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No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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TROY LATRIAL RAMSEY,

Petitioner,

v.

JEFF PREMO,

Respondent.

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On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

Kristina Hellman  
Assistant Federal Public Defender  
101 SW Main Street, Suite 1700  
Portland, Oregon 97204  
(503) 326-2123

Attorney for Petitioner

## QUESTIONS PRESENTED

1. Whether the Ninth Circuit's ruling denying a certificate of appealability conflicts with this Court's ruling in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), when Mr. Ramsey presented a debatable issue of counsel's ineffective representation under the Sixth Amendment.
2. Whether the Ninth Circuit's ruling denying a certificate of appealability conflicts with this court's ruling in *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), when the district court implicitly created a per se rule about counsel's representation, in direct contradiction to *Strickland v. Washington*, 466 U.S. 668 (1984), which holds that that counsel's representation must be assessed "considering all of the circumstances."

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
OPINIONS BELOW.....	2
JURISDICTIONAL STATEMENT.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS .....	2
STATEMENT OF THE CASE .....	3
A.    State Court Trial Proceedings.....	3
1.    Background.....	3
2.    Mr. Ramsey's Testimony .....	4
3.    David Knight's Testimony .....	6
4.    “Honest Claim of Right” Defense .....	7
B.    Direct Appeal Proceedings.....	8
C.    Post-Conviction Proceedings .....	10
D.    Federal Habeas Proceedings .....	11
REASONS FOR GRANTING THE PETITION .....	12
A.    The Ninth Circuit's Denial Of A Certificate Of Appealability Conflicts With This Court's Holding in <i>Miller-El</i> That The Issues Need Only Be Debatable Among Jurists Of Reason. ....	13
B.    It Is Debatable Whether The District Court Erroneously Created A Per Se Rule For Ineffective Assistance Of Counsel And Whether Counsel's Failure To Pursue Her Chosen Trial Strategy Was Ineffective Under The Sixth Amendment....	15

1.	The District Court Applied A Per Se Rule By Holding That Counsel Acted Reasonably When She Failed To Elicit Needed Testimony From Mr. Knight For The “Simple Reason That Knight’s Statement Directly Contradicted Petitioner’s Own Testimony.” .....	16
2.	But For Counsel’s Failure To Sufficiently Cross-Examine Mr. Knight, Mr. Ramsey Would Have Been Entitled To An Honest Claim Of Right Jury Instruction And, Armed With Such Instruction, A Jury Would Have Had Reasonable Doubt Respecting Guilt. ....	18
	CONCLUSION.....	19

## **APPENDIX**

Ninth Circuit's Order Denying Certificate Of Appealability .....	1
District Court's Opinion and Order .....	2

## TABLE OF AUTHORITIES

	Page(s)
<b>CONSTITUTIONAL PROVISIONS</b>	
U.S. Const. amend VI .....	2
<b>CASES</b>	
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003) .....	i, 13, 14, 19
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000) .....	15
<i>State v. Ramsey</i> , 56 P.3d 484 (Or. Ct. App. 2002) .....	8, 9, 16
<i>State v. Ramsey</i> , 173 P.2d 142 (Or. Ct. App. 2007) .....	9, 10
<i>State v. Shelley</i> , 821 P.2d 1111 (Or. Ct. App. 1991) .....	18
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	i, 11, 12, 13, 15, 17, 19
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) .....	16
<b>STATUTES</b>	
28 U.S.C. § 1254(1) (2012).....	2
28 U.S.C. § 2253(c)(1) (2012) .....	2
28 U.S.C. § 2253(c)(2) (2012) .....	3, 13
Or. Rev. Stat. § 164.035(1)(b) .....	4

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The petitioner, Troy Latrial Ramsey, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) filed on January 28, 2019. Appendix (App.) at 1.

## **OPINIONS BELOW**

The United States District Court for the District of Oregon (district court) denied Mr. Ramsey's petition for writ of habeas corpus in an unpublished opinion and order. App. at 2-25. The district court also denied a certificate of appealability. App. at 25. On appeal, the United States Court of Appeals for the Ninth Circuit also denied a certificate of appealability. App. at 1.

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to review this petition for writ of certiorari under 28 U.S.C. § 1254(1) (2012). The Ninth Circuit filed its order sought to be reviewed on January 28, 2019. App. at 1.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

U.S. Const. Amend. VI. provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. § 2253(c)(1) (2012) provides:

Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

- (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court...

28 U.S.C. § 2253(c)(2) (2012) provides:

A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

## **STATEMENT OF THE CASE**

### **A. State Court Trial Proceedings**

#### **1. Background**

In 1997, Troy Ramsey was charged with Aggravated Murder, Robbery with a Firearm, Burglary with a Firearm, and Felon in Possession of a Firearm.<sup>1</sup> The charges were based on allegations that Mr. Ramsey stole money from James Mayes and Antoine Levier after a craps game at an after-hours club, and that when confronted by the owner of the club, Phillip Robinson, who was wielding a shotgun, Mr. Ramsey shot Mr. Robinson at least four times.

A key factual dispute was whether Mr. Ramsey robbed Mr. Mayes and Mr. Levier, or whether they had cheated at the dice game and he was recovering the money that they stole from him. Mr. Ramsey's

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<sup>1</sup> The facts in this case are taken from the record filed in the district court case of *Ramsey v. Premo*, 6:14-cv-01524-MC, and are fully cited in Mr. Ramsey's brief. ECF No. 92.

position was that through their cheating, Mr. Mayes and Mr. Levier had taken specific property (money) that belonged to him, and that under Or. Rev. Stat. § 164.035(1)(b), he was allowed to recover his property.

Or. Rev. Stat. § 164.035(1)(b) provides in relevant part that “in a prosecution for theft it is a defense that the defendant acted under an honest claim of right, in that [] the defendant reasonably believed the defendant was entitled to the property involved[.].” Although a stand-alone theft charge was not alleged in the case, theft was an essential element of the robbery charges, and all of the burglary charges were premised on the intent to commit theft.

## **2. Mr. Ramsey’s Testimony**

Mr. Ramsey testified that he joined in a dice game that was run by Mr. Mayes. He rolled a few good rolls, which won money, but then started to get some bad rolls. He then noticed that Mr. Mayes was rolling the dice out of his hand, instead of the cup, which resulted in better rolls for him. Mr. Ramsey told Mr. Mayes “Hey, there’s none of that going on at this table man.” The second time Mr. Ramsey confronted Mr. Mayes about the improper rolls, Mr. Robinson came over

to the table, said something to Mr. Mayes, and then Mr. Mayes left the table.

Mr. Ramsey was going to confront Mr. Mayes, but was concerned that he may have a gun, so Mr. Ramsey got a gun from Mr. Branch before he approached Mr. Mayes and Mr. Levier. Mr. Ramsey asked Mr. Mayes for his money back because he believed Mr. Mayes had cheated at the dice game. When Mr. Mayes refused, saying “Go on, youngster” Mr. Ramsey showed Mr. Mayes the gun and told him “Man, well, I ain’t joking.” He then told Mr. Mayes that he was “not playing” and pulled out the gun.

Mr. Ramsey also testified that during part of the time Mr. Mayes was cheating, another person was operating as the stick man – the person who collects the money from around the table and takes the percentage from the house. Mr. Ramsey did not know that person, Mr. Levier, at the time.

On cross-examination, Mr. Ramsey addressed his approach to the table:

Q. All right. So as you approached Mr. Mayes at the time . . . you had indicated that you lifted up your shirt and Mr. Levier was right there to your left, wasn’t he?

A. Yes, he was.

Q. And you looked at Mr. Levier as well, didn't you?

A. No. I didn't.

Q. You never looked at him?

A. I seen him, but I wasn't paying attention to him because my focus wasn't on Mr. Levier.

Later, Mr. Ramsey again testified that "I wasn't paying attention to what [Mr. Levier] was doing at all."

### **3. David Knight's Testimony**

A large group of people were present at the club that night, one of which was David Knight. On direct examination, Mr. Knight testified that he could not hear the conversation between Mr. Ramsey, Mr. Mayes, and Mr. Levier. On cross-examination, Mr. Knight was asked, in the following exchange, about the conversation:

Q. All right. And do you remember seeing Mr. Ramsey talking to the tall older man with the glasses at the other table?

A. Yeah, I seen him and the other dude was at the table talking loud, and like I don't know, they was just talking loud. That's all I heard.

Q. Okay. Would it appear to you that they were having an argument, a conversation?

A. No, I couldn't hear it.

Counsel then abandoned her cross-examination on that point, and moved on to another topic.

However, when the defense investigator interviewed Mr. Knight three weeks earlier, Mr. Knight stated that

eventually, everyone could tell that the older man with glasses was cheating. Mr. Knight said that he was covering up money under his palm which he revealed on a good roll of the dice. Mr. Knight said that this action allowed him to increase the amount of his bet if he had a winning roll of the dice.

Mr. Knight said that eventually the older man with glasses said, "I'm done, I'm done" and left the table. Mr. Knight said that another taller older man left the table with him. Mr. Knight said that the man with glasses began counting his money at a nearby table.

Mr. Knight next remembered seeing "Beatlejuice" at the other table yelling at the two older men. Mr. Knight said that he was accusing them of being on the "same team."<sup>2</sup>

#### **4. "Honest Claim of Right" Defense**

Counsel attempted to put on the "Honest Claim of Right" defense.

She submitted a written request for the following instruction:

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<sup>2</sup> The older man with glasses is Mr. Mayes. The taller older man is Mr. Levier. Beatlejuice is Mr. Ramsey.

[I]t is a defense to the charge of theft . . . that the defendant acted under an honest claim of right, in that he reasonably believed that he was entitled to the property involved.

The court refused to give the instruction.

Counsel continued to argue in closing that both Mr. Mayes and Mr. Levier were cheating at the dice game, and that Mr. Ramsey had the ability to take his money back from them.

The jury returned a verdict of guilty on all counts. After a sentencing hearing, the jury determined that Mr. Ramsey should serve life in prison without the possibility of parole.

## **B. Direct Appeal Proceedings**

Mr. Ramsey appealed his convictions and sentence. As relevant to this case, he argued that the trial court erred when it refused to instruct the jury on his honest claim of right defense. The Oregon Court of Appeals agreed with Mr. Ramsey that the trial court erred when it refused to give those jury instructions. *State v. Ramsey*, 56 P.3d 484 (Or. Ct. App. 2002). The Oregon Court of Appeals found that there was sufficient evidence in the record that Mr. Ramsey believed that Mr. Mayes cheated him, so that a jury could believe that Mr. Ramsey

was just recovering his property from Mr. Mayes. *Ramsey*, 56 P.3d at 488.

Because the robbery of Mr. Robinson was based on a theory that Mr. Mayes owed Mr. Robinson a cut of his winnings, the jury could also have found that Mr. Ramsey did not rob Mr. Robinson when he recovered property from Mr. Mayes. *Id.* Accordingly, the Oregon Court of Appeals reversed all of the convictions that related to the robbery of Mr. Mayes and Mr. Robinson. *Id.* at 490. They also reversed all of the burglary convictions because the jury instructions and jury verdict form did not specify which theft formed the basis for the charges. *Ramsey*, 56 P.3d at 489.

However, the Oregon Court of Appeals affirmed the convictions that were specifically premised on the robbery of Mr. Levier. *Id.* at 490. According to the Oregon Court of Appeals, there was no evidence in the record that would support a finding that Mr. Levier was also cheating at the dice game, and that Mr. Ramsey had an honest belief that he was simply recovering his own money from Mr. Levier. *Id.* at 488.

On remand, the state elected not to retry the reversed convictions and not to seek the death penalty again. *See State v. Ramsey*, 173 P.2d

142, 143-44 (Or. Ct. App. 2007). Thus, the trial court conducted a resentencing proceeding on the Aggravated Murder and Robbery counts related to Mr. Levier. *Id.* The jury again returned a verdict of life imprisonment without the possibility of parole and the Oregon appellate courts affirmed that sentence.

### **C. Post-Conviction Proceedings**

Thereafter, Mr. Ramsey pursued post-conviction relief. As relevant to this case, he claimed that counsel was ineffective when she failed to introduce testimony that Mr. Levier was also a participant in the cheating at the after-hours club.

When questioned about the evidence of Mr. Levier cheating, counsel testified that she “certainly tried” to introduce “all the evidence that [she] could regarding this Honest Claim of Right defense.” The following exchange then occurred:

Q. And there was nothing out there that –

A. Well, nothing else that I found that I – but I – but, you know, I’m not – I – I can’t say to you that I ever focused specifically on Levier, I focused on all of those old guys at that table, don’t -- I don’t remember ever focusing specifically on Levier.

Q. But there's just – to your knowledge there was no additional evidence you could have presented regarding this Honest Claim of Right defense?

A. I didn't look for any, I presented everything that I had and that I looked for.

On the claim regarding counsel's failure to introduce testimony about Mr. Levier's cheating, the court held that

[b]ecause the Court of Appeals determined that petitioner was not entitled to the honest claim of right instruction based on the evidence he presented at trial, and because he fails to present any additional evidence regarding this issue, petitioner cannot prove that that counsel was ineffective in failing to present additional evidence regarding this issue.

The court concluded that Mr. Ramsey was not denied effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The Oregon appellate courts affirmed the ruling.

#### **D. Federal Habeas Proceedings**

Seeking a writ of habeas corpus, Mr. Ramsey continued to argue that his trial counsel failed to elicit testimony regarding Mr. Levier's cheating. The district court recognized that "counsel apparently was in possession of the investigator's report containing Knight's statements." App. at 21. However, the court held that counsel "was not deficient by failing to introduce Knight's statement at trial, for the simple reason

that Knight’s statement directly contradicted petitioner’s own testimony.” App. at 22. In so finding, the district court relied on its finding that: “Petitioner’s testimony was directly at odds with Knight’s statement that petitioner accused Mayes and Levier of being on the ‘same team.’” App. at 22. Thus, “trial counsel may have reasonably believed that introducing Knight’s contradictory statement would hurt petitioner’s case more than help it.” App. at 22. The district court acknowledged that “[g]ranted, in light of the Court of Appeal’s decision, the risk of introducing Knight’s statement may have been warranted.” App. at 24. However, the district court determined that finding of ineffective representation would have required counsel to anticipate the eventual appellate reversal and that “*Strickland* does not mandate prescience.” App. at 24.

The district court denied Mr. Ramsey’s request for habeas relief and denied a certificate of appealability. App. at 25. The Ninth Circuit also denied a certificate of appealability. App. at 1.

## **REASONS FOR GRANTING THE PETITION**

The district court decided an important question of federal law that conflicts with relevant decisions of this Court: that trial counsel

cannot be ineffective under *Strickland* if she fails to introduce necessary testimony in support of her defense, if that testimony would contradict the defendant's testimony, in part. In so doing, the district court failed to consider the entirety of the record in this case, and the specific circumstances that required counsel to introduce the testimony. The district court's implicit creation of a *per se* rule regarding counsel's representation conflicts with *Strickland*. In addition, Mr. Ramsey's claim of ineffective representation was debatable. Accordingly, the Ninth Circuit ruled contrary to *Miller-El* when it denied Mr. Ramsey a certificate of appealability.

**A. The Ninth Circuit's Denial Of A Certificate Of Appealability Conflicts With This Court's Holding in *Miller-El* That The Issues Need Only Be Debatable Among Jurists Of Reason.**

To obtain a certificate of appealability, a habeas petitioner must make a "substantial showing of the denial of constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner need not demonstrate that he would prevail on the merits. Rather, he "must '[s]how reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner

or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (some internal quotation marks omitted)).

“[A] [certificate of appealability] does not require a showing that the appeal will succeed.” *Id.* at 337. As this Court wrote: “We do not require petitioner to prove, before the issuance of a [certificate of appealability], that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the [certificate of appealability] has been granted and the case has received full consideration, that petitioner will not prevail.” *Id.* at 338. As explained below, the district court’s opinion raised debatable issues; accordingly, Mr. Ramsey’s Sixth Amendment claim meets the standard set by § 2253(c). The Ninth Circuit’s decision to deny a certificate of appealability thus conflicts with this Court’s precedent.

**B. It Is Debatable Whether The District Court Erroneously Created A Per Se Rule For Ineffective Assistance Of Counsel And Whether Counsel's Failure To Pursue Her Chosen Trial Strategy Was Ineffective Under The Sixth Amendment.**

*Strickland* outlines the test courts must employ when addressing ineffective assistance of counsel claims: (1) was counsel's performance deficient, and (2) if so, did this performance prejudice the defendant? 466 U.S. at 692. If both questions are answered in the affirmative, a defendant's Sixth Amendment right to effective assistance of counsel has been violated. *Id.*

This Court in *Strickland* emphasized that “the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Id.* at 696. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel.” *Id.* at 688-89. As such, per se rules governing the acceptableness of counsel conduct are disfavored. *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

**1. The District Court Applied A Per Se Rule By Holding That Counsel Acted Reasonably When She Failed To Elicit Needed Testimony From Mr. Knight For The “Simple Reason That Knight’s Statement Directly Contradicted Petitioner’s Own Testimony.”**

Here, counsel fiercely pursued an honest claim of right defense before and after Mr. Knight’s cross-examination, and Mr. Knight’s statements to the investigator strongly supported her trial strategy. Moreover, as the Oregon Court of Appeals noted during Mr. Ramsey’s appeal, “any evidence” may support an honest claim of-right instruction. *Ramsey*, 56 P.3d at 488.

Counsel’s deviation from her trial strategy to prove an honest claim of right defense constitutes deficient performance because it was a “result[] from inattention, not reasoned strategic judgment.” *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). That inattention was confirmed by counsel’s testimony during post-conviction proceedings, where she admitted: “I can’t say to you that I ever focused specifically on Levier . . . . I presented everything that I had and that I had looked for” regarding Mr. Ramsey’s honest claim of right defense.

Despite that strong evidence of ineffective representation, the district court found counsel's conduct reasonable for the "simple reason that Knight's statement directly contradicted Petitioner's own testimony." App. at 22.<sup>3</sup> By only considering the supposed conflict between Mr. Ramsey and Mr. Knight's testimony, the district court implied that counsel is always reasonable when cutting off conflicting testimony—an unacceptable *per se* rule under *Strickland*. By failing to consider the entirety of the circumstances in the case, and essentially applying a *per se* rule, the district court ruled contrary to *Strickland* when it held that counsel's performance was reasonable.

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<sup>3</sup> The district court further determined that a finding that counsel was ineffective for her failure with Mr. Knight's testimony would have required counsel to "anticipat[e] a future ruling on appeal. App. at 24. The district court must have been referring to the ruling in Mr. Ramsey's case, because the some evidence rule had been the law in Oregon since 1991. *See State v. Shelley*, 821 P.2d 1111, 1113 (Or. Ct. App. 1991) (holding that a defense instruction is required "if any evidence from which the jurors could infer that the required elements of the defense are present."). Moreover, counsel did not proffer a strategic reason for her actions that would have required any analysis about what may have informed her decision to cease-cross examination of Mr. Knight. Instead, counsel's failure was due to inattention – she was simply unaware that her investigator's report contained the necessary information to elicit from Mr. Knight.

**2. But For Counsel’s Failure To Sufficiently Cross-Examine Mr. Knight, Mr. Ramsey Would Have Been Entitled To An Honest Claim Of Right Jury Instruction And, Armed With Such Instruction, A Jury Would Have Had Reasonable Doubt Respecting Guilt.**

To demonstrate prejudice, a petitioner must show a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694. Here, the record contains evidence of that probability. Had counsel cross-examined Mr. Knight on this issue, or recalled him as a defense witness, the record would have contained evidence that Mr. Ramsey believed Mr. Levier was on the “same team” with Mr. Mayes, and that they were both cheating at the dice game.

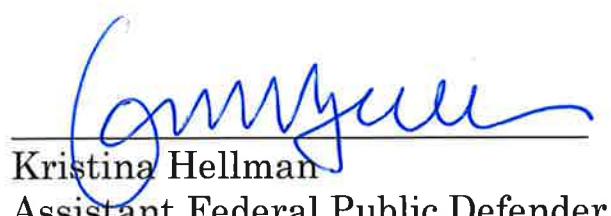
With this evidence, the Oregon Court of Appeals would have concluded that Mr. Ramsey was entitled to the honest claim of right defense on the charges involving Mr. Levier, and in all probability, would have reversed all of Mr. Ramsey’s convictions. Even the district court acknowledged this probability: “Granted, in light of the Court of Appeal’s decision, the risk of introducing Knight’s statement might have been warranted.” App. at 24. But for counsel’s deficient performance, Mr. Ramsey would have been entitled to an honest claim

of right jury instruction. It is therefore debatable whether the district court correctly concluded that counsel was not ineffective under *Strickland*. As a result, the Ninth Circuit ruled contrary to *Miller-El* when it denied Mr. Ramsey a certificate of appealability.

## CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari, summarily reverse, and remand the case to the Ninth Circuit with instructions that it grant a certificate of appealability on Mr. Ramsey's claim of ineffective assistance of counsel under the Sixth Amendment for failure to cross-examine David Knight, or to call him as a defense witness, on Mr. Knight's knowledge that Mr. Ramsey believed that Antoine Levier, along with James Mayes, was cheating Mr. Ramsey out of money.

Respectfully submitted on April 26, 2019.



Kristina Hellman  
Assistant Federal Public Defender  
Attorney for Petitioner