Case No. 22-5024

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2022

JEROD RODRIGUEZ,

Petitioner,

v.

RICKY D. DIXON, as Secretary of the DEPARTMENT OF CORRECTIONS, State of Florida,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED (Combined and Restated)

Whether the Eleventh Circuit should have issued a certificate of appealability where Petitioner failed to demonstrate a substantial showing of the denial of a constitutional right?

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DECISION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is an unpublished denial of a certificate of appealability ("COA") issued by the Eleventh Circuit Court of Appeals on February 28, 2022.

JURISDICTION

Petitioner seeks certiorari review of the order of the Eleventh Circuit Court of Appeals denying his request for a COA.

In order to obtain review, 28 U.S.C. § 1254(1) requires two things. First, Petitioner must show that he is seeking review of a case in the court of appeals. In Hohn v. U.S., 524 U.S. 236 (1998), this Court overruled long standing precedent and held that a proceeding which only involved the denial of a COA was still the equivalent of a "case" in the Court of Appeals. Thus, Petitioner meets this test.

Petitioner must also show that he presented the questions raised in his petition to the Eleventh Circuit and that court passed on the questions raised in his petition. Campbell v. Louisiana, 523 U.S. 392 (1998); City of Springfield v. Kibbe, 480 U.S. 257 (1987). Here, Petitioner presented his claim in his request for a COA. Petitioner's claim was rejected by the Circuit Court of Appeal when denying the certificate "because he has failed to make a substantial showing of the denial of a constitutional right." Therefore, Petitioner's issue was ruled upon and this Court has

jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2253(c)(2) of Title 28 of the United States Code provides that "A certificate of appelability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Trial Court.

On July 10, 2003, Petitioner was charged by Information with robbery with a firearm while wearing a mask (Count 1), and burglary of a dwelling with an assault while armed and wearing a mask (Count 2) (DE#9: Exh. 2). Petitioner pled not guilty and demanded a jury trial.

Petitioner was convicted as charged on both counts (DE# 9: Exhs. 9 and 11). A scoresheet prepared for Petitioner's sentencing showed Petitioner had prior convictions for robbery with a weapon, grand theft of a motor vehicle, burglary and petite theft (DE# 9: Exh. 10 at p. 1). Petitioner was sentenced to two concurrent life sentences as a prison releasee reoffender (DE# 9: Exhs. 10 and 12).

2. Direct Appeal.

Petitioner filed a timely notice of appeal of his convictions and sentences to the Fourth District Court of Appeal of the State of Florida (DE# 9: Exh. 13). Petitioner

raised one (1) issue on appeal: whether the trial court conducted an adequate Nelson[1] inquiry (DE# 9: Exhs. 14 and 15).

On December 7, 2005, the Fourth District affirmed Petitioner's conviction and sentence per curiam, without a written opinion. Rodriguez v. State, 916 So. 2d 807 (Fla. 4th DCA 2005) (table) (DE# 9: Exh. 16). Mandate issued on December 23, 2005 (DE# 9: Exh. 17).

3. Proceedings on Petitioner's Motion for Postconviction Relief.

On March 6, 2007, Petitioner, through counsel, filed a "shell" motion for postconviction relief, pursuant to Fla. R. Crim. P. 3.850 (DE# 9: Exh. 18). The motion contained ten (10) grounds for relief (DE# 9: Exh. 18). On December 13, 2007, over 9 months after the filing of the first motion for postconviction relief, Petitioner finally filed his "amended" motion for postconviction relief (DE# 9: Exh. 26). Whereas the original motion only contained 10 grounds, Petitioner's "amended" motion contained 14 grounds (DE# 9: Exh. 26). Specifically, in Ground 10, Petitioner argued that trial counsel was ineffective for failing to object to hearsay statements attributed to Christy Ferguson (Petitioner's girlfriend) and Petitioner's

[1]Under Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973), once a defendant requests the trial court to discharge his court-appointed attorney because the attorney's representation is allegedly ineffective, the trial court is required to make an independent inquiry into whether there is reasonable cause to believe that the attorney is not providing effective assistance to the defendant.

mother contained in a taped telephone conversation between the victim, Larry Hopkins, and Petitioner (DE# 9: Exh. 26 at pp. 73-74).

The State provided a comprehensive response, addressing each of Petitioner's claims (DE# 9: Exh. 28). With regard to Ground 10, the State put the statement in context and argued as follows:

> 54. The defendant claims his attorney should have objected to audio recordings that included statements of people that did not testify.
>
> 55. First he complains that a portion of a jail phone call included a statement from the victim that Kristy Ferguson said she thought the defendant took it.
>
> 56. The entire exchange was the following:
>
> > MR. RODRIGUEZ: Has - has Christy talked to you about this?
> >
> > MR. HOPKINS: Yeah, she told me that she thought you took it.
> >
> > MR. RODRIGUEZ: No, she- you're lying. No, she never said that. Christy never said that. I know she never said that. She told me that she believes I didn't do it and I didn't do it, Larry and Christy believes I didn't do it. Christy knows I'm not going (indiscernible) like that. At first she started wondering - she started thinking, then we started talking and then she told me she believes I wouldn't do nothing-
>
> Transcript 349-350.

57. The exchange is admissible because of the defendant's reaction to the statement. In McWatters v. State the Florida Supreme Court explained:

> The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In Crawford v. Washington, the Supreme Court held that testimonial hearsay that is introduced against a defendant violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior meaningful opportunity to cross-examine that witness. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 60 n. 9, 124 S.Ct. 1354 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985)).

36 So. 3d 613, 637-38 (Fla 2010).

58. The defendant's reaction was not, "I didn't do it" or "You loaned me that watch" or any of the various other defenses the defendant tried during the course of this case. Therefore the reaction was relevant and appropriately admitted. See also, Jackson v. State, 18 So.3d 1016, 1031-32 (Fla. 2009), Worden v. State, 603 So.2d 581,583 (Fla. 2d DCA 1992), and Eugene v. State, 53 So. 3d 1104, 1112 (Fla. 4th DCA 2011).

59. The defendant further complains of other statements made during phone calls but fails to specify which statements or calls. All of the jail calls introduced at the trial were appropriately admitted to show the defendant's manipulation or his attempts to cover his

crime or return the property.

60. The second prong of Strickland has not been met because there has been no showing that the sentence "Yeah, she told me that she thought you took it," if improper, changed the outcome of the trial. In fact, the defendant's paragraph long explanation of Ms. Ferguson's support for him surely outweighed any impact the complained of statement had. Also, without other specific incidents to address, there can be no showing that any deficiency affected the outcome of the trial when compared to the totality of the evidence.

61. Further, claims which were or could have been raised on direct appeal are procedurally barred in a rule 3.850 motion. See Roberts v. State, 568 So.2d 1255, 1257-58 (Fla.1990) and Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla.1993) ("Postconviction motions are not to be used as second appeals.").

62. This claim should be denied.

(DE# 9: Exh. 28 at pp. 110-11).

The trial court found claims 3-6 and 8-13 of the "amended" motion were insufficiently pled (DE# 9: Exh. 31). The trial court dismissed those claims, giving Petitioner an opportunity to refile the claims in a sufficiently pled supplemental motion (DE# 9: Exh. 31 at p. 3).

Pursuant to the trial court's order, Petitioner filed an amendment to his "amended" postconviction motion which only addressed the insufficiently pled claims in compliance with the trial court's order (DE# 9: Exh. 32). In the amendment, Petitioner voluntarily dismissed two of his claims (claims 3 and 13) (DE# 9: Exh. 32

at pp. 1, 9).

Again, the State provided a comprehensive response to Petitioner's claims (DE# 9: Exh. 33). As to Ground 10, the State provided as follows:

> 22. With regards to Ground 10, the State will be relying on its Response from June 19, 2014.
>
> 23. The defendant, in his amended motion, simply explains that it was highly prejudicial for a jury to hear that Ms. Ferguson [. . .] stated that she thought the defendant committed the crime.
>
> 24. What is blindly forgotten in this amended motion as the 72 words spoken by the defendant after being confronted with the statement from Mr. Hopkins to the defendant:
>
> > MR. HOPKINS: Yeah, she [Ms. Ferguson] told me she thought you took it.
>
> 25. When the defendant hears this statement, he immediately retorts by saying, in some way shape or form, that he in fact did not commit this crime (emphasis added). In no less than eight different sentences, the defendant explains his innocence when being confronted with the above-referenced statement, and the jury heard this as well.
>
> 26. The State is making mention of this in particular because while 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. All of this without the threat of having the defendant cross-examined and the number of the defendant's prior felony convictions displayed for a jury.
>
> 27. For the above reasons, coupled with the State's initial Response,

the State is requesting this Ground be denied.

(DE# 9: Exh. 33 at pp. 4-5).

The trial court issued an order in which it denied Petitioner any relief on claims 8 and 12 (DE# 9: Exh. 34 at pp. 4, 5). The trial court granted Petitioner an evidentiary hearing on claims 1, 2, 4, 5, 6, 7, 9, 10 and 11 (DE# 9: Exh. 34 at pp. 3-5). Regarding Ground 10, the trial court determined that because the State had argued, in part, that the failure to object may have been part of a trial strategy, then a hearing was required on that claim (DE# 9: Exh. 34 at p. 4). The trial court reserved ruling on claim 14 (DE# 9: Exh. 34 at p. 5).

The trial court subsequently sua sponte reconsidered its prior order granting Petitioner an evidentiary hearing (DE# 9: Exh. 35). The trial court summarily denied Petitioner's remaining claims for the reasons stated in the State's two responses, including Ground 10 (DE# 9: Exh. 35 at p. 2).

Petitioner's motion for rehearing (DE#9: Exh. 36) was denied (DE# 9: Exh. 37).

a. Appeal.

Petitioner timely appealed the trial court's summary denial of his "amended" 3.850 motion to the Fourth District (DE# 9: Exh. 38). On July 27, 2017, the Fourth District affirmed the trial court's summary denial per curiam, without written opinion (DE# 9: Exh. 40). Rodriguez v. State, 228 So. 3d 572 (Fla. 4th DCA 2017) (table).

Mandate issued on October 13, 2017 (DE# 9: Exh. 44).

4. <u>The § 2254 Petition</u>.

On October 16, 2017, Petitioner, through counsel, filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (DE# 1). Petitioner raised thirteen (13) grounds for relief (DE# 1). What was formerly Ground 10 in the state court proceedings was raised as Ground 8 in the federal habeas petition: trial counsel was ineffective for failing to object to hearsay statements attributed to Christy Ferguson (Petitioner's girlfriend) and Petitioner's mother contained in a taped telephone conversation between the victim, Larry Hopkins, and Petitioner (DE# 1 at pp. 32-36).

On October 19, 2017, the Magistrate Judge assigned to the case issued an order to show cause, directing Respondent to file a response to Petitioner's petition (DE# 5). The Magistrate Judge ordered Respondent to "demonstrate good cause why the Petitioner's requested relief should not be granted" (DE# 5 at p. 1). The Magistrate Judge also ordered Respondent to file an appendix of "relevant documents and records" in support of the response (DE# 5 at p. 1).

In the timely response filed pursuant to the Magistrate Judge's order, Respondent addressed whether the petition should be considered timely and concluded that it should not, providing the Magistrate Judge with copies of the relevant pleadings to support its timeliness argument (DE# 8 at pp 8-12, DE# 9). In

compliance with a subsequent order issued by the Magistrate Judge, Respondent provided a full copy of the trial transcript (DE# 16).[2]

In a comprehensive 32-page Report and Recommendation, the Magistrate Judge rejected Respondent's timeliness argument, finding the Petition was timely (DE# 17 at pp. 9-11). However, rather than requiring Respondent to address the merits of Petitioner's claims, the Magistrate Judge examined the record provided and determined that all claims raised in the petition should be denied. With regard to Ground 8 (formerly Ground 10), the Magistrate Judge wrote the following:

> Claim 8 alleges ineffectiveness of trial counsel for failing to object to the proffer of taped conversations where (1) Hopkins said that Christy Ferguson had told him that she believed Petitioner to be guilty and where (2) Petitioner's mother said that she did not want to speak to him anymore (DE 1 at 32; DE 16-1 at 351, 521, 781-82, 786). The postconviction court relied upon the government's arguments that, among other things, Petitioner failed to show prejudice (DE 9-1 at 159-60, 208-09). 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. Furthermore, even if the offending statements had been redacted, their absence would not overcome the other evidence before the jury such as Petitioner arranging the return of Hopkins' watch after denying he took it or had it (DE 16-1 at 341-71, 514-22, 534-36, 539). As the government argued, Petitioner does not demonstrate that, but for counsel's failure to object to the playing of these statements for the jury, there is a reasonable probability that the

[2]References to the page of the trial transcript (the number originally provided by the court reporter and shown in the top right of the transcript itself) will be designated as (T. ___) throughout the rest of the instant pleading.

> outcome of the proceeding would have been different. Thus, claim 8 is without merit.

(DE# 17 at p. 26).

In his objection to the Report and Recommendation, Petitioner complained that Respondent had not been required to address his claims on the merits in the federal proceeding (DE# 21 at pp. 1-2). Petitioner faulted the Magistrate Judge for failing to order Respondent to provide a supplemental response to his Petition addressing the substance of his claims (DE# 21 at p. 2). Additionally, Petitioner faulted the Magistrate Judge for not including the "unique procedural history" surrounding the evidentiary hearing that was initially ordered, but was subsequently dispensed with (DE# 21 at pp. 2-5). Petitioner also raised various complaints about the way the Magistrate Judge ruled on his claims. In particular, with regard to Ground 8, Petitioner merely reiterated the arguments raised in his state postconviction proceedings and his federal habeas petition (DE# 21 at pp. 10-15).

The District Court issued an order summarily denying the § 2254 petition (DE# 22). The Court noted that Petitioner's objections to the Report and Recommendation had not presented any additional argument not already presented, and failed to address the Magistrate Judge's conclusion that Petitioner had failed to satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1994), given the other

evidence adduced at trial, including Petitioner's own "highly incriminating recorded conversations" (DE# 22 at p. 1). The District Court declined the issuance of a certificate of appealability. The District Court denied a subsequent pro se motion for reconsideration for the same reasons (DE# 30).

Petitioner then sought review in the Eleventh Circuit Court of Appeals. The Eleventh Circuit issued a limited remand of the case to the District Court to make a determination in the first instance of whether a certificate of appealability should issue on any of the grounds Petitioner sought to raise on appeal regarding his pro se motion for reconsideration. The District Court subsequently declined to issue a certificate of appealability with regard to the pro se motion for reconsideration (DE# 36).

Pursuant to 28 U.S.C. § 2253, Petitioner then sought a COA from the Court of Appeals for the Eleventh Circuit. The application was denied because Petitioner failed to make a substantial showing of the denial of a constitutional right.

STATEMENT OF THE FACTS

1. State's Case.

a. Deputy Scott DeMichael.

Deputy Scott DeMichael responded to a 911 call from Larry Hopkins reporting a robbery in the early morning hours of May 31, 2003 (T. 307). Upon arrival at the

Hopkins' home, he saw Larry Hopkins and his son, Christopher, sitting in a truck in their driveway (T. 308). Dep. DeMichael noted that they were scared, covered with pepper spray, and that Larry Hopkins had electrical wire wrapped around one of his wrists (T. 308). Dep. DeMichael testified that the case was turned over to Detective Mark Colangelo after the preliminary investigation (T. 309).

b. <u>Larry Hopkins</u>.

Larry Hopkins testified that on May 30-31, 2003, he was awakened from a sound sleep in his home by a barking dog and noticed three masked gunmen enter his bedroom (T. 318, 320). One of the men placed a gun to his head demanding money (T. 320). Hopkins recognized the voice of this man as belonging to Petitioner (T. 320-321). Hopkins had known Petitioner for six weeks prior to that date, through Petitioner's girlfriend, Christy Ferguson (T. 316-317). Eventually, the gunmen took a wallet from Hopkins' pants pocket, then "pepper sprayed" Hopkins in the chest (T. 322-23). The three gunmen tied up both Larry Hopkins and his son, Christopher Hopkins, who was present during this incident, and who also identified Petitioner by voice (T. 324, 327, 446-447, 457). Subsequently, the gunman, whom Larry Hopkins identified as Petitioner, forced him to hand over a Rolex watch (T. 325).

When the three gunmen fled the scene, Larry Hopkins telephoned 9-1-1, identifying Petitioner by name to the first law enforcement officer he spoke with (T.

331-336). According to Hopkins, Petitioner telephoned him at 4 a.m. on May 31, 2003, stating that he had just gotten home; in response, Larry Hopkins accused Petitioner of committing the crimes charged in this case, and "demanded" Petitioner to return his Rolex watch (T. 337-338)

After Petitioner and Larry Hopkins exchanged numerous telephone calls subsequent to this robbery/burglary, a law enforcement officer gave Hopkins a recording device, which he used to record his phone conversations with Petitioner; these subsequent conversations were played for Petitioner's jury cumulatively as State Exhibit 4 (T. 3 38, 341, 344). During these phone conversations, Petitioner repeatedly denied being involved in the charged crimes charged, despite Hopkins' accusations to the contrary (T. 344, 346-49, 353-54, 360-61, 364-65, 368). At one point, Petitioner declared, "I have no watch at all" (T. 361). Two other times, in response to Hopkins' repeated requests to get his watch back, Petitioner first said, "I cannot give you nothing I do not have," and then he said, "I don't have nothing" (T. 364, 365). Moreover, Petitioner told Hopkins on one of the calls that he was at Johnny Rodriguez's house at the time of the burglary (T. 352-53).

After Petitioner was arrested, Hopkins continued receiving phone calls from Petitioner from the jail, which were recorded and played for Petitioner's jury as State Exhibit 5 (T. 369-370). Again, Petitioner consistently denied guilt as charged when

accused by Hopkins of being one of the perpetrators of these offenses (T. 371, 375-377). During one of Petitioner's denials, Hopkins informed Petitioner, "I know that," but promised to exonerate Petitioner with police if the watch was returned (T. 379-380).

Eventually, the Rolex watch Hopkins claimed was stolen from him was returned by Petitioner's father (T. 391, 395, 611-613).

c. Christopher Hopkins.

Christopher Hopkins, Larry Hopkins' son, was home at the time of the charged crime; he recalled watching television that evening when he heard the family dog barking, then saw three masked gunmen enter the living room of the residence (T. 446-49). Both Christopher and his father were then "pepper sprayed," after which Christopher Hopkins was walked to his father's bedroom, then tied up with electrical wire (T. 451-52, 454-56). Like his father, Christopher Hopkins recognized one of the gunmen by voice as Petitioner (T. 457, 462-63). Christopher Hopkins identified Petitioner in court (T. 459-60).

d. Lacey Coker.

Lacey Coker testified that Petitioner was at her residence on May 30, 2003 (the night before the robbery) from around 7:30 p.m. until between 9:30 p.m. and 11:30 p.m. (T. 479-80). The next morning she overheard a phone call Petitioner made to

her boyfriend, Johnny Rodriguez (no relation), at around 8:30 a.m. asking that she and Johnny tell law enforcement Petitioner was with them later than he actually was with them (T. 481-82).

e. Johnny Rodriguez.

Johnny Rodriguez (no relation to Petitioner), a Saint Lucie County resident, confirmed the testimony of his girlfriend, Lacey Coker, stating that Petitioner, Petitioner's little brother, and another friend were at their residence on the evening of May 30, 2003 (T. 486-89). Rodriguez testified that all three left around 10 p.m. to 10:30 p.m., and Petitioner was not with him at 12:30 p.m. as Petitioner wanted him to say (T. 489, 537). Rodriguez also confirmed that Petitioner called him the next morning around 8:30 a.m (T. 489). During that call, Petitioner told Johnny that he needed an alibi for the night before because "he was going to be blamed for something" (T. 489). Petitioner asked Rodriguez to say that he was at Rodriguez's home all night (T. 489).

Petitioner also called Rodriguez from jail the first day of his arrest, and these calls were recorded and played for the jury (T. 493). In these phone calls, Petitioner informed Rodriguez that he and Lacy Coker were his alibi witnesses, and that they should tell police that Petitioner was present between 12:15 and 1:30 a.m. the morning of May 31, 2003 (T. 494-495). Petitioner also instructed Rodriquez to ask

Christy Ferguson to call Larry Hopkins about dropping charges, and insisted that police were trying to "blame me for shit I didn't do, man" (T. 498-499).

Rodriguez also facilitated a number of three-way calls so that Petitioner could talk to others (T. 496, 538). On one of those calls, Petitioner directed his father to dig up a plastic bag in their backyard, and to "clean the money off, [because] it probably has a little bit of dirt on it . . . [but] don't touch it" (T. 511-19). At Petitioner's instruction, Johnny called Petitioner's parents back to explain that they needed to take the watch that was in the plastic bag to victim Hopkins (T. 533, 536). Petitioner wanted the watch returned because he believed Hopkins would not press charges against him if he returned the watch (T. 531-533).

f. <u>Detective Mark Colangelo</u>.

Detective Mark Colangelo testified that the incident at the Hopkins' home happened at 12:40 a.m. on May 31, 2003, and he arrived on the scene about 1:30 a.m. (T. 547-48). Det. Colangelo further testified that Larry Hopkins immediately identified Petitioner as one of the intruders (T. 549). As part of his investigation that night, Det. Colangelo called Petitioner's girlfriend, Christy Ferguson, in Port Saint Lucie and called a residential number in Orlando trying to locate Petitioner with no success (T. 548-49). Det. Colangelo later provided Hopkins with a tape recorder to record phone calls from Petitioner (T. 550-51).

Det. Colangelo interviewed Petitioner on June 9, 2003 (T. 551). Post Miranda, Petitioner said that on the night of the incident he left the home of his girlfriend, Christy, before midnight and drove to Orlando (T. 551-53). Petitioner said he had problems with the truck he was driving that night and had to drive really slowly to get back to Orlando, which is why the drive took him over four hours to complete and why he did not call victim Hopkins back until 4:00 a.m. the next morning (T. 552-53).

The next day, however, Petitioner changed his story. Petitioner returned to the Sheriff's Office on June 10, 2003 and spoke to law enforcement (T. 553-54). Petitioner's second story was that he was at Johnny and Lacey's house early in the evening, went to Christy's house for a while and then returned to Johnny's house where he stayed until 2:00 a.m. (T. 554-55). Petitioner told Det. Colangelo that Johnny would provide him with an alibi (T. 555). Petitioner was then arrested (T. 556).

According to Det. Colangelo, Larry Hopkins received a phone call from Christy Ferguson on June 10, 2003 (the same day Petitioner was arrested) (T. 558). Hopkins received his watch back that evening (T. 557-58).

2. <u>Defense Case</u>.

a. <u>Macario Rodriguez</u>.

Macario Rodriguez, Petitioner's father, testified that he found Larry Hopkins'

watch in a plastic bag that he dug up in his backyard per Petitioner's "in code" instructions, that Christy called Hopkins to arrange the return of the watch, and that he drove down from Orlando to return the watch to Hopkins (T. 611-13, 627-28). He first saw the watch in Petitioner's room a couple days after a birthday party on May 9, 2003 (T. 641-42). He also testified that the truck Petitioner drove to Orlando the night of the incident had catalytic converter issues causing it not to drive over 20 miles per hour (T. 616-17). Mr. Rodriquez admitted having one prior felony conviction (T. 618).

b. Timothy Hernandez.

Timothy Hernandez, who had four prior felony convictions at the time of trial, testified that he saw Petitioner and Larry Hopkins at a party in Orlando on May 9, 2003 (T. 668-69). Petitioner was wearing a Rolex watch at that time (T. 667-71). According to Hernandez, Petitioner stated that he received the watch from Hopkins after they went into the bathroom together (T. 667-671).

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner asks this Court to summarily reverse the Eleventh Circuit on the ground that it simply misapplied the COA standard, not that it applied the wrong standard. Such review is not the proper domain of this Court.

Disagreement among the circuits is the principle justification for granting plenary review in this Court. See Sup. Ct. R. 10(a). However, there is none here. Absent a split, this Court typically does not grant certiorari for error correction. City & Cty. of San Francisco v. Sheehan, 575 U.S. 600, 620 (2015) (Scalia, J., concurring in part and dissenting in part) ("[W]e are not, and for well over a century have not been, a court of error correction."); Kyles v. Whitley, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) (noting that a fact-bound case in which the court of appeals unquestionably stated the correct rule of law is "the type of case in which we are most inclined to deny certiorari"); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner has not alleged a split of authority, and he is seeking no more than factbound error correction of the sound decision of the intermediate state court. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). Therefore, Petitioner has not raised any certworthy issue.

BECAUSE PETITIONER FAILED TO DEMONSTRATE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT, THE ELEVENTH CIRCUIT PROPERLY DECLINED TO ISSUE A CERTIFICATE OF APPEALABIITY.

A. No Traditional Certiorari Criteria Are Presented.

AEDPA precludes relief unless the state habeas court's judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[C]learly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

A decision is "contrary to" this Court's precedent if it rests on a "rule that contradicts the governing law set forth in [the Court's] cases," or involves "a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." Williams, 529 U.S. at 405, 406. Under the "unreasonable application" prong, a decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011).

Moreover, "an unreasonable application of federal law is different from an incorrect application of federal law." Id. at 101 (quoting Williams, 529 U.S. at 410). A state court's decision is unreasonable "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." White v. Woodall, 572 U.S. 415, 427 (2014) (quoting Richter, 562 U.S. at 103). "The more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004), and the more room there is for fairminded disagreement. Renico v. Lett, 559 U.S. 766, 776 (2010).

For claims of ineffective assistance of counsel, "[e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Richter, 562 U.S. at 105. Because "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential,'" "when the two apply in tandem, review is 'doubly' so." Id. "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id.

As mandated by federal statute, a prisoner seeking a petition for writ of habeas corpus has no absolute entitlement to appeal a district court's denial of the petition. 28 U.S.C. § 2253. Instead, a petitioner must first seek and obtain a COA. §

2253(c)(1). When a habeas petitioner seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. Slack v. McDaniel, 529 U.S. 473, 481 (2000). A petitioner seeking a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. at 484. Applying these principles to Petitioner's claim, discussed more fully, infra, the Eleventh Circuit properly denied the issuance of a COA.

Because Petitioner's claim is based on the denial of the effective assistance of counsel, resolution of the COA application requires a preliminary consideration of the two-prong analysis outlined in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different in order to prevail on a claim of ineffective assistance of counsel. Id. at 687.

The reasonableness of counsel's actions is reviewed under the first prong of Strickland. Judicial scrutiny must be "highly deferential," avoiding the "distorting

effects of hindsight," and, as such, reviewing courts must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. The second prong of Strickland considers the actual prejudice attributable to counsel's actions and how such impacted the overall result obtained.

In order to show ineffective assistance of counsel, a defendant must establish that his attorney's performance fell below "an objective standard of reasonableness," and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 688. "Reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." Id. at 694. The integrity of the entire proceeding must have been compromised by counsel's deficiencies before counsel is declared ineffective.

It is not necessary, and often unwarranted, to scrutinize claims of ineffectiveness under both prongs of Strickland. This Court has made it clear that a defendant's failure to make a sufficient showing as to one prong will vitiate the claim. Id. at 697. The purpose of such review is not intended "to grade counsel's performance;" this Court emphasized that where the record demonstrates a lack of prejudice, the analysis must cease. Id.

B. Petitioner's Argument Rests on an Inaccurate Summary of the Proceedings in the State Court.

Before addressing Petitioner's argument, it is important to note that Petitioner fails to acknowledge the fact that Respondent made multiple arguments at the state level in support of the claim that Petitioner had failed to satisfy Strickland. In the first response to Petitioner's postconviction motion, Respondent argued that: (1) Petitioner failed to establish that trial counsel's performance was deficient under the **first** prong of Strickland where the exchange was relevant and admissible to show Petitioner's reaction to the statement; and (2) based on the totality of the other evidence introduced against Petitioner at trial, Petitioner failed to satisfy the **second** prong of Strickland by showing he was prejudiced by the admission of the statements. In the response to the amended postconviction motion, Respondent adopted the first two arguments previously presented and added: (3) Petitioner failed to satisfy the **first** prong of Strickland because counsel may have made a strategic choice not to object to the admission of the statement where Petitioner's response to the statement was beneficial to Petitioner.

Initially, the state trial court granted an evidentiary hearing based solely on Respondent's argument (3) (strategic decision), while overlooking arguments (1) and (2) (that had presented alternative arguments that Petitioner had failed to meet either

prong of Strickland). However, upon reconsideration, the state trial court determined that an evidentiary hearing was not necessary and denied Petitioner's claim for the reasons contained in both of Respondent's responses. The state trial court did not specify which of the three reasons presented by Respondent was the reason for its reconsideration and denial.

In this proceeding, Petitioner overlooks that the trial court's denial of relief was based on both responses provided by Respondent, and that in the first response, Respondent had made an argument that Petitioner failed to satisfy the second prong of Strickland because he failed to show how counsel's allegedly deficient performance prejudiced the outcome of his trial based on the overwhelming amount of other evidence presented against him.

C. Because Petitioner Failed to Satisfy the Prejudice Prong of Strickland, Analysis of the Deficient Performance Prong Was Unnecessary.

Petitioner claims that the state court erred when it determined that Petitioner failed to satisfy the performance prong of Strickland for Ground 8 (formerly Ground 10) where Petitioner had asserted that trial counsel was ineffective for failing to object to hearsay statements attributed to Christy Ferguson (Petitioner's girlfriend) and Petitioner's mother contained in a taped telephone conversation between the victim, Larry Hopkins, and Petitioner. As he has did in his pleadings below,

Petitioner reiterates the procedural history and arguments he made to the state courts, and concludes that the state trial court's, and subsequently the District Court's refusal to grant him an evidentiary hearing on this claim was erroneous.

As noted, supra, to support his claim that the denial of a COA was erroneous, Petitioner places great reliance on one of the three arguments presented by Respondent in the state court: that the failure to object to the admission of the testimony may have been a strategic decision made by defense counsel. He also relies on the trial court's initial reason for granting an evidentiary hearing: that such a hearing was warranted because the State had argued that it was possible that trial counsel had made a strategic decision. However, the record clearly shows that the state trial court ultimately denied relief "based on the responses provided by the State," and that in Respondent's initial response, Respondent had also argued that Petitioner failed to satisfy the second prong of Strickland because he had failed to make a showing that the admission of the evidence affected the outcome of the trial:

> 60. The second prong of Strickland has not been met because there has been no showing that the sentence "Yeah, she told me that she thought you took it," if improper, changed the outcome of the trial. In fact, the defendant's paragraph long explanation of Ms. Ferguson's support for him surely outweighed any impact the complained of statement had. Also, without other specific incidents to address, there can be no showing that any deficiency affected the outcome of the trial when compared to the totality of the evidence.

(DE# 9: Exh. 28 at p. 111). Because a federal habeas proceeding is not a second appeal or a rehearing of the state court decisions, Petitioner errs when he simply reiterates his arguments made to the state trial court while failing to address the merits of the decisions rendered by the federal courts in this case.

As noted, supra, it is well-settled that a defendant claiming ineffective assistance of counsel in violation of the Sixth Amendment must demonstrate that: (1) counsel's performance was deficient, **and** (2) the deficient performance prejudiced the outcome of the proceedings. See Strickland, 466 U.S. at 687. "Unless a defendant makes **both** showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. (emphasis added).

In the case at bar, because the failure to demonstrate prejudice was dispositive of Petitioner's claim, "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697. Accordingly, the federal courts could consider whether Petitioner suffered prejudice as a result of counsel's alleged error without first evaluating the adequacy of counsel's performance. See id.; see also Windom v. Sec'y, Dep't of Corr., 578 F.3d 1227, 1248 (11th Cir. 2009) (because the failure to demonstrate either deficient performance or prejudice is

dispositive of the claim, there is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one; accordingly, a court may consider whether the defendant suffered prejudice as a result of counsel's alleged errors without first evaluating the adequacy of counsel's performance); McClain v. Hall, 552 F.3d 1245, 1251 (11th Cir. 2008) ("We may decline to decide whether the performance of counsel was deficient if we are convinced that [the petitioner] was not prejudiced"). In fact, this Court has made clear that "[t]he object of an ineffectiveness claim is not to grade counsel's performance" and therefore, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

Because Petitioner's claim could have been resolved under the prejudice prong of Strickland by the state court, the federal district court was correct when it determined that, based on the record, Petitioner had failed to demonstrate a substantial showing of the denial of a constitutional right. This Court should also find.

D. Petitioner Cannot Meet the Threshold for Showing the Eleventh Circuit Committed Error by Failing to Grant Him a Certificate of Appealability.

1. The Magistrate Judge Correctly Concluded That Petitioner Failed to Satisfy Either Prong of Strickland.

In the District Court, the Magistrate Judge examined the trial transcript and determined that with regard to Ground 8, Petitioner had failed to satisfy either prong of Strickland. The Magistrate Judge concluded that Petitioner had failed to show the state court's determination that he should be denied relief on that claim was improper:

> Claim 8 alleges ineffectiveness of trial counsel for failing to object to the proffer of taped conversations where (1) Hopkins said that Christy Ferguson had told him that she believed Petitioner to be guilty and where (2) Petitioner's mother said that she did not want to speak to him anymore (DE 1 at 32; DE 16-1 at 351, 521, 781-82, 786). The postconviction court relied upon the government's arguments that, among other things, Petitioner failed to show prejudice (DE 9-1 at 159-60, 208-09). 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. Furthermore, even if the offending statements had been redacted, their absence would not overcome the other evidence before the jury such as Petitioner arranging the return of Hopkins' watch after denying he took it or had it (DE 16-1 at 341-71, 514-22, 534-36, 539). As the government argued, Petitioner does not demonstrate that, but for counsel's failure to object to the playing of these statements for the jury, there is a reasonable probability that the outcome of the proceeding would have been different. Thus, claim 8 is without merit.

(DE# 17 at p. 26). Thus, the Magistrate Judge clearly determined that Petitioner had

failed to satisfy either prong of Strickland.

Three things in the Magistrate Judge's ruling are important to highlight: (1) Petitioner's claim that the trial court would have granted a mistrial if trial counsel had moved for one was based on mere speculation; (2) such speculation cannot establish deficient performance;[3] and (3) based on the other evidence adduced at trial, Petitioner failed to show he was prejudiced by the admission of the statements. Respondent will address each of these points in order.

(a) Petitioner's Claim That the Trial Court Would Have Been Required to Grant a Mistrial If a Proper Objection Had Been Lodged Was, and Continues to Be, Speculative.

Petitioner continues to maintain that had a proper objection been lodged by trial counsel, then the trial court would have been required to grant a mistrial. Petitioner fails to show, again, that the trial court would have granted a mistrial. Petitioner fails to cite to Florida precedent that would have required the trial court to grant trial counsel's motion for a mistrial. Respondent's research on the issue reveals no clear precedent establishing that a mistrial must have been granted in this instance. In fact, even where a proper motion for mistrial has been made, and denied, the

[3]Petitioner's contention in his Petition that the Magistrate Judge found he had failed to establish prejudice on this basis (Petition at p. 12) is clearly not supported by the language used in the Magistrate Judge's Report and Recommendation.

analysis on appeal in Florida courts is under the harmless error test. See, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) (the application of the harmless error test requires examination of the entire record by an appellate court, including close examination of permissible evidence on which the jury could have legitimately relied, and in addition, even closer examination of impermissible evidence that might have possibly influenced the jury verdict). There is a noticeable dearth of case law in the present Petition supporting Petitioner's claim that a mistrial would have been granted in the case at bar had one been made, or that the failure to grant the mistrial would have been sufficient for reversal on appeal and the granting of a new trial.

Petitioner's reliance on United States v. Ramsey, 323 F. Supp. 2d 27 (D.D.C. 2004), is misplaced. Ramsey can be distinguished in many ways, the most important of which is the standard of review. The District Court in that case reviewed Ramsey's § 2255 petition directly under Strickland. The standard of review before a District Court in a § 2254 proceeding is whether the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). This additional level of deference means that the decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement' for a District Court in a §

2254 proceeding to find that it was unreasonable. Harrington v. Richter, 562 U.S. at 101-04.

Even were Petitioner correct that the Magistrate Judge found Petitioner failed to establish prejudice (rather than deficient performance) on this basis, because there is no clearly established federal law for the prejudice standard regarding an attorney's failure to request a mistrial under these circumstances, the state court did not unreasonably apply Strickland or unreasonably fail to extend federal law in requiring Petitioner to demonstrate a reasonable probability that a different verdict would have been reached in a second trial. Therefore, the Eleventh Circuit correctly found that, on this basis, Petitioner had failed to establish that reasonable jurists could find that the Magistrate Judge's conclusion that Petitioner failed to demonstrate a substantial showing of the denial of a constitutional right was debatable.

(b) Petitioner Has Failed to Show the Magistrate Judge's Conclusion That Based on the Other Evidence Adduced at Trial Petitioner Failed to Show He Was Prejudiced by the Admission of the Statements, Was Erroneous.

The Magistrate Judge also reasonably concluded that Petitioner was not prejudiced. The Magistrate Judge reasoned that the evidence against Petitioner was strong and included testimony from various eyewitnesses. The Magistrate Judge

reasonably decided that even if Petitioner had established deficient performance by his counsel in failing to move for a mistrial, he was not prejudiced as a result of that deficiency.

Petitioner never addresses the Magistrate Judge's conclusion that he failed to satisfy the prejudice prong of Strickland. Notably, Petitioner fails to rebut the Magistrate Judge's reference to the properly admitted evidence establishing that Petitioner arranged for the return of Larry Hopkins watch to him right after Petitioner's arrest. Based on that finding, the Eleventh Circuit correctly found that Petitioner had failed to establish that reasonable jurists could find that the Magistrate Judge's conclusion that Petitioner failed to demonstrate a substantial showing of the denial of a constitutional right was debatable.

2. Petitioner Was Not Entitled to an Evidentiary Hearing, Either in the State Court or in the Federal Habeas Proceeding.

Petitioner argues that federal case law interpreting Strickland holds that a trial court cannot make a determination about whether trial counsel's actions were "strategic" without holding an evidentiary hearing, relying on Barnes v. Elo, 231 F.3d 1025, 1019 (6th Cir. 2000). Respondent agrees that whether an attorney's action or inaction is a sound strategic decision is analyzed under the first prong of Strickland, i.e., whether trial counsel's performance was deficient. However, other than that fine

legal point, Petitioner's reliance on Barnes is misplaced.

Barnes, issued in 2000, was based on the law at the time it was handed down. At that time, the District Courts frequently held evidentiary hearings in habeas corpus cases. However, that practice was repudiated by this Court in Cullen v. Pinholster, 563 U.S. 170 (2011), which is now the controlling authority. In Pinholster, this Court determined that a habeas court must accept the factual determinations of the state courts unless the petitioner shows that those determinations are clearly wrong based on the evidence that was before state courts. 28 U.S.C. §§ 2254(d)(2) and (e)(1). That showing cannot be based on an evidentiary hearing in the federal court.

> Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard to expand the state-court record is a stringent one. If a prisoner has "failed to develop the factual basis of a claim in State court proceedings," a federal court "shall not hold an evidentiary hearing on the claim" unless the prisoner satisfies one of two narrow exceptions, see 28 U.S.C. § 2254(e)(2)(A), and demonstrates that the new evidence will establish his innocence "by clear and convincing evidence," § 2254(e)(2)(B). In all but these extraordinary cases, AEDPA "bars evidentiary hearings in federal habeas proceedings initiated by state prisoners." McQuiggin v. Perkins, 569 U.S. 383, 395, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013).

Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

Finally, it is worth repeating that neither the trial court nor the Magistrate Judge found that trial counsel's failure to move for a mistrial was a "strategic decision," Petitioner's continued insistence to the contrary notwithstanding.

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of October, 2022, a true and correct copy of the foregoing has been served within three days on Michael Ufferman, Esquire, 2022-1 Raymond Diehl Road, Tallahassee, Florida, 32308, at ufferman@uffermanlaw.com.

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