No.

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN KOELEMIJ,
Petitioner,
v.

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

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability on his 28 U.S.C. § 2254 claim that he was denied his constitutional right to a fair trial as a result of the state trial court rebuking the Petitioner and then defense counsel *in the presence of the jury*.

B. PARTIES INVOLVED AND RELATED CASES

1. Parties Involved

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

2. Related Cases

a. *State of Florida v. Kevin Koelemij*, case no. 2015-CF-972, Florida Second Judicial Circuit Court, Leon County. Judgment entered on August 15, 2018.

b. *Kevin Koelemij v. State of Florida*, case no. 1D2018-3432, Florida First District Court of Appeal (direct appeal). Opinion entered on December 10, 2018.

c. *Kevin Koelemij v. Secretary, Department of Corrections*, case no. 4:21-cv-373-AW-ZCB, Northern District of Florida (28 U.S.C. § 2254 petition). Judgment entered on September 16, 2024.

d. *Kevin Koelemij v. Secretary Department of Corrections State of Florida*, case no. 24-13381, Eleventh Circuit Court of Appeals (appeal from the denial of the § 2254 petition/request for a certificate of appealability). Order denying a certificate of appealability entered on May 12, 2025.

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, KEVIN KOELEMIJ, prays the Court to issue its writ of certiorari to review the opinion/order of the Eleventh Circuit Court of Appeals entered in this case on May 12, 2025. (A-3)[1]

D. CITATION TO OPINION BELOW

The opinion/order of the Eleventh Circuit Court of Appeals was not reported in the Federal Reporter.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number. References to the documents contained on the district court docket (Northern District of Florida) will be made by the designation "Doc," short for document, followed by a citation to the appropriate document number, followed by the designation "Pg," short for page, followed by a citation to the appropriate page number.

Eleventh Circuit Court of Appeals. On July 21, 2025, this Court granted an application for an extension of thirty days to file this petition for writ of certiorari by September 9, 2025.

F. CONSTITUTIONAL PROVISION INVOLVED

The right to a fair trial is guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment to the Constitution. *See Cone v. Bell*, 556 U.S. 449, 451 (2009).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the Case.

The Petitioner was charged in state court (Florida) with one count of "sexual battery when victim physically helpless." The offense allegedly occurred on

February 28, 2015.

The case proceeded to a jury trial in 2018. At the conclusion of the trial, the jury found the Petitioner guilty as charged. As explained in this petition, during the trial, the state trial court rebuked the Petitioner and then defense counsel in the presence of the jury. Following the trial, the state trial court sentenced the Petitioner to fifteen years' imprisonment followed by five years of probation.

The Petitioner appealed the judgment, arguing that the state trial court erred by denying the Petitioner's motion for new trial and motion to disqualify. Ultimately, the Florida First District Court of Appeal rejected this claim and affirmed the Petitioner's conviction and sentence. *See Koelemij v. State*, 285 So. 3d 376 (Fla. 1st DCA 2019). The Petitioner timely sought review in the Florida Supreme

Court, and the Florida Supreme Court denied review on April 14, 2020.

Thereafter, the Petitioner filed a petition pursuant to 28 U.S.C. § 2254. (Docs 1 & 4). In his § 2254 petition, the Petitioner argued the same claim that he previously presented on direct appeal (i.e., the state trial court erred by denying the Petitioner's motion for new trial and motion to disqualify). On June 26, 2024, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (Doc 27). On September 16, 2024, the district court issued an order adopting the report and recommendation. (A-8).[2]

The Petitioner appealed the denial of his § 2254 motion. On May 12, 2025, a single circuit judge denied

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[2] A separate judgment denying the § 2254 petition was also issued on September 16, 2024. (A-7).

a certificate of appealability. (A-3).

2. Statement of the Facts – the Jury Trial.

T.S.[3] T.S., who was twenty-three years old at the time of his trial testimony, testified that in February of 2015, he was a student at Florida A&M University. (Doc 8-4 - Pg 35). T.S. stated that he met the Petitioner at an Alcoholics Anonymous ("AA") meeting, and he said that the Petitioner subsequently became one of his best friends. (Doc 8-4 - Pgs 38-46). T.S. testified that after he became friends with the Petitioner, he started receiving therapeutic massages from the Petitioner. (Doc 8-4 - Pgs 42-46).

T.S. stated that during the early morning hours of February 28, 2015, he went to the Petitioner's house at approximately 1:00 a.m., and he said that the two

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

talked and then he laid down for a massage. (Doc 8-4 - Pg 48). T.S. testified that he fell asleep at approximately 3:30 a.m., and he claimed that he later woke up "to the feeling of oral sex being performed" on him:

> And when I woke up, it was to the feeling of oral sex being performed on me, which I – in that initial waking up haze and confusion, I attributed it to, like, the sliding of the sheets while doing – sleeping a certain way or something like that. I knew what it felt like but I also – that wasn't a reasonable conclusion in my brain and said, no, that's not what it is. Like, obviously, that clearly can't be what it is.
>
> Q So what did you do?
>
> A As time wore on, I became more sure. I initially tried to – I made a noise or two, shifted a little bit hoping that there would be an "oh, he's awake" moment and then I would just be able to get up and leave or everything would stop or something. That did not work. I tried to pull the sheet over myself as if I was cold, still kind of feigning sleep because I

> didn't know what to do, and the sheet was stopped. I don't know. My eyes were still closed. There was a towel or folded washcloth over my eyes.
>
> And then I tried to roll over, away, so that I would be on my side, so that I would be moving away, and my leg was stopped with moderate pressure. It wasn't, like, forceful but I could not move my leg anymore. And I wanted to avoid confrontation because this is now outside of the realm of what I know to be reasonable; and if this is happening, then, I don't know, maybe there's, like, a gun or a knife involved and I can't see and, you know, it's a scary experience.
>
> And so I'm trying to, you know, passively make this stop, and I see no alternative. And I – I'm laying down on my back, and I lean up and kind of prop myself on my elbows and remove the blindfold as I do. And I say, Kevin, what are you doing? And he quickly stops, and in one smooth motion, stands up, wipes his mouth and says, "tantric release," very – very shakily. And I'm just kind of standing there.

(Doc 8-4 - Pgs 48-49). T.S. stated that he told the Petitioner "[t]hat wasn't okay" and he said that he proceeded to get dressed and he left the Petitioner's

house. (Doc 8-4 - Pgs 50-51). T.S. admitted that he did not report the alleged incident to the police for "three days or so." (Doc 8-4 - Pg 52).

Jeff Caplan. Mr. Caplan, an investigator with the Tallahassee Police Department, testified that T.S. previously came to the police department alleging that he was the victim of a sexual assault. (Doc 8-4 - Pgs 97-98). Investigator Caplan stated that when T.S. came to the police department, it had been "several days" since the alleged assault, and therefore Investigator Caplan said that he was unable to collect any physical evidence. (Doc 8-4 - Pg 98). Investigator Caplan testified that he interviewed the Petitioner on March 13, 2015, and during Investigator Caplan's testimony the State played portions of the audio-recorded interview for the jury. (Doc 8-4 - Pgs 98-107).

At the conclusion of Investigator Caplan's

testimony, the State rested. (Doc 8-4 - Pg 122). The defense did not present any witnesses.

H. REASON FOR GRANTING THE WRIT

The question presented is important.

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

The provisions of 28 U.S.C. § 2253(c)(1) were

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

The Court in *Miller-El* recognized that a

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

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if

> appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

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

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here

> a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 338.

As explained below, the Petitioner contends that the Eleventh Circuit Court of Appeals erred by concluding that he does not have a valid constitutional claim "debatable" among jurists of reason.

1. The Petitioner's § 2254 claim.

In his § 2254 petition, the Petitioner alleged that the state trial court erred by denying his motion for new trial and motion to disqualify. At trial, during the prosecutor's direct examination of the alleged victim, the following occurred:

> Q And do you see the person who you know to be Kevin Koelemij in the

courtroom here today?

A Yes, ma'am.

Q Will you please describe something that he's wearing –

THE COURT: **Sit down**.

MR. PUMPHREY [defense counsel]: I asked him to stand up, Judge, for identification.

THE COURT: Okay. Well, I'm telling – *I'm ordering him* –

MR. PUMPHREY: I understand. I just didn't want the Court to –

THE COURT: Okay. *I don't need to hear anything from you.*

MR. PUMPHREY: Right.

BY MS. VOLLRATH-BUENO [the prosecutor]:

Q Mr. [T.S.], if you could identify what he's wearing for the record.

A Yes, ma'am. It's going to be a red tie, light blue shirt and a gray coat.

> MS. VOLLRATH-BUENO: We ask the record reflect that the witness has identified the defendant in this case.
>
> I have nothing further at this time, Your Honor.
>
> THE COURT: Okay. Cross?
>
> MR. PUMPHREY: Judge, I need to put some things on the record if I may.
>
> THE COURT: *I don't know what you're talking about. I want you to ask him questions right now.*
>
> MR. PUMPHREY: Right. Judge, my prior objection, I just need to put –
>
> THE COURT: Well, you're going to have to do that later. Do you have questions for Mr. T.S.?
>
> MR. PUMPHREY: I do, Judge.
>
> CROSS EXAMINATION
>
> BY MR. PUMPHREY:
>
> Q Mr. [T.S.], good morning. . . .

(A-25-27) (bold emphasis added to show the state trial court's stern tone/other italics emphasis added).

Following defense counsel's cross-examination of T.S., the following occurred outside the presence of the jury:

> THE COURT: What would – what did you want to put on the record, Mr. Pumphrey? . . .
>
> MR. PUMPHREY: Okay. I want to make it clear to the Court that I instructed Mr. Koelemij, as I do in every case, the hundreds of cases I've tried, when it comes to identification to make sure there's no question of identification or anything else. And I'm unaware of this Court and the number of trials I've had before it, but I told Mr. Koelemij to stand.
>
> THE COURT: I know. You said that.
>
> MR. PUMPHREY: Okay. *But the Court's demeanor in front of the jury was troubling to me.* I enjoy practicing before this Court, but when the Court yells directly at my client and then when I respond, the Court's demeanor is less than appropriate, in my – in my professional opinion, I don't think that is biding well for the Court, I don't think it's biding well for the jurors, *I don't think it is biding well for the defendant.*
>
> That having been said, I don't

think it's affected the outcome of this trial, in all candor, to put that on the record, but I'd like to know what it is I did to solicit that from the Court in front of the jury. I have no problem with this Court dressing me down, *but in front of the jury is what concerns me.*

THE COURT: Okay. Well, it's my responsibility to control the flow of the trial, and the only time anyone should be standing is when the lawyers are addressing the Court or questioning witnesses.

MR. PUMPHREY: I will follow that from this point forward, Your Honor.

THE COURT: Okay. *And I never yelled at anybody.*

MR. PUMPHREY: Well, I disagree, Your Honor, but that's your opinion. I'll respect it. But I – I don't raise these issues. In fact, I've been practicing for over 20 years; I've never raised this issue with any judge in this jurisdiction. *But today I saw a lot of anger, your voice was raised, you yelled at my client.*

THE COURT: Okay. I definitely did not yell at him. I just had no – I

didn't know you had told him that. I had no idea why he was standing up. He was late yesterday and he wore that – some pen yesterday to try to communicate with the jury, and so then when he stood up, I just told him to sit down.

Is there anything else you wanted to put on the record, Mr. Pumphrey?

MR. PUMPHREY: Judge, Mr. Koelemij is not wearing any pens, per the Court –

THE COURT: Today he's not, correct.

MR. PUMPHREY: Right, today.

THE COURT: Was there anything else –

MR. PUMPHREY: He was wearing – he was wearing pens the other day and I told him he needed to not wear them.

THE COURT: Actually, I ordered him to not wear those.

So anything else that you were talking about before that you wanted to put on the record?

MR. PUMPHREY: No, Your

Honor.

(A-27-30).[4] Following the trial, defense counsel filed a

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[4] At the conclusion of the jury selection proceeding, the state trial court stated the following to the Petitioner:

> THE COURT: Okay. And, Mr. Koelemij, I don't know what that pin says that you have on your lapel, but you're not going to be wearing that pin or any other pins tomorrow during the trial.
>
> THE DEFENDANT: Okay.
>
> THE COURT: Okay. Or anything else that communicates any type of message to the jury.
>
> THE DEFENDANT: Okay.

(A-33). The state trial court also asked that the Petitioner not be late for the trial:

> THE COURT: 8:30. Okay, see you guys tomorrow.
>
> And make sure you're not late tomorrow, Mr. Koelemij. You were about five minutes late today.

(A-33).

motion for disqualification and asserted the following:

> During the identification phase of the State's direct examination of T.S., the alleged victim, defense counsel quietly directed Defendant to stand up so that the record would properly reflect this identification. Defendant silently stood up following this direction. This Court promptly yelled at Defendant to sit down, using an aggressive tone of voice toward Defendant in front of the jury. Defense counsel then attempted to clarify why the Defendant stood up and apologize on behalf of Defendant, explaining that Defendant was simply following his direction. This Court then interrupted defense counsel mid-sentence, explaining that it is her duty to control the courtroom.
>
> After discussing a separate evidentiary matter outside of the presence of the jury, defense counsel placed on the record that the Court's demeanor toward Defendant in front of the jury was troubling. This Court then repeated that she controls the courtroom, and further referenced the previous day when Defendant was late to jury selection and was wearing lapel pins which she believed to constituted signals to the potential jurors.
>
> This Court will recall that after

jury selection, Judge Dempsey ordered Defendant to not be late and to not wear any lapel pins to trial the next day, and the Defendant followed those orders, and only stood during the trial at the direction of defense counsel.

It is uncontested, as defense counsel conceded on the record, that it is well within a judge's province to control the courtroom. The Supreme Court of Florida held in *Braddy* that a judge may sternly, perhaps even angrily, direct a defendant to not interrupt courtroom proceedings. *Braddy v. State*, 111 So. 3d 810, 834 (Fla. 2012). The Court held that the stern commands toward the defendant in that case were not legally sufficient to evidence a bias or prejudice that requires disqualification. *Id.* Unlike presently, the proceeding at issue in *Braddy* was a pretrial hearing where there was no jury present and the Supreme Court also noted "Braddy continually tried to interrupt while either the judge or the State was speaking, despite the trial judge telling Braddy that he could talk "[i]n a minute," and asking him to "[h]ang on for a second." *Id*.

Defendant in the present case did not persist in any type of similarly disruptive nor exhibit any disrespectful behavior during the trial.

One year after *Braddy* was

decided, the court in *Martinez* ruled that a judge's actions in the course of attempting to control the courtroom can be legally sufficient to require disqualification in some circumstances. *Martinez v. Cramer*, 111 So. 3d 206, 207 (Fla. 4th DCA 2013). The court held that the trial court judge's behavior "far exceeded comments or actions necessary to control his courtroom and were sufficient to evidence to a reasonable person bias requiring disqualification, even if the judge may have felt that he had no bias." *Id*. The judge in that non-jury guardianship proceeding ejected the petitioner from the courtroom, struck her testimony, and made some personal comments about her.

Similarly, the tone of voice used in admonishing Defendant and defense counsel during the jury trial on July 3rd far exceeded the comments or actions necessary to control the courtroom. The response to Defendant's silent, benign act of standing up was wholly out of proportion. Furthermore, when defense counsel respectfully readdressed this issue at a later point, this Court seemingly attempted to justify the reaction by citing to her admonishments of Defendant from the day prior. This served to only add to Defendant's well-founded fear of prejudice and bias.

The context of the hearing and history of the case are relevant to understanding whether a movant has a well-founded fear of judicial bias. *Wall v. State*, 238 So. 3d 127, 143 (Fla. 2018).

Defendant's fear of prejudice and bias also stems from the extrajudicial and personal knowledge that this Court possesses about the Defendant. While a motion to disqualify was not filed previously in this case on the singular basis of this Court's personal knowledge of Defendant, the conduct toward Defendant paired with this historical context bolsters Defendant's fear of judicial bias if a disqualification is not granted for the sentencing hearing. Additionally, pursuant to the Code of Judicial Conduct, Canon 3(E), "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party . . . ." The comments further provide that "a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification." No such disclosure occurred.

In conclusion, the combination of

> the following creates a well-founded fear of judicial bias from the perspective of a reasonably prudent defendant: this Court's admonishment of Defendant and counsel in the presence of the jury, the Judge's seemingly unrelated reference to her previous admonishments of Defendant, and the extrajudicial knowledge this Court possesses regarding the Defendant. The notably angry reaction to the commonplace act of having a defendant stand up during an identification stage was beyond what was necessary to control the courtroom and it merely evidenced bias and prejudice against Defendant when considered in the complete context of the trial. The well-founded fear of bias and prejudice possessed by Defendant is further amplified by the broad discretion that a trial judge is afforded in sentencing hearings. An order granting disqualification would remove the appearance of judicial bias from the reasonable perspective of Defendant.

(A-36-43). Defense counsel also filed a motion for new trial wherein he argued:

> Lastly, during the identification phase of the State's direct examination of T.S., the alleged victim, defense counsel

> quietly directed Defendant to stand up so that the record would properly reflect this identification. Defendant silently stood up following this direction. This Court promptly yelled at Defendant to sit down, using an aggressive tone of voice toward Defendant in front of the jury. After discussing a separate evidentiary matter outside of the presence of the jury, defense counsel placed on the record that the Court's demeanor toward Defendant in front of the jury was troubling. This Court then repeated that the judge controls the courtroom, and further referenced the previous day when Defendant was late to jury selection and was wearing lapel pins which she believed to constituted signals to the potential jurors. The tone of voice used in admonishing Defendant and defense counsel during the jury trial on July 3rd far exceeded the comments or actions necessary to control the courtroom. *Martinez v. Cramer*, 111 So. 3d 206, 207 (Fla. 4th DCA 2013). The response to Defendant's silent, benign act of standing up was wholly out of proportion and the fact that it occurred in front of the jury contributed to Defendant not receiving a fair and impartial trial.

(A-50-52). The state trial court denied both motions.

(Doc 8-3 - Pgs 89-90). As explained below, the state trial court erred by denying the motion for new trial and motion to disqualify – and as a result of the state trial court's actions, the Petitioner was denied his constitutional due process right to a fair trial.

The Fourteenth Amendment to the Constitution guarantees a criminal defendant the due process right to a fair trial: it is "the most fundamental of all freedoms" – "the great bulwark of [our] civil and political liberties." *Estes v. Texas*, 381 U.S. 532, 540 (1965); 2 J. Story, *Commentaries on the Constitution of the United States* 541 (4th ed. 1873). This due process right includes the right to a fair trial before a neutral arbiter. *See Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997). The requirement of neutrality

> helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of

> the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti–Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citation omitted).[5]

To warrant habeas corpus relief, a trial judge's conduct "must be egregious, and fairly capable of

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[5] In *Carey v. Musladin*, 549 U.S. 70 (2006), the Court did not predicate the presence of "clearly established federal law" upon the existence of Supreme Court holdings involving essentially *identical factual circumstances.* In other words, the Court did not insist upon exact factual identity between existing Supreme Court cases and the case *sub judice.* Thus, a petitioner can still obtain § 2254 relief even if the legal rule at issue need not have its genesis in the closely-related or similar factual context, as long as this Court has expressly extended the legal rule to that context.

characterization as beyond that necessary to fulfill the role of 'governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.'" *United States v. Tilton*, 714 F.2d 642, 645 (6th Cir. 1983) (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)). The Petitioner asserts that the state trial court's conduct during his trial was "egregious."

In *Simmons v. State*, 803 So. 2d 787, 788 (Fla. 1st DCA 2001), the state appellate court considered whether "the trial court's rebuke of defense counsel . . . deprived the appellant of a fair and impartial trial."[6]

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[6] In *Simmons*, the following occurred:

> During the State's rebuttal, the prosecutor ridiculed the defense argument, saying, "according to the defense, no crime occurred here because [the victim] said it was a butcher knife and [the eyewitness] said it was a steak knife." The trial court overruled defense counsel's mischaracterization of evidence objection by saying, "[i]t is accurate and

The *Simmons* court concluded that the remark resulted in a breach of the trial court's position of neutrality in front of the jury. *See id.* at 788-89. *See also Kelvin v. State*, 610 So. 2d 1359, 1366 (Fla. 1st DCA 1992) ("[W]e do note that it is inappropriate to admonish counsel in such manner in the presence of the jury."); *Wilkerson v. State*, 510 So. 2d 1253, 1254 (Fla. 1st DCA 1987) ("Florida courts have recognized that there are occasions when there is no error in rebuking defense counsel in the presence of the jury; however, the better practice is to require the jury's retirement before doing so."); *Jones v. State*, 385 So. 2d 132 (Fla. 4th DCA 1980) (concluding that rebuke of defense counsel in presence of jury abridged defendant's fundamental right to a fair trial).

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dead on point. Sit down, Mr. Boothe."

Simmons, 803 So. 2d at 788.

In the instant case, the state trial court should not have rebuked the Petitioner and then defense counsel *in the presence of the jury* (the matter should have been addressed during a side-bar conference). As explained by defense counsel during the trial, when the Petitioner stood up – a gesture that actually assisted the witness in making his identification[7] – the state trial court *yelled* at the Petitioner to "SIT DOWN"[8] and then "order[ed]" him (not just told, but ordered: "Well, I'm telling – I'm ordering him") to sit down. When

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[7] Many times when a witness is asked to identify the defendant in the courtroom, the witness struggles to do so (i.e., the witness identifies the person sitting at the table "wearing a suit and tie" – when both the defendant and the defense attorney are wearing a suit and tie). By having the Petitioner stand, defense counsel was simply making it easier for T.S. to identify him (because identity was not a disputed issue in this case).

[8] An audio/video disk of the trial was filed as an exhibit in the district court. (Doc 23).

defense counsel attempted to explain to the state trial court that he was the one who had directed the Petitioner to stand up, the state trial court told defense counsel "I don't need to hear anything from you." As explained in the motion for disqualification, the state trial court's response to the Petitioner's silent and benign act of standing up was wholly out of proportion – resulting in a breach of the state trial court's position of neutrality in front of the jury. As a result of the state trial court's actions, the Petitioner was denied his constitutional due process right to a fair trial.

Accordingly, for the reasons set forth above, the Petitioner argued in his § 2254 petition that he is entitled to federal habeas relief. The state courts' rulings on this matter are contrary to and an unreasonable application of the Petitioner's constitutional right to a fair trial. *See Estes*, *Bracy*, &

Marshall. Moreover, the state courts' rulings are based on an unreasonable determination of the facts in light of the evidence presented in the proceeding (i.e., the state court's assertion that it "never yelled at anybody" is directly refuted by the audio/video of the trial). In light of the state trial court's actions in this case – which occurred in the presence of the jury – the Petitioner asserts that the state court's application of his due process claim was "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn v. Kayer*, 592 U. S. 111, 118 (2020).

"Trial judges must be fair, impartial, and disinterested participants in the proceedings." *Johnson v. State*, 114 So. 3d 1012, 1013 (Fla. 5th DCA 2012). "The requirement of judicial impartiality is at the core of our system of criminal justice." *Id.* at 1017

(citation omitted). *See also Jones v. State*, 54 So. 3d 503, 505 (Fla. 1st DCA 2010) ("[T]he trial judge should not depart from a position of neutrality.") (citations omitted). In this case, *yelling* at the Petitioner to "sit down" – and then telling defense counsel "I don't need to hear anything from you" – both in the presence of the jury – clearly amounted to a departure from the judge's position of neutrality.[9] The state trial court could have handled the incident in a manner that did not prejudice the Petitioner's right to a fair trial (i.e.,

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[9] The Florida Code of Judicial Conduct delineates the manner in which the judges preside in any proceeding. The Code repeatedly provides that all judges are required to be impartial and avoid even the appearance of impropriety. *See* Canon 2(A) ("[a] judge . . . shall at all times act in a manner that promotes . . . the . . . impartiality of the judiciary"); Commentary to Canon 2(A) ("[a] judge must avoid impropriety and all appearance of impropriety"); Canon 3(B)(5) ("[a] judge shall perform judicial activities without bias or prejudice"); & Commentary to Canon 3(B)(5) ("[a] judge must perform judicial duties impartially . . . .").

by either addressing the matter at sidebar – outside the presence of the jury – or refraining from yelling at the Petitioner and disparaging defense counsel). It is reasonable to presume that the jury picked up on the state trial court's disdain for both the Petitioner and defense counsel – which necessarily had an impact on the jury's determination of guilt in this case.[10]

2. The Petitioner has made a substantial showing of the denial of a constitutional right.

The Petitioner submits that he has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Contrary to the Eleventh Circuit's order below, the Petitioner's claim is a matter "debatable" among jurists of reason. To be

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[10] This was a close "he said/he said" case – and the jury's impression that the state trial court was biased against the Petitioner and defense counsel could have improperly tipped the scales in favor of the prosecution.

entitled to a COA, the Petitioner needed to show only "that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. The Petitioner has satisfied this requirement. Thus, the Eleventh Circuit Court of Appeals should have granted a COA in this case.

The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit Court of Appeals for the consideration it deserves.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.

COUNSEL FOR THE PETITIONER