No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JEROD RODRIGUEZ,
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 prejudice prong set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is established if a petitioner/defendant can demonstrate that a mistrial would have been granted by the trial court had defense counsel properly moved for a mistrial (i.e., the result of the proceeding would have been different, because the trial would have ended in a mistrial rather than a guilty verdict).

2. Whether the court of appeals in this case 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.

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The Petitioner, JEROD RODRIGUEZ, 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 28, 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 2005, the Petitioner was convicted (following a jury trial) of robbery and burglary. The state trial court sentenced the Petitioner to life imprisonment (as a prison releasee reoffender). On direct appeal, the Florida Fourth District Court of Appeal affirmed the Petitioner's convictions and sentences. *See Rodriguez v. State*, 916 So. 2d 807 (Fla. 4th DCA 2005).

Following the direct appeal, the Petitioner timely filed a state postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. In the state postconviction motion, the Petitioner raised several grounds – one of which is the subject of the instant proceeding: defense counsel rendered ineffective assistance of counsel by failing to object to the violation of the Petitioner's constitutional right of confrontation.

As explained below, this case has a unique procedural history concerning the evidentiary hearing that was *never held* in state court. On May 27, 2016, the state postconviction court entered an "Order Dismissing in Part, Denying in Part, and Granting Evidentiary Hearing in Part on Defendant's Second Amended Rule 3.850 Motion; and Setting Status Hearing." (A-69). In the order, the state postconviction court granted an evidentiary hearing on the claim that is the subject of the instant proceeding. At the conclusion of the order, the state postconviction court set a status conference for August 16, 2016.

Apparently the status hearing occurred on August 16, 2016, but undersigned counsel was not present at the hearing because undersigned counsel had *not* been

served with a copy of the May 27, 2016, order (and therefore undersigned counsel was unaware of the August 16, 2016, status hearing). When undersigned counsel learned of the May 27, 2016, order and the August 16, 2016, status hearing, undersigned counsel immediately filed (on August 18, 2016) a "Motion to Reschedule Status Hearing," explaining:

> 1. On August 16, 2016, undersigned counsel's office was contacted by the Defendant's family regarding the status of this case. Undersigned counsel was out of his office on August 16, 2016. When undersigned counsel returned to his office on August 17, 2016, he was given the message and he asked his office to print out the docket. Upon reviewing the docket, undersigned counsel saw that an order was issued on May 27, 2016, setting this case for a status hearing on August 16, 2016, at 9:15 a.m. Prior to August 17, 2016, undersigned counsel was not aware of the August 16, 2016, status hearing and undersigned counsel had not previously received a copy of the May 27, 2016, order in the mail.[2]
>
> 2. Undersigned counsel apologizes to the Court that he was unaware of the August 16, 2016, status hearing. Undersigned counsel respectfully requests the Court to reschedule the status hearing. Undersigned counsel's office will contact the Court's judicial assistant and the State to schedule a new date for the status hearing.
>
> WHEREFORE, the Defendant prays the Court to reschedule the status hearing in this case.

(Footnote in the original). After undersigned counsel filed the "Motion to Reschedule Status Hearing," undersigned counsel's assistant contacted the state postconviction

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[2] In order to ensure that no documents delivered by U.S. mail to undersigned counsel's office are lost, undersigned counsel's office manager scans the mail every day and she sends a daily email to all office personnel detailing the items that were received by mail on that particular day. After reviewing the docket in this case on August 17, 2016, undersigned counsel's office searched both the scans and the May and June emails from the office manager and the May 27, 2016, order was not previously scanned and there is no email from the office manager indicating that the May 27, 2016, order had been received. Undersigned counsel's office has now obtained a copy of the order (both from the Court's judicial assistant and from Assistant State Attorney Jeffrey Hendriks).

court's judicial assistant via email (with a copy to the prosecutor) to facilitate rescheduling the status hearing,[3] and undersigned counsel's assistant received the following email from the judicial assistant on August 29, 2016:

> I received your phone message, regarding your evidentiary hearing request, Judge Levin has informed me to let you know that he is aware of your request and will be setting the matter for a hearing when and if he deems it appropriate. He further understands that he did issue an order previously which stated a hearing would be necessary, but is reviewing that order and the court file to determine what action needs to be completed next. I will contact you when Judge Levin has told me further directions or I will forward you any additional Order he may enter. The evidentiary hearing will not be set at this time. Thank you for your understanding.

Subsequently, undersigned counsel's assistant checked the online docket for this case and discovered that the postconviction court had issued an order on September 2, 2016, summarily denying the Petitioner's state postconviction motion. In the September 2, 2016, order, the state postconviction court stated the following:

> [T]his Court has reconsidered its findings and will deny grounds 1, 2, 4, 5, 6, 7, 9, 10, 11, and 14 based on the responses provided by the State.

(A-76). Again, undersigned counsel did *not* receive a copy of the September 2, 2016, order.[4] *Notably*, the state postconviction record on appeal contains a "return mail" envelope that establishes that the clerk of the state postconviction court had mailed

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[3] It is undersigned counsel's understanding that the only purpose of the status hearing was to pick a date for the evidentiary hearing.

[4] Undersigned counsel notes that neither the May 27, 2016, order nor the September 2, 2016, order were e-served on undersigned counsel.

the September 2, 2016, order to undersigned counsel's *old address*[5] (and presumably the May 27, 2016, order was also mailed to undersigned counsel's old address). Yet despite this procedural history, on appeal, the Florida Fourth District Court of Appeal *per curiam* affirmed the denial of the Petitioner's state postconviction motion.

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner argued the same claims that he previously presented in his state postconviction motion (including the claim that is the subject of the instant proceeding). After the Petitioner filed his § 2254 petition, the magistrate judge directed the Respondent to file an answer. (A-37). The Respondent subsequently filed an answer (A-40), but in the answer, the Respondent did *not* respond to the merits of any of the Petitioner's § 2254 claims – rather, the Respondent argued only that the Petitioner's § 2254 petition was untimely. The magistrate judge subsequently rejected the Respondent's argument and concluded that the Petitioner's § 2254 petition was timely filed. (A-13-15).[6] However, rather than directing the Respondent to respond to the merits of the Petitioner's § 2254 petition, the magistrate judge proceeded to

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[5] Undersigned counsel's current address is "Raymond Diehl Road," which is the address that appears on the certificates of service for the May 27, 2016, order and the September 2, 2016, order. However, the envelope utilized by the clerk's office of the state postconviction court lists undersigned counsel's address as "East Jefferson Street."

[6] After the Respondent filed his answer, the Petitioner filed a reply and thoroughly explained why his § 2254 petition was timely filed pursuant to *Green v. Sec'y, Fla. Dep't of Corr.*, 877 F.3d 1244 (11th Cir. 2017). (A-53).

consider and rule on the merits of the § 2254 petition[7] (and the magistrate judge recommended that the Petitioner's § 2254 petition be denied). (A-5). Thereafter, on August 28, 2020, the district court adopted the report and recommendation. (A-4).

Prior to denying the Petitioner's § 2254 petition, the district court did *not* conduct an evidentiary hearing. Thus, despite the state court initially ordering an evidentiary hearing, *no evidentiary hearing has ever been* held on the postconviction claim that is the subject of the instant proceeding (in either state court or federal court).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On February 28, 2022, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim. (A-3).

[7] Rule 5(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he answer *must* address the allegations in the petition." (emphasis added). Pursuant to Rule 5(b), once the magistrate judge rejected the Respondent's argument that the § 2254 petition should be dismissed as untimely, the magistrate judge should have directed the Respondent to file an answer addressing the allegations in the Petitioner's § 2254 petition.

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 prejudice prong set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), is established if a petitioner/defendant can demonstrate that a mistrial would have been granted by the trial court had defense counsel properly moved for a mistrial (i.e., the result of the proceeding would have been different, because the trial would have ended in a mistrial rather than a guilty verdict).

In his § 2254 petition (and in his state postconviction motion), the Petitioner alleged that defense counsel rendered ineffective assistance by failing to object to the violation of his constitutional right of confrontation. Specifically, the Petitioner explained that during the trial, the State played for the jury a recording of a telephone conversation during which a witness stated that the Petitioner's girlfriend (Kristy Ferguson) had stated that she believed the Petitioner committed the crimes in question:

> The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Article I, section 16, of the Florida Constitution similarly provides that "[i]n all criminal prosecutions, the accused shall . . . have the right to . . . confront at trial adverse witnesses . . . .". In *Crawford v. Washington*, 541 U.S. 36, 51-69 (2004), the United States Supreme Court held that when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute "testimonial hearsay," the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant. In Defendant

> Rodriguez' case, *the prosecution played for the jury a tape of a telephone conversation between Defendant Rodriguez and Larry Hopkins. During the tape, Mr. Hopkins stated that Kristy Ferguson told him that Ms. Ferguson believed that Defendant Rodriguez participated in the offenses and took Mr. Hopkins' watch*: "[S]he told me that she thought you took it." (T-349).[8] In closing argument, the prosecutor relied upon statements by Ms. Ferguson and Defendant Rodriguez' mother (statements that were also introduced by playing tapes for the jury). (T-776-77). Neither Ms. Ferguson nor Defendant Rodriguez' mother testified at trial. As a result, Defendant Rodriguez was denied his right to cross-examine and confront either of these witnesses. The State did not establish that either of these witnesses were unavailable or that Defendant Rodriguez had a prior opportunity to cross-examine either witness. Defense counsel should have objected to all hearsay statements made by Ms. Ferguson and Defendant Rodriguez' mother that were introduced by the State during the trial. Defense counsel should have objected on hearsay grounds and on *Crawford* grounds.

(A-77-79) (footnote in the original). In his second amended state postconviction motion, the Petitioner added:

> The improper hearsay statements affected the outcome of the trial – it was highly prejudicial for the jury to hear that Ms. Ferguson allegedly stated that she thought that the Defendant engaged in the criminal conduct – especially since the prosecutor relied on Ms. Ferguson's alleged statement during closing arguments. There was no evidence linking the Defendant to the alleged offenses other than Mr. Hopkins' unreliable voice identification. But by allowing the jury to hear Ms. Ferguson's hearsay statement, the State was able to inform the jury that the Defendant's own girlfriend believed that he committed the offenses. The Defendant was not afforded the opportunity to cross-examine or confront Ms. Ferguson regarding this alleged statement. Pursuant to *Crawford*, there is a reasonable probability that a motion for

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[8] Ms. Ferguson's alleged statement was highly prejudicial. There was no evidence linking Defendant Rodriguez to the alleged offenses, other than the victims' unreliable voice identifications. But by allowing the jury to hear Ms. Ferguson's hearsay statement, the State was able to inform the jury that Defendant Rodriguez' own girlfriend believed that he committed the offenses. Defendant Rodriguez was not afforded the opportunity to cross-examine or confront Ms. Ferguson regarding this alleged statement.

> mistrial would have been granted had defense counsel properly moved for a mistrial.

(A-82-84) (footnote omitted).

When the state postconviction court initially ruled on this claim, the state postconviction court *agreed* that the Petitioner was entitled to an evidentiary hearing on this claim:

> In ground 10, the Defendant claims that counsel was ineffective for failing to object to hearsay statements attributed to Kristy Ferguson and the Defendant's mother contained in a taped telephone conversation between victim Larry Hopkins and the Defendant. The State argues that failure to object to the tape may have been a defense trial strategy. Consequently, the court finds that an evidentiary hearing is required to determine the reasonableness of this trial strategy.

(A-72). However, in the state postconviction court's September 2, 2016, order, the state postconviction court stated that it "ha[d] reconsidered its [previous] finding[] [in the May 27, 2016, order] and will deny [this] ground[] . . . based on the responses provided by the State." (A-76). In its initial response to this claim, the State asserted that "the exchange is admissible because of the defendant's reaction to the statement." (A-80-81). Contrary to the State's assertion, Ms. Ferguson's hearsay statement was not admissible "because of the defendant's reaction to the statement" – as this is *not* a valid exception to the hearsay rule.[9] As explained in the amended state postconviction motion, the Petitioner was denied his right to cross-examine and confront Ms. Ferguson (as she did not testify at trial). The State did not establish that Ms.

[9] In the report and recommendation, the magistrate judge denied this claim solely on the basis of prejudice – meaning that the magistrate judge did *not* find that Ms. Ferguson's statement was admissible as an exception to the hearsay rule. (A-30).

Ferguson was unavailable or that the Petitioner had a prior opportunity to cross-examine her. Thus, defense counsel should have objected to the hearsay statement made by Ms. Ferguson (because the introduction of the statement by the State at trial violated the Petitioner's constitutional right of confrontation). *It was highly prejudicial for the jury to hear that Ms. Ferguson allegedly stated that she thought that the Petitioner engaged in the criminal conduct* – especially since the prosecutor relied on Ms. Ferguson's alleged statement *during closing arguments.*

Next, in its second response to this claim, the State argued that defense counsel had a strategic reason for failing to object to the hearsay. (A-85-86) ("[W]hile the defendant feels that it may be highly prejudicial for a jury to have heard what Mr. Hopkins said in a jail call, common sense may dictate that the defendant (or a defense attorney) may have wanted a jury to hear the defendant deny any and all accusations, numerous times."). "A trial court cannot deny a motion for post-conviction relief by finding that defense counsel's decision was tactical or trial strategy without first holding an evidentiary hearing." *Button v. State*, 941 So. 2d 531, 533 (Fla. 4th DCA 2006) (citation omitted). As explained by the Sixth Circuit Court of Appeals in *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000), without conducting an evidentiary hearing, it is impossible to determine whether counsel's actions were strategic:

> Barnes argues that he was denied effective assistance of counsel by his trial attorney's failure to investigate or call a medical witness to establish Barnes's inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes's medical condition, and why he failed to contact Dr. Waring. *Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's*

> *failure to investigate and call Dr. Waring was sound trial strategy*, *see Strickland* [*v. Washington*], 466 U.S. [668,] 690-691 [(1984)] ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."), or was constitutionally deficient performance. *See id.* at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. *Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of Strickland.*

(Emphasis added). This point concerning the need for an evidentiary hearing to determine whether defense counsel's actions were strategic *was acknowledged* by the state postconviction court in the May 27, 2016, order. (A-72) ("The State argues that failure to object to the tape may have been a defense trial strategy. Consequently, the court finds that an evidentiary hearing is required to determine the reasonableness of this trial strategy."). By arguing that defense counsel's actions were "strategic," the State has conceded that an evidentiary hearing is required on this claim (as the state postconviction court could not make any conclusion as to whether defense counsel's actions were strategic without first holding an evidentiary hearing). *See Barnes.*

Thus, for all of the reasons set forth above, defense counsel was ineffective for failing to object to the violation of the Petitioner's constitutional right of confrontation. Counsel's failure fell below the applicable standard of performance. 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.

The state courts' rulings in this case were contrary to and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and the Petitioner's Sixth Amendment right to the effective assistance of counsel. Additionally, the state courts' rulings were based on an unreasonable determination of the facts in light of the evidence contained in the state court record.

In the report and recommendation, the magistrate judge denied this claim solely on the basis of prejudice (i.e., the magistrate judge did not dispute that defense counsel was ineffective for failing to object to Ms. Ferguson's improper hearsay statement). (A-30). Ultimately, the magistrate judge concluded that the Petitioner cannot establish prejudice by arguing that but for defense counsel's ineffectiveness, the trial would have resulted in a mistrial:

> Petitioner speculates that the trial court would have granted a mistrial if trial counsel had moved for one (DE 1 at 33). Such speculation does not, however, establish trial counsel's deficient performance under *Strickland*.

(A-30). *Contrary to the magistrate judge's conclusion*, in *United States v. Ramsey*, 323 F. Supp. 2d 27 (D.D.C. 2004), the district court (the Honorable Paul L. Friedman) held that the *Strickland* prejudice prong is established if a defendant can demonstrate that a mistrial would have been granted by the trial court had defense counsel properly moved for a mistrial.[10] In the instant case, there is a reasonable probability that the

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[10] In *Ramsey*, Judge Friedman stated:

> Mr. Ramsey has shown prejudice by demonstrating a reasonable probability that a mistrial would have been requested if he had been

trial court would have granted a mistrial if one had been properly requested by defense counsel.[11] To the extent that there is any factual dispute regarding this matter, the district court (or the magistrate judge) should have held an evidentiary hearing on the issue.

In light of the foregoing, the Court should grant this petition to address the first question presented in this case. The issue of whether a mistrial satisfies the *Strickland* prejudice prong has the potential to impact numerous criminal cases nationwide.

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

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> represented by competent counsel and by demonstrating a reasonable probability that the Court would have granted a mistrial if one were requested.

Ramsey, 323 F. Supp. 2d at 44.

[11] Once the jury heard Ms. Ferguson's improper hearsay statement that she thought the Petitioner had engaged in the criminal conduct at issue in this case, any reasonable attorney would have requested a mistrial (as no curative instruction could cure the prejudice of this damning evidence).

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 his right of confrontation) and (2) the district court's resolution of this claim is "debatable amongst jurists of reason." This is especially true given that (1) the Petitioner has not been afforded any evidentiary hearing on his postconviction claim and (2) the magistrate judge's conclusion that a mistrial does not satisfy the *Strickland* prejudice prong is contrary to Judge Friedman's conclusion in *Ramsey*. 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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