No. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

DAVID LEE GREEN,
*Petitioner*,

v.

RICKY D. DIXON,
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. QUESTIONS PRESENTED FOR REVIEW

1. 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 ineffective assistance of counsel claim – and specifically – whether an attorney's decision to forego presenting a viable defense (in this case entrapment) can ever be considered "strategic" if the attorney misunderstood the law regarding the defense.

2. Whether the court of appeals improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

## 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

## 2. TABLE OF CITED AUTHORITIES

### a. Cases



### b. Statutes

**c. Other Authority**

The Petitioner, DAVID LEE GREEN, 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 February 10, 2022. (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).

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

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

In 2000, the Petitioner was charged with solicitation to commit first-degree murder. The prosecution's case was based solely on a tape recording of the conversation between the Petitioner and Michael Bemis. At the time of the conversation, Mr. Bemis was working in an undercover capacity for law enforcement officials in an effort to get favorable treatment for his pending criminal charges. Specifically, Mr. Bemis told law enforcement officials that if he was outfitted with a hidden recording device, he could catch the Petitioner on tape soliciting him (Mr. Bemis) to kill the Petitioner's ex-wife. However, a review of the conversation between Mr. Bemis and the Petitioner reveals that it was Mr. Bemis who was enticing the Petitioner to discuss the alleged plan. For example, the following was said at the beginning of the conversation:

> MR. BEMIS: You still want me to do that job?
>
> MR. GREEN: Which one?
>
> MR. BEMIS: The ex-wife thing.
>
> MR. GREEN: Must be something pretty freaky.

(A-52). Thereafter, Mr. Bemis attempted to convince the Petitioner to give him a gun to carry out the plan, a picture of his ex-wife, and his ex-wife's work schedule – yet the Petitioner refused each of these requests and Mr. Bemis left the Petitioner's residence with none of these things. Nevertheless, the prosecution proceeded to trial and the tape recording of the conversation between Mr. Bemis and the Petitioner was the

cornerstone of the prosecution's case. Defense counsel's sole defense was that although the Petitioner discussed the murder plan with Mr. Bemis, the Petitioner was only joking at the time of the discussion (i.e., the Petitioner never had any intent to actually kill his ex-wife). At the conclusion of the trial, the Petitioner was convicted as charged. The trial court sentenced the Petitioner to thirty years' imprisonment.

Following his conviction, the Petitioner timely sought postconviction relief in state court. In his state court postconviction motion, the Petitioner raised several claims – one of which is relevant to the instant petition: defense counsel rendered ineffective assistance of counsel by failing to raise a viable entrapment defense at trial. During a state court postconviction evidentiary hearing on the motion, defense counsel testified and insisted that he could *not* raise the entrapment defense because the Petitioner was not going to take the stand and say he intended to have his wife killed. Defense counsel stated that because the Petitioner denied that he intended to commit the crime, he could not raise the entrapment defense because admitting to the intent would have been required as an element of the entrapment defense. (A-48-51). The state court subsequently denied the Petitioner's postconviction motion.

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner raised the same claim that he previously presented in his state postconviction motion. On February 18, 2021, the district court denied the Petitioner's § 2254 petition. (A-4 & A-5).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On February 10, 2022, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim. (A-3).

## H. REASON FOR GRANTING THE WRIT

**The questions presented are 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).

The first question presented in this case is as follows:

> 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 ineffective assistance of counsel claim – and specifically – whether an attorney's decision to forego presenting a viable defense (in this case entrapment) can ever be considered "strategic" if the attorney misunderstood the law regarding the defense.

In his § 2254 petition, the Petitioner argued that defense counsel was ineffective for failing to pursue a viable entrapment defense. To establish the defense of subjective entrapment there are two elements: government inducement of the crime and a lack of predisposition on the part of the defendant to engage in the criminal conduct. *See Mathews v. United States*, 485 U.S. 58 (1988). In the instant case, both of these elements are apparent from the record. First, the evidence was clear that Mr. Bemis (an informant) was wearing a wire and acting at the direction of law enforcement when he taped the conversation with the Petitioner. The recording of the conversation between the Petitioner and Mr. Bemis shows that the Petitioner was not attempting to have contact with Mr. Bemis. Mr. Bemis appeared at the Petitioner's door uninvited, and chastised the Petitioner for hanging up on him when he called him from

jail. Then, when Mr. Bemis asked the Petitioner if he was still interested in that "job," the Petitioner did not know what job Mr. Bemis was talking about. Mr. Bemis continues throughout the tape to try to steer the conversation back to killing the ex-wife. He repeatedly encourages the Petitioner, pleading that he needs the money from the life insurance.

As to the second element, "[i]n laying an evidentiary foundation for entrapment, the defendant bears the initial burden of production as to government inducement; once the defendant meets this burden, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Ryan*, 289 F.3d 1339, 1343 (11th Cir. 2002). The Petitioner could have established his lack of predisposition to commit the crime because he had "no prior criminal history related to the offense at issue." *Farley v. State*, 848 So. 2d 393 (Fla. 4th DCA 2003). The record was clear that the Petitioner had virtually no criminal history[2] and certainly no criminal history related to the issue at trial – and the Petitioner's sentencing scoresheet indicates that no prior crimes were scored. Pursuant to *Farley*, the Petitioner's burden to show a lack of predisposition would have been met by this fact alone (and the burden would have shifted to the State to prove a predisposition beyond a reasonable doubt). Thus, entrapment was a viable defense in this case.

[2] The Petitioner had a prior DUI.

In determining whether defense counsel was ineffective for failing to pursue this viable defense, the question becomes why did defense counsel fail to pursue the entrapment defense. As explained below, this question was answered by defense counsel at the state court postconviction evidentiary hearing – *but defense counsel's reason demonstrates that counsel was ineffective.*

During the prosecutor's direct examination of defense counsel during the state court postconviction evidentiary hearing, defense counsel stated the following:

> A: . . . [B]ut he never, to this day, pretrial, trial, appeals, post convictions, to this day, I'm not aware of him ever saying that he meant to kill his wife and that somehow law enforcement induced him to do that. I've never heard him say that.
>
> Q: *Isn't – is that a – an element of entrapment*?
>
> A: Yes.
>
> Q: Now during trial, you – well, what was your defense at trial?
>
> A: *That he didn't intend to commit the crime of solicitation. He didn't intend to have his wife killed.*

(A-48-49) (emphasis added). Later during his testimony, defense counsel stated that he would not have been able to argue both lack of intent and entrapment (because defense counsel believed that "intent" was an element of the entrapment defense):

> A: . . . *David Green was not going to take the stand and say I intended when I spoke those words to have my wife killed.* And he never said that that's what he would say. In fact, he denied it.
>
> Q: And did that –
>
> A: So I couldn't get that into evidence. Somehow I was going to have to try to argue that without, you know I mean it's just such a reach

> that I felt that the best defense, based on everything we had, was the evidence that we put on, which was lack of intent.
>
> Q: *And would that [intent] have been an element of the entrapment defense if you had to go forward on that he in fact committed this?*
>
> A: *Yeah.*

(A-51) (emphasis added).

The record is *undisputed* that defense counsel's understanding of the law was wrong. Pursuant to *Mathews*, the Petitioner had a right to *both* raise the entrapment defense and to deny that he had any intent to commit the underlying offense. *See Mathews*, 485 U.S. at 62 ("We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment."). As explained by the state appellate court in *State v. Rokos*, 771 So. 2d 47, 48-49 (Fla. 4th DCA 2000):

> Finally, since we are reversing the order of dismissal and remanding for further proceedings, we also address the State's contention that the trial court erred in ruling, pursuant to the supreme court's decision in *Wilson v. State*, 577 So. 2d 1300 (Fla. 1991), that an entrapment defense was available to Rokos even though he denied that he offered Kleinbach money to testify falsely. In *Wilson*, the Florida Supreme Court recognized the long-standing rule that "one who denies committing the act that constitutes the offense cannot claim entrapment." 577 So. 2d at 1300. In light of the then-recent United States Supreme Court opinion in *Mathews v. United States*, 485 U.S. 58 (1988), however, the Florida Supreme Court held that, under certain circumstances, *a defendant could deny that he had committed the crime and still claim entrapment.*
>
> > "[W]here the circumstances are such that there is no inherent inconsistency between claiming entrapment and

> yet not admitting commission of the criminal acts, certainly the defendant must be allowed to raise the defense of entrapment without admitting the crime. . . . Asserting the entrapment defense is not necessarily inconsistent with denial of the crime even when it is admitted that the requisite acts occurred, for the defendant might nonetheless claim that he lacked the requisite bad state of mind."
>
> 577 So. 2d at 1302 (quoting W. LaFave & J. Israel, *Criminal Procedure* § 5.3, at 254-55 (1985)). We agree with the trial court's finding that this is one of the circumstances where there is no inherent inconsistency in the defendant denying commission of the crime and still claiming entrapment.

(Emphasis added). In the order below, the district acknowledged that defense counsel's understanding of the law as it relates to entrapment was incorrect. (A-20-21).

However, in the district court's order below, the district court held that the state court properly found that defense counsel's actions were "strategic," stating that "counsel evaluated possible defenses; concluded that entrapment was not viable; and decided to pursue lack of intent, which he believed was the single most compelling defense." (A-24). But in reaching this conclusion, the district court overlooked that counsel could *not* make a valid "strategic" decision *if counsel misunderstood the law regarding entrapment. See, e.g., Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006) ("The evidence in this case suggests that the attorney's decision was not an exercise in professional judgment because it reflected a misunderstanding of the law regarding the availability of a mental health expert."); *Cox v. Donnelly*, 432 F.3d 388, 390 (2d Cir. 2005) (finding deficient performance where trial attorney admitted that "he did not challenge the trial court's intent instructions because he did not then know that they were illegal under state and federal law") *United States v. Span*, 75 F.3d 1383, 1390

(9th Cir. 1996) ("Counsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a misunderstanding of the law."); *United States v. Streater*, 70 F.3d 1314, 1321 (D.C. Cir. 1995) ("While this court remains unwilling to second-guess 'reasonable strategic or tactical judgments,' [trial counsel]'s erroneous legal advice to Streater on a critical point cannot be excused as a strategic or tactical judgment, but could have sprung only from a misunderstanding of the law." (internal citation omitted)). As in all of these cases, in the instant case, defense counsel's decision to forego the entrapment defense was based on a misunderstanding of the law. *By his own admission* (i.e., his testimony during the state court postconviction evidentiary hearing), the reason that defense counsel did not pursue the entrapment defense was because defense counsel believed that he could not both raise the entrapment defense and argue that the Petitioner lacked any intent to commit the underlying offense.

Pursuant to *Mathews*, defense counsel's understanding of the law regarding entrapment was incorrect. And pursuant to *Dando*, *Cox*, *Span*, and *Streater*, because defense counsel misunderstood the law as it relates to entrapment, any alleged "strategic" decision to forego presenting the entrapment defense based on this misunderstanding of the law was unreasonable – meaning that defense counsel rendered ineffective assistance of counsel in this case.

The record is clear that the Petitioner was prejudiced by defense counsel's failure to raise the entrapment defense. As explained above, entrapment was a viable defense based on the circumstances and facts of this case. Due to counsel's failure to

raise the entrapment defense, the jury was not given the option of acquitting the Petitioner based on entrapment. During the state court postconviction evidentiary hearing, Don Pumphrey, Jr. – an attorney who was accepted as an expert in criminal defense trial work – opined that there is a reasonable probability that the result of the Petitioner's trial would have been different had defense counsel pursued the entrapment defense. (A-46-47). The record in this case supports Mr. Pumphrey's conclusion.

Had defense counsel properly raised and prosecuted an entrapment defense, there is a reasonable probability that the outcome of the Petitioner's trial would have been different and/or counsel's ineffectiveness affected the fairness and reliability of the proceeding, thereby undermining any confidence in the outcome. Accordingly, the Petitioner's constitutional right to a fair trial with the effective assistance of counsel has been violated. Applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to the state court trial record, the Petitioner is entitled to a new trial as a result of the ineffective assistance of counsel rendered by his trial attorney. The Petitioner has established that the state postconviction court's ruling on this claim was contrary to and an unreasonable application of *Mathews* and *Strickland*. Moreover, the state court's decision was based on an unreasonable determination of the facts in light of the evidence contained in the state record.

The second question presented in this case is as follows:

> Whether the court of appeals improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by

the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

28 U.S.C. § 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . ." 28 U.S.C. § 2253(c)(2) further provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right." Finally, 28 U.S.C. § 2253(c)(3) provides that "[t]he certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

The provisions of 28 U.S.C. § 2253(c)(1) were included in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the statute governing appeals in habeas corpus and postconviction relief proceedings. In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Court observed that a certificate of appealability ("COA") will issue only if the requirements of § 2253 have been satisfied. "§ 2253(c) permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Court in *Miller-El* recognized that a determination as to whether a certificate of appealability should be issued "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The Court looked to the district court's application of AEDPA to Mr. Miller-El's constitutional claims and asked whether that resolution was debatable amongst jurists of reason. The Court explained:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

*Id.* at 336-337. The Court proceeded to stress that the issuance of a certificate of appealability must not be a matter of course. The Court clearly defined the test for issuing a certificate of appealability as follows:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, 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. As we stated

> in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

*Id.* at 338.

Thus, 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 claim[] or that jurists could conclude the issue[] presented [is] adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The Petitioner has satisfied 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 district court's resolution of this claim is "debatable amongst jurists of reason." This is especially true given that the record is unrefuted (as acknowledged by the district court) that defense counsel in this case misunderstood the law as it relates to the entrapment defense. Hence, the issue in this case is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to further clarify the certificate of appealability standard. The issue in this case is important and has the potential to affect all federal habeas cases nationwide. Accordingly, for the reasons set forth above, the Petitioner asks the 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

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