No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MALIK GREEN,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. 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 claim that his counsel rendered ineffective assistance of counsel by misadvising him that if he testified at trial, the jury would learn of the *details* of his prior criminal history – which resulted in defense counsel interfering with the Petitioner's right to testify.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, MALIK GREEN, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on June 5, 2023. (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).

G. STATEMENT OF THE CASE

The Petitioner was charged in Florida with burglary and aggravated battery. The case proceeded to trial in 2014. Notably, the Petitioner did not testify at trial. At

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

the conclusion of the trial, the jury found the Petitioner guilty as charged for both counts. The state trial court sentenced the Petitioner to twenty-five years' imprisonment followed by drug offender probation. On direct appeal, the Florida First District Court of Appeal affirmed the Petitioner's convictions but reversed his sentence and remanded for a new judgment that removed the drug offender probation. *See Green v. State*, 178 So. 3d 467 (Fla. 1st DCA 2015).

The Petitioner subsequently filed a state postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850 raising claims of ineffective assistance of counsel (including the claim that is the subject of the instant petition). However, the state postconviction court summarily denied the motion (i.e., the state trial court did *not* hold an evidentiary hearing before ruling on the motion). The Petitioner appealed the state postconviction court's denial of his rule 3.850 motion and the Florida First District Court of Appeal affirmed the denial of the Petitioner's rule 3.850 motion without any explanation. *See Green v. State*, 272 So. 3d 1241 (Fla. 1st DCA 2019).

Thereafter, the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. The Petitioner raised several claims in the petition – one of which is the focus of the instant petition: defense counsel rendered ineffective assistance of counsel by affirmatively misadvising the Petitioner that if he testified at trial, the jury would learn of the details of his prior history (and, as a result of defense counsel's erroneous advice, defense counsel interfered with the Petitioner's right to testify). On January 18, 2022, the magistrate judge issued a report and recommendation recommending that the § 2254 petition be denied. (A-9). Then, on October 17, 2022, the district court

adopted the report and recommendation and denied the § 2254 petition. (A-6 & A-5).

The Petitioner proceeded to appeal the denial of his § 2254 motion. On June 5, 2023, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 petition. (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is 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).

At the time of the trial, the Petitioner had a prior felony history. In his § 2254 petition, the Petitioner explained that at trial, defense counsel misadvised him that if he testified at trial, the jury would learn of the details of his prior history. Counsel's advice to the Petitioner was incorrect. Florida law is well established that when a defendant testifies on his own behalf at trial, his prior conviction may be admissible (i.e., the jury can hear that a defendant is a convicted felon and how many times the defendant has been convicted of a felony or a crime involving dishonesty) – however, the *details* concerning a defendant's prior convictions are inadmissible. *See Livingston v. State*, 682 So. 2d 591, 592 (Fla. 2d DCA 1995). Thus, defense counsel's misadvice to the Petitioner deprived the Petitioner of his right to effective assistance of counsel (in violation of the Sixth Amendment to the Constitution). In *Everhart v. State*, 773 So. 2d 78, 79 (Fla. 2d DCA 2000), the state appellate court explained that erroneous legal advice regarding the consequences of a defendant testifying at trial constitutes deficient performance sufficient to require relief:

> Everhart alleges that counsel interfered with his right to testify by erroneously informing him that if he testified, the jury would automatically be told of the specific nature of his prior convictions. *If*

> *counsel told him this, it would be an incorrect statement of the law*, *see Britton v. State*, 604 So. 2d 1288 (Fla. 2d DCA 1992), *and would constitute deficient performance by counsel sufficient to require relief*, provided that Everhart can show that he was prejudiced. *See Jackson v. State*, 700 So. 2d 14 (Fla. 2d DCA 1997).

(Emphasis added).

In *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court recognized that a criminal defendant has a constitutional right to testify on his own behalf at trial. The Court declared that the right "is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 51(quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The Court held that the right is derived from several constitutional provisions, including the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, the Sixth Amendment right to self-representation, and as a corollary to the Fifth Amendment privilege against self-incrimination. The Court acknowledged that "[o]n numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental right." *Rock*, 483 U.S. at 53 n.10. It follows that a criminal defendant cannot properly weigh the option of foregoing this "fundamental" constitutional right unless the defendant is properly advised regarding how the prosecution can impeach the defendant based on criminal history. Pursuant to *Everhart*, defense counsel's misadvice to the Petitioner that the prosecution could impeach him with the details of his prior history "constitute[d] deficient performance

by counsel sufficient to require relief." *Everhart*, 773 So. 2d at 79.[2] The Petitioner's decision not to testify at trial was based *solely* on defense counsel's erroneous advice.

Had the Petitioner testified at trial, he would have told the jury that he had no knowledge or participation in the crimes in question, he was not at all familiar with the victim, and that prior to the crimes and during the time the events occurred, he was not at the scene of the crimes but rather was with Ouwee Trower. In *Everhart*, the state appellate court said the following:

> Everhart goes on to allege that, but for this incorrect advice, he would have testified. He asserts that he would have told the jury that he did have permission to enter the apartment, that the officer mischaracterized his statement, and that he told the officer that Ford had asked him not to come back to the apartment until the following day, which was when the burglary occurred. *Based on the record before us, it appears that the issue of whether Everhart had consent to enter the apartment was disputed and that the resolution of it turned on a credibility determination. Under these circumstances, we believe that Everhart has adequately shown prejudice.*

Everhart, 773 So. 2d at 79 (emphasis added). As in *Everhart*, the Petitioner has "adequately shown prejudice." *Everhart*, 773 So. 2d at 79. *See also Hicks v. State*, 666

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[2] In *Harris v. New York*, 401 U.S. 222, 225 (1971), this Court explained that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so." Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Thus, a criminal defendant cannot properly weigh the option of foregoing this "fundamental" constitutional right unless the defendant is properly advised regarding this right. Based on the record in this case, it is clear that defense counsel interfered with the Petitioner's fundamental constitutional right to testify. In light of defense counsel's actions, the Petitioner's waiver of his fundamental right to testify was *not* knowing, voluntary, and intelligent.

So. 2d 1021 (Fla. 4th DCA 1996).[3]

In the magistrate judge's report and recommendation (which was adopted by the district court), the magistrate judge concluded that even if defense counsel was ineffective for misadvising the Petitioner that by testifying the jury would learn of the details of his prior history, the Petitioner was nevertheless not prejudiced by defense counsel's ineffectiveness:

> [T]his Court concludes that Green failed to show that had he taken the stand, there is a reasonable probability he would have been acquitted. That is because the record squarely contradicts Green's purported testimony that "he didn't do it".
>
> First, the victim, who had known Green for more than ten years, identified Green as the shooter from a photo line-up and in open court. Second, minutes after the crimes, Green was stopped by police driving a car that matched the get-away car's description. And, notably, his passenger was the co-defendant who admitted to committing the crimes. Third, the clothing items retrieved from Green's vehicle matched three eye-witnesses' description. Finally, the testimony about Green's unusual height (6'2"-6'3"), his unusual eye color, and his light skin complexion solidified his identification by witnesses who knew him (despite his having masked his lower face with a bandana).

(A-31). The Petitioner respectfully disagrees with the magistrate judge's conclusion. Notably, the victim (William Johnson) who made the alleged identification in this case was impeached at trial with his prior inconsistent statement (i.e., Mr. Johnson's initial denial that there was marijuana in his house at the time of the incident). Moreover, regarding the magistrate judge's reliance on the search of the Petitioner's vehicle, undersigned counsel notes that all of the incriminating items found were on the

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[3] Although the Florida appellate court did not decide the issue in *Hicks*, the court "recognize[d] that some cases have held that no prejudice need be shown when the defendant's right to testify has been abridged in any way." *Hicks*, 666 So. 2d at 1023.

codefendant's person (and none of the items were found on the Petitioner's person or in his vehicle).

In *Riggins v. State*, 168 So. 3d 322 (Fla. 2d DCA 2015), the appellate court explained that a criminal defendant's trial testimony has a different "impact" on the jury than the testimony of other witnesses:

> *Second, a defendant's testimony cannot be "cumulative" because the impact of a defendant's own testimony is qualitatively different from the testimony of any other witness* – even a witness as aligned with the defendant as his girlfriend. *In the minds of the jurors, the defendant's testimony would not be "cumulative" of that of any other witness. Cf. Solorzano v. State*, 25 So. 3d 19, 25 (Fla. 2d DCA 2009) (noting that it may be error to exclude otherwise cumulative evidence when the evidence is offered from a source that "'differ[s] in quality and substance' from that of the other witnesses" (quoting *Valle v. State*, 502 So. 2d 1225, 1226 (Fla. 1987))). While the trial court may have discretion to limit the number of other witnesses a defendant may call to present cumulative evidence, the defendant's own testimony simply is not "cumulative" to that of any other witness *because of its different effect on the jury*. Therefore, this rationale cannot be the basis for denying postconviction relief.

Riggins, 168 So. 3d at 325 (emphasis added). Pursuant to *Riggins*, the "impact" of the Petitioner's own testimony "would have been qualitatively different" from the testimony of all other witnesses and his testimony would have had a "different effect on the jury." As explained above, had the Petitioner not been misadvised, he would have told the jury that he had *no knowledge or participation* in the crimes in question. And as explained above, no court has granted an evidentiary hearing on the Petitioner's ineffective assistance of counsel claim – *meaning that no judge has actually heard the Petitioner testify in order to consider and weigh his credibility.*

For all of these reasons, the Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Petitioner's claim is a matter debatable among jurists of reason. Therefore, the Eleventh Circuit should have granted a certificate of appealability for this claim (i.e., whether a defendant can demonstrate prejudice when the decision to waive the constitutional right to testify is based on an attorney's misadvice).

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 claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the magistrate judge's/district court's conclusion. The Petitioner therefore asks this 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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