NO. 22-_____

In the Supreme Court of the United States

FRANK OSWALD,

Petitioner,

v.

NICHOLAS MAUER, SUMMIT COUNTY ADULT PROBATION OFFICER; AND DAVE YOST, OHIO ATTORNEY GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a Circuit Court's denial of an application for a Certificate of Appealability based on the merits of the appeal, rather than on whether reasonable jurists could disagree on a petitioner's constitutional claims, violate a petitioner's constitutional right to due process?

LIST OF PROCEEDINGS

HABEAS PROCEEDINGS

United States Court of Appeals for the Sixth Circuit
No. 21-4218
Frank Oswald v. Nicholas Mauer, et al.
Date of Final Order: June 28, 2022

United States District Court for the
Northern District of Ohio, Eastern Division
No. 5:19-cv-01191
Frank Oswald v. Nicholas Mauer, et al.
Date of Final Order: November 29, 2021

DIRECT PROCEEDINGS

Supreme Court of Ohio
No. 2018-0388
State of Ohio v. Frank Oswald
Date of Final Order: May 23, 2018

Court of Appeals of Ohio,
Ninth District, Summit County
No. 28633
State of Ohio v. Frank Oswald
Date of Final Order: January 24, 2018

Court of Common Pleas, County of Summit, Ohio
No. CR-20160-04-1302
State of Ohio v. Frank Oswald
Date of Final Disposition/Sentencing: April 17, 2017

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Frank Oswald, respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Circuit Court of Appeals for the Sixth Circuit denying a Certificate of Appealability appears in the Appendix at App.1a-5a and is unpublished. The denial of Petitioner's habeas corpus petition by the U.S. District Court for the Northern District of Ohio appears at App.6a-9a, and is found at *Oswald v. Mauer*, 2021 WL 5567299 (N.D. Ohio). The Report and Recommendation of the United States Magistrate Judge appears at App.10a-33a. The opinion of the Ohio Court of Appeals appears at App.35a, and is reported at *State v. Oswald*, 2018-Ohio-245, 2018 WL 542358 (Ohio App. 9th Dist. Jan. 24, 2018).

JURISDICTION

The judgment of the Sixth Circuit denying a Certificate of Appealability was entered on June 28, 2022. App.1a. This petition is timely filed pursuant to Supreme Court Rule 13.1. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1, Due Process Clause

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.R.C. § 2907.03(A)(3)

> (A) No person shall engage in sexual conduct with another, not the spouse of the offender, when . . .
>
> (3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

STATEMENT OF THE CASE

Petitioner, Frank Oswald, was charged with, *inter alia*, one (1) count of Rape in violation of O.R.C. § 2907 .02(A)(2); one (1) count of Sexual Battery in violation of O.R.C. § 2907.03(A)(2); and one (1) count of Sexual Battery in violation of O.R.C. § 2907.03(A)(3). After a bench trial, Petitioner was convicted of one count of Sexual Battery in violation of O.R.C. § 2907.03(A)(3) and acquitted of the remaining offenses. Petitioner was sentenced to a term of two (2) years' incarceration and required to register as a Tier III sex offender.

This Petition presents a novel issue of great importance: whether a conviction in a criminal proceeding deprives defendants of their constitutional right to due process of law by eliminating the requirement that the Government prove guilt beyond a reasonable doubt.

The issue presented by this case is also of great national significance as the Sixth Circuit Court of Appeals determined that Petitioner's appeal would not succeed and thus denied Petitioner's Certificate of Appealability in direct opposition to this Court's directives in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

I. Factual Background

This case arises from a sexual encounter and what constitutes "knowledge" to sustain a conviction for Sexual Battery in violation of Ohio Revised Code § 2907.03(A)(3). The Court of Appeals of Ohio, Ninth District, Summit County, and the United States District Court for the Northern District of Ohio both

improperly concluded that knowledge is established under a purposeful avoidance theory, despite the absence of proof that Petitioner believed there was a high probability that the other party was unaware the sexual conduct was occurring such that knowledge could reasonably be imputed or inferred. App.73a.

One evening, Petitioner and his cousin attended a wedding reception for a family member. App.36a. Petitioner's cousin came with his girlfriend, C.J., the accuser in this matter, and she socialized with Petitioner as the evening progressed. *Id*. When the reception ended, Petitioner, C.J., and her boyfriend (*i.e.*, Petitioner's cousin) drove together to a nearby hotel where several family members had rented rooms for the evening. *Id*. They then spent the next few hours visiting with other cousins, drinking, and occasionally smoking marijuana. *Id*. C.J. even took an Adderall to stay awake longer and gave one to Petitioner. App. 39a.

Eventually, all of the cousins returned to their own rooms, save for Petitioner, who needed a place to sleep. App.36a. Petitioner's cousin and C.J. agreed that Petitioner could stay in their room, but a fight between C.J. and her boyfriend led to her and Petitioner being alone together in the room. *Id*. According to both C.J. and Petitioner, they fell asleep in the hotel bed, fully dressed, holding hands, and facing in the same direction. *Id*. C.J. testified that she awoke some time later to find Petitioner having vaginal intercourse with her. App.40a. C.J. told Petitioner to stop, and he complied. *Id*. Later, C.J. asked Petitioner for a ride to her car. *Id*. While in transit, C.J. expressly directed Petitioner not to tell anyone about the sexual encounter that had transpired earlier that morning. App.45a.

That evening, however, C.J. told her boyfriend (Petitioner's cousin) that Petitioner had sex with her. App.24a. After speaking with her boyfriend, C.J. permitted him to report the incident to police. *Id.* Several days later, C.J. spoke with the police about the incident, and they arrested Petitioner. App.25a-26a.

Petitioner has steadfastly maintained that based on C.J.'s movements and the noises she was making, he believed she was awake and inviting him to have sex with her. App.44a. Thus, the major point of contention in this case concerned whether Petitioner knew C.J. was asleep and unaware that sexual conduct was occurring. App.45a-46a.

The State theorized that Petitioner knew C.J. was asleep based on his initial interview with a Detective —which was surreptitiously recorded. App.41a. In that interview, Petitioner admitted that both he and C.J. had fallen asleep before the sexual encounter. App.42a. Therefore, according to the State, Petitioner knew that C.J. submitted to the sexual conduct only because she was unaware that it was occurring. *Id.*

At trial, though, both the State and defense proffered testimony supporting Petitioner's (albeit mistaken) belief that C.J. was awake, namely: she invited Petitioner to lay in bed with her and cuddle; both parties fell asleep holding hands; Petitioner was behind C.J. in a "spooning" position during the sexual activity; the lights were off, and the shades drawn, making it impossible for Petitioner to *see* C.J.'s face and whether her eyes were open or closed. App.62a-63a.

Following trial, the court convicted Petitioner of one count of Sexual Battery in violation of R.C.

§ 2907.03(A)(3), which expressly provides that "[n]o person shall engage in sexual conduct with another . . . know[ing] that the other person submits because the other person is unaware that the act is being committed." *See* R.C. § 2907.03(A)(3). App.60a.

II. The Decision of the Court of Appeals of Ohio, Ninth District, Summit County

On appeal to the Court of Appeals of Ohio, Ninth District, Summit County, Petitioner argued that the State failed to present sufficient evidence to sustain a conviction under O.R.C. § 2907.03(A)(3), which deprived him of his constitutional right to due process of law, thereby violating his Fourteenth Amendment rights under the United States Constitution, as well as his comparable rights under the Ohio Constitution. App.37a. Petitioner maintained that the evidence was insufficient to substantiate that he knew the victim was asleep *at the time the sexual conduct occurred*. *Id*.

In deciding whether a defendant had knowledge of the accuser's inability to consent, the proper focus is on the defendant's awareness at the time the sexual conduct occurred. *See, e.g., State v. Doss*, 2008-Ohio-449, ¶ 23 (8th Dist. 2008) (considering defendant's knowledge of victim's mental condition at the time sexual conduct occurred); *State v. Freeman*, 2011-Ohio-2663, ¶ 23 (8th Dist. 2011) ("[t]he totality of facts and circumstances in existence *at the moment where resistance or consent is established* are all relevant in assessing the offender's knowledge of the victim's impairment") (emphasis added); *State v. Antoline*, 2003-Ohio-1130, ¶ 52 (9th Dist. 2003); *State v. Theodus*, 2012-Ohio-2064, ¶ 8 (8th Dist. 2012); *State v. Noernberg*, 2012-Ohio-2062 (8th Dist. 2012) (the fact

that victim vomited while performing oral sex on defendant was *insufficient to establish knowledge because it occurred after the sexual conduct had already commenced*) (emphasis added). Whether or not Petitioner learned after the sexual conduct occurred that C.J. had been asleep is irrelevant to a finding that he had knowledge that C.J. submitted because she was unaware that the act was being committed.

The Ninth District determined that a rational trier of fact "could have concluded that [Petitioner] believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted 'with a conscious purpose to avoid learning that fact.'" App.43a Specifically, the Ninth District relied on a remark Petitioner had made that he thought "maybe" the victim was awake, but he did nothing to confirm that and thus acted "with a conscious purpose to avoid learning the fact." *Id. citing* O.R.C. § 2901.22(B). Based on this erroneous standard, the Appellate Court upheld Petitioner's conviction of Sexual Battery.

Thereafter, Petitioner filed a Notice of Appeal and a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court declined to accept Petitioner's matter for review on May 23, 2018.

III. The Order of the United States District Court, Northern District of Ohio, Eastern Division

Petitioner filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 on May 23, 2019. Again, Petitioner argued that his right to due process was violated when his conviction was affirmed despite the absence of sufficient evidence on each essential element of the offense. App.59a. Both the trial court and the Ninth District disregarded any evidence of Petitioner's subjective belief and instead determined that knowledge could be established based solely upon a determination that the accuser was, in fact, unaware that the conduct was occurring. App.69a. This rationale contravenes the express statutory language defining "knowingly" and effectively transformed O.R.C. § 2907.03(A)(3) into a strict liability offense. *Id.* Further, this rationale seemingly imposes a duty on defendants to obtain affirmative consent before engaging in sexual activity regardless of the circumstances. *Id.* While such a proposition might be preferable or even ideal, it is not the law in Ohio. *Id.*

To the contrary, and as argued in the district court, whether C.J. was actually asleep at the time the sexual conduct occurred is immaterial to the determination of whether Petitioner had the requisite intent to commit Sexual Battery. App.70a. Thus, irrespective of any flawed reasoning underlying the courts' decisions, the fact remains that there was insufficient evidence presented to sustain Petitioner's conviction in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. *Id.*; s*ee, e.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979);

State v. Jenks, 61 Ohio St.3d 259 (Ohio 1991); U.S. Const. amend. XIV.

After the issues were fully briefed, Magistrate Greenberg issued his Report and Recommendation, which concluded that Petitioner should be denied habeas relief. App.11a. United States Magistrate Judge Greenberg correctly noted that "a habeas court must confine its review to determining whether the state court 'was unreasonable in its conclusion that a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial.'" App.29a. Magistrate Greenberg then proceeded to deny Petitioner relief on the grounds that "the Court is unable to say the state appellate court's decision 'was so insupportable as to fall below the threshold of bare rationality.'" App.31a *citing Coleman v. Johnson*, 566 U.S. 650, 656 (2012).

Petitioner reminded the Court that there was no direct evidence presented to prove that Petitioner knew that C.J. was asleep when the sexual conduct occurred and thus his conviction can only be sustained if the statute permits an inference or imputation of knowledge under the theory of purposeful avoidance. App.82a-83a. In order for this to be true, the evidence must clearly establish that the "person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." O.R.C. § 2901.22(B). App.83a. The statutory language evinces the legislature's intent to distinguish between the mere possibility that a particular fact or circumstance exists and the probability that it does. *Id*.

In recommending that the instant Petition be denied, the Magistrate primarily relies on statements

that Petitioner made—or failed to make—to law enforcement officers and/or in a text message conversation with C.J. App.26a-27a. The Magistrate found that although Petitioner thought C.J. was awake, he did not attempt to verify that fact. App.27a.

United States District Court, Northern District of Ohio, Eastern Division issued an Order overruling Petitioner's objection and denying the Petition on November 29, 2021. App.6a-7a.

IV. The Order of the United States Court of Appeals for the Sixth Circuit

On January 5, 2022, Petitioner asked the United States Court of Appeals for the Sixth Circuit to issue a certificate of appealability to address the due process violation claim. The Sixth Circuit ultimately denied the issuance of a certificate of appealability (COA). App.5a. While the Sixth Circuit accurately recites the standard in *Miller-El* whereby a petitioner need only demonstrate that jurists of reason could disagree, 537 U.S. at 327, it went on to evaluate the sufficiency of the evidence in light of the *mens rea* required under O.R.C. § 2907.03(A)(3). App.3a-5a.

After considering the evidence and determining that a reasonable trier of fact could have interpreted it to find that Petitioner had the requisite *mens rea*, the Sixth Circuit concluded that it had to deny the COA because "reasonable jurists could not disagree with the district court's conclusion that the Ohio Court of Appeals reasonably determined that a rational juror could have found the element of intent based on this evidence." App.5a.

Petitioner maintains that the Sixth Circuit's role in reviewing a COA was not to determine whether or

not the evidence supported the verdict; the Court should only have decided whether or not Petitioner had a debatable constitutional claim regarding his due process rights. *Miller-El*, 537 U.S. 322, 336. Petitioner now seeks a writ of certiorari from this Honorable Court to correct the error of the Sixth Circuit. Specifically, the relief requested herein seeks to remand the matter to the Sixth Circuit, directing it to consider Petitioner's application for a certificate of appealability under the correct standard.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT INCORRECTLY CONSIDERED THE LEGAL AND FACTUAL BASES OF PETITIONER'S CLAIM IN REFUSING TO ISSUE A CERTIFICATE OF APPEALABILITY CONTRARY TO THIS COURT'S CLEARLY ESTABLISHED PRECEDENT

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in habeas proceeding in which the detention complained of arises out of process issued by a state court. *See* 28 U.S.C. § 2253(c)(1)(A); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). A certificate of appealability may issue only if the applicant makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). Under this standard, a petitioner "need not show that he should prevail on the merits," *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983); rather, he need only to show that reasonable jurists could debate whether the petition should have been resolved in a

different manner or that the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 336, *quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("Where 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."). A certificate should issue if the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct" in any procedural ruling. *See Slack*, 529 U.S. at 478. It is not necessary to establish that the appeal will succeed. *See Miller-El*, 537 U.S. at 338.

In resolving this issue, the court must conduct an overview of the claims in the habeas petition, generally assess their merits, and determine whether the resolution was debatable among jurists of reason. *Id*. An applicant must show more than an absence of frivolity or the existence of good faith; however, it is not necessary to establish that the appeal will succeed. *Id*. As this Court has explained, "the issuance of a certificate of probable cause (the predecessor to a certificate of appealability) generally should indicate that an appeal is not legally frivolous," whereas "a court of appeal should be confident that petitioner's claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous." *Barefoot*, 463 U.S. at 894.

Although Petitioner's Fifth Amendment claim is not "legally frivolous" and the issues raised in his petition concern the most basic and fundamental constitutional rights upon which this country was founded, the United States Court of Appeals for the Sixth Circuit denied the issuance of a certificate of appealability (COA). While the Sixth Circuit accurately recited the standard in *Miller-El* whereby a petitioner need only demonstrate that jurists of reason could disagree, 537 U.S. at 327, it went on to evaluate the sufficiency of the evidence in light of the *mens rea* required under O.R.C. § 2907.03(A)(3). App.3a-5a.

To determine whether a Petitioner has a debatable constitutional claim, this Court stated:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. *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 sidesteps 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* 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."

Miller-El, 537 U.S. at 336-37. "Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*. at 342.

Despite this Court's clear guidance, the Sixth Circuit denied Petitioner's COA in direct contravention to precedent: it decided Petitioner's claim on the merits and then justified its denial of his COA based on those merits. Rather than determining whether reasonable jurists could disagree on Petitioner's constitutional claims, the Sixth Circuit evaluated Petitioner's constitutional claim in light of 28 U.S.C. § 2254(d), which reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). But "[s]ubsection (d)(2) . . . applies to the granting of habeas relief *rather than to the granting of a COA*." (Emphasis added) *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003). Under *Miller-El*, the Sixth Circuit was prohibited from evaluating Petitioner's application for COA by evaluating the sufficiency of the evidence, yet that is it exactly what it did—evaluated Petitioner's application for COA as though it were an appeal.

The Sixth Circuit determined that in viewing the evidence in the light most favorable to the prosecution, "reasonable jurists could not disagree with the district court's conclusion that the Ohio Court of Appeals reasonably determined that a rational juror could have found the element of intent based on this evidence." App.5a. But it was not for the Sixth Circuit to decide the merits of Petitioner's appeal; Petitioner had only sought a Certificate of Appealability to bring his appeal properly before the Circuit. *See Miller-El*, 537 U.S. at 342 ("At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. The Court of Appeals should have inquired whether a 'substantial showing of the

denial of a constitutional right' had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA.").

The question properly before the Sixth Circuit was whether "reasonable jurists" could deem the issues related to the sufficiency of the evidence "debatable," and "deserv[ing] encouragement to proceed further." *Slack*, 529 U.S. at 484. As Petitioner has demonstrated in both his state appeal and federal habeas petition, reasonable jurists could find the evidence debatable. The Sixth Circuit only needed to determine whether Petitioner had a debatable constitutional claim regarding his due process rights. He did.

Petitioner demonstrated that the evidence was not sufficient to uphold a conviction for Sexual Battery in violation of O.R.C. § 2907.03(A)(3) and reasonable jurists could disagree with the district court in finding that there was. To that end, Petitioner contends that the State failed to present sufficient evidence that he acted with the requisite mental state of "knowingly" to sustain his conviction. More specifically, Petitioner argues that the State failed to prove that he knew, *at the time the sexual conduct occurred*, that C.J. was unable to consent because she was unaware that it was occurring.

Under Ohio law, "knowledge" can be established either through direct or circumstantial evidence. App.73a. As to the latter, Ohio Revised Code § 2901 .22(B) provides, in pertinent part, that "[a] person has knowledge of circumstances when the person is aware that such circumstances *probably* exist." (Emphasis added). Moreover, "[w]hen knowledge of the existence of a particular fact is an element of an offense, such

knowledge is established if a person subjectively believes that there is a *high probability* of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." (Emphasis added) O.R.C. § 2901.22(B).

Here, the uncontroverted evidence demonstrated that the lights were off in the hotel room and the shades were drawn. App.90a. Petitioner was unable to *see* C.J.'s face because he was "spooning" her. *Id.* Petitioner awoke to C.J. pressing her body against him and making what he perceived to be amorous noises. *Id.* Although he could not see her face, Petitioner believed that C.J. was awake and fully aware of what was occurring. Petitioner eventually began engaging in sexual intercourse with C.J. *Id.* Shortly after the conduct commenced, C.J. turned to face Petitioner and told him that he did not have her permission. *Id.* By all accounts, the sexual activity immediately stopped at that point in time. *Id.* 90a-91a.

Petitioner and C.J. then discussed what had occurred. App.91a. Importantly, C.J. never accused Petitioner of knowing that she was asleep prior to or during the sexual intercourse. *Id.* And, although he expressed remorse for the entire incident, Petitioner never indicated that he knew or believed that C.J. was asleep when the sexual conduct commenced. *Id.* C.J. stated that they should pretend that the incident never happened and directed Petitioner not to mention it to anyone else. *Id.* Petitioner drove C.J. to her vehicle, where the two eventually parted ways amicably. *Id.*

The undisputed testimony concerning the incident —as attested by the accuser—supported Petitioner's (albeit mistaken) belief that C.J. was awake and consented to the sexual conduct. App.92a. There was

nothing to suggest that Petitioner believed there was a high probability that C.J. was sleep at the time the sexual conduct commenced. *Id*. Knowledge also could not be inferred under the circumstances of this case.

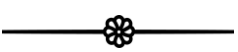
Despite the dearth of evidence concerning Petitioner's awareness, the Ninth District affirmed the conviction because "[a]lthough [Petitioner] . . . thought . . . the victim was awake, he made no attempt to verify that fact." *Id*. A rational trier of fact, according to the Ninth District, "could have concluded that he believed there was a high probability that the victim was asleep or otherwise unconscious, but failed to inquire or acted 'with a conscious purpose to avoid learning that fact.'" *Id*. The district court agreed, finding that "a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." App.26a.

The courts' decisions are predicated on the mistaken belief that knowledge could be imputed under the purposeful avoidance theory. However, the statutory language makes clear that the State cannot prove a defendant's knowledge of a particular fact under a purposeful avoidance theory unless the record demonstrates that the defendant believed there was *a high probability* that said fact actually existed. *See* O.R.C. § 2901.22(B); *see also State v. Hover*, 2005-Ohio-5897, ¶ 29-31 (Ohio App. 12th Dist. 2005) (trial court committed plain error by improperly instructing the jury that a defendant acts "knowingly" when there existed at the time in the mind of the defendant an awareness of the *possibility*, as opposed to probability, of a certain fact). While Petitioner may have recognized that it was possible C.J. was asleep when the sexual conduct commenced, such a post-hoc acknowledgment

is insufficient to constitute knowledge under the circumstances. Even if it suggests some uncertainty, it certainly does not support a finding that Petitioner acted despite being aware of a *high probability* that C.J. was asleep or otherwise unconscious.

There is nothing in the record to establish that Petitioner believed there was a "high probability" that C.J. was asleep such that his failure to further inquire into the subject would support the conclusion that he acted with a "conscious purpose to avoid learning the fact." At best, Petitioner's statements suggest that he was aware of the *possibility* that C.J. was not awake. Whether his belief was, in fact, accurate is not *ipso facto* determinative of the ultimate issue. Likewise, acknowledging the possibility that his belief (*i.e.,* that C.J. was awake) might have been incorrect does not provide justification for inferring knowledge under a theory of purposeful avoidance. Neither the express language of the statute nor precedent case law supports such a proposition.

Regardless, Petitioner sought a COA based on *Miller-El*: there is an underlying debate to his constitutional claim. It was not for the Sixth Circuit to resolve that debate on its merits in deciding whether to grant Petitioner's COA. *Miller-El,* 537 U.S. at 336-37 ("The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. . . . When a court of appeals sidesteps 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.").



CONCLUSION

The bedrock of the criminal justice system is the assurance that no defendant will be deprived of his rights to life or liberty without due process of law, which necessitates that all convictions be sustained by proof of every essential element of an offense beyond a reasonable doubt. *See, e.g., In re Winship*, 397 U.S. 358 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Fiore v. White*, 531 U.S. 225, 228-229 (2001); *see also* U.S. Const. amend. XIV. There is a compelling societal interest in safeguarding the protections afforded to all citizens by the United States Constitution.

Permitting Circuit Courts to deny an application for a certificate of appealability based upon a unilateral and premature determination of the underlying merits is akin to allowing said courts to decide an appeal without jurisdiction. *Miller-El,* 537 U.S. at 337.

Respectfully, Petitioner requests that a writ of *Certiorari* be issued to the United States Court of Appeals for the Sixth Circuit to issue a certificate of appealability to address the due process violation claim.

Respectfully submitted,

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