No.

IN THE

SUPREME COURT OF THE UNITED STATES

TYSON MARTIN,
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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COUNSEL FOR THE PETITIONER

A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his federal habeas claim (i.e., whether the court of appeals improperly applied the "reasonable jurists could debate" certificate of appealability standard articulated by the Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, TYSON MARTIN, 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 July 26, 2022. (App. 1).[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.

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

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).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner was charged in Florida with one count of "sexual battery when victim physically helpless." The alleged offense purportedly occurred on July 3, 2014.

The case proceeded to a jury trial on May 10, 2016. At the conclusion of the trial, the jury found the Petitioner guilty of the lesser offense of attempted

sexual battery when victim physically helpless. The state trial court sentenced the Petitioner to sixty months' imprisonment followed by sixty months of sex offender probation. On direct appeal, the Petitioner argued that the state trial court erred by prohibiting the defense from introducing the recording of Sergeant Greg Wilder's interview of the Petitioner. The Florida First District Court of Appeal rejected this claim and affirmed the Petitioner's conviction and sentence. *See Martin v. State*, 247 So. 3d 422 (Fla. 1st DCA 2018).

Following the direct appeal, the Petitioner timely filed a state postconviction motion raising several grounds – one of which is the subject of the instant petition: defense counsel rendered ineffective assistance of counsel by failing to appropriately object to the mischaracterization of the Petitioner's statement to Investigator Wilder. The state postconviction court

summarily denied this claim (i.e., the state postconviction court denied the claim without first holding an evidentiary hearing). On appeal, the Florida First District Court of Appeal affirmed the summary denial of the Petitioner's state postconviction claim. *See Martin v. State*, 297 So. 3d 525 (Fla. 1st DCA 2020).

The Petitioner subsequently filed a habeas petition in federal court pursuant to 28 U.S.C. § 2254. In his § 2254 petition, the Petitioner argued the same claims that he previously presented on direct appeal and in his state postconviction motion. On September 7, 2021, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (App. 8). Thereafter, on November 1, 2021, the district court denied the Petitioner's § 2254 petition. (App. 6).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On July 26, 2022, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 claim. (App. 1).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The Petitioner contends that the Eleventh Circuit Court of Appeals erred by denying him a certificate of appealability on his federal habeas 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).

On direct appeal, the Petitioner argued that he was denied his constitutional right to a fair trial as a result of the state trial court prohibiting the defense from introducing the recording of Sergeant Greg Wilder's interview of the Petitioner. During the trial, the State presented the testimony of Sergeant Wilder, who stated that he interviewed the Petitioner on July 10, 2014. During direct examination, Sergeant Wilder

gave the following testimony:

> Q Did you ask him whether he penetrated her vagina?
>
> A I did.
>
> Q And what was his response?
>
> A He said he did not.
>
> Q So he denied penetrating her vagina?
>
> A That is correct. Yes, ma'am.
>
> Q Okay. But said his hands were moving towards that area?
>
> A Yes, ma'am.

(App. 154). Thereafter, defense counsel indicated that he intended to play the complete recording of Sergeant Wilder's interview of the Petitioner during defense counsel's cross-examination of Sergeant Wilder. The state trial court, however, ruled that defense counsel could only cross-examine Sergeant Wilder about

specific statements and defense counsel could not introduce the complete recording. (App. 157-159). During cross-examination and then re-direct examination, Sergeant Wilder gave the following testimony:

> Q Okay. And throughout the interview Mr. Martin denied going towards the – to actually penetrate her vagina; is that correct?
>
> A Throughout the interview, yes, he–
>
> Q He admitted touching her butt?
>
> A Right.
>
> Q He denied doing anything to try to penetrate her vagina?
>
> A He denied penetrating her vagina, yes.
>
> Q He denied trying to penetrate it? Did he ever admit to trying to penetrate her vagina?
>
> A No. That – that exact verbiage,

no.

Q Did he ever admit to trying to touch her labia majora or labia minora?

A That question was never asked, so –

Q Did he ever try to touch her clitoris?

A It was never asked.

Q What about her butthole?

A It was never asked specifically.

Q So you never asked him specifically what he was doing, did you?

A No, I asked him what he was doing. He indicated to me that his hand was underneath, skin on skin, and that her – he was – he had grabbed her boob, he had grabbed her butt, and his hand was moving down towards her vagina.

Q Did you ask him if he intended to touch her vagina?

A No, I did not ask him that.

Q Did you ask him if he tried to

touch her vagina?

A No, sir.

Q Did you ask him if he tried to touch her clitoris?

A No, sir, I did not.

Q Did you ask him if he tried to touch her labia?

MS. NORRIS [the prosecutor]: Object to asked and answered.

THE COURT: I think you did ask that. Sustained.

MR. ZELMAN [defense counsel]: I did? Just a moment, Your Honor.

(Pause.)

BY MR. ZELMAN:

Q Investigator Wilder, during your interview with Mr. Martin, did you ask him what he intended to do?

A I don't recall. I'd have to go back to the – I would have to back to the

entire interview, but there were several questions asked there. Your specific questions, I do not recall – I did not ask him those. Overall, I don't know if I asked him that, his overall intention.

Q Did he make any statements about whether or not he intended to touch –

MS. NORRIS: Are you done with your –

BY MR. ZELMAN:

Q – her vagina?

MS. NORRIS: I was going to object to hearsay.

THE COURT: Well, overruled on the hearsay. He asked a specific question that relates to what you asked him about, although I think you've already asked him that question. He's already answered no.

BY MR. ZELMAN:

Q Well, if you refer to page 23, of your – of the transcript, lines 2 and 3.

A Two and 3? Page 23?

Q Yes. Did he make a statement about whether or not he intended to touch her vagina?

MS. NORRIS: I object to improper – can we go to sidebar?

. . . .

Q Investigator Wilder, we'll go back to what we were just discussing.

A Yes, sir.

Q You testified that you never asked him or he never said what his intentions were. Is that a fair statement?

A What his intentions were?

Q Yes.

A I don't think that was a direct terminology that I asked.

Q You didn't ask him that?

A Right, I don't think that was a direct terminology, what I asked. I don't think I specifically asked, "What were your intentions?"

Q Okay. Did he indicate what his

intentions were?

A He indicated what were not his intentions. Does that make sense?

Q That being that it was not his intention to touch the vagina?

A Yes. I'm not trying to go around with words, but his statement was it wasn't his – it was not an intention to touch her vagina.

MR. ZELMAN: Just a moment, Your Honor.

(PAUSE.)

MR. ZELMAN: Nothing further at this time, Your Honor.

THE COURT: Okay. Any redirect from the State?

MS. NORRIS: Sure.

MR. ZELMAN: Do you want him to keep the transcript?

MS. NORRIS: Yes.

REDIRECT EXAMINATION BY MS.

NORRIS:

Q I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.

A It got cut off. Page 23, I think it's line 2.

Q No.

A I'm –

Q Pay attention to my question.

A Okay.

Q Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?

A It doesn't, ma'am.

Q So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?

A That's correct.

Q So more accurately he never said about what he did or did not intend

to do?

A Yes, ma'am.

(App. 178-186). Notably, during the recorded interview, the Petitioner actually said the following:

> INVESTIGATOR WILDER: But your hand made it underneath and you were grabbing her butt.
>
> DEFENDANT MARTIN: Yes, that's right.
>
> INVESTIGATOR WILDER: And I'll use non-clinical terms: more of the cheek or more of the crack? Or were you – you said you were moving your hands down toward her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants –
>
> DEFENDANT MARTIN: *I mean, it went towards but it was not an intention to* –
>
> INVESTIGATOR WILDER: Well, let me ask: Did you go in the waistband or the short? Did you go up the leg?
>
> DEFENDANT MARTIN: In the waistband. And these are high waisted

shorts.

(App. 283-284) (emphasis added). Hence, as explained below, the state trial court erred by preventing the Petitioner from playing for the jury the actual recording of the interview.

Section 90.108(1), Florida Statutes (the "rule of completeness"), states that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part *or any other writing or recorded statement* that in fairness ought to be considered contemporaneously." (Emphasis added). *See also Whitfield v. State*, 933 So. 2d 1245, 1248 (Fla. 1st DCA 2006) ("Because portions of the defendant's conversation with the officer were admitted on direct examination, the rule of completeness generally allows admission of the balance of the conversation as well as

other related conversations that in fairness are necessary for the jury to accurately perceive the whole context of what has transpired between the two.") (quoting *Eberhardt v. State*, 550 So. 2d 102, 105 (Fla. 1st DCA 1989)).

The Petitioner submits that pursuant to the "rule of completeness," "fairness" dictated that he be permitted to introduce the actual recording of Sergeant Wilder's interview of him. When the State introduced Sergeant Wilder's testimony about statements that the Petitioner made during the interview, the State opened the door to the introduction of the actual recording. In *Swearingen v. State*, 91 So. 3d 885, 886 (Fla. 5th DCA 2012), the state appellate court stated the following regarding the "rule of completeness" and a defendant's statements to law enforcement officials:

> [P]ursuant to the rule of completeness set

forth in section 90.108(1), Florida Statutes (2011), all portions of Ms. Swearingen's statements should be provided, contemporaneously, to the jury and not just those that benefit the State. *See Ramirez v. State*, 739 So. 2d 568, 580 (Fla. 1999); *Metz v. State*, 59 So. 3d 1225 (Fla. 4th DCA 2011); *Whitfield v. State*, 933 So. 2d 1245 (Fla. 1st DCA 2006). As the court explained in *Whitfield*

> [T]he purpose of the rule is to "avoid the potential for creating misleading impressions by taking statements out of context." The proper standard for determining the admissibility of testimony under the rule is "whether, in the interest of fairness, the remaining portions of the statements should have been contemporaneously provided to the jury."

Id. at 1248 (quoting *Larzelere v. State*, 676 So. 2d 394, 401, 402 (Fla. 1996)); *see also Metz*, 59 So. 3d at 1226-1227 ("A defendant's exculpatory out-of-court statement is admissible into evidence when a state witness has testified to incriminating statements

> contemporaneously made by the defendant and 'the jury should hear the remaining portions at the same time so as to avoid the potential for creating misleading impressions by taking statements out of context.'" (quoting *Mason v. State*, 719 So. 2d 304, 305 (Fla. 4th DCA 1998))). Although section 90.108(1), Florida Statutes (2011), speaks in terms of written or recorded statements, "[t]his rule has been applied to verbal statements as well." *Ramirez*, 739 So. 2d at 580 (citing *Reese v. State*, 694 So. 2d 678, 683 (Fla. 1997); *Christopher v. State*, 583 So. 2d 642, 646 (Fla.1991)); *see also Metz*, 59 So. 3d at 1226. The violation of this rule alone requires reversal under the facts and circumstances of this case.

See also Layman v. State, 728 So. 2d 814 (Fla. 5th DCA 1999) (holding that the defendant was entitled to a new trial in a sexual battery prosecution after the trial court denied the defendant's request to play for the jury the entire audio-recording of the defendant's post-arrest statement, where the defendant alleged that the entire statement was necessary to give context

to the portions of the statement introduced by the prosecution).

As in *Swearingen*, the state trial court in the instant case erred by preventing defense counsel from playing the recording of the Petitioner's interview. M.W.,[2] the alleged victim, testified that the Petitioner committed the completed act of sexual battery by digital penetration. Defense counsel argued in closing that the Petitioner was guilty of only the lesser offense of battery. When the Petitioner was interviewed by Sergeant Wilder, he denied ever touching M.W.'s vagina (and it appears that the jury believed the Petitioner because the jury did not find the Petitioner guilty as charged). Thus, the jury was left with deciding whether the Petitioner committed the offense

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[2] Only the initials of the alleged victim will be used in this petition.

of attempted sexual battery or simple battery. The difference in these two charges is based on whether the Petitioner had the *intent* to penetrate M.W.'s vagina with his finger(s). *The Petitioner's statements to Investigator Wilder were key to making this determination.* Undersigned counsel submits that the passages quoted above were extremely confusing to the jury, likely creating a misleading impression for the jury or making it so the jury would be unable to understand the context of the Petitioner's actual statements to Investigator Wilder. This is especially true in light of the prosecutor's redirect examination of Investigator Wilder:

> Q I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.
>
> A It got cut off. Page 23, I think it's line 2.

Q No.

A I'm –

Q Pay attention to my question.

A Okay.

Q Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?

A It doesn't, ma'am.

Q So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?

A That's correct.

Q So more accurately he never said about what he did or did not intend to do?

A Yes, ma'am.

(App. 186).[3]

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[3] Perhaps these questions may have been proper if the jury had been given the opportunity to hear – in proper context – the Petitioner's actual statements to Investigator Wilder. But because the jury was

The Petitioner actually said the following about his intent:

> INVESTIGATOR WILDER: Or were you – you said you were moving your hands down toward her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants –
>
> DEFENDANT MARTIN: I mean, it went towards but it was not an intention to –

(App. 284). The jury *never* got to hear these crucial statements in context. Based on the facts of this case and the importance of the Petitioner's statements, the Petitioner's actual statements to Investigator Wilder should have been played for the jury "in the interest of fairness." *See Swearingen*, 91 So. 3d at 886.

Accordingly, for the reasons set forth above, the

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prevented from hearing the Petitioner's actual statements, it is unlikely that the jury understood what the Petitioner actually said about his intent or the context in which he made such statements.

state trial court erred by prohibiting the defense from introducing the recording of Sergeant Wilder's interview of the Petitioner. The state trial court's erroneous ruling resulted in the Petitioner being denied his constitutional right to a fair trial (i.e., the state courts' rulings in this case were contrary to and an unreasonable application of the Petitioner's constitutional rights). *See* U.S. Const. amends. V & XIV. 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.

When the Petitioner attempted to raise this claim on direct appeal, the State argued in its answer brief that this claim was not preserved and that defense counsel should have asked to recross-examine Investigator Wilder. A review of the direct appeal oral argument (available on the Florida First District Court

of Appeal's website) demonstrates that the panel agreed with the State's argument that defense counsel failed to preserve the claim (and specifically, failed to renew the request to play the recording following the prosecutor's redirect examination of Investigator Wilder). Accordingly, in his state postconviction motion, the Petitioner asserted that defense counsel rendered ineffective assistance of counsel by failing to appropriately object to the mischaracterization of his statement to Investigator Wilder.

Ultimately, the jury *never heard* the Petitioner's actual statement to Investigator Wilder. This is because there was no objection to Investigator Wilder's testimony on redirect examination, there was no request to recross-examine Investigator Wilder based upon this inaccurate impression, and there was no additional request to play the recording of the

interview for the jury in order to clarify the issue. Then to make the mischaracterization worse, the prosecutor highlighted it in her closing, telling the jury that the Petitioner never said what he did not intend:

> But Investigator Wilder – he never said he did not intend to touch her vagina. When he had his memory refreshed with the transcript of the interview, he said he didn't – he said, "I never intended," dot, dot, dot. Didn't say what it was he didn't intend. Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend – I don't know. But he didn't say that.
>
> And, in fact, what he did say, when I asked Investigator Wilder, the direct quote was: Did your fingers ever make it to her vagina? No, they didn't. They moved towards that area, but no.
>
> What do you think he was going to do when he got down there, if he didn't? . . .

(App. 253-254). Again, defense counsel failed to object to the mischaracterization of the Petitioner's testimony.

In sum, defense counsel (1) failed to object to Investigator Wilder's redirect examination testimony that mischaracterized the Petitioner's statement; (2) failed to argue that this testimony was misleading or to request to recross-examine Investigator Wilder further by using the recording of the interview; and (3) failed to object to the misleading closing argument. When taken in context, the subject of the Petitioner's "it was not an intention to" statement was clearly the alleged victim's vagina (as the question asked whether he was moving his hand towards the alleged victim's vagina). *But due to defense counsel's ineffectiveness, the jury never heard the Petitioner's actual pretrial statement to Investigator Wilder.*

It was crucial for defense counsel to present evidence of the Petitioner's lack of intent to the jury. The alleged victim testified that the Petitioner

committed the *completed* act of sexual battery by digital penetration. Defense counsel argued in closing that the Petitioner was guilty of only the lesser offense of battery. When the Petitioner was interviewed by Investigator Wilder, he denied ever touching the alleged victim's vagina (and it appears that the jury believed the Petitioner because the jury did not find the Petitioner guilty as charged). Thus, the jury was left with deciding whether the Petitioner committed the offense of attempted sexual battery or simple battery. The difference in these two charges is based on whether the Petitioner had the intent to penetrate the alleged victim's vagina with his finger(s). Again, the Petitioner's statements to Investigator Wilder were *key* to making this determination. But again – due to defense counsel's ineffectiveness, the jury *never heard* the Petitioner's *actual* pretrial statement to

Investigator Wilder.

The Sixth Amendment right to counsel implicitly includes the right to the effective assistance of counsel. *See Chatom v. White,* 858 F.2d 1479, 1484 (11th Cir. 1988). "The test to be applied by the trial court when evaluating an ineffectiveness claim is two-pronged: The defendant must show both that trial counsel's performance was deficient and that the defendant was prejudiced by the deficiency." *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The Petitioner meets both prongs of the *Strickland* standard (i.e., defense counsel failed to properly object to the mischaracterization of his pretrial statement and/or failed to seek to recross-examine Investigator Wilder with the actual recording of the interview and – but for counsel's ineffectiveness

– there is a reasonable probability that the jury would have returned a verdict for the lesser offense of simple battery). 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. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

The state courts' rulings denying the Petitioner's ineffective assistance of counsel claim were contrary to and an unreasonable application of *Strickland* 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.

The magistrate judge recommended that this claim be denied – a recommendation that was adopted by the district court. The magistrate judge's conclusion regarding this claim is summed up in the penultimate paragraph of the section addressing this claim in the report and recommendation:

> Martin has not shown that playing the entire recording of his conversation with Investigator Wilder would have explained or clarified the portions presented to the jury through Investigator Wilder's testimony. Nor has Martin shown that without playing the entire recording, the jury was left with a mistaken or false impression of his statement(s) regarding his intentions when he put his hand down the waistband of M.W.'s shorts. *The jury heard Martin's statements that he put his hand down the back of M.W.'s shorts and moved it toward her vagina, "but it was not an intention to—,"* and that he did not penetrate it. Martin has not demonstrated that the trial court's prohibiting him from introducing the

> entire recording of the interview prevented him from mounting an effective defense or otherwise deprived him of a fair trial.

(App. 65-66) (emphasis added). In the order denying a certificate of appealability, the circuit judge repeated the magistrate judge's assertion:

> [R]easonable jurists would not debate that the trial court's refusal to admit the entirety of Mr. Martin's statements to Sergeant Wilder, even if a violation of state evidentiary law, did not render his trial fundamentally unfair. The jury was exposed to the portion of Mr. Martin's statement that he contended had been mischaracterized and that he asserted was crucial for his defense of lack of intent. Because the jury was exposed to the portion of Mr. Martin's statement at issue, and he was able to argue in closing arguments that his statement to Sergeant Wilder showed his lack of intent, the trial court's refusal to admit his entire statement did not render his trial fundamentally unfair.

(App. 3). Respectfully, these conclusions are erroneous because the finding that the "[t]he jury heard Martin's

statement[] that 'it was not an intention to'" is grossly taken out of context. When reviewed in context, it is clear that the state court's ruling deprived the Petitioner of a fair trial because the jury – based on the prosecutor's questioning and closing argument – was *extremely confused* as to what the Petitioner *actually said* during his interview – confusion that would have been *completely resolved* had the jury heard the *actual recording of the interview.*

During cross-examination and then re-direct examination, Sergeant Wilder gave the following testimony (note, the first emphasized portion of the excerpt is apparently what the magistrate judge relied upon – but the second emphasized portion negated this testimony):

> Q Did you ask him if he intended to touch her vagina?

A No, I did not ask him that.

Q Did you ask him if he tried to touch her vagina?

A No, sir.

Q Did you ask him if he tried to touch her clitoris?

A No, sir, I did not.

Q Did you ask him if he tried to touch her labia?

MS. NORRIS: Object to asked and answered.

THE COURT: I think you did ask that. Sustained.

MR. ZELMAN: I did? Just a moment, Your Honor.

(Pause.)

BY MR. ZELMAN:

Q Investigator Wilder, during your interview with Mr. Martin, did you ask him what he intended to do?

A I don't recall. I'd have to go

back to the – I would have to back to the entire interview, but there were several questions asked there. Your specific questions, I do not recall – I did not ask him those. Overall, I don't know if I asked him that, his overall intention.

Q Did he make any statements about whether or not he intended to touch –

MS. NORRIS: Are you done with your –

BY MR. ZELMAN:

Q – her vagina?

MS. NORRIS: I was going to object to hearsay.

THE COURT: Well, overruled on the hearsay. He asked a specific question that relates to what you asked him about, although I think you've already asked him that question. He's already answered no.

BY MR. ZELMAN:

Q Well, if you refer to page 23, of your – of the transcript, lines 2 and 3.

A Two and 3? Page 23?

Q Yes. Did he make a statement about whether or not he intended to touch her vagina?

MS. NORRIS: I object to improper – can we go to sidebar?

. . . .

Q Investigator Wilder, we'll go back to what we were just discussing.

A Yes, sir.

Q You testified that you never asked him or he never said what his intentions were. Is that a fair statement?

A What his intentions were?

Q Yes.

A I don't think that was a direct terminology that I asked.

Q You didn't ask him that?

A Right, I don't think that was a direct terminology, what I asked. I don't think I specifically asked, "What were your intentions?"

Q Okay. Did he indicate what his intentions were?

A He indicated what were not his intentions. Does that make sense?

Q That being that it was not his intention to touch the vagina?

A Yes. I'm not trying to go around with words, but his statement was it wasn't his – it was not an intention to touch her vagina.

MR. ZELMAN: Just a moment, Your Honor.

(PAUSE.)

MR. ZELMAN: Nothing further at this time, Your Honor.

THE COURT: Okay. Any redirect from the State?

MS. NORRIS: Sure.

MR. ZELMAN: Do you want him to keep the transcript?

MS. NORRIS: Yes.

REDIRECT EXAMINATION BY MS. NORRIS:

Q I would like you to direct me to the line and page number where he told you it was not his intention to touch her vagina.

A It got cut off. Page 23, I think it's line 2.

Q No.

A I'm –

Q Pay attention to my question.

A Okay.

Q Where in this transcript does he say, "It was not my intention to touch her vagina, to penetrate her vagina," to X, Y, Z?

A It doesn't, ma'am.

Q So it's actually just the phrase, "It was not my intention," and he didn't finish the sentence?

A That's correct.

Q So more accurately he never said

about what he did or did not intend to do?

A Yes, ma'am.

(App. 180-186) (emphasis added). Then, during her closing argument, the prosecutor told the jury the following:

> *But Investigator Wilder – he never said he did not intend to touch her vagina. When he had his memory refreshed with the transcript of the interview, he said he didn't – he said, "I never intended," dot, dot, dot. Didn't say what it was he didn't intend. Maybe he didn't intend to hurt her feelings. Maybe he didn't intend for her to go this far. Maybe he didn't intend – I don't know. But he didn't say that.*
>
> And, in fact, what he did say, when I asked Investigator Wilder, the direct quote was: Did your fingers ever make it to her vagina? No, they didn't. They moved towards that area, but no.
>
> What do you think he was going to do when he got down there, if he didn't?

(App. 253-254).

Yet, despite the clear attempt by the prosecutor to confuse the issue, there is *no confusion* as to what

the Petitioner actually said – his statement was recorded and could have been played for the jury:

> INVESTIGATOR WILDER: Or were you – you said you were moving your hands down toward her vagina, I'm assuming from behind? Your hand wasn't going down the front of her pants –
>
> DEFENDANT MARTIN: I mean, it went towards but it was not an intention to –

(App. 284). *But the jury never got to hear these crucial statements in context.* Based on the facts of this case and the importance of the Petitioner's statements to Investigator Wilder, the Petitioner's *actual statements* to Investigator Wilder should have been played for the jury.

Ultimately the attorneys and Investigator Wilder spent a substantial amount of time trying to explain to the jury what the Petitioner said – when *all*

doubts would have been removed if the jury had just been permitted to hear what the Petitioner *actually said* by listening to the recording of the interview. The goal of any trial should be to get to the truth – and yet the State and/or defense counsel's ineffectiveness in this case prevented the jury from hearing the truth.

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

appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

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

resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

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

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without

> jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

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

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good

> faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 338.

Thus, to be entitled to a certificate of appealability, the Petitioner needed to show only "that jurists of reason could disagree with the district court's[/magistrate judge'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 due process right to a fair trial and/or his Sixth Amendment right to the effective assistance of counsel) and (2) the district court's resolution of this claim is "debatable amongst jurists of reason." 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 the petition for writ of certiorari.

Respectfully Submitted,

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