21-7411

No. 21A496

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD PLATT - PETITIONER

vs.

RICKY D. DIXON - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

11TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

RICHARD PLATT DC# 618204
OKEECHOBEE CORRECTIONAL INSTITUTION
3420 N.E. 168th STREET
OKEECHOBEE, FLORIDA, 34972

QUESTION(S) PRESENTED

1. WHETHER THE 11TH CIRCUIT COURT OF APPEALS ERRED IN DENYING THE CERTIFICATE OF APPEALABILITY PURSUANT TO *SLACK V. MCDANIEL,* 529 U.S. 473, 120 S.Ct. 1595 (2000).

LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

* See Attached 'Certificate of Interested Persons'
(Next Page)

RELATED CASES

Case No: 18-14169 - CV - Middlebrooks (United States District Court, Southern District of Florida).

Case No: 21-11158-E (United States Court of Appeals for the Eleventh Circuit).

Case No: 2008 - CF - 003914 (19th Jud. Cir. Ct. for St. Lucie County, FL) (Trial Court).

Case No: 4D09 - 2598 (4th District Court of Appeals for Florida) (Direct Appeal)

CERTIFICATE OF INTERESTED PERSONS

Akins, Russell (Defense co-counsel)

Belanger, Hon. Robert E. (19th Judicial Circuit)

Bettendorf, Heidi L. (Senior Asst. Attorney General)

B. L. R. (alleged victim)

Canady, Hon. Charles T. (Florida Supreme Court)

Conner, Hon. Burton C. (Fourth District Court of Appeals)

Colton, Bruce (State Attorney, 19th Judicial Circuit)

Craft, Linda (Asst. State Attorney)

Damoorgian, Hon. Dorian K. (Fourth District Court of Appeals)

Gross, Hon. Robert M. (Fourth District Court of Appeals)

Ham, David (Defense counsel)

Haughwout, Carey (Public Defender, 15th Judicial Circuit)

Hendricks, Jeffrey W. (Asst. State Attorney, 19th Judicial Circuit)

Klingensmith, Hon. Mark W. (Fourth District Court of Appeal)

Labarga, Hon. Jorge (Florida Supreme Court)

Levin, Hon. Steven J. (19th Judicial Circuit)

Levine, Hon. Spencer D. (Fourth District Court of Appeal)

Lipson, Alan T. (Asst. Public Defender, 15th Judicial Circuit)

Lustagarten, Coffinbarger, Kaitlin (Asst. State Attorney)

May, Hon. Melanie E. (Fourth District Court of Appeal)

McCollum, Bill (Attorney General)

McManus, Hon. F. Shields (19th Judicial Circuit)

Middlebrooks, Hon. Donald M. (U.S. District Court)(Southern)

Moody, Ashley (Attorney General)

Perry, Hon. James E. C. (Florida Supreme Court)

Platt, Richard (petitioner)

Polston, Hon. Ricky (Florida Supreme Court)

Quince, Hon. Peggy A. (Florida Supreme Court)

Reid, Hon. Lisette M. (U.S. District Court)(Southern)

Rogers, Don (Asst. Attorney General)

Shack, Hon. Larry (19th Judicial Circuit)

Taylor, Hon. Carole Y. (Fourth District Court of Appeal)

Terencio, Celia (Asst. Attorney General)

Vaughn, Hon. Dan L. (19th Judicial Circuit)

Warner, Hon. Martha C. (Fourth District Court of Appeals)

White, Hon. Patrick A. (U.S. District Court)(Southern)

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TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNTIED STATES
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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of Appeals appears at Appendix C to the petition and is:

☒ unpublished.

JURISDICTION

☒ For cases from **federal courts:**
The date on which the United States Court of Appeals decided my case was 8-25-21

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10-14-2021 and a copy of the order denying rehearing appears at Appendix **A**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

F.S. § 90.803(23)

U.S.C.A. AMENDMENTS 5, 6, 14

STATEMENT OF THE CASE

On October 20, 2008, the State of Florida charged Petitioner with one count of Sexual Battery on a child under 12.

On May 29, 2009, following a jury trial, Petitioner was found guilty as charged.

Petitioner initiated a direct appeal. Through counsel, Petitioner submitted an Initial Brief; the State filed an Answer Brief; and Petitioner filed a Reply Brief. The 4th District Court of Appeal affirmed the judgment and sentence without comment. *Platt v. State,* 63 So.3d 777 (Fla. 4th DCA 2011.

Petitioner filed two (2) motions for postconviction relief under Florida Rule of Criminal Procedure 3.850. The postconviction court dismissed both without prejudice and with leave to amend for exceeding the page limitation.

Petitioner then filed a final Amended 3.850 Motion for Postconviction Relief. The trial court denied some of the claims without a hearing (summarily), and after an evidentiary hearing, the court denied the remaining claims.

Petitioner appealed. The 4th DCA affirmed without comment. *Platt v. State,* 236 So.3d 1082 (Fla. 4th DCA 2017.

Petitioner filed a federal §2254 Petition for Writ of Habeas Corpus on May 4, 2018, and an Amended Petition on May 22, 2018. The State filed a Response/Answer on June 21, 2018. Petitioner filed a Traverse/Reply on or about July 26, 2018.

Notwithstanding the denial of Petitioner's Motion for Summary Judgment filed on or about July 9, 2020 (Denied on July 10, 2020), the district court Magistrate issued a Report and Recommendation on August 5, 2020. Petitioner filed a Motion for Reconsideration on August 11, 2020, and on March 23, 2021, the district judge issued an 'Order Adopting Report of Magistrate Judge', which denied the petition, overruled the objections and denied a COA.

The Notice of Appeal timely followed, and a Brief on the COA reasonably followed.

In Petitioner's Amended federal §2254 Petition, he raised the following grounds:

1. PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW BY THE STATE COURT'S ABUSE OF DISCRETION, MISAPPLICATION OF WELL ESTABLISHED LAW AND STARE DECISIS IN THEIR [SIC] FAILURE TO RECOGNIZE OUT-OF-COURT TESTIMONY BEING SENT INTO DELIBERATION CHAMBERS IS 'REVERSIBLE ERROR' AND NOT PERMITTED TO OCCUR IN FLORIDA

2. PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW BY THE STATE COURT'S ABUSE OF DISCRETION, MISAPPLICATION OF WELL ESTABLISHED LAW AND STARE DECISIS IN THEIR [SIC] FAILURE TO RECOGNIZE AND APPLY THE CORRECT STANDARD OF REVIEW TO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM OF FAILING TO OBJECT TO INADMISSIBLE WILLIAMS RULE EVIDENCE

3. PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW BY THE STATE COURT'S ABUSE OF DISCRETION, MISAPPLICATION OF WELL ESTABLISHED LAW AND STARE DECISIS IN PERMITTING CHILD HEARSAY STATEMENTS, IN WANT OF THE MANDATORY PREREQUISITE RELIABILITY SCREENING TO BE ADMITTED AT TRIAL

4. PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW BY THE STATE COURT'S ABUSE OF DISCRETION, MISAPPLICATION OF WELL ESTABLISHED LAW AND STARE DECISIS IN THEIR [SIC] FAILURE TO RECOGNIZE COUNSEL'S INEFFECTIVENESS FOR ALLOWING AN AVAILABLE WITNESSES FORMER TESTIMONY TO BE READ INTO THE RECORD ABSENT DIRECT OR CROSS [SIC] ON AN AFFIRMATIVE DEFENSE

REASON FOR GRANTING THE WRIT

The Eleventh Circuit did not address the issue of whether reasonable jurists would find debatable the district court's resolution of claims 1-4 of petitioner's §2254 petition.

In *Buck v. Davis,* 137 S.Ct. 759 (2017, this court held that a court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and only ask if the district courts' decision was debatable. At section (8) the court further held that a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. *Miller-El v. Cockrell,* 537 U.S. 322, 337 (2003).

Furthermore, by not reaching the debatability question the Eleventh Circuit determined not only that petitioner had failed to show any entitlement to relief "but also that reasonable jurists would consider that conclusion to be beyond all debate". *Welsh v. United States,* 194 L. Ed 2d 387 (2016). See also *Tennard v. Dretke,* 124 S.Ct 2562 (2004) ("We turn to the analysis the Fifth Circuit should have conducted: Has Tennard "demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong? *Slack v. McDaniel,* 529 U.S., at 484 … we conclude that he has."

In the instant case, the petitioner did in fact demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. (Appendix)(COA Motion filed at the Eleventh Circuit).

The Honorable Supreme Court Justice Sotomayor in *Simmons JR v. U.S.,* 29 Fla L. Weekly Fed. S 33 (2021) stated:

"As this Court has repeatedly stressed, a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007). These liberal construction requirements for *pro se* litigants carry

particular weight when courts consider habeas filings, given that "the writ of habeas corpus plays a vital role in protecting constitutional rights. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)." See also *Holsomback v. White,* 133 F.3d 1382, 1386 (11th Cir. 1998) (Finding that "given the liberal construction to which *pro se* pleadings are entitled, *Holsomback's* pleadings can fairly be read to assert a broader claim").

In the instant case, the petitioner alleged that counsel was ineffective for failing to object to the alleged child victim's out-of-court interview being sent to the jury room during deliberations; but, the pleading, when given its liberal construction, also raises a claim of a denial of petitioner's right of confrontation. Petitioner cited, among others, *Chambers v. Mississippi,* 410 U.S. 284, 294 (1973), as well as *Crawford v. Washington,* 541 U.S. 36 (2004), and *Bruton v. U.S.,* 391 U.S. 123 (1968).

The crux of a *Bruton* violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant. *Hunter v. State,* 8 So.3d 1052 (Fla. 2008).

The district court, in its assessment of this claim, cited to *Davis v. Washington,* 547 U.S. 813, 821 (2006), and *Crawford v. Washington,* 541 U.S. 36, 51 (2004), and held that: "Here, however, the victim testified at trial. Furthermore, counsel cross-examined her on the same subject matter of her CPT interview. *Compare* [ECF 11-3, pp. 118-52 (cross-examination)], with [ECF 11-4, pp. 128-48 (video)]. Accordingly, petitioner has not shown a Confrontation Clause violation." (Appendix).

The petitioner is entitled to a certificate of Appealability on this issue, in that petitioner can, in fact, demonstrate that reasonable jurists would find the district court's aforementioned assessment debatable or wrong. Because, although the alleged victim was cross-examined in open court, her testimony did not include her **inadmissible** videotaped CPT testimony where she

accused the petitioner of prior sexual molestation and other crimes and bad acts.

The record shows that, on page 1214, a discussion about the inadmissible *Williams* Rule evidence about prior acts was had. In this discussion, the prosecutor informed the court the following:

"... so we have a disk, but it's just not the redacted disk. And I don't want to run any - "

At this point, the following transpired:

The Court: Well, the worst that happens is we get up to that point and we stop it.

Ms. Craft: There's not a whole lot -

Mr. Akins: We - we had an unredacted tape in the last trial and it -

Ms. Craft: Well, we're not going to play it.

Mr. Akins: It didn't work so good. I'm just afraid of trying to do this again." (Appendix).

The record shows, at page 1346 of the trial transcript, that the CPT video was indeed stopped at the moment prior to the inadmissible *Williams* rule evidence. But, the **unredacted** CPT video was still sent back to the jury room, where the jury was still exposed to the inadmissible *Williams* rule evidence. This included allegations of sexual abuse, exposure to pornographic movies, allegations of prior domestic violence & allegations of petitioner smoking crack cocaine. (Transcript pages 746 thru 772) (Appendix).

At the Evidentiary Hearing, the prosecutor argued to the court that there had been no prejudice shown by the petitioner in regards to the CPT video going back to the jury room during deliberations.

In his closing statement, Mr. Dodd, recognized that CPT interviews were to be treated as out-of-court depositions and are not supposed to go back to the jury. Mr. Dodd pointed out that defense counsel had testified that "there was a standing objection regarding that evidence was put forward." He further argued that if the court should find that: "the court doesn't agree that the

standing objection was sufficient, under the second prong, the state argues essentially that the defense is unable to show prejudice given the facts of this particular case." (Appendix).

He then cited to *Ruiz v. State,* 108 So.3d 694 Fla. 2013), and further argued that:

"The only reason I provided it to the court is that it outlines that what we're looking at here is really the question of whether or not the tape going back would cause a different outcome in the trial. And I point out that's what the standard is because under the facts of this case, the child hearsay recorded CD **did** go back to the jury, but so did the defendant's statement." (Appendix).

Mr. Dodd argued that petitioner's statement to the police "was really an exculpatory statement by the defendant." (Appendix).

He then concluded as follows:

"So I would ask the court to find under the second prong of *Strickland*, that the Defendant is not able to establish that the result of a trial would have been different. Because this isn't a type of case where the CPT interview went back and the jury had an opportunity to watch that. There wasn't other testimony or exculpatory evidence, or the evidence of the defendant's version that went back there as well. They were sent back with essentially what amounts to both sides of the case. So I would ask the court to find there is insufficient prejudice." (Appendix).

In its order denying petitioner's amended motion for post-conviction relief, Judge Levin, (whom did not preside over petitioner's second trial), made the following findings as his basis for denying the aforementioned claim of ineffective assistance of counsel.

1. That, the Defendant did not provide any evidence that the recording was actually watched by the jury;
2. That, while it was error for the recording to be sent to the jury in the deliberating room, the jury could have reviewed the recording in open court;
3. That, in addition to the CPT interview recording going back to the jury, the recording of the interview between the Defendant and law enforcement also went back to the jury;

The court then concluded as follows:

"Therefore, the concern in *Young* that the jury would give more emphasis to the child protection team interview recording is alleviated by having the Defendant's version of the events of the night before them. This court notes that the recording of the interview between the Defendant and law enforcement was played for the jury, but the Defendant did not testify. Thus, the Defendant was able to get his version of the events of that day before the jury without being cross-examined. The Defendant has not demonstrated that he was prejudiced by the child protection team interview recording being sent back to the jury during deliberations." (Appendix) (*The CPT video was a feature of the second trial) (Appendix).

The district court's Magistrate Judge, in her "Report of Magistrate Judge," (which was adopted by the federal District Court Judge), made the following assessment:

"... Here, the postconviction court reasonably concluded that petitioner failed to show prejudice on this claim. The video was played during the trial, [ECF 11-4 pp. 128-48], and petitioner has not established that the jury watched it again during deliberations. Assuming it did petitioner has not shown that this bolstered the victim's testimony; the video was largely cumulative of the victim's testimony" ... "Furthermore, video of the interview in which petitioner denied abusing the victim was played for the jury as well".

The Magistrate Judge concluded, as to this claim that:

"Here, for the above reasons, the postconviction court reasonably concluded that petitioner failed to make this showing, (that, 'but for counsel's errors, the outcome at trial would have been different'); in sum, the state court's rejection of this claim was not contrary to, or an unreasonable application of, clearly established federal law or an unreasonable determination of the facts". (Appendix).

With the granting of a COA by the Eleventh Circuit Court of Appeals, the petitioner can make a showing that reasonable jurists would find the district court's assessment of the

aforementioned constitutional claim debatable or wrong. See *Reynaldo Martin-Godinez v. State,* 290 So.3d 144 (Fla. 1st DCA 2020) (videotaped out-of-court interviews with child victims introduced into evidence under §90.803(23), Fla. Stat., **shall not be allowed into the jury room during deliberations**. Trial counsel can be deemed ineffective for failing to object to a videotaped child protection team (CPT) interview being sent to the jury room during deliberations where this omission results in prejudice).

The record show that counsel's standing objection was specific to "the admissibility of the child hearsay pursuant to the court's amended order on statement of child victim", (Appendix), and did not object to the unredacted CPT video going back to the jury room during deliberations; even though counsel knew that the inadmissible *Williams* rule evidence was included in the CPT video.

In *Nunez v. State,* 109 So.3d 890 (Fla. 3rd DCA 2013), the court held:

"The trial court sent the DVD into the jury room, with a written response advising the jury: 'You are to view the entire interview, without any regard to any in court objections that were placed on the record. Defense counsel objected to the court permitting the jury to view the entire unredacted DVD. The trial court committed reversible error in permitting the jury to view the entire, unredacted forensic interview of A. B., and this error was not harmless. We reverse the conviction and sentence and remand for a new trial." See *Williams v. State*, 515 So.2d 1042 (Fla. 3rd DCA 1987) (Finding that counsel's failure to object to the introduction of evidence that would have been deemed inadmissible constituted ineffective assistance of counsel); *Kopsho v. State*, 84 So.3d 204 (Fla. 2012) (Holding the erroneous admission of *Williams* rule evidence is presumed harmful and amounts to reversible error).

In the instant case, counsel specifically informed the Court as follows:

"... Your Honor, I have no objection to the exhibits that are going back." (Appendix).

Counsel was ineffective. See *Mendez v. State,* 271 So.3d 1093 (Fla. 3rd DCA 2019) (Holding that the admission of prior acts of child molestation has an even greater potential for unfair prejudice than the admission of other collateral crimes. New Trial ordered). See also *Martin v. State,* 85 So.3d 537 (Fla. 4th DCA 2012), at 540 ("The state acknowledges that it was error for the redacted statements to be played before the jury").

In *Rodriguez-Olivera v. State,* 46 Fla. L. Weekly D 2229 (Fla. 2nd DCA 2021), the Court held that:

"The improper admission of evidence of an uncharged crime is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." *Straight v. State,* 397 So.2d 903, 908 (Fla. 1981). Moreover, because of the commonly held belief that individuals who commit sexual assaults are more likely to recidivate as well as societal outrage directed at child molesters, the admission of prior acts of child molestation has an even greater potential for unfair prejudice than the admission of other collateral crimes. *McLean v. State,* 934 So.2d 1248, 1256 (Fla. 2006). Mr. Rodriguez-Olivera was prejudiced because "if counsel had acted otherwise, a reasonable probability exists that the outcome would have been different - that is, a probability sufficient to undermine confidence in the outcome." *Curran v. State,* 229 So.3d 1266, 1269 (Fla. 1st DCA 2017) (quoting *Jones v. State,* 998 So.2d 573, 584 (Fla. 2008) (Holding that defendant was prejudiced where counsel failed to object to testimony of uncharged acts of molestation); see *Botto v. State,* 307 So.3d 1006, 1010 (Fla. 5th DCA 2020 (same); see also *Austin v. State*, 48 So.3d 1025, 1028 (Fla. 2nd DCA 2010) (Recognizing that jury's assessment of defendant's credibility and character in molestation case "could easily have been affected by the improper evidence" of uncharged collateral crime). Simply put, "we cannot say that there was no reasonable probability of [Mr. Rodriguez-Olivera] being prejudiced by his trial counsel's error".

In the instant case, based on *Young v. State,* 645 So.2d 965 (Fla. 1994), the state conceded error, but argued that petitioner "did not provide any evidence that the recording in question was actually watched by the jury ..."

The court adopted this erroneous interpretation of *Young.* A thorough reading of *Young* clearly shows that there is no requirement that a defendant prove that the jury watched the CPT video. Instead, the burden is on the state to prove that the conceded error did not contribute to the jury's verdict. *State v. DiGuilio,* 491 So.2d 1129 (Fla. 1986) (Holding that the state bears the burden to demonstrate beyond a reasonable doubt that the error did not contribute to the jury's verdict; adopting the *Chapman* standard, which is to the exclusion of a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967); *Hernandez v. State,* 946 So.2d 1270 (Fla. 2nd DCA 2007).

As for the district court's assessment that, the "video of the interview in which petitioner denied abusing the victim was played for the jury as well," the court overlooked the fact that the detectives interrogation was extremely prejudicial in that it was accusatory. See *Jackson v. State,* 107 So.3d 328 (Fla. 2012) (Holding that a police officer's opinion as to the guilt of the accused is admissible). In that case, the detective told *Jackson* in the videotape" "I know you did it, there's no doubt in my mind you did it, okay?"

The interrogation by Detective Donnon is lengthy, and was played for the jury per their request, so, for the purpose of brevity, the following inadmissible prejudicial accusatory statements shall be cited. At all times after petitioner maintained his innocence, Detective Donnon made accusations and personal opinions of petitioner's guilt. This was prejudicial error. See *Martinez v. State,* 761 So.2d 1074, 1080 (Fla. 2000) (There is increased danger of prejudice when the investigating officer is allowed to express his or her opinion about the defendant's guilt).

The following clearly shows that the state's position, that there was no prejudice in sending the CPT video to the jury room because the jury also saw petitioner's interrogation video denying guilt, us wholly without merit:

"A. I'm saying I didn't do anything wrong and I was on the couch in my house.

Q. That's because you're sick, that's because mentally you're sick and I think maybe you've even got yourself believing that. Mr. Platt, seize this opportunity.

A. I don't know what else to tell you.

Q. You better come up with something else to tell me. I can tell you that. It's not me that you have to convince, it's absolutely not me. Who you need to convince is a jury of your peers and a judge. And with what you've told me so far, that's not gonna happen. This is absolutely not gonna happen ..." (Appendix) (pp. 603-604)

At T-605 the following transpired:

Q. "... But you know as well as I do that B. R. is not lying about what happened in the house, you know that.

A. I don't know what happened because I was on the couch.

Q. Okay.

A. I never touched her.

Q. You know that's not true."

At T-606:

Q. This is building against you so quick, it's just getting worse and worse.

A. I haven't done anything wrong.

Q. Mr. Platt, we both know that's not true ..."

The prejudicial statements continue throughout the interrogation, between T-607 and T-609, and at T-610 Detective Donnon stated:

"... you have this illness and you need help, that's what it is, it's an illness..."

At T-611 he expressed what he would tell the state attorney's office:

"... I'm going to say this guy has an illness and he needs to be put away for the rest of his life ..."

At T-612 and T-613 the following transpired:

Q. "You're a sick man, Mr. Platt, you really are. I think maybe you're to the point where you don't even realize how sick you are. You touched this little girl and I'm going to make sure that you're convicted for it."

A. I never touched her.

Q. Yes, you did. Mr. Platt, yes, you did and the evidence totally points towards that and it totally shows that. You can deny, deny, deny, deny, deny all you want, but I will make sure that story that you give me, that that's what a jury hears and that's what they convict you of. I'll - I can guarantee you that, that's what I will do if I have to spend the last day of my career here making sure that happens, I will make sure that happens ..." (Appendix).

The aforementioned was not objected to by counsel. This prejudicial error was compounded by defense counsel's failure to impeach the state witness with documented proof of prior false sexual allegations that were lodged against the petitioner by his step-daughter. And these past sexual allegations were heard by the jury in the **unredacted** CPT video, where petitioner was unable to cross-examine, or confront his accuser.

At the evidentiary hearing, counsel raised the "defense shield" of strategy decision, to justify his challenged decision. But this court has clearly held that the question before the court is not whether counsel's choices were strategic, but whether they were reasonable. See *Roe v. Flores-Ortega,* 528 U.S. 470, 481 (2000); see also *Roesch v. State,* 627 So.2d 57, 58 n. 3 (Fla. 2nd DCA 1993) ("patently unreasonable decisions although characterized as tactical, are not immune").

The following relevant portions of the evidentiary hearing are offered to show that counsel knew about the exculpatory records, but chose not to use them.

At the Evidentiary Hearing, (EHT-14), the following transpired:

Q. "And were you aware of prior allegations of sexual misconduct by this defendant towards that same victim?"

A. Yes."

At EHT-15, counsel testified that he "wanted to make sure that we didn't open the door to any of those allegations, if at all possible." (See also EHT-19 and 20).

During cross-examination counsel reiterated what his strategy was:

Q. "And you also said that part of the defense strategy would have been to try to keep out any evidence of prior allegations of sexual abuse --

A. Yes.

Q. -- with this victim, correct?

A. Yes." (EHT-27).

At EHT- 44-46, counsel testified about the importance of not allowing the jury to know about prior allegations of sexual abuse. Then, at EHT - 46, counsel testified as to the lack of physical evidence of abuse, and how it really came down to a question of credibility between the defendant and the victim. And at EHT-48, counsel again reiterated the importance of keeping these past allegations of abuse from the jury:

Q. "And if there were those kinds of allegations, would it have been important to you to keep those records, themselves, out of evidence if they contained allegations of prior abuse?

A. Absolutely."

At EHT-56 counsel admitted that he reviewed the DCF information, but "didn't admit that information, *per se*, the records." **But**, at EHT-58, counsel testified that:

A. "Part of my defense strategy would be to use any information that we had to undermine the credibility of the state's case."

The following transpired between EHT-62 and 63:

Q. "Do you recall there being statements or information in the multilingual reports saying -- essentially saying that the victim has lied in the past ..."

A. As I said earlier, I'm not sure. I knew that there was some suggestions that the girl had lied in the past."

At trial transcript 685, the state noted that the DCF had three volumes, and that she had requested from the detective, "to try and get me one particular volume, which seemed to be the appropriate one for the prior allegations, I never received. So I - but we didn't use it, so - ".

At that time, defense counsel, Mr. Smith responded:

"But that's the volume we're interested in because it appears from what we received currently that the prior allegation was closed, for whatever reason, unfounded, we don't know. Uh, there's a - again I think as Miss White says in her report that it appears the child had been coached, if that's an - an accurate statement". (EHT-686).

The records clearly show, that petitioner vulnerable step-daughter not only had been coached in the past by her caretaker, Dusty Rogers, her Aunt, but was also coached in the present false allegations.

In fact, the trial court made the following statements between T-850 and T-851:

THE COURT: Well, I'm thinking of some balancing in the sense that, uh, allow the video in, but not allow the aunt's statement of hearsay as to what the child said, but if I do that, what is the defense going to do because they might be able to make some points in their favor by cross-examining the aunt on well, how come your statement that you're telling me today is exactly what's on the video word for word. Because one of the things that I did take notice how she used the same terms, uh, so that could actually be an argument made for the defense -

MR. SMITH: Correct.

THE COURT: That the aunt's hearsay is so close to what the video is as to be - raise the issue that the aunt put the idea in the child's head. You may want to bring that up is what I'm saying."

Unfortunately, defense counsel did not cross-examine the aunt, Dusty Rogers, on the aforementioned, which was also prejudicial to the defense. And the DCF records would have been admissible to impeach Dusty Rogers' trial testimony. Because, at trial, Dusty testified that petitioner's stepdaughter B. R. only lied "when it comes to her homework". (Appendix T-1203).

At T-1204 Dusty denied the fact that during B. R .'s therapy, she had been "confronted with the fact that she has problems with truth telling?"

A. "I don't believe so."

Defense counsel Mr. Akins pressed on as follows:

Q. "Okay. So you were never advised that, uh, she has difficulty with telling the truth, she fabricates a great deal, she is an unreliable historian and seems to make up stories even if it's unnecessary to do so?"

A. I was never told that."

At T-1208 the following transpired:

Q. "Okay. And in the course of I guess you have - have caught her in lies from time to time."

A. "About her homework, correct. Yes."

At this time counsel should have impeached Dusty with the 4/6/2007 Multilingual Psychotherapy Centers, Inc. Clinical Record # 4966, wherein the author of the "progress notes" wrote as follows:

"Aunt stated that client continues to be intrusive and inappropriate. Aunt added that client also lies **about everything**..."

Also that:

"Discussed with aunt about client's past exposure to her mother's mental illness, drug use and prostitution, which contribute to client's inability to tell the truth". (Appendix).

Counsel's inactions as aforementioned were not a product of sound strategy, but instead constitutes ineffective assistance under the facts of this case. Dusty Rogers, B.R.'s aunt, is the one who coached B. R.

Furthermore, according to his Evidentiary Hearing testimony, counsel's strategy was to do all he could to keep this evidence of prior sexual abuse allegations away from the jury. And yet, counsel, with the full knowledge that the CPT video that was about to be sent back to the jury room during deliberations, was **unredacted**, and contained the **inadmissible** *Williams* rule allegations, simply remained silent.

These aforementioned prejudicial errors were compounded by the fact that defense counsel stipulated to reading Theresa Platt's prior trial testimony transcript. Such stipulation deprived the petitioner of his constitutional right to confront his accuser.

At trial, specifically at T-1068 the prosecutor informed the court:

> "I don't believe -- we will not be calling Miss Platt ..."

But, at T-1220 counsel informed the court:

> "... we have a stipulation as to the reading of former testimony, uh, of Teresa Platt. The state is going to use former testimony and we have no objection to that."

At no time did the state argue or proffer to the court that Theresa Platt was unavailable. In Fact, the state knew exactly where Theresa was at, in the County Jail.

This court, in *Barber v. Page,* 390 U.S. 719, 722 (1968), explained that prior to a finding by the trial court that a prosecutorial witness is unavailable for trial, the burden is on the state to demonstrate good-faith efforts at securing the witness's presence for trial. See also *State v. Abreu,* 837 So.2d 400 (Fla. 2003), at 401-402, affirming *Abreu v. State,* 804 So.2d 442 (Fla. 4th DCA 2001) (Holding that "live testimony may not be constitutionally supplanted with former testimony in criminal cases absent a showing of unavailability.").

In the instant case, petitioner hired an investigator prior to the second trial, for the purpose of visiting and documenting [video recording] the apartment's configuration and specifically the time frame it took to go to the mail box, from the back patio, and back to the apartment through the apartment's front door.

This time frame is of critical importance due to the fact that Theresa Platt (a state witness) testified in the first trial that she left the apartment when the kids were playing in the pool on the patio and the petitioner was asleep on the sofa. Theresa smoked a cigarette with the next door neighbor near the neighbor's and Platt's rear patio. Theresa testified that her whole absence was 10-15 minutes. (Appendix) (T-1240 to 1258).

But, according to petitioner's investigator's video evidence, it took him 1.5 to 2.0 minutes total to casually walk from the rear patio - to the mail box and into the apartment's front door. Any reasonable jurist would find 1.5 to 2.0 minutes to accomplish the alleged offense is not a reasonable possibility. (See Appendix, Ground Four of §2254 petition for additional supporting facts).

CONCLUSION

WHEREFORE, Petitioner prays for this Honorable Court grant this Petition for Writ of Certiorari in order to correct a serious Manifest Injustice. *Miller-El v. Cockrell,* 537 U.S. 322 (2003).

Respectfully Submitted,

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