fleischman stated that he did not remember whether his client or his client's mother subsequently told him about the misstatement during the trial.

Mr. Fleischman conceded that nothing precluded him from seeking to redact portions of the Petitioner's taped interrogation. However, Mr. Fleischman stated that he wanted the entire tape of the interrogation played for the jury, although he said "I can't tell you why now." Mr. Fleischman testified that he has won in previous cases "with whole tapes coming in," but he acknowledged "maybe that's what lost it in this case."[2]

When asked about why he impeached the

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[2] Mr. Fleischman said "I'm not an idiot[;] I may have been in this case . . . ."

alleged victim with a purported prior inconsistent statement that was more damaging than the alleged victim's in-court testimony, Mr. Fleischman stated "I don't care what it said if it's different from what she said in trial . . . ." However, Mr. Fleischman added "I hear what you're saying because, you know, it sounds bad . . . ."

Peggy Ann McElhenny. Ms. McElhenny, the Petitioner's mother, stated that she was in the courtroom during her son's trial, and she said that she could see the jurors from where she was seated. Ms. McElhenny testified that during defense counsel's opening statement at trial, defense counsel said "we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts." Ms. McElhenny stated that when the jurors heard defense counsel say "find Hatton guilty on all counts," the jurors "were

looking at each other and they were just, 'Did I hear what I think I heard?'" Ms. McElhenny testified that during a subsequent break in the trial, she informed defense counsel about his mistake.

The Petitioner. The Petitioner testified that during defense counsel's opening statement at trial, defense counsel said "we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts." The Petitioner stated that when the jurors heard defense counsel say "find Hatton guilty on all counts," all the "jurors gave me the most puzzling look I've ever seen probably in my life." The Petitioner testified that Juror Luna furrowed his brow, squinted, and looked at him and defense counsel as if to ask "why would he say that if he's the defense attorney?" The Petitioner testified that during a subsequent break in the trial, he informed defense counsel about his

mistake.

Theodore Charles Shafer. Mr. Shafer, a criminal trial lawyer, was accepted by the court as an expert in the field of criminal defense. Mr. Shafer testified that he reviewed the trial transcripts in the Petitioner's case. Mr. Shafer commented on defense counsel's opening statement at trial, noting that defense counsel concluded the opening statement by saying "we feel confident that at the end of this case you will, in fact, find Hatton guilty on all counts." (A-136). Mr. Shafer explained why this misstatement was so prejudicial to the Petitioner:

> . . . I've always ascribed to the theory primacy and recency. And recency is generally the thought is that individuals will remember the first things that are said to them and the last things that are said to them. And the last thing in that particular section of the trial was as – as you've just read it what the defense

attorney had said to that jury.

(A-138). Mr. Shafer testified that upon being informed of the mistake by the Petitioner and his mother, defense counsel should have moved for a mistrial:

> [A]t that stage of the proceedings there's been jury selection and opening statements and I think that a course of action would be to at least ask the court to approach the bench and tell the judge, the presiding judge, that I think I have misspoken and certainly misspoken gravely. And that I would ask the court to at a minimum to either have the court reporter read back what – what has been transcribed or – and/or if there were audiotapes, have the audio listened to to make sure that – that, in fact, I had if I had some thought that that had occurred. And if so I would have at that point I would – I would think an attorney in a case such as this with the stakes being what they were, would have asked that a mistrial be declared.

(A-139-140). Mr. Shafer added that a mistrial would have been the only reasonable remedy:

> . . . I – I read through the – the various

> documents and I've been rolling that around in my head and I think in this type of a case with – I don't think there would be a way to unring the bell, put the cow back in the barn, whatever the metaphor might be. I think that it would be incumbent upon the attorney to – to move for a mistrial, at least to protect the record. It's – it's the – there's no way of knowing how that was – how that was consumed, if you will, by the jury. And if – if the jury sees and hears the defense counsel making that type of a statement as early as opening statement as to, you know, how they looked at the rest of the evidence in the trial and the – and the – the questioning and the arguments that the attorney made subsequent to making that statement. I think that was it was not something a reasonable attorney would do.
>
> . . . .
>
> . . . [S]ome ascribe to the strategy that you win a case in jury selection and opening statement. I don't know if I ascribe to that. *But I certainly know that you can lose a case on opening statement and certainly by making a statement as – as important as that, I just think it would have infected the – the entire trial proceeding.*

(A-141-143) (emphasis added). Mr. Shafer opined that

defense counsel's misstatement was "[v]ery, very damaging" and that "the fear is [the jury] could completely disregard anything the defense says from that point onward."

Mr. Shafer was asked about the tape of the Petitioner's interrogation, and specifically the part where the Petitioner was asked whether the alleged victim was reliable and the Petitioner answered "I would say reliable, yes." (A-145). Mr. Shafer opined that the Petitioner's statement that the alleged victim was "reliable" was inadmissible character evidence and therefore he would have moved to redact the statement from the tape:

> [W]ith the case setting as it's set, and at least two of the counts, and it affects all three, affects all three, but certainly the two counts that don't have any eye – other eyewitness testimony besides the – the victims I would think that the reasonable course of action would have

> been to move in Limine to keep that part of the statement out, to redact that statement.

(A-143-144). Mr. Shafer further stated that defense counsel should have moved to redact the Petitioner's statement concerning the uncharged act of the Petitioner unintentionally touching the alleged victim's breast:

> [T]he fact that we're dealing with lewd and lascivious acts on the same particular individual, I think that the reasonable strategy would have been to redact it as – an uncharged prior bad – prior conduct of – of the accused or a 404(b) objection. I think that would have been the reasonable course of action, knowing the – with the facts set out the way they are, and with the fact that – with the statement that was said in the opening, that – that even com – compounds the idea that – that there are – that the defense counsel is less than engaged in defense of his client.

(A-147).

Finally, Mr. Shafer explained that it was

unreasonable for defense counsel to impeach the alleged victim with a purported prior inconsistent statement that was more damaging than the alleged victim's in-court testimony:

> [T]he issues that are being raised did not hap – they don't happen in a vacuum. When the – when the state introduces the defendant's statement and we have a statement now that he is saying that the victim is a reliable person. And now we have the defense counsel questioning the victim. And she, if I recall correctly, says that she doesn't remember making such a statement. And then he impeaches her with that statement I think that that makes it even worse. I – I – I believe the strategy was to impeach her and show that she is in some way being less than credible. And I think it was hugely, it's a huge backfire. And I don't think it was reasonable considering everything that had gone before it. With the idea that the jury could have certainly assumed that because Mr. Hatton was saying that this young lady was, in fact, reliable when she says she doesn't remember and then it's for impeachment to show that she's less than credible just – just doesn't – it just falls flat. And – and – and I think it – it's

> extremely inflammatory.
>
> . . . .
>
> I think with this case with the evidence that has – the jury has before it. I think that the tactical decision that was made was unreasonable to present that as impeachment evidence. That's what I think.

(A-148-150).

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 claims. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

1. The Petitioner's § 2254 claims.

In his § 2254 petition (and in his state postconviction motion), the Petitioner raised three claims. Each claim is addressed in turn below.

i. Defense counsel was ineffective when, after telling the jury to find the Petitioner guilty during opening statements, he failed to correct his misstatement before the jury by asking to address the jury to correct his mistake, to move for mistrial, or take other action to correct his misstatement.

As acknowledged by the magistrate judge in the

report and recommendation, at the conclusion of his opening statement, defense counsel made the following comments to the jury:

> I don't have to prove or disprove anything and that we feel confident that at the end of this case you will, in fact, find Hatton *guilty* on all counts. Thank you.

(A-80) (emphasis in the original). Shortly after defense counsel made this statement, the Petitioner and his mother brought to defense counsel's attention that he had told the jury to return a verdict of guilty instead of not guilty. Yet defense counsel took no further action to determine whether or not the Petitioner was correct (such as asking the court reporter to read back the last portion of counsel's opening statement) and defense counsel made no effort to correct his misstatement with the jury, such as asking for a mistrial.

In the report and recommendation (adopted by the district court), the magistrate judge concluded that "Petitioner cannot show that if his counsel had not made the misstatement, the outcome of the case would have been different." (A-82). Contrary to the magistrate judge's conclusion, the Petitioner was clearly prejudiced by defense counsel's mistake. Defense counsel encouraged the jury to render a guilty verdict and, in doing so, assisted the prosecution in proving its case, thus depriving the Petitioner of a full adversarial testing of the prosecution's case. *See Clark v. State*, 690 So. 2d 1280, 1282 (Fla. 1997) ("Clark argues that counsel's closing argument during the penalty phase failed the *Strickland*[3] test, and thus Clark received ineffective assistance of counsel. Clark's contention is founded in part upon statements

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

his counsel presented in closing argument which had the effect of prejudicing Clark rather than assisting him. We agree. Consequently, we reverse the trial court's order denying postconviction relief and remand for a new sentencing proceeding before a jury.") (footnote added). In the instant case, defense counsel's comment, even if inadvertent, was so contrary to the Petitioner's best interest that it seriously affected the fairness and reliability of the proceedings and as a result, had the effect of undermining confidence in the jury's verdict of guilt. Defense counsel failed to function as counsel where this comment encouraged the jury to determine credibility issues in favor of the prosecution and not the Petitioner.

Additionally, during the state court postconviction evidentiary hearing, the Petitioner's mother testified that when the jurors heard defense

counsel say "find Hatton guilty on all counts," the jurors "were looking at each other and they were just, 'Did I hear what I think I heard?'"[4] Furthermore, as explained by Theodore Charles Shafer (the criminal law expert who testified during the state court postconviction evidentiary hearing), the statement was especially damaging because it was the last thing that the jury heard from defense counsel:

> . . . I've always ascribed to the theory primacy and recency. And recency is generally the thought is that individuals will remember the first things that are said to them and the last things that are said to them. And the last thing in that particular section of the trial was as – as you've just read it what the defense

[4] Moreover, the Petitioner stated that when the jurors heard defense counsel say "find Hatton guilty on all counts," all the "jurors gave me the most puzzling look I've ever seen probably in my life." The Petitioner added that Juror Luna furrowed his brow, squinted, and looked at him and defense counsel as if to ask "why would he say that if he's the defense attorney?"

> attorney had said to that jury.

(A-138).

Even if defense counsel's statement that the jury should find the Petitioner guilty was inadvertent, defense counsel's failure to take appropriate corrective action constitutes deficient performance. After being told of the mistake, defense counsel refused to even check to see if he had urged the jury to convict the Petitioner (i.e., defense counsel did not even ask to have the court reporter read back his final opening statement).

As explained by Mr. Shafer, upon being told about the mistake, defense counsel was ineffective for failing to request a mistrial:

> [A]t that stage of the proceedings there's been jury selection and opening statements and I think that a course of action would be to at least ask the court to approach the bench and tell the judge,

> the presiding judge, that I think I have misspoken and certainly misspoken gravely. And that I would ask the court to at a minimum to either have the court reporter read back what – what has been transcribed or – and/or if there were audiotapes, have the audio listened to to make sure that – that, in fact, I had if I had some thought that that had occurred. And if so I would have at that point I would – I would think an attorney in a case such as this with the stakes being what they were, would have asked that a mistrial be declared.

(A-139-140).

Finally, contrary to the magistrate judge's conclusion regarding prejudice, during the state court postconviction evidentiary hearing, Mr. Shafer explained that defense counsel's statement "infected" the entire trial:

> . . . I – I read through the – the various documents and I've been rolling that around in my head and I think in this type of a case with – I don't think there would be a way to unring the bell, put the cow back in the barn, whatever the

> metaphor might be. I think that it would be incumbent upon the attorney to – to move for a mistrial, at least to protect the record. It's – it's the – there's no way of knowing how that was – how that was consumed, if you will, by the jury. And if – if the jury sees and hears the defense counsel making that type of a statement as early as opening statement as to, you know, how they looked at the rest of the evidence in the trial and the – and the – the questioning and the arguments that the attorney made subsequent to making that statement. I think that was it was not something a reasonable attorney would do.
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> . . . .
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> . . . [S]ome ascribe to the strategy that you win a case in jury selection and opening statement. I don't know if I ascribe to that. *But I certainly know that you can lose a case on opening statement and certainly by making a statement as – as important as that, I just think it would have infected the – the entire trial proceeding.*

(A-141-143) (emphasis added). Mr. Shafer opined that defense counsel's misstatement was "[v]ery, very

damaging" and that "the fear is [the jury] could completely disregard anything the defense says from that point onward." *See, e.g., Mathis v. State*, 973 So. 2d 1153, 1156 (Fla. 1st DCA 2006) ("At the evidentiary hearing on remand, Tony Bajoczky, an attorney who was accepted as an expert in criminal defense trial work, testified that he had reviewed the record in this case and opined that appellant's trial counsel was ineffective.").

In this case, there could be no strategic basis for failing to take corrective action. Notably, during the state court postconviction evidentiary hearing, defense counsel offered *no strategic reason* for failing to act.

Applying the *Strickland* standard to the state court record, it is clear that defense counsel was ineffective for failing to take action after he told the jury to find the Petitioner guilty. Absent counsel's

ineffectiveness in the instant case, the result of the proceeding would have been different.

ii. Defense counsel was ineffective by failing to file a motion in limine or otherwise seek to exclude from evidence those portions of the Petitioner's statement to law enforcement officials which were inadmissible character evidence and which bolstered the credibility of the alleged victim and those portions of the statement which constituted evidence of other wrongs or bad acts, were not relevant to the charged offenses, and for which the prejudicial impact far outweighed any possible probative value.

In his § 2254 petition, the Petitioner alleged that defense counsel was ineffective by failing to file a motion in limine or otherwise seek to exclude from evidence those portions of the Petitioner's statement to law enforcement officials (1) which were inadmissible character evidence and which bolstered the credibility of the alleged victim and (2) those portions of the statement which constituted evidence of other wrongs

or bad acts, were not relevant to the charged offenses, and for which the prejudicial impact far outweighed any possible probative value. The Petitioner was prejudiced by defense counsel's deficiencies because these actions led to highly prejudicial evidence being admitted for the jury's consideration in a case that rested exclusively on the jury's assessment of the Petitioner's credibility versus that of the alleged victim. Further, the admission of evidence of other bad acts improperly allowed the jury to consider propensity and further cast doubt on the credibility of the Petitioner.

In this case, the Petitioner was charged with three counts of lewd and lascivious molestation. Count 1 purportedly occurred between December 2003 and September 2004 in a swimming pool and involved the allegation that the Petitioner had the alleged victim

touch his penis and that he kissed her. Count 2 purportedly occurred between September 27, 2004, and June 13, 2005, and asserted that the Petitioner "humped" the alleged victim through her clothing. Count 3 purportedly occurred on June 14, 2005, and asserted that the Petitioner placed his hands inside the alleged victim's shorts, touching her buttocks. At no point did the prosecution present evidence or argue that any other inappropriate contact occurred between the Petitioner and the alleged victim during the trial. No *Williams*[5] rule notice was filed by the prosecution at any point in time. During opening statements, defense counsel told the jury that they would hear the Petitioner's statement, that he met freely and voluntarily with the police, and he denied any improper touching, molesting, or sexually abusing the

[5] *Williams v. State*, 110 So. 2d 654 (Fla. 1959).

alleged victim.

The Petitioner's interrogation statement was admitted during the prosecution's case, played during the prosecution's closing argument, and was replayed to the jury at their request during deliberations. At the beginning of the interrogation – *before* the Petitioner was confronted with the actual allegations in this case – the following occurred:

> DETECTIVE ALTMAN: Okay. Would you, uh, how would you categorize her as a kid, is she a good kid?
>
> STEVE HATTON: A very good kid.
>
> DETECTIVE ALTMAN: Okay. Is she pretty reliable?
>
> STEVE HATTON: Uh, *I would say reliable, yes.*

(Emphasis added). The following uncharged act was also played for the jury:

> DETECTIVE ALTMAN: Have you

ever touched her breasts with your hands?

STEVE HATTON: Yes, I have, yes, sir.

DETECTIVE ALTMAN: Tell – tell me about that.

STEVE HATTON: Well, I think one time, uh, probably been a year or so ago –

DETECTIVE ALTMAN: Uh-huh.

STEVE HATTON: – uh, getting dressed, I don't – I don't know how to describe the situation, I don't even remember.

DETECTIVE ALTMAN: Uh-huh.

STEVE HATTON: Uh, I'm almost certain I have touched her breasts before. Have I fondled her breasts? No I haven't. That – that very well can be termed as, you know, fondling, I guess, I don't –

DETECTIVE ALTMAN: In what manner did you touch her? That's – that's my question. You had your hand on her breast, what happened?

> STEVE HATTON: Uh, I don't remember unless, uh, I don't know if she was injured. I'm sorry, I – I don't remember.
>
> DETECTIVE ALTMAN: But you do remember touching her breasts?
>
> STEVE HATTON: Yes, I believe I have touched her breasts before.

Finally, the jury also heard the following from the interrogation: (1) the Petitioner stated that he had been in the bathroom when the alleged victim was in the shower and he denied ever being undressed in the bathroom while the alleged victim was in the shower; (2) the Petitioner acknowledged that the alleged victim had sat on his lap "a bunch"; (3) the Petitioner noted they lived in a small house and that the alleged victim has probably seen him naked (i.e., she may have come into the bathroom while he was dressing or getting in the shower); (4) the Petitioner acknowledged laying in

bed with the alleged victim several times – to talk, to say goodnight, to watch television, or to wrestle – but he has never touched her inappropriately; and (5) the Petitioner acknowledged that he and the alleged victim slept in the same bed in Marco Island since there were no sheets for the couch, but nothing occurred.

Defense counsel was ineffective in failing to file a motion in limine to exclude from evidence the Petitioner's statements that the alleged victim was "reliable." In its order denying this claim, the state postconviction court held that had a motion in limine been filed, the motion would have been denied because the Petitioner's statements were admissible. Contrary to the state postconviction court's order, the statements in question were inadmissible character evidence. Moreover, one witness/party is not permitted to comment on another witness' credibility. Finally, the

prejudicial impact of this evidence far outweighed any probative value pursuant to section 90.403, Florida Statutes (especially since at the time of the comment, the Petitioner was being set-up by the detective and he had not even been informed as to the nature of the allegations). *See Moton v. State*, 697 So. 2d 1271, 1271 (Fla. 1st DCA 1997) ("Evidence of the character of a witness is irrelevant and thus inadmissible. *See* §§ 90.402 and 90.404, Fla. Stat. The only exception is when that character has been attacked. § 90.609, Fla. Stat. Proof of the characteristic is limited to testimony in the form of reputation. § 90.609, Fla. Stat."); *Acosta v. State*, 798 So. 2d 809, 810 (Fla. 2d DCA 2001) ("It is clearly error for one witness to testify as to the credibility of another witness."). The Petitioner was prejudiced by defense counsel's failure in that the jury heard – *from the Petitioner no less* – testimony that

bolstered the alleged victim's credibility in an impermissible fashion. Defense counsel's failure to exclude the good character evidence that militated in favor of the alleged victim over the Petitioner increased the likelihood of conviction in this case. Notably, during the prosecutor's closing argument, the prosecutor highlighted the Petitioner's statement that the alleged victim was "reliable" – first by playing again for the jury that portion of the interrogation and then arguing:

> Feel free to listen to his entire statement because what he said is not only the part I played, she's a good kid, she's reliable.

The only issue in this case was whether the alleged victim was "reliable" with her allegations against the Petitioner. It is hard to imagine anything more damaging than the prosecutor telling the jury to find the Petitioner guilty because the defendant himself has

already said that she is "reliable."

Defense counsel was also ineffective in failing to exclude the portions of the Petitioner's statement that were subject to reasonable interpretation as evidence of other bad acts or wrongs. This would include the Petitioner's statement that he had touched the alleged victim's breasts where there was *no charge* involving a touch of the breasts in the information, that he slept in the same bed with the alleged victim in Marco Island, that he had lain on top of the alleged victim on other occasions, that the alleged victim may have seen him naked, and that the alleged victim frequently sat on his lap. The above described actions were not sufficiently similar to be admissible as similar fact evidence under *McLean v. State*, 934 So. 2d 1248, 1258 (Fla. 2006). *See also Griffith v. State*, 723 So. 2d 860, 861-862 (Fla. 1st DCA 1998). Further, any possible

probative value of those statements was far outweighed by the prejudicial impact under section 90.403. The Petitioner was prejudiced due to defense counsel's deficient performance as there exists a reasonable probability that the inappropriate admission of the evidence of other bad acts impermissibly contributed to the jury's verdict of guilt. *See also Woodard v. State*, 978 So. 2d 217 (Fla.1st DCA 2008).

During the state court postconviction evidentiary hearing, although defense counsel stated that he wanted the entire tape of the interrogation played for the jury, he admitted "I can't tell you why now." In fact, even though defense counsel stated that he has won in previous cases "with whole tapes coming in," he acknowledged "maybe that's what lost it in this case." When Mr. Shafer was asked about defense

counsel's failure to redact the inadmissible evidence, Mr. Shafer opined that the Petitioner's statement that the alleged victim was "reliable" was inadmissible character evidence and therefore he would have moved to redact the statement from the tape:

> [W]ith the case setting as it's set, and at least two of the counts, and it affects all three, affects all three, but certainly the two counts that don't have any eye – other eyewitness testimony besides the – the victims I would think that the reasonable course of action would have been to move in Limine to keep that part of the statement out, to redact that statement.

(A-143-144). Mr. Shafer further stated that defense counsel should have moved to redact the Petitioner's statement concerning the uncharged act of the Petitioner unintentionally touching the alleged victim's breast:

> [T]he fact that we're dealing with lewd and lascivious acts on the same particular

> individual, I think that the reasonable strategy would have been to redact it as – an uncharged prior bad – prior conduct of – of the accused or a 404(b) objection. I think that would have been the reasonable course of action, knowing the – with the facts set out the way they are, and with the fact that – with the statement that was said in the opening, that – that even com – compounds the idea that – that there are – that the defense counsel is less than engaged in defense of his client.

(A-147).

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to redact portions of the Petitioner's interrogation that were inadmissible. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

iii. Defense counsel was ineffective when he introduced into evidence a prior inconsistent statement of the alleged victim wherein the alleged victim had told a police officer that during the allegations that formed the basis of count 2 the Petitioner had told the alleged victim that he "wished he could put his penis inside me."

In his § 2254 petition, the Petitioner alleged that defense counsel was ineffective when he introduced into evidence a prior inconsistent statement of the alleged victim wherein the alleged victim had told a police officer that during the allegations that formed the basis of count 2 the Petitioner had told the alleged victim that he "wished he could put his penis inside me." At trial, during the alleged victim's testimony on direct examination by the prosecution, the alleged victim testified that she was lying on her bed going to sleep when the Petitioner entered the room and got on top of her. The alleged victim testified that they both

were fully clothed. The alleged victim testified that the Petitioner started "humping" her by moving back and forth on top of her. The prosecutor asked the victim if the Petitioner said anything during the purported incident and the alleged victim replied "No, sir." The alleged victim stated that the purported incident did not last long and ended when the Petitioner got up and left.

On cross-examination, defense counsel asked the alleged victim if she recalled giving a statement to the police and she responded she did. Defense counsel then asked the alleged victim if she told the police that the Petitioner said that he "wished he could really stick his penis inside" her during the incident. The alleged victim said she remembered making that statement to the police. The alleged victim agreed that she did not testify in court that the Petitioner said those words

because she "d[id]n't really remember."

An element to the charge of lewd and lascivious conduct is whether or not the defendant commits an act with the requisite lewd intent. *See Williamson v. State*, 839 So. 2d 921, 923 (Fla. 2d DCA 2003). The requisite intent has been defined as "wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator." *Durant v. State*, 647 So. 2d 163, 164 (Fla. 2d DCA 1994) (citation omitted).

In the instant case, by impeaching the alleged victim with the statement she made to the police that the Petitioner purportedly told her that he "wished he could stick his penis in" her, *defense counsel* presented the only testimony to the jury of any unlawful intent on the part of the Petitioner. Had defense counsel forgone this ill-taken path, the jury would not have heard this highly prejudicial testimony – as the alleged

victim had maintained in her direct examination that the Petitioner *said nothing* during the incident. Prior to the ill-conceived impeachment, the jury knew only that for a few brief seconds the Petitioner and the alleged victim had contact while fully clothed.

In the report and recommendation, the magistrate judge acknowledged that defense counsel's impeachment of the alleged victim "allowed a relatively worse statement to come into the record . . . ." (A-91). The magistrate judge, however, "disagree[d] that the impeachment strategy was so wholly unreasonable as to rise to the level of deficient performance under *Strickland*." (A-91). Contrary to the magistrate judge's conclusion, although defense counsel stated during the state court postconviction evidentiary hearing that he wanted the entire tape of the interrogation played for the jury, he admitted "I can't

tell you why now." Thus, the state court record refutes the assertion that defense counsel's actions were "strategic." Moreover, the relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Defense counsel's actions in the instant case were *not* reasonable.

As explained by Mr. Shafer during the state court postconviction evidentiary hearing, it was unreasonable for defense counsel to impeach the alleged victim with a purported prior inconsistent statement that was *more damaging* than the alleged victim's in-court testimony:

> [T]he issues that are being raised did not hap – they don't happen in a vacuum. When the – when the state introduces the defendant's statement and we have a statement now that he is saying that the victim is a reliable person. And now we have the defense counsel questioning the

> victim. And she, if I recall correctly, says that she doesn't remember making such a statement. *And then he impeaches her with that statement I think that that makes it even worse.* I – I – I believe the strategy was to impeach her and show that she is in some way being less than credible. And I think it was hugely, *it's a huge backfire.* And I don't think it was reasonable considering everything that had gone before it. With the idea that the jury could have certainly assumed that because Mr. Hatton was saying that this young lady was, in fact, reliable when she says she doesn't remember and then it's for impeachment to show that she's less than credible just – just doesn't – it just falls flat. And – and – and I think it – *it's extremely inflammatory.*
>
> . . . .
>
> I think with this case with the evidence that has – the jury has before it. I think that the tactical decision that was made *was unreasonable to present that as impeachment evidence.* That's what I think.

(A-148-150) (emphasis added).

The Petitioner was severely prejudiced by

defense counsel's actions because the only evidence of criminal intent was brought to the jury's attention *by defense counsel.* Any minimal value of the impeachment of the alleged victim was far outweighed by the prejudicial impact of the testimony, was at odds with the theory of defense at trial, and damaged the Petitioner's credibility. The decision to impeach the alleged victim with evidence more damaging than the alleged victim's trial testimony was a "patently unreasonable" trial strategy. *See Bowers v. State*, 929 So. 2d 1199, 1202 (Fla. 2d DCA 2006) (citation omitted). Defense counsel's unreasonable impeachment of the alleged victim by bringing out the damaging prior statement detracted from the overall trial strategy to the degree that confidence in the outcome of the jury's verdict is called into question.

Thus, for all of the reasons set forth above,

defense counsel was ineffective for attempting to impeach the alleged victim with a purported prior inconsistent statement that was more damaging than the alleged victim's in-court testimony. Absent counsel's ineffectiveness in the instant case, the result of the proceeding would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome.

2. The Petitioner meets the standard for a certificate of appealability.

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 to deserve encouragement to proceed further." *Miller-El*

v. Cockrell, 537 U.S. 322, 327 (2003). The Petitioner satisfies this requirement because he has (1) made "a substantial showing of the denial of a constitutional right" (i.e., his right to effective assistance of counsel) and (2) the magistrate judge's resolution of this claim (later adopted by the district court) is "debatable amongst jurists of reason." *See* 28 U.S.C. § 2253(c)(2). The Petitioner's § 2254 claims are "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

Accordingly, the Eleventh Circuit should have granted a certificate of appealability in this case. 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 the petition for writ of certiorari.

Respectfully Submitted,

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