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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF **FLORIDA**

CASE NO. 19-23952-CV-WILLIAMS

JIMMIE L. BOWEN,
Petitioner,

v.

RICKY D. DIXON,[1] SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

ORDER FOLLOWING REMAND DENYING AMENDED PETITION FOR WRIT OF HABEAS CORPUS
(28 U.S.C. § 2254)

THIS MATTER is before the Court following the Eleventh Circuit Court of Appeals' Judgment (DE

[1] The proper Respondent in this case is Ricky D. Dixon, Secretary for the Florida Department of Corrections and not Ashley Moody, the Florida Attorney General. The Clerk shall ensure that the docket is updated accordingly. See Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party.").

31)[2] reversing the Court's Order (DE 20) granting in part[3] and denying in part the *pro se* Amended Petition for Writ of Habeas Corpus ***("Amended Petition")*** (DE 6), brought pursuant to 28 U.S.C. § 2254, by Petitioner Jimmie L. Bowen ***("Petitioner").*** See *Bowen v. Sec'y, Fla. Dep't of Corr.,* 92 F.4th 1328 (11th Cir. 2024); (DE 31.) In its decision, the appellate court reversed the Court's Order granting Petitioner a new trial on the bases that federal courts only "[h]ave the power to overturn state criminal convictions in exceptional circumstances," and that the state court's decision denying Petitioner's Fifth Amendment claim, "was not 'so obviously wrong'" it warranted habeas relief. (DE 31 at 12, 19.) The Eleventh Circuit reversed and remanded with instructions to enter an Order consistent with its decision. (*Id.*) Thus, after careful review of the record, the applicable case law, and the appellate court's judgment reversing the Court's Order granting habeas corpus relief, Petitioner's Fifth Amendment claim is denied for the reasons set forth in the appellate court's opinion. And, the Amended Petition is now DENIED in its entirety.

A prisoner seeking to appeal a district court's

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[2] On April 15, 2024, the appellate court issued its Mandate. (DE 31.)

[3] The Court's Order granted the Amended Petition in part "[a]s to Petitioner's request for a new trial because Mr. Bowen's Fifth.Amendment rights under the U.S. Constitution were not scrupulously honored, and his statements should have been suppressed," ordering Respondent to conduct a new trial consistent with the Court's Order. (DE 20 at 5.)

final order denying his § 2254 habeas corpus petition has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. See *Harbison v. Bell,* 556 U.S. 180, 183 (2009) (citing *Slack v. McDaniel,* 529 U.S. 473, 484-85 (2000); *Wilkinson v. Dotson,* 544 U.S. 74, 78-83 (2005)). When a district court rejects Petitioner's constitutional claims on the merits, Petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See *Slack,* 529 U.S. at 484. However, when the district court rejects a claim on procedural grounds, Petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* The Court finds that no certificate of appealability shall issue. Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Pursuant to the appellate court's mandate, the Fifth Amendment claim raised in the Amended Petition (DE 6), is **DENIED;**

2. The Amended Petition (DE 6) is **DENIED** in its entirety;

3. Judgment in favor of the Respondent will be entered by way of a separate Order;

4. No certificate of appealability shall issue; and

5. All pending motions are **DENIED AS MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida, this 24th day of April, 2024.

/s/
KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

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APPENDIX B

In the UNITED STATES COURT OF APPEALS
for the ELEVENTH CIRCUIT

No. 22-11744

JIMMIE L. BOWEN,
Petitioner-Appellee,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-23952-KMW

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 15, 2024

For the Court: DAVID J. SMITH, Clerk of Court

ISSUED AS MANDATE:

APPENDIX C

In the UNITED STATES COURT OF APPEALS
for the ELEVENTH CIRCUIT

No. 22-11744

JIMMIE L. BOWEN,
Petitioner-Appellee,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-23952-KMW

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before WILSON, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en bane. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

APPENDIX C

In the UNITED STATES COURT OF APPEALS for the ELEVENTH CIRCUIT

No. 22-11744

JIMMIE L. BOWEN,
Petitioner-Appellee,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-23952-KMW

Before WILSON, GRANT, and BRASHER, Circuit Judges.

Opinion of the Court

GRANT, Circuit Judge:

State criminal defendants can receive federal habeas corpus relief under 28 U.S.C. § 2254 only in limited circumstances. One of those is when the state court whose decision is under review decided an issue in a way that involved an "unreasonable application"

of clearly established federal law. Jimmie Bowen says the Florida courts did just that in his case. He argues that the Florida trial court clearly violated *Miranda* by refusing to suppress incriminating statements he made to a fellow suspect when police placed the two in an interrogation room after he had invoked his right to counsel. The district court agreed and overturned his conviction. But the Supreme Court's cases are–at best–murky on when putting two suspects in a room together qualifies as interrogation under *Miranda.* Because reasonable jurists could disagree about whether Bowen was "interrogated" in the interview room, federal courts lack the power to upset his state criminal conviction. We therefore reverse the district court.

I.

Jimmie Bowen and his gang, New Moneii, had a bone to pick with Pierre Roche, who was selling drugs on New Moneii' s turf. Years before, the gang's leaders had shot Roche for the same perceived violation–but he did not change his habits. The turf dispute continued, and when sixteen-year-old Bowen spotted Roche playing dominoes nearby, he hatched a plan to execute him. This time, the gang got its target. Bowen killed Roche, shooting him from close range. He even stood directly over him, firing more rounds to make sure the grisly task was complete. But Roche was not the only victim. Bowen also wounded Christopher Smith, another dominoes player, and shot and killed Derrick Days, Jr.–a ten-month-old baby sitting in his father's lap across the table.

Bowen was not immediately identified. He was wearing a face covering, and witnesses could describe him only as a black male, roughly five feet eight inches tall. The police had no leads until an associate of Bowen's identified him as the shooter. That same person also told the police that Bernard Jones, a seventeen-year-old member of the New Moneii gang, was the getaway driver. Bowen and Jones were soon arrested.

The detectives first questioned Bowen and Jones separately. After they advised Bowen of his *Miranda* rights, both he and his mother invoked his right to counsel. The detectives then ceased their questioning and left the interrogation room. Jones, by contrast, waived his *Miranda* rights and spoke with Detective Jean Solis that same day. The details of their conversation are not clear, but at one point while they were together, Solis observed that Bowen was calling Jones's cell phone. Jones did not pick up.

Some time after Bowen invoked his rights, Solis moved him to a second interrogation room. Soon enough, Jones was there too. Solis informed the two suspects that they would remain there until transportation to the Juvenile Assessment Center could be arranged. He activated audio and video recording in the room, but neither Solis nor any other law enforcement officer asked either suspect to speak with the other about the murders. Nor did anyone promise any benefit to one suspect in return for seeking information from the other.

Even so, the two began talking almost

immediately. The microphone in the room picked up several incriminating statements from Bowen, who implicitly acknowledged that he was the shooter (and that Jones was the driver), accurately described the scene of the crime, and incredulously wondered how the police had "the two right motherf***ers." He and Jones, Bowen said, were the only living people to "know the truth."

The state brought charges, and Bowen moved to suppress his statements to Jones, alleging violations of the Fourth, Fifth, and Sixth Amendments, the Florida Constitution, and Florida's wiretap statute. Bowen testified that he talked with Jones because he "wanted to," and knew that he could have refused to do so. Still, he argued that Detective Solis, by placing Jones in the interview room with him after he had invoked his *Miranda* rights, effectively "interrogated" him in violation the Fifth Amendment.

At the suppression hearing, Solis shared several motivations for putting Bowen and Jones in the room together. He first testified that it was so they could await transportation to the Juvenile Assessment Center. But he later admitted to recognizing that the two suspects might speak to each other about the murders–indeed, hoping they would–and conceded that this possibility informed his decision to put them in the same room. After taking evidence and hearing arguments, the state court issued a short oral ruling denying Bowen's suppression motion.

At the end of the trial, before both sides began their closing arguments, Bowen renewed his motion to

suppress. The state court again denied it, and the jury found Bowen guilty on all counts. The court sentenced him to life in prison with judicial review after twenty-five years. He appealed to the Florida district court of appeal, arguing, among other things, that the trial court erred when it denied his motion to suppress. The appeal was denied without opinion. *Bowen* v. *State,* 184 So. 3d 533 (Fla. Dist. Ct. App. 2016). Bowen subsequently filed several other state post-conviction motions, all of which were also denied.

He then moved to federal court, filing a petition for habeas corpus under 28 U.S.C. § 2254. The petition raised several claims related to Bowen's interrogation-room statements to Jones, including that his placement in the room violated *Miranda,* federal and state guarantees of due process, and the state wiretap statute.

Faced with the limited rationale offered in the state court's oral ruling, the magistrate judge properly attempted to theorize what reasoning could have supported that court's denial of the motion to suppress. *See Harrington v. Richter,* 562 U.S. 86, 98, 102 (2011); *Pye v. Warden, Georgia Diagnostic Prison,* 50 F.4th 1025, 1035- 41 (11th Cir. 2022) (en banc). The only plausible theory, she concluded, was that placing Bowen and Jones together did not amount to custodial interrogation. *Bowen v. Sec'y, Florida Dep't of Corr.,* No. 19-23952-CV, 2020 WL 13281250, at *7-8 (S.D. Fla. July 29, 2020). But despite recognizing AEDPA's deferential standard of review, the magistrate judge found the state-court ruling "patently unreasonable." *Id.* at *10. The district court agreed and granted the

petition, concluding that "'clearly established' Supreme Court precedent left no 'fairminded' dispute" about the alleged *Miranda* violation. *Bowen v. Dixon,* No. 19-CIV-23952, 2022 WL 1521983, at *1 (S.D. Fla. May 13, 2022). This appeal followed.

II.

We review a district court's ruling on a petition for habeas corpus de novo. *Smith v. Comm'r, Alabama Dep't of Corr.,* 924 F.3d 1330, 1336 (11th Cir. 2019).

III.

Under the Antiterrorism and Effective Death Penalty Act of 1996, also known as AEDPA, a federal court may not grant habeas relief to a state prisoner "with respect to any claim that was adjudicated on the merits in State court," unless the adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state-court adjudication qualifies as "contrary to" clearly established federal law if that court contradicted the Supreme Court on a question of law, or if it arrived at a different conclusion than the Supreme Court did in a case with materially indistinguishable facts. *Williams v. Taylor,* 529 U.S.

362, 405-06 (2000). And a state-court adjudication involves an "unreasonable application of' clearly established federal law if the decision was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn v. Kayer, 592* U.S. 111, 118 (2020) (per curiam) (quotation omitted).

By this standard, to justify habeas relief a Supreme Court precedent must "clearly *require* the state court" to have adopted a different result. *Kernan v. Cuero,* 583 U.S. 1, 3 (2017) (per curiam). The unreasonable-application standard is thus significantly higher than a showing that the state court was incorrect, or even that it clearly erred. *Shinn, 592* U.S. at 118. The bottom line is this: a "state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Pye,* 50 F.4th at 1034 (quoting *Richter,* 562 U.S. at 101).

On each claim for relief, we review the "last state-court adjudication on the merits." *See Greene v. Fisher,* 565 U.S. 34, 40 (2011). But when that final merits adjudication does not offer specific reasons in support of its holding, we "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers,* 138 S. Ct. 1188, 1192 (2018). Still, even when "looking through" to another opinion, federal courts must defer to the state court's *ruling,* not its specific *reasoning*. *Pye,* 50 F.4th 1035-41. Put simply, state-court decisions must be "given the benefit of the

doubt"-there must have been "no reasonable basis" for the state court's action. *Raulerson v. Warden,* 928 F.3d 987, 996 (11th Cir. 2019) (quoting *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011)); *Richter,* 562 U.S. at 98.

That is because federal habeas review of state convictions "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter,* 562 U.S. at 103 (quotation omitted). State courts–not federal–"play the leading role in assessing challenges to state sentences based on federal law." *Shinn,* 592 U.S. at 124. The federal judiciary is a backstop, guarding against only "extreme malfunctions" in state courts, not engaging in "ordinary error correction through appeal." *Richter,* 562 U.S. at 102-03 (quotation omitted). AEDPA's standards are thus highly deferential and "difficult to meet"intentionally and for good reason. *Pinholster, 563* U.S. at 181 (quoting *Richter,* 562 U.S. at 102).

Habeas review, in short, is a uniquely powerful form of federal intrusion into state affairs. AEDPA significantly-and appropriately-constrains federal-court forays into state convictions, denying us the authority to correct all but the most obvious, and least arguable, state-court errors.

IV.

We now apply those standards here. Bowen argues that his state conviction should be vacated

because his self-incriminating statements were the product of a *Miranda* violation.[1] Specifically, he claims that Officer Solis's decision to place him in a seemingly private space with a fellow suspect amounted to an interrogation–and thus a violation of *Miranda*–under *Rhode Island v. Innis,* 446 U.S. 291 (1980). Bowen, however, relies on an incomplete account of the Supreme Court's precedents on interrogation, and the Florida courts reasonably concluded that his *Miranda* rights were not violated. Habeas relief is not appropriate because fairminded jurists, applying clearly established federal law to this record, could (rather straightforwardly) agree with the state court that Solis did not violate Bowen's *Miranda* rights.

A.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a

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[1] At oral argument, counsel for Bowen also argued, for the first time, that the state court did not rule on the merits of the Fifth Amendment claim. We do not consider this argument as it was not raised squarely before the district court. *Bryant v. Jones,* 575 F.3d 1281, 1308 (11th Cir. 2009). But even in the face of light reasoning–it was, after all, an oral ruling–we easily conclude that the court did rule on the *Miranda* claim. To start, federal courts generally presume that a state court rules on the merits when it denies relief after a federal claim has been presented. *Richter,* 562 U.S. at 99. Neither party disputed that presumption before the district court. *See Bowen,* 2020 WL 13281250, *report and recommendation adopted, Bowen,* 2022 WL 1521983. And as a matter oflogic, the trial judge could not have allowed the statements to be introduced without rejecting Bowen's Fifth Amendment claim.

witness against himself." U.S. Const. amend. V. In service of this privilege, the Supreme Court held in *Miranda v. Arizona* that the government may not use statements offered while a suspect was in "custodial interrogation" unless that suspect was informed of his rights. 384 U.S. 436, 444 (1966). This post-arrest catechism is known as the *Miranda* warning. Once that warning is made, if an individual invokes his right to counsel, interrogation cannot resume until counsel is present. *Edwards v. Arizona,* 451 U.S. 477, 484-85 (1981).

But *Miranda* does not require a warning, or otherwise impose restrictions, anytime police speak with someone–even if that someone is a suspect. Instead, its protections apply only in custodial interrogation. Custodial interrogation, in turn, is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. *Rhode Island v. Innis* further clarified that definition (or muddied it, depending on who you ask). There, the Court explained that interrogation includes both "express questioning" and "its functional equivalent." *Innis,* 446 U.S. at 300-01.

The functional equivalent of express questioning, according to *Innis,* encompasses "any words or actions" by the police that they "should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnote omitted). This part of the definition is objective, focusing "primarily upon the perceptions of the

suspect, rather than the intent of the police." *Id.* Although the officer's subjective intentions may remain relevant to the analysis, that is only because those intentions can inform the objective inquiry. An action designed to elicit an incriminating response, for example, is more likely to be one the officer should know is objectively likely to do so. *Id.* at 301 & n.7.

"Interrogation" is more than just "subtle compulsion." *Id.* at 303. Under *Miranda,* interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. Still, as Bowen emphasizes, the Supreme Court has recognized that any police knowledge of a suspect' s "unusual susceptibility" to a "particular form of persuasion" can inform whether the officer should have known the action taken was reasonably likely to elicit an incriminating response. *Id.* at 302 n.8.

What Bowen does *not* emphasize is that even after this elaboration, the *Innis* Court found no interrogation. *See id.* at 302. There, the police–with suspect Innis in the back of their car in easy earshot of the conversation–had talked among themselves, expressing their concern over a missing shotgun near a school for handicapped children. *Id.* at 294-95. Innis remained silent at first, but as the officers continued to worry out loud about the children's safety, he divulged the gun's location. *Id.* The Supreme Court concluded that such "subtle compulsion" was not the functional equivalent of interrogation and that Innis's *Miranda* rights were respected. *Id.* at 302-03.

Over time, the Supreme Court has elaborated on

Innis's definition of interrogation, emphasizing that whether a given police practice amounts to interrogation must be determined in light of *Miranda's* purpose: "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro,* 481 U.S. 520, 529-30 (1987). In *Mauro,* for example, the Court found no error when the police allowed a suspect' s wife to speak to him after he had invoked his *Miranda* rights. *Id.* at 521-25. The police admitted they knew it was "possible" that Mauro would incriminate himself, yet refused to allow the conversation unless it was recorded and an officer was present. *Id.* at 522-24. The state court concluded that an incriminating statement was "reasonably likely" under *Innis's* standard. *Id.* at 524-25. The Supreme Court disagreed. It reversed, emphasizing that Mauro was not subject to any "compelling influences, psychological ploys, or direct questioning." *Id.* at 525-30.

The majority and dissenting opinions in *Mauro* debated whether incrimination was just a "possibility" as opposed to "reasonably likely," or even "highly probable" on the facts of that case, and struggled to weigh the importance of the officers' admissions about their subjective intentions. *See id.* at 526-28; *id.* at 531-36 (Stevens, J., dissenting). Ultimately, the Court concluded that *Innis's* standard was not violated: the police had a permissible purpose for sending Mrs. Mauro in to see her husband, and allowing the two of them to speak was not the functional equivalent of interrogation. *Id.* at 528-30 (majority opinion).

The majority, at least indirectly, suggested that the *Miranda* inquiry should be infused with the core of the Fifth Amendment privilege–protection against coercion. That it was Mrs. Mauro's idea to speak to her husband became highly relevant; how could a conversation, held at the parties' own insistence, compel them to speak? *See id.* at 528. Given that Mauro "could have chosen not to speak to his wife," his "volunteered statements" were not properly considered the "result of police interrogation." *Id.* at 528 n.5, 529 (quotation omitted). Allowing someone to be in a position where they may choose to make incriminating statements is not the "kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* at 527. After all, officers "do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.* at 529. So there was no "interrogation" when law enforcement officers were only witnesses to a conversation between the accused and his spouse-even though they knew about and recorded the conversation. *Id.* at 529.

Likewise, schemes to "mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda's* concerns." *Illinois v. Perkins,* 496 U.S. 292, 297 (1990). In *Perkins,* police placed an undercover agent in a jail cell and instructed the agent to engage a suspect in casual conversation and report back anything he heard about a murder they were investigating. *Id.* at 294-9 5. Without first reading the suspect his rights, the agent asked him if he had ever "done" anybody, at which point he made incriminating statements about the murder. *Id.* The Supreme Court

decided that even this did not violate *Miranda's* protections. *Id.* at 296-300. "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda"* because the "essential ingredients of a 'police-dominated atmosphere' and compulsion are not present." *Id.* at 296.

The Court emphasized that *"Miranda* forbids coercion, not mere strategic deception," and coercion "is determined from the perspective of the suspect." *Id.* at 296-97 (citing *Innis,* 446 U.S. at 301). There is no coercion, the Court said, when the officer «wears not police blue, but the same prison gray." *Id.* at 297 (quotation omitted). Perkins, unaware that he was talking with an undercover agent, could not have been coerced into speaking because he had "no reason to think that the listeners [had] official power over him." *Id.* Thus, in conversations where «the suspect does not know that he is speaking to a government agent," there is «no reason to assume the possibility that the suspect might feel coerced"–which means *Miranda* protections do not apply. *Id.* at 299.

The *Perkins* Court made explicit what had been suggested in *Mauro:* some measure of compulsion is required before *Miranda* rights attach. So the «reasonably likely" language from *Innis* does not eliminate the fundamental requirement of coercion in deciding whether police conduct is the functional equivalent of interrogation. Courts instead must enforce the principles underlying the Fifth Amendment privilege-a proscription against compelled testimony. *See* U.S. Const. amend. V.

B.

A fairminded jurist, applying the *Innis-Mauro-Perkins* trio of cases, could conclude that Solis's decision to place Bowen in an interrogation room with Jones was not a *Miranda* violation. These cases certainly do not "clearly *require* the state court" to have reached the opposite conclusion. *See Kernan,* 583 U.S. at 3. In fact, they show that police actions that lead to a suspect making incriminating statements to a third party are the functional equivalent of interrogation only if they involve some "psychological ploy" with sufficient coercive elements. *See Mauro,* 481 U.S. at 527; *Perkins,* 496 U.S. at 297.

Here, there was no psychological ploy. Like the wife in *Mauro,* Jones was operating completely independently from the police, as was Bowen, who spoke to Jones only because he "wanted to." And just like the suspect in *Perkins,* Bowen did not believe that he was in the presence of law enforcement officers, so it is not at all clear why he would have felt the coercive pressure of police interrogation. A fairminded jurist could thus conclude that placing Bowen and Jones in a room together was the strategic use of a neutral situation rather than a coercive psychological ploy.

Yes, an officer's knowledge of a suspect' s young age may be relevant because the risk of coercion is more "acute" when "the subject of custodial interrogation is a juvenile." *J.D.B. v. North Carolina,* 564 U.S. 261,269,277 (2011); *see also Innis,* 446 U.S. at 302 n.8. But relevancy is not the same as certainty. Far from it. Neither *J.D.B.* nor any other case

affirmatively *requires* a court to determine that Bowen's youth was dispositive here.

What's more, it is not obvious that all jurists would agree that it was reasonably likely that Bowen would incriminate himself if Jones was placed in the same room. The Supreme Court has not provided much guidance on *Innis's* "reasonably likely" language, but *Mauro* instructs us that a mere "possibility" of incrimination is not enough. *See Mauro,* 481 U.S. at 528-29. Here, Solis did not interrogate Bowen merely by "hoping" he would incriminate himself. *Id.* at 529. And there is room for disagreement about whether it was "reasonably likely" that Bowen would do so. After all, he had been arrested and read his rights many times before–and fully understood that he could have refused to speak to anyone. That Bowen *did* incriminate himself is not enough to show with certainty that it was reasonably likely that he would do so when Jones was placed in the room.

In short, the facts place Bowen's challenge in a gray area that is not unambiguously dictated by Supreme Court precedent. That is the exact type of case where § 2254 relief is inappropriate.

* * *

Federal courts have the power to overturn state criminal convictions only in exceptional circumstances. This is not one of them. The Florida court's decision was not "so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn,* 592 U.S. at 118 (quoting *Richter,* 562 U.S. at 103).

Accordingly, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings not inconsistent with this opinion.

WILSON, Circuit Judge, concurring in the judgment:

Due to AEDPA's deferential standard of review, I concur in the majority's judgment. I write separately to emphasize the significance of the defendant's age and the heightened concern that should attach to cases involving juveniles.

Our precedent maintains that *Miranda* rights are not implicated where "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present." *Illinois v. Perkins,* 496 U.S. 292, 296 (1990); *see also United States v. Stubbs,* 944 F.2d 828, 832 (11th Cir. 1991) (applying *Perkins* to find that *"Miranda* and Fifth Amendment concerns are not implicated when a defendant misplaces her trust in a cellmate who then relays the information–whether voluntarily or by prearrangement–to law enforcement officials.").

Miranda, as the majority appropriately explains, turns on the presence of a custodial interrogation, defined as "express questioning or its functional equivalent." *Rhode Island* v. *Innis,* 446 U.S. 291, 300-01 (1980). Here, a co-defendant was placed, albeit purposefully, in the same interrogation room with Bowen. Bowen confessed to this co-defendant, and the police recorded the confession. These facts are not sufficiently different from *Perkins* to warrant finding that the state's decision was "an unreasonable

application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

But what I do find troubling is how Bowen's age interplays with the voluntariness of his confession. At the time he was taken into custody, Bowen was only sixteen years old with a ninth-grade education. Prior to being left in the interrogation room, he clearly invoked his *Miranda* rights, as did his mother on his behalf.

In *Hall v. Thomas,* I also wrote separately to emphasize that "the greatest care must be taken to assure that the confession of a juvenile [is] voluntary." 611 F.3d 1259, 1294 (11th Cir. 2010) (Wilson, J., concurring) (internal quotations omitted). Ascertaining voluntariness requires understanding the totality of the circumstances that led to a waiver and confession, including evaluating "'the juvenile's age, experience, education, background, and intelligence, and [] whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.'" *Id.* at 1285 (quoting Farev. *Michael* C., 442 U.S. 707, 725 (1979)). Voluntariness will thus turn on whether "the entire record was before the state court ... and [whether] the record amply supported that finding." *Id.* at 1287.

The year after *Hall,* the Supreme Court held that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the

objective nature of that [inquiry]." *J.D.B. v. North Carolina,* 564 U.S. 261, 277 (2011). In reaching this conclusion, the Court wrote that "[t]ime and again," it has expressed that children are to be held in a different light than adults, seeing as they "generally are less mature and responsible than adults" and more vulnerable and susceptible to influence and psychological damage. *Id.* at 272 (quotations omitted).

Below, citing to *J.D.B.,* the district court explained that the risk of an involuntary confession is "acute" when dealing with juveniles. *Id.* at 269. I echo their sentiments here. My analysis diverges with the majority in that I believe the majority treats *J.D.B.* too lightly. The majority writes that in considering a suspect's young age, "relevancy is not the same as certainty .... Neither *J.D.B.* nor any other case affirmatively *requires* a court to determine that Bowen's youth was dispositive here." I do not contend that age should be dispositive. I do however, as I wrote in *Hall,* contend that the "greatest care" should be exercised to ensure that a juvenile's statements were voluntarily and freely given.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-CIV-23952-WILLIAMS

JIMMIE L. BOWEN,
Petitioner,

v.

RICKY D. DIXON,[1] *Secretary, Florida Department of Corrections,*
Respondent.

ORDER

THIS MATTER is before the Court on Magistrate Judge Lisette Reid's Report and Recommendation ("Report") (DE 18) on Jimmie L. Bowen's ("Petitioner's" or "Mr. Bowen's") Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 (the "Amended Petition"). (DE 6.) Respondent filed objections to the Report ("Objections"). (DE 19.) Petitioner did not file a response to the Objections. The Report recommends the Court grant in part and deny

[1] Ricky D. Dixon succeeded Mark S. Inch as the Secretary of the Florida Department of Corrections in November 2021 and is, therefore, automatically substituted for Inch as a Respondent pursuant to Fed. R. Civ. P. 25(d).

in part the Amended Petition. (DE 18 at 2, 34.) The Court believes a brief additional discussion is appropriate.

First, it appears that Respondent misunderstands the Report's analysis of the applicable standard of review under 28 U.S.C. § 2254(d), which provides that:

> An application for a writ of habeas corpus ... shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Respondent objects to the Report's conclusions because, "[i]n the instant case, there is no decision of the Supreme Court of the United States holding that the acts of leaving a suspect in an interview room with a codefendant ... while recording their ensuing conversation, constitutes 'custodial interrogation.'" (DE 19 at 4-5.) Thus, Respondent seems to assert that, in order to grant Mr. Bowen's Amended Petition as to his Fifth Amendment claim, the Court must identify a Supreme Court decision with

the identical facts at issue here. (*Id.*) This is incorrect. The Supreme Court has expressly held that, to grant a petition for habeas corpus under Section 2254(d)(1), a court need not cite to "an identical factual pattern." *White v. Woodall,* 572 U.S. 415, 427 (2014) (quoting *Panetti v. Quarterman,* 551 U.S. 930, 953 (2007)). Rather, "relief is available under § 2254(d)(1)'s unreasonable-application clause 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,* 572 U.S. at 427 (citing *Harrington v. Richter,* 562 U.S. 86, 103 (2011)). Upon review of the record and the applicable case law, the Court concurs with Judge Reid and concludes that the state court incorrectly denied Petitioner's motion to suppress his statements obtained after he scrupulously invoked his Fifth Amendment right to remain silent, because "clearly established" Supreme Court precedent left no "fairminded" dispute as to this issue.

Next, as extensively discussed by Judge Reid in the Report, "the state court's denial of the motion to suppress was an unreasonable application of clearly established federal law as determined by the Supreme Court." (DE 18 at 25.) Here, Mr. Bowen, who was a sixteen-year-old minor, invoked his right to remain silent in writing. (DE 6 at 3.) Moreover, his mother told the interrogating detective-more than once-that she needed to be present for any attempts to question her minor son, and the detective assured her he would not do so. *(Id.)* Nevertheless, the detective placed Mr. Bowen in an interrogation room with his co-defendant, who had waived his right to remain silent and

discussed the incident at issue with police.[2] Additionally, the detective purposefully recorded the conversation. *(Id.)* Consequently, as the Report concludes, Petitioner's Fifth Amendment rights were violated, and the state court's ruling to the contrary rested on an "unreasonable application" of clear Supreme Court precedent. See 28 U.S.C. § 2254(d)(1); *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980) (providing "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation"); *Kuhlmann v. Wilson,* 477 U.S. 436, 459 (1986) (stating that to show a violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), a petitioner for habeas corpus "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.");. *J.D.B. v. North Carolina,* 564 U.S. 261, 269 (2011) (stating that the risks of coercive custodial police interrogations are "more troubling" and "more acute ... when the subject of custodial interrogation is a juvenile"); see *also Maine v. Moulton,* 474 U.S. 159, 176 (1985) (analyzing the Sixth Amendment right to counsel and stating "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have

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[2] Detective Benny Solis testified that, "yes" he put Mr. Bowen and his co-defendant, Bernard Jones ("Mr. Jones"), in a room to see if they would talk about the case. (DE 13- 3 at 31.) And Mr. Jones, when eliciting statements from Mr. Bowen, stated "they told me what happened ... they know that you was the shooter, and I was the um ... the driver ..." (*Id.* at 20.) The videorecording of Mr. Jones and Mr. Bowen was played for the jury. *(Id.)*

counsel present in a confrontation between the accused and a state agent"); *see also Smith v. Illinois,* 469 U.S. 91, 98 (1984) (analyzing the Sixth Amendment right to counsel and holding that "[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease.").

Finally, the cases cited by Respondent do not support rejection of the Report. The two cases Respondent heavily relies upon, *United States v. Stubbs,* 944 F.2d 828 (11th Cir. 1991), and *Arizona v. Mauro,* 481 U.S. 520 (1987), are clearly distinguishable. As discussed in the Report, *United States v. Stubbs* is inapplicable because it dealt with a defendant who made statements while incarcerated in prison, not detained in an interrogation room pre-arrest. 944 F.2d at 831. Likewise, *Arizona v. Mauro* is inapposite because it involved a defendant who spoke with his wife in an interview room, while a law enforcement officer was present, with the recorder placed "in plain sight ... ." 481 U.S. at 522. Notably, both these cases involve adult defendants. Mr. Bowen (and his mother, who spoke for her minor child) clearly invoked his *Miranda* rights yet was nevertheless placed in an interrogation room alone with his co-defendant and recorded without his knowledge. The detective in this matter acknowledged that the motive for moving Mr. Bowen to a room with his co-defendant was to see if they would talk about the case and that he "absolutely" hoped they would. (DE 14-1 at 32.) Accordingly, the state court should have suppressed Mr. Bowen's statements and the failure to do so was "a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States .... " 28 U.S.C. § 2254(d)(1).

Accordingly, upon a careful review of the Report, the Amended Petition, the Objections, and the record, it is **ORDERED AND ADJUDGED** that:

1. Judge Reid's Report (DE 18) is **AFFIRMED AND ADOPTED.**

2. Mr. Bowen's Amended Petition (DE 6) is **GRANTED IN PART AND DENIED IN PART.** The Amended Petition is granted in part as to the request for a new trial because Mr. Bowen's Fifth Amendment rights under the U.S. Constitution were not scrupulously honored, and his statements should have been suppressed. Accordingly, Respondent is ordered to conduct a new trial consistent with this Order and the Report. The Amended Petition is denied in all other respects.

3. The Clerk is ordered to **CLOSE** this case.

DONE AND ORDERED in Chambers in Miami, Florida, this 13th day of May, 2022.

/s/
KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE

cc: **All Counsel of Record;** and

Jimmie L. Bowen
B12752
Madison Correctional Institution
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382 SW MCI Way
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APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-23952-CV-WILLIAMS
MAGISTRATE JUDGE REID

JIMMIE L. BOWEN,
Petitioner,

v.

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,
Respondent.

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

I. Introduction

This matter is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus, filed with the assistance of counsel, and brought pursuant to 28 U.S.C. § 2254. [ECF No. 6]. Petitioner **Jimmie L. Bowen** challenges his conviction following a jury trial in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, **Case No. F0S-46866B.**

Pursuant to the Rules Governing Section 2254 Proceedings, the Court "must promptly examine" the Petition upon receipt from the Clerk of Court. Rules

Governing Section 2254 Proceedings, R. 4. Accordingly, this matter has been referred to the Undersigned for Report and Recommendation on any dispositive matter pursuant to 28 U.S.C. § 636(b)(1)(B) and S.D. Fla. Admin. Order 2019-2. [ECF No. 2].

Petitioner asserts one overarching claim in his Amended Petition: the placing of Petitioner in a wired police station interview room with his co-defendant after Petitioner had invoked his rights, and the surreptitious recording of their conversation, violated *Miranda v. Arizona,* 384 U.S. 436 (1966), Florida and federal guarantees of Due Process, and the Florida Wiretap Statute, and it was reversible error to deny his motion to suppress. [ECF No. 6 at 15].

Upon the Undersigned's review of the record in this federal habeas case and the underlying state court criminal case, the state court's determination that Petitioner's incriminating statement was not acquired in violation of his Fifth Amendment rights was an unreasonable application of clearly established federal law. Accordingly, as further discussed below, the Undersigned **RECOMMENDS** the Amended Petition [ECF No. 6] be **GRANTED IN PART** as to his Fifth Amendment claim and **DENIED** in all other respects.

II. Factual and Procedural History

On December 13, 2008, Pierre Roche and a ten-month-old infant were shot and killed during a dominoes game outside a grocery store near 58th Street and 22nd Avenue in Miami, Florida. [ECF No. 6 at 2]. Another man sitting with them, Christopher

Smith, was also shot, but survived. *[Id.]*.

Also present was Derrick Days Sr., the father of the ten-month-old infant who was killed. *[Id.]*. Days could not identify the shooter but described the shooter's weapon as a black and chrome semi-automatic pistol and stated that more than five shots were fired. [ECF No. 12 at 15]. Days also stated that the shooter was a black male, a little taller than he was (5'7"), and had a white flag or bandana covering his face. *[Id.]*. According to Days, the shooter "emptied his clip" and shot Mr. Roche twice, once while he was laying on the ground. *[Id.]*.

Another man, Milliage Chester, did not witness the shooting itself but did see what he believed to be the suspect walking in the area nearby before the shooting. [ECF No. 14-5 at 37-38]. Chester stated that the suspect was not wearing a face covering before the shooting, but he did not recognize him and could not identify him at trial. *[Id.* at 42]. Like Days, Chester identified the suspect as a black male who was approximately 5'8". *[Id.]*. After hearing several gunshots, he saw the person he believed to be the suspect run towards a white truck and leave the scene at a high rate of speed. *[Id.* at 38-41].

Immediately after the shooting, Detective Solis, the lead investigator, testified that the police "had no leads whatsoever." *[Id.* at 130]. No one was able to identify the shooter, except describing him as an average height black male. *[Id.]*. There was no DNA or other physical evidence recovered from the scene of the shooting except for nine bullet casings, a shoe print

potentially from the shooter, and vehicle tread prints, potentially from a get-away vehicle. *[Id.].* However, with no firearm, suspect, or vehicle, there was nothing to compare. *[Id.].*

On December 18, 2008, Detective Solis's luck changed. Out of nowhere, Terrence "Bull" Yarborough, a four-time convicted felon, identified Petitioner as the shooter to Detective Solis following Yarborough's arrest for an unrelated armed robbery in which Yarborough potentially faced life imprisonment if convicted. [ECF No. 6 at 6, 12-13]. Later that same day, Petitioner, who was sixteen years old and only had a ninth-grade education, was arrested at his home and brought to the police station. *[Id.* at 12-13]. Less than an hour later, two detectives entered Petitioner's interrogation room with Petitioner's mother and read Petitioner his *Miranda* rights. *[Id.* at 3]. Petitioner was advised by his mother to invoke his *Miranda* rights, and Petitioner did so in writing. *[Id.].*

The detectives subsequently left Petitioner's interrogation room and did not continue questioning him. *[Id.].* Petitioner's mother then told the detectives that she wanted to be present if they were going to interrogate her son, and to otherwise leave him alone. *[Id.].* Petitioner's mother then left the police station. *[Id.].*

Petitioner's co-defendant, Bernard Jones, however, did waive his rights and spoke with Detective Solis about the incident, but it is unclear exactly what was discussed. [ECF No. 13-3 at 19]. During Detective Solis's conversation with Jones, Detective Solis

observed that Petitioner attempted to call Jones using his cellular telephone, though it does not appear that Jones answered. [ECF No. 14-5 at 97]. Soon after their conversation, Detective Solis brought Petitioner into Jones's interrogation room, and secretly turned on a recording device. *[Id.]*.

Detective Solis originally testified at the suppression hearing that this was for purposes of facilitating the transfer of Petitioner and Jones to a Juvenile Assessment Center, however Petitioner argued that Detective Solis's reasoning was pretextual and that Detective Solis was secretly recording them in the hopes that they would make incriminating statements. [ECF No. 6 at 3]. On cross examination, Detective Solis later testified after being impeached with prior deposition testimony that he did in fact place Petitioner with Jones "to see if they were going to talk about the investigation." [ECF No. 14-1 at 27-31]. When Detective Solis was further asked: "You put them together, you wanted to see if they would talk about this case?" he answered: "Correct." *[Id.* at 31]. On redirect examination, when Detective Solis was asked if he knew they were going to talk about the case, he said: "Correct. Possibly." *[Id.* at 32]. When asked if "as investigator [he] hoped that obviously they'll talk about the case," Detective Solis said that "[a]bsolutely" he hoped so. *[Id.]*.

Unsurprisingly, Petitioner did make several incriminating statements to Jones, though the vast majority of the conversation was initiated by Jones. [ECF No. 13-2 at 22-41]. When talking with Jones, Petitioner seemingly acknowledged to him that

Petitioner was the shooter and Jones was the driver; described the scene of the crime, for example, that the people present at the shooting were sitting at a dominoes table and had their backs to the shooting; and incredulously wondered "how the fl'**" the police had "the two right motherfl'**ers" because Petitioner and Jones were the only two living people who "know the truth." *[Id.].* Clearly, Petitioner was unaware that Jones had waived his *Miranda* rights and had spoken with Detective Solis, because Jones denied talking with Detective Solis about the case. *[Id.].* Petitioner was also seemingly unaware that Detective Solis knew that Petitioner had tried to call Jones from his interview room.

On the other hand, Detective Solis testified that at no time did anyone say or promise anything to Petitioner to elicit a statement from him, nor did anyone ask Petitioner's co-defendant Jones to speak with Petitioner or promise anything to Jones to elicit a statement from Petitioner. [ECF No. 14-1 at 32-33]. Further, Detective Solis stated that Petitioner and Jones did not ask to have a private conversation or ask for a private room, and all that he told them was that they were going to wait together in the room to be transported to the Juvenile Assessment Center, though it turns out that they were not actually transported together, and that Petitioner was transported several hours after *Jones.[Id.* at 32-33, 76-77].

Petitioner also made unchallenged incriminating statements on at least two other occasions in addition to the interrogation room

conversation with Jones. After being transported, Petitioner made several recorded jailhouse telephone calls further implicating himself and discussing his belief that Mr. Yarborough "snitched" on Petitioner and Jones. [ECF No. 13-2 at 72-76]. Petitioner was correct; as stated before, Mr. Yarborough had implicated Petitioner to investigators and recounted to investigators conversations between him and Petitioner made before and after the shooting. [ECF No. 6 at 6, 12-13]. Mr. Yarborough provided his telephone records corroborating his statement that after the shooting, Petitioner called him, and they allegedly discussed the incident. *[Id.].*

On December 24, 2008, Petitioner was charged with two counts of First-Degree Murder for the deaths of Pierre Roche and the ten-month-old infant, two counts of Attempted Premeditated Murder, and two counts of Attempted Felony Murder. [ECF No. 13-2 at 1-11]. Petitioner moved to suppress his statements to his co-defendant Jones based on violations of his Fourth, Fifth, and Sixth Amendment rights, as well as under the Florida Constitution and Florida law [ECF No. 13-2 at 12-21], but the motion was denied, and the evidence was allowed at trial. [ECF No. 14-1 at 115-118].

Rather than issue a written opinion, the state court ruled orally from the bench. [*Id.* at 117-18]. In denying Petitioner's motion to suppress, the state trial court solely stated as follows:

> THE COURT: Okay. I want you to know that I have read all the cases. In an

overabundance of caution[,] I consulted with three of my colleagues because this - I am new to this division. Okay. I consulted three of my colleagues in the building and spoke to them at length just to confirm what I thought I should do and so I feel pretty confident in my ruling that I'm going to deny the motion to suppress. I'm not going to suppress the statements. Okay.

....

THE COURT: I don't know if I have to [issue a written ruling]. We had a lengthy hearing, everybody testified. I read the cases. I read [*State* v.] *Calhoun[,* 479 So. 2d 241 (Fla. 4th DCA 1985)]. I read the Third District Court of Appeals cases and what the distinction in *Calhoun* is, and I think this is a very important distinction, is that the defendant asked for privacy and said, can I have privacy with my brother. It was a relative that was the co-defendant. And the Court made a very important distinction, that didn't happen here. And I listened to the testimony of Mr. Bowen's mother and I understand the Right had been – he signed the *Miranda* Warnings and invoked his right to remain silent, but I think that – I don't think it's a statement that should be suppressed at this time.

[ECF No.14-1 at 117-18].

Petitioner was tried by a jury and renewed his objection to the evidence being admitted on Fourth, Fifth, and Sixth Amendment grounds, but was denied without explanation. [ECF No. 14-8 at 94-95]. On August 1, 2012, following the jury trial, Petitioner was found guilty of two counts of First-Degree Murder and two counts of Attempted Premediated Murder. [ECF No. 13-2 at 77-86].

On September 18, 2013, Petitioner was sentenced to life in prison without parole. *[Id.* at 92-95]. After filing a motion to correct his sentence, on June 8, 2015, Petitioner received a new sentence of life imprisonment with a judicial review after twenty-five years, subject to a twenty-five-year mandatory minimum sentence, to run consecutively with another sentence. *[Id.* at 96-98].

Petitioner appealed, arguing among other things, that the trial court erred in denying his motion to suppress. [ECF No. 13-3 at 1-55]. Petitioner's appeal was denied, per *curiam,* and without a written opinion on February 3, 2016. *[Id.* at 99]; *see also Bowen v. State,* 184 So. 3d 533 (Fla. 3d DCA 2016). Petitioner's motion for rehearing *en bane* of the denial was denied on April 14, 2016, [ECF No. 13-3 at 106], and his conviction became final 90 days later, on July 12, 2016. *See* 28 U.S.C. § 2244(d)(1)(A). Petitioner then filed several other post-conviction motions not relevant here, all of which were denied.

Petitioner filed his original *pro se* Petition for

Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in this Court on August 18, 2019. [ECF No. 1]. Petitioner retained counsel and filed the instant Amended Petition on November 11, 2019. [ECF No. 6]. The Amended Petition raised one claim: that the placing of Petitioner in Jones' interview room after he invoked his *Miranda* rights and secretly recording them violated *Miranda,* Florida and federal guarantees of Due Process, and the Florida Wiretap Statute, and it was reversable error to deny his motion to suppress. *[Id.* at 15].

Respondent filed a Response in opposition to the Amended Petition on January 8, 2020. [ECF No. 12]. In the Response, Respondents concede that this case was timely filed and properly exhausted but argue that Petitioner's claim should nevertheless still be denied on the merits. *[Id.].* Petitioner filed his Reply on January 27, 2020 [ECF No. 17], and this case is now ripe for review.

III. Discussion

A. Standard of Review

This Court may only entertain a petition for a writ of habeas corpus from a "person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Thus, as a threshold matter, Petitioner's claims alleging violations of the Florida Constitution and of Florida law should be denied because they do not allege a violation of the U.S.

Constitution or federal law. *See id.; see also Carrizales* v. *Wainwright,* 699 F.2d 1053, 1055 (11th Cir. 1983).

Further, a federal habeas petition may not be granted unless "the applicant has exhausted the remedies available" in state court prior to filing the federal habeas petition. 28 U.S.C. § 2254(b). Even so, "the availability of federal habeas relief is limited with respect to claims previously 'adjudicated on the merits' in state-court proceedings." *Harrington* v. *Richter,* 562 U.S. 86, 91 (2011). "By its terms§ 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in§§ 2254(d)(1) and (2)." *Id.* at 98.

In Petitioner's state court case, before trial, Petitioner's attorney filed a motion to suppress his interrogation room statements to his co-defendant Jones. [ECF No. 13-2 at 12-21]. The motion argued that the statements should be suppressed because they were acquired by police in violation of Petitioner's Fourth, Fifth, and Sixth Amendment rights, as well as in violation of Petitioner's rights under the Florida Constitution and Florida law. *[Id.].* The state court denied the motion to suppress without a written opinion and ruled orally from the bench, as recounted above. [ECF No. 14-1 at 117-18]. After trial, all of Petitioner's post-conviction appeals, including his appeal of the denial of the motion to suppress, were affirmed, *per curiam,* and without a written opinion. [ECF No. 13-3 at 99].

Accordingly, because the state appellate court was silent in affirming the denial of the motion to

suppress, this Court is required to "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale," which in this case is the trial court's oral ruling denying the motion to suppress. *Wilson v. Sellers,* 584 U.S. _, _, 138 S. Ct. 1188, 1192 (2018); *see also Meders v. Warden, Ga. Diagnostic Prison,* 911 F.3d 1335, 1349 (11th Cir. 2019) (citing *Wilson, supra*).

In looking through to the decision of the state court, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington,* 562 U.S. at 99. The presumption in *Harrington* is rebuttable, however, "only in unusual circumstances." *Johnson v. Williams,* 568 U.S. 289,302 (2013). In Petitioner's case, the presumption applies, and neither party seeks to dispute this, because the federal claim was clearly presented to the state court, and the motion to suppress was denied on the merits, rather than a procedural rule.

As for the standard this Court reviews Petitioner's claim, Respondent argues that § 2254(d) deference to the state court's adjudication on the merits is appropriate, and Petitioner does not challenge this argument. Accordingly, under § 2254(d), the Court may grant habeas relief from the state court judgment only if the state court's decision on the merits of the federal claim was: (1) "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme

Court of the United States;" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented" in the state court proceeding. 28 U.S.C. § 2254(d).

"Deciding whether a state court's decision involved an unreasonable application of federal law ... requires the federal habeas court to train its attention on the particular reasons - both legal and factual - why state courts rejected a state prisoner's federal claims, and to give appropriate deference to that decision." *Wilson,* 584 U.S. at_, 138 S. Ct. at 1191-92 (quotation marks and citations omitted). Again, this standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster,* 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (per curiam)).

"A decision is 'contrary to' clearly established federal law if the state court applied a rule that contradicts governing Supreme Court precedent, or if it reached a different conclusion than the Supreme Court did in a case involving materially indistinguishable facts." *James v. Warden,* 957 F.3d 1184, 1190 (11th Cir. 2020) (citing *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000)). "A state court decision involves an 'unreasonable application' of clearly established federal law if the court identifies the correct legal principle but applies it unreasonably to the facts before it." *Id.* (citing *Williams, supra).*

"The question under AEDP A is not whether a federal court believes the state court's determination was incorrect but whether that determination was

unreasonable-a substantially higher threshold." *Id.* at 1190-91 (quoting *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007)). "A state court's application of clearly established federal law or its determination of the facts is unreasonable only if no 'fairminded jurist' could agree with the state court's determination or conclusion." *Id.* at 1191 (quoting *McNabb v. Comm 'r Alabama Dep 't of Corr.,* 727 F.3d 1334, 1339 (11th Cir. 2013) (internal citations omitted).

In this case, the only state court decision that provides any rationale is the oral ruling denying the motion to suppress from the state court pre-trial proceedings. [ECF No. 14-1 at 117-118]. Admittedly, the ruling is scant; the only legal and factual reasons that the state court provided in denying the motion to suppress was that it had "read the Third District Court of Appeals cases and what the distinction in *Calhoun* is ... that the defendant asked for privacy and said, can I have privacy with my brother. It was a relative that was the co-defendant. And the Court [in *Calhoun]* made a very important distinction, that didn't happen here." [ECF No. 14-1 at 118].

B. Petitioner's Fourth Amendment Claim

First looking to Petitioner's Fourth Amendment claim, the Fourth Amendment states that, among other things, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "To assert a Fourth Amendment violation, an individual must establish he or she had a legitimate expectation of privacy in the

place searched." *Ziegler v. Martin Cnty. Sch. Dist.,* 831 F.3d 1309, 1320 (11th Cir. 2016) (citing *Rakas v. Illinois,* 439 U.S. 128, 148-49 (1978); *United States v. Brazel,* 102 F.3d 1120, 1147-48 (11th Cir. 1997)). "Establishing a legitimate expectation of privacy is 'a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 1320-21 (quoting *United States v. Ford,* 34 F.3d 992, 995 (11th Cir. 1994); *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

In Petitioner's case, he argued in his motion to suppress, *inter alia,* that the police violated his Fourth Amendment rights when they secretly recorded his conversation with his co-defendant. The state court determined that the main case cited by Petitioner, *State v. Calhoun,* 479 So. 2d 241 (Fla. 4th DCA 1985), was factually distinguishable because the defendant in *Calhoun* asked the police for privacy. [ECF No. 14-1 at 118]. Accordingly, the court held that because Petitioner did not ask for privacy to speak with his co-defendant, his motion to suppress should be denied. [ECF No. 14-1 at 118].

While Petitioner now cites a variety of cases from various courts arguing that the state court's adjudication was incorrect, it is not enough to be merely incorrect. The state court's adjudication is entitled to substantial deference under § 2254(d), and Petitioner may only be granted relief if the decision was "unreasonable," meaning he must prove "no 'fairminded jurist' could agree with the state court's

determination or conclusion." *McNabb,* 727 F.3d at 1339.

Here, Petitioner cannot meet this "substantially higher threshold." *Schriro,* 550 U.S. at 473. Petitioner was in a police interview room when he made the statements to his co-defendant. There was no Supreme Court case involving materially indistinguishable facts, and the state court's determination that Petitioner failed to exhibit a legitimate expectation of privacy, unlike the defendant in *Calhoun,* was not unreasonable. Accordingly, Petitioner's Fourth Amendment claim should be denied.

C. Petitioner's Fifth Amendment Claim

Next, we look to Petitioner's Fifth Amendment argument, which was not expressly discussed in the state court's oral ruling but was extensively argued and briefed by the parties in the motion to suppress and on direct appeal in state court. Since there is no requirement that a state court provide written reasons accompanying its orders, in cases like this one, where the state court's merits adjudication of a federal claim contains no explanation at all, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court of the United States.]" *Harrington,* 562 U.S. at 102. To determine what arguments or theories "could have" supported the state court's denial of Petitioner's Fifth

Amendment claim, the Court must first look to Petitioner's Fifth Amendment rights, and the facts of the alleged violation by the police.

"The Fifth Amendment prohibits the admission at trial of compelled testimonial self-incriminating statements – inculpatory statements made to law enforcement while in custody – providing, in relevant part that '[n]o person ... shall be compelled in any criminal case to be a witness against himself[.]'" *Gore v. Sec'.y for the Dep't of Corr.,* 492 F.3d 1273, 1295 (11th Cir. 2007) (quoting U.S. Const. amend. V). The "threshold Fifth Amendment admissibility inquiry" is: "was the suspect given a warning advising him of the now-familiar four *Miranda* rights." *Id.* at 1295-96 (citing *Dickerson v. United States,* 530 U.S. 428, 435 (2000); *Miranda,* 384 U.S. at 479).

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda,* 384 U.S. at 473; *see also Gore,* 492 F.3d at 1296. Accordingly, a request to cut off questioning must be "scrupulously honored." *Michigan v. Mosley,* 423 U.S. 96, 104 (1975). "[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him." *Edwards v. Arizona,* 451 U.S. 477, 484- 85 (1981). "[A]bsent a finding of waiver, if counsel is not present, any statement made following the request for counsel is presumed to be the result of coercion and is, therefore, inadmissible." *Gore,* 492 F.3d at 1299 (citing *Smith v. Illinois,* 469 U.S. 91, 98-

99 (1984) (holding that since all statements taken after a clear request for counsel are presumed to be the product of coercion those statements may not cast doubt on the clarity of the request)).

"The sole concern of the Fifth Amendment, on which *Miranda* is based, is governmental coercion." *United States v. Phillips,* 812 F.2d 1355, 1362 (11th Cir. 1987) (quoting *Colorado v. Connelly,* 479 U.S. 157, 170 (1986)). Custodial settings are more likely to produce coerced confessions, thus necessitating *Miranda* warnings for custodial interrogations. *See generally, Thompson v. Keohane,* 516 U.S. 99, 112 (1995); *United States v. Acosta,* 363 F.3d 1141, 1148 (11th Cir. 2004).

Here, it is not disputed that Petitioner made a clear and unequivocal invocation of his *Miranda* rights after being advised of them. It is also not disputed that Petitioner was in custody when he made his statements. Accordingly, after invoking his *Miranda* rights, the investigators were barred from engaging in any form of custodial interrogation of Petitioner without his attorney present. *See Gore,* 492 F.3d at 1299. The remedy for such a violation would typically be suppression of the statement. *See id.* (citing *Edwards,* 451 U.S. at 484-85).

In looking to what theory could have supported the state court's decision, there are only a handful of arguments the state court could have relied upon. In general, the most common arguments made by prosecutors against an alleged Fifth Amendment violation consist of: (1) waiver by the suspect; (2) the

suspect not being "in custody" during the interrogation; (3) there was no "interrogation" of the in custody suspect; or (4) a factual dispute as to the circumstances of the alleged Fifth Amendment violation where the court finds in favor of the prosecution.

Here, the parties' pleadings are illuminating. Respondent argued at all stages of this case that Petitioner's statements should not be suppressed because they were freely made and not the product of a "custodial interrogation." Petitioner argues that the statements were the result of a custodial interrogation because Detective Solis' actions were the "functional equivalent" of a custodial interrogation.

The state court could not have relied upon a waiver argument because Petitioner did not waive his *Miranda* rights, he invoked them in writing. The state court could not have relied upon an argument claiming that Petitioner was not in custody at the time he made the statements, because Petitioner was in fact in custody. Because there was no factual dispute as to what took place, the only remaining argument the state court could have relied upon in denying the motion to suppress was the argument actually made by Respondent and squarely before the state court, namely that Detective Solis's actions were not the functional equivalent of a custodial interrogation.

"[C]ustodial interrogation" means "questioning *initiated* by law enforcement officers after a person has been taken into custody." *Rhode Island v. Innis,* 446 U.S. 291, 298 (1980) (quoting *Miranda,* 384 U.S. at

444) (emphasis in original). However, Supreme Court precedent clearly holds that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to *any words or actions* on the part of the police ... that the police *should know are reasonably likely to elicit an incriminating response* from the suspect." *Id.* at 301 (emphasis added). Further, the Supreme Court held, "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning *or its functional equivalent." Id.* at 300-01 (emphasis added). On the other hand, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected." *Id.* at 300 (quoting *Miranda,* 384 U.S. at 478).

"Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302, n.8. "Thus, custodial interrogation for purposes of *Miranda* includes both express questioning, and also words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to 'have ... the force of a question on the accused,' ... and therefore be reasonably likely to elicit an incriminating response." *Pennsylvania v. Muniz,* 496 U.S. 582, 601 (1990) (internal citations omitted).

To show a *Miranda* violation, Petitioner "must demonstrate that the police and their informant took

some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson,* 477 U.S. 436, 459 (1986). The "primary concern" is the use of"secret interrogation techniques that are the equivalent of direct police interrogation." *Id.* (citations omitted); *see also Maine v. Moulton,* 474 U.S. 159, 176 (1985).

As previously stated, because the state court was silent on why it denied Petitioner's Fifth Amendment claim, we must ask "what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court of the United States]." *Harrington,* 562 U.S. at 102. Because the parties agree in all other respects, the only argument the state court "could have" relied upon in denying the motion to suppress was Respondent's argument that Detective Solis's actions were not the functional equivalent of a custodial interrogation. In analyzing this argument, we must assume that "the court identifie[d] the correct legal principle," or in this case, principles, as discussed above and recounted below. *James,* 957 F.3d at 1190 (citations omitted).

Pursuant to the Fifth Amendment, no person shall be compelled to be a witness against themselves in a criminal case. U.S. Const. amend. V. The concern of the Fifth Amendment, on which *Miranda* is based, is governmental coercion. *See Connelly,* 479 U.S. at 170. Custodial settings are more likely to produce coerced confessions, thus necessitating *Miranda*

warnings for custodial interrogations. *See Keohane,* 516 U.S. at 112. "That risk is all the more troubling-and recent studies suggest, all the more acute-when the subject of custodial interrogation is a juvenile." *J.D.B. v. North Carolina,* 564 U.S. 261, 269 (2011) (citations omitted).

"If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda,* 384 U.S. at 473. A request to cut off questioning must be "scrupulously honored." *Mosley,* 423 U.S. at 104. "[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him." *Edwards,* 451 U.S. at 484-85. Absent a finding of waiver, if counsel is not present, any statement made following the request for counsel is presumed to be the result of coercion and is, therefore, inadmissible. *See Smith,* 469 U.S. at 98-99.

To show a *Miranda* violation, Petitioner "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann,* 477 U.S. at 459. The "primary concern" is the use of "secret interrogation techniques that are the equivalent of direct police interrogation." *Id.* (citations omitted); *see also Moulton,* 474 U.S. at 176.

In addition to identifying the correct legal principles above, however, the state court must also apply the facts of the case at hand, and an

"unreasonable" application may result in a grant of habeas relief from the state court judgment. *See James,* 957 F.3d at 1190-91 (citations omitted). To analyze if the state court decision was "unreasonable" requires that the Court determine if "any fairminded jurist could disagree" that it is inconsistent with the holding of a prior Supreme Court decision. *Harrington,* 562 U.S. at 102. To obtain relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

In the case at hand, the facts are uncontested. Petitioner was only sixteen years old at the time he was arrested, which presents an "acute" risk of coercion pursuant to the Supreme Court's holding in *J.D.B.,* 564 U.S. at 269. Further in support of this, when Detective Solis questioned Petitioner about the incident, Petitioner was accompanied by his mother, who only left after Detective Solis told her that he was being brought to the juvenile detention center. Petitioner's education level is also relevant, and it is undisputed that Petitioner dropped out of high school after the ninth grade. [ECF No. 14-1 at 60].

Next, the parties agree that when Detective Solis informed Petitioner of his *Miranda* rights, Petitioner immediately invoked them, and Detective Solis stopped the interview and left the room, as required by *Mosley*.

Police also arrested Petitioner's co-defendant,

who was also a minor. Unlike Petitioner, his co-defendant waived his *Miranda* rights and provided a statement.

Petitioner did not know his co-defendant had waived his *Miranda* rights, but obviously Detective Solis did because he was present for the interview with Petitioner's co-defendant. In addition, when Petitioner was alone in his interrogation room, he used his cell phone to attempt to call his co-defendant to speak with him. Detective Solis knew that Petitioner had sought to speak with his co-defendant because he saw the caller identification on the phone indicate it was Petitioner who was calling. Pursuant to the Supreme Court's holding in *Innis,* 446 U.S. at 302, n.8, Detective Solis's knowledge "concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect."

Knowing that Petitioner had invoked his *Miranda* rights and that he could no longer interrogate him, Detective Solis returned to Petitioner's interview room and told Petitioner that he was moving him to his co-defendant's interview room to facilitate their transport to the juvenile detention facility. At the suppression hearing, however, Detective Solis testified that Petitioner was actually moved to be with his co-defendant for what appeared to be investigative purposes. Detective Solis wanted "to see if they were going to talk about the investigation," and testified that he knew it was possible that they would speak

about the case, and that he "absolutely" hoped they did. [ECF No. 14-1 at 32]. This is crucial because under *Innis,* 446 U.S. at 301, n. 7, the intent of police "may well have bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response."

Finally, after placing Petitioner m his co-defendant's interview room, Detective Solis activated a recording device without their knowledge. Again, the purpose of this was to secretly listen to Petitioner and his co-defendant "to see if they were going to talk about the investigation." Detective Solis was correct, and Petitioner did talk about the investigation with his co-defendant. This exact scenario was discussed in *Innis,* where the Supreme Court stated that: "[i]n particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Innis,* 446 U.S. at 301, n.7.

On these facts, the state court's denial of the motion to suppress was an unreasonable application of clearly established federal law as determined by the Supreme Court. In *Innis,* the Supreme Court held that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis,* 446 U.S. at 301. Here, Detective Solis admitted at the suppression hearing that he essentially devised a scheme that was designed to frustrate Petitioner's

invocation of his *Miranda* rights, and that the scheme was successful. Petitioner moved to suppress the statements, but the state court denied the claim without even acknowledging any of the relevant Supreme Court precedent, which we provide here and assume the state court considered.

The parties do not dispute that Petitioner was in custody and had invoked his *Miranda* rights at the time of the incident. Rather, Respondent argues that Petitioner's statement was not a result of a "custodial interrogation," while Petitioner argues that Detective Solis's actions were the "functional equivalent" of a custodial interrogation because he "should have known it was reasonably likely to elicit an incriminating response" from Petitioner. Thus, the only way the state court "could have" denied the motion to suppress was to find that Detective Solis should not have known that his actions were reasonably likely to elicit an incriminating response. Such a finding is patently unreasonable given the facts known at the time.

Detective Solis obviously should have known it was reasonably likely putting Petitioner in the interview room with his co-defendant and secretly turning on a recording device would elicit an incriminating response. Detective Solis knew that Petitioner wanted to speak with his co-defendant (presumably about the case) because he witnessed Petitioner's attempt to call his co-defendant while interviewing the co-defendant. Detective Solis knew he could not question Petitioner, but he thought that if he put Petitioner together with his co-defendant, they would talk about the investigation. Detective Solis

testified that he knew it was possible that they would speak about the case, and that in his role as an investigator, he hoped they would. Thus, Detective Solis admittedly created a pretextual scheme to put them together because he "wanted to see if they were going to talk about the investigation." We know this is what happened because Detective Solis testified about this at the suppression hearing.

We also know that Petitioner was only sixteen years old, only had a ninth-grade education, was previously accompanied by his mother, and had invoked his *Miranda* rights. Yet, despite all of this, the state court ignored clear Supreme Court precedent and held that Detective Solis should not have known that his actions were reasonably likely to elicit an incriminating response. This is an unreasonable application of longstanding Supreme Court precedent starting with *Miranda* and *Innis,* and continuing with *J.D.B., Mosely, Kuhlmann, Smith,* and *Moulton,* and no fairminded jurist could disagree that, on these facts, the motion to suppress should have been granted. As discussed, the only dispute was whether Petitioner's statement was the result of the functional equivalent of a custodial interrogation, and Supreme Court precedent dictates that the only reasonable answer is in the affirmative because Detective Solis obviously should have known that his scheme might be successful.

The cases cited by Respondent to argue otherwise are significantly distinguishable and inapplicable in this case. First, the case most heavily relied upon, *United States v. Stubbs,* 944 F.2d 828

(11th Cir. 1991), dealt with a defendant who made inculpatory statements to her cellmate while in prison.

This is a fatal distinction that renders *Stubbs* inapplicable to Petitioner's motion to suppress because the Supreme Court has long stated that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying Miranda" because "[t]he essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." *Illinois v. Perkins,* 496 U.S. 292, 296 (1990) ("In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.").

Respondent also admits that the only case cited by the state court, *Calhoun,* 4 79 So. 2d at 241, is "not relevant" because it "never acknowledges or discusses the line of cases emanating from *Rhode Island v. Innis* and the critical concept of 'custodial interrogation,'" nor does it "acknowledge or address the line of Supreme Court cases related to the [Sixth Amendment]." [ECF No. 12 at 36-37].

The Undersigned agrees that *Calhoun* is not relevant and fails to address the relevant Supreme Court precedent. Respondent's own words best reflect this: "[i]n short, *Calhoun* is utterly irrelevant to the issue of whether the state court adjudication of the instant case is contrary to or an unreasonable application of clearly established federal law." *[Id.].* However, the implication brought about by this

bolsters Petitioner's argument, not Respondent's.

Second, Respondent's argument here also undermines its reliance on *Stubbs,* because, as Respondent argues, *Calhoun* failed to "acknowledge or address the line of Supreme Court cases related to the [Sixth Amendment]" "all of which are critical and carefully considered by the Eleventh Circuit in *Stubbs"* [ECF No. 12 at 36-37], which further indicates why *Stubbs* is not applicable to Petitioner's Fifth Amendment claim here.[1] *See Perkins,* 496 U.S. at 296 (holding that Sixth Amendment precedent is not applicable in a case where charges had not been filed.).

D. Harmless Error

Just because there was a Fifth Amendment violation in Petitioner's criminal case does not necessarily mean he is entitled to federal habeas relief. Respondent argues that any error regarding the admissibility of Petitioner's statements was harmless due to other evidence in Petitioner's case, such as the jailhouse telephone recordings of him discussing the case with his friends and family. [ECF No. 17 at 45-46]. Petitioner, on the other hand, argues that the jailhouse recordings are far less inculpatory and extensive, and that the error was not harmless. [ECF

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[1] Before proceeding to the implications of the Fifth Amendment violation in Petitioner's criminal case, the Undersigned briefly notes that Petitioner conceded that the Sixth Amendment right to counsel was not implicated by the motion to suppress because it had not attached at that stage of the case. [ECF No. 17 at 4-5]. Thus, the claim should be dismissed.

No. 17 at 8].

The harmless error test is set forth by the Supreme Court in *Brecht v. Abrahamson,* 507 U.S. 619 (1993). In *Brecht,* the Court held that the test is whether an error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 623 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." *Id.* at 63 7 (citing *United States v. Lane,* 474 U.S. 438, 449 (1986)).

"To show prejudice under *Brecht,* there must be more than a reasonable possibility that the error contributed to the conviction or sentence." *Mason* v. *Allen,* 605 F.3d 1114, 1123 (11th Cir. 2010) (internal quotation marks and alteration omitted). "Although harmless error review is necessarily fact-specific and must be performed on a case-by-case basis, the erroneous admission of evidence is likely to be harmless under the *Brecht* standard where there is significant corroborating evidence, ... or where other evidence of guilt is overwhelming." *Mansfield v. Sec'y., Dep't of Corr.,* 679 F.3d 1301, 1313 (11th Cir. 2012) (citations omitted).

Looking to the facts of Petitioner's case, we know from the record that Petitioner was tried jointly with his co-defendant, and that the trial lasted eight days. [ECF No. 6 at 4]. We also know there were no

eyewitness identifications of either defendant at trial and neither defendant testified. *[Id.].* Importantly, there was no physical evidence specifically linking Petitioner or his co-defendant to the crimes.

Police recovered nine bullet casings from the scene, as well as the bullets recovered from the victims' bodies, and determined them to have come from a .40 Glock pistol. *[Id.* at 10]. However, no firearm was recovered from the scene, and approximately nine months later, the murder weapon was recovered by the police in the course of investigating an unrelated 2009 crime. *[Id.].* Obviously, Petitioner and his co-defendant were incarcerated at the time of the unrelated crime and recovery of the firearm, and it is unknown who possessed the murder weapon during that period of time.

The "star witness" against the defendants was Terrance "Bull" Yarborough, a former member of Petitioner's gang. *[Id.* at 6]. However, Yarborough is a four-time convicted felon and only told Detective Solis that Petitioner was the one responsible for the shooting after Yarborough was arrested for an unrelated armed robbery in which faced a potential sentence of life imprisonment if convicted. *[Id.].* In exchange for his testimony against the defendants, Yarborough only received 5 years' imprisonment. *[Id.].*

In addition to Yarborough's extensive but uncorroborated testimony against the defendants, the prosecution also provided cellular tower records that placed Petitioner's cell phone within approximately

two to three miles of a tower near the shooting at the time the shooting took place. *[Id.* at 7-8]. However, that doesn't have significant probative value because the Annie Coleman Apartments (also known as the "Rockies") where Petitioner and his gang operated were also located within the three-mile area, there were no GPS records showing more specific information on the location of Petitioner's cell phone, nor does it show who actually possessed the cell phone at the time it was within the radius of the tower. [ECF No. 14-5 at 76-77].

The final noteworthy evidence consists of recordings of Petitioner's telephone calls to friends and family while in jail awaiting trial. [ECF No 13-2 at 72-76]. In one telephone call, Petitioner discusses Yarborough "snitching" on Petitioner, and tells an unknown caller that he should tell Yarborough "if they make him go to court, tell him to say that it all was all a lie. He just made it up because I owed him some money." *[Id.* at 72].

In another call, Petitioner discusses the police's search for the murder weapon, saying "they ain't going to find that shit." *[Id.* at 72-74]. In a call with his mother, Petitioner discusses the tracing of his cell phone, and says "[t]here ain't nothing on that phone." *[Id.* at 74]. Later, he discusses "snitching" with his mother, and states that the reason he is in jail is because of Yarborough "snitching on me." *[Id.* at 75-76]. Finally, in another call with an unknown female, Petitioner states that he wants to "see Bernard's ass, so [he] can whoop his ass" and that his co-defendant is a "snitching ass" and a "[p]ussy." *[Id.* at 76]. In that

call, Petitioner also says: "everything was all good until the police snatched Bull's [Yarborough] ass," and that he hates him. [*Id.*].

Respondent argues that the admission of the recording from Petitioner's conversation with his co-defendant from the police station interview room was harmless error because the above jail conversations were similar and unchallenged inculpatory statements. Respondent also highlights that Petitioner's statements to Yarborough, which Yarborough testified to at trial, were highly inculpatory in support of the error being harmless. However, a review of the transcript of Petitioner's conversation in the police station interview room shows that the statements were much more damning, and a review of the trial transcripts shows that they were the most significant evidence against Petitioner outside of Yarborough' s obviously self-serving testimony.

Simply put, at trial, the prosecution argued that Petitioner's police station interview room statements essentially amounted to a confession and invited the jury to listen to them "as many times as you want to" during their deliberations, placing Petitioner's counsel in the unenviable position of attempting to explain away the statements without having Petitioner testify at trial. [ECF No. 14-8 at 110-11]. Outside of this, the prosecution relied upon the sworn testimony of a four-time convicted felon who was attempting to avoid a lifetime term of imprisonment for his own armed robbery, cellular tower records indicating that Petitioner's cell phone was within three miles of the

shooting, and Petitioner's far less inculpatory jailhouse telephone call recordings.

Otherwise, there were no eyewitnesses who identified Petitioner as the shooter, no physical evidence connecting Petitioner to the shootings, no evidence connecting Petitioner to the firearm, which was found in someone else's possession months after the shooting, and the vehicle that was allegedly used in the shooting was never recovered and was not linked to Petitioner in any way. In short, Petitioner was convicted on Yarborough's words, relatively weak circumstantial evidence, and the unconstitutionally obtained police station interview room statements. The state court's erroneous admission of the statements was far from harmless, and as a result, the conviction cannot stand.

IV. Recommendations

Based on the above, it is **RECOMMENDED** that Petitioner's Amended Petition for Writ of Habeas Corpus [ECF No. 6] be **GRANTED IN PART** as to Petitioner's claim that his Fifth Amendment rights were violated when the state court failed to suppress his interview room statements to his co-defendant, **DENIED** in all other respects, and the case be **CLOSED** by the Clerk of Court.

Objections to this Report and Recommendation may be filed with the District Judge within fourteen days of receipt of a copy of such. Failure to do so will bar a *de nova* determination by the District Judge of anything in the Report and Recommendation and will

bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1)(C); *see also Thomas v. Arn,* 474 U.S. 140, 149 (1985).

SIGNED this 29th day of July, 2020.

/s/
UNITED STATES MAGISTRATE JUDGE

cc: **All Counsel of Record;** and

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