No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM B. CROCKETT III – PETITIONER

VS.

RICHARD BROWN – RESPONDENT

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals' unreasoned, one-page order summarily denying a certificate of appealability, while citing the relevant statute but not the relevant precedent of this Court holding that a certificate of appealability must issue if jurists of reason could debate that habeas corpus relief should be denied, and relying solely on the reasoning of the final order of the district court, which in turn relied solely on "the reasons explained in this opinion for denying habeas corpus relief" to explain its denial of a certificate of appealability, conflicts with relevant decisions of this Court requiring a limited threshold inquiry that is separate from and less burdensome than an ultimate merits determination, and that asks only if the district court's decision was "debatable." *Buck v. Davis*, 137 S.Ct. 759, 773-75 (2017).

2. Whether the United States Court of Appeals for the Seventh Circuit misapplied, even if it properly stated, the stricture of 28 U.S.C. § 2253(c)(2) that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," when it found no substantial showing of the denial of a constitutional right.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The order of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States District Court appears at Appendix B to the petition and is unpublished. The order of the United States Court of Appeals denying rehearing appears at Appendix C to the petition and is unpublished. The opinion of the State Court of Appeals appears at Appendix D to the petition and is unpublished. The Amended Findings of Fact and Conclusions of Law of the State Post-Conviction Trial Court appears at Appendix E to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided the petitioner's case was April 17, 2018. A timely petition for rehearing was denied by the United States Court of Appeals on May 18, 2018, and a copy of the order denying rehearing appears at Appendix C. An extension of time to file the petition for a writ of certiorari was granted to and including October 15, 2018 on August 6, 2018 in Application No. 18A139. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) 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;
>
> . . .
>
> (2) 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.

STATEMENT OF THE CASE

This case essentially comes down to whether a reasonable jurist could disagree with the district court's determination that it was not unreasonable for the Indiana Court of Appeals to hold that there was not even a reasonable possibility that the petitioner, William Crockett, would have been acquitted at trial had a detective not been allowed to tell the jury that Crockett had asked him for a "deal" while being questioned about the murder he was on trial for, and had Crockett's own trial counsel not told the jury in so many words that Crockett's asking the detective for a "deal" indeed signified that he was guilty – if not of the murder he was on trial for then of a sexual assault he was also charged with, and about which the jury would not have been informed had Crockett's trial counsel not opened the door to it.

The State charged Crockett with murder and conspiracy to commit murder, alleging that he had essentially ordered two associates, Antrone Crockett and Michael Wright, to murder another associate, Don Langenderfer, who was shot and killed on October 27, 2002.

At trial the State called Officer Timothy Corbett to testify concerning statements made by Crockett to him during an interview on October 23, 2003, at which Officer Randy Kaps was also present. These statements were portrayed and used by the State at trial as evidence tending to make it more likely that Crockett was involved in or ordered the homicide, in that Crockett not only admitted in the interview knowing who carried out the homicide, but also repeatedly asked Corbett for a "deal" and thereby, according to the State, essentially admitted his guilt.

The very first substantive question and answer in the State's direct examination of Officer Corbett were as follows:

> Q. Did he give you any kind of ultimatum or anything, with regard to any information he may give up?
>
> A. Okay. We talked about the case. Mr. Crockett asked on several occasions if I could make a deal with him. He said he had information in regards to this homicide, that he could lock the case down, that he knew who the people were that were involved. He knew that one of them was white and one of them was black. He said he knew who the shooter was. He continued to ask for a deal. He said he would be willing to talk about it. He would do whatever he had to do, but he did not want to go to jail, and he wanted to know if I could cut him some kind of deal. I was very specific that I could not cut any deals, that I needed to know what his information was. And he continued to press for me to give him some kind of deal, and I did not do that.

[Tr. at 358].

The very last question and answer in the State's direct examination of Officer Corbett went as follows:

> Q. Outside of what I've asked you, was there anything else, any other information given by him, regarding his involvement or anything else, his knowledge of specifically what happened?
>
> A. No, other than he was very, very adamant that he wanted some kind of deal. The word deal came up several times in our conversation, and that he would provide information on what happened, that he could lock this down, that he was the guy that knew, and he could clear it up, but he wanted a deal. And there was none provided.

[Tr. at 367].

Defense counsel did not object to Corbett's testimony that Crockett had asked for a "deal." Instead, the following exchange occurred at the end of defense counsel's cross-examination of Corbett:

> Q. Now you kept saying on direct examination that William Crockett wanted to talk to you about a deal; is that right?

A. Yes.

Q. At the time you spoke to him on October the 23rd of 2003, this case was not the only problem with the law that he had, was it?

A. No, sir.

Q. That's all I have.

[Tr. at 383].

Then, on redirect, the State asked Corbett what the other "problem with the law" Crockett had on October 23, 2003, and that defense counsel had referred to, was, and Corbett answered as follows:

A. That he had been arrested that evening for the warrant that we had [i.e., for the murder charge], in addition to an offense that happened over in Mishawaka.

Q. Okay. What was the offense in Mishawaka?

A. Sexual offense to two females.

Q. What was the alleged crime?

[Tr. at 384].

Defense counsel objected at this point, the trial court sustained the objection, and the jury was instructed to disregard Corbett's testimony that Crockett had also been arrested for a "sexual offense to two females."

Following the conclusion of Corbett's testimony, the jurors were given the opportunity to submit questions for the witness. After these questions were submitted to the court and the State and defense counsel consulted with the court on the proper response to the jurors' questions, the court addressed the jury as follows, without objection from defense counsel:

> Ladies and gentlemen, two different jurors here had questions about audiotapes or videotapes, and that has been discussed by the Court with counsel outside of the presence of the jury, and for legal reasons I have determined that those tapes would not be used in this trial.

[Tr. at 394-95].

The State later called Officer Randy Kaps to testify very briefly concerning Officer Corbett's interview with Crockett. Specifically, the State asked Officer Kaps whether Crockett had asked for a "deal" in that interview, and Officer Kaps' answer and subsequent testimony were as follows:

> A. Yes.
>
> Q. And that was in regards to what information?
>
> A. In regards to giving us information on the murder of Don Langenderfer.

[Tr. at 548-49].

Defense counsel did not ask Officer Kaps any questions on cross-examination.

The State argued as follows in closing argument:

> And we get to the deal, deal, deal, on the second statement. [Crockett had also made an earlier statement.] He comes in, on October 23, 2003, approximately a year after his first statement, he says he can put the lock on the case, but he wants a deal. He's not going to provide any information with regard to this case, unless he gets a deal. Why would an individual who did not partake or participate in the planning of this crime, or aid in the planning of this crime, want to deal? There would be no reason for a deal, if all he had was information about what others did.

[Tr. at 639].

Defense counsel argued as follows in his closing argument:

> And so, on cross examination, I asked Officer Corbett if Mr. Crockett was there on other matters. The answer was yes. All right? So then what becomes the inference? That he has something else that he needed to make a deal

about? That's what inferences are about. And you have to decide which of them are true inferences and which of them are not.

[Tr. at 654].

On rebuttal the State argued as follows:

Deal. You know there are reasons in this courtroom why certain things aren't allowed to be asked, certain things don't come out. Officer Kaps was called to testify concerning what the deal issue was, in the second statement with William Crockett. He specifically told you that William Crockett wanted a deal because of information that he had concerning this homicide. It had absolutely nothing else to do with any other criminal legal matters that William Crockett was involved with.

[Tr. at 667].

Crockett was convicted of murder by the jury and the conspiracy count was dismissed. On direct appeal, Crockett's appointed appellate counsel contended that: (1) evidence of Crockett's drug dealing and other bad acts, including Corbett's testimony that Crockett had been arrested for sexual offenses involving two females on the night he was interviewed by Corbett, were improperly admitted at trial; (2) the prosecutor committed misconduct during closing argument; (3) Crockett was denied effective assistance of trial counsel; and (4) he was entitled to a reversal because a conflict of interest occurred regarding his legal representation. The ineffective assistance of trial counsel claim was based only on trial counsel's failure to object to the same evidence of Crockett's drug dealing and other bad acts and to the same statements made by the prosecutor during closing argument that were challenged by appellate counsel's other contentions on direct appeal.

In its unpublished opinion affirming Crockett's conviction, the Indiana Court of Appeals included in its statement of facts supporting the conviction the following:

"South Bend police officers then interviewed Crockett, who admitted to Officer Timothy Corbett that he knew that Wright and Antrone were involved in the murder. Tr. p. 359-60. Crockett repeatedly indicated that the State should offer him a 'deal' with regard to the incident. Tr. p. 359." *Crockett v. State*, Cause Number 71A03-0506-CR-263, slip op. at 6 (Ind. Ct. App. December 28, 2005).

Crockett's claim in his state post-conviction case, which was also his claim in his federal habeas corpus case, is that he received ineffective assistance when his counsel on direct appeal raised trial counsel ineffectiveness and thereby deprived him of the ability to raise trial counsel ineffectiveness later in post-conviction proceedings. To prevail on this claim, Crockett had to show "not only that appellate counsel performed deficiently by raising these claims on direct appeal, but also that evidence established in postconviction relief would have proved trial counsel's ineffectiveness." *Timberlake v. State*, 753 N.E.2d 591, 605 (Ind. 2001); *Strickland v. Washington*, 466 U.S. 668 (1984).

Relying on *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694, 707 (1966) and *Carr v. State*, 934 N.E.2d 1096, 1107 (Ind. 2010), the "heart" of Crockett's argument in his petition for state post-conviction relief was that "the interview with Officer Corbett violated the petitioner's constitutional rights," and that "the substance of that interview should not have been relayed to the jury and that trial counsel was ineffective in this regard." App. E, at 21-23.

Crockett introduced at the evidentiary hearing on his petition for post-conviction relief the audio and video tape of Officer Corbett's interview with Crockett.

Contrary to the State's portrayal at trial of Crockett's statements to Corbett about a "deal," the postconviction court found that it was clear that Crockett "was not negotiating a plea to any charges. He was instead trying to talk his way out of jail and out of any charges being filed against him." App. E at 30. "[T]he petitioner's primary motive in talking to the officers was to deny any personal involvement in the killing and to obtain his immediate release from custody in return for providing evidence against others in this case and in unrelated matters." *Id.* at 26. "[T]he petitioner admitted to having knowledge of the killing but did not otherwise incriminate himself." *Id.*

The audio and video tape also demonstrated that the very first thing Crockett said after Officer Corbett and Officer Kaps came into the interview room, other than to identify Corbett, was to ask, "Where's the prosecutor?" Petitioner was told in response that "he's watching" the interview from the next room. In fact, as the postconviction court found, the officers had lied to Crockett, because there was no prosecutor watching the interview in the next room. *Id.* at 26. Moreover, the post-conviction court found that Corbett appeared to have "intended to get the petitioner to keep talking" after he had invoked his right to counsel. *Id.* at 25.

Although the post-conviction found that the manner in which Crockett's statement (as seen on the videotape) was obtained was "troubling in several respects," the post-conviction court ultimately concluded that any error in the admission of evidence related to the police interview was "harmless." App. E, at 22,

28. The Indiana Court of Appeals agreed with this assessment, App. D, at 11, and so did the Northern District of Indiana.

Following the Northern District's order denying habeas relief, denying a certificate of appealability, and denying leave to proceed on appeal *in forma pauperis*, Crockett filed a notice of appeal and a 5,200-word Request for Certificate of Appealability in the Seventh Circuit, in which he complained that "[t]he district court did not engage with the substance of the arguments Crockett made in his Petition for Rehearing in the [Indiana Court of Appeals], in his Petition to Transfer to the Indiana Supreme Court, and again in his federal habeas corpus petition, to the effect that the [Court of Appeal's] application of the *Strickland* prejudice prong in his case was unreasonable and contrary to *Strickland* itself," and set forth again the unanswered points he had made there. The Seventh Circuit's response was its one-page summary denial.

REASONS FOR GRANTING THE WRIT

When the district court judge denied a certificate of appealability in the penultimate paragraph of his Opinion and Order, he did what this Court reversed the Fifth Circuit for doing in *Buck v. Davis*, 137 S. Ct. 759 (2017): "The court below phrased its determination in proper terms – that jurists of reason would not debate that Buck should be denied relief – but it reached that conclusion only after essentially deciding the case on the merits." *Id.* at 773 (citation omitted). That is, the district court judge, properly stating the rule as set forth in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), said that no reasonable jurist could debate whether the

district court judge should have granted rather than denied Crockett's petition, "[f]or the reasons explained in this opinion for denying habeas corpus relief." App. B, at 11-12. *See also Miller-El v. Cockrell*, 537 U.S. 322 (2003).

But the reasons explained in the district court's opinion for denying habeas corpus relief were the district court's reasons for denying habeas corpus relief – not reasons or explanations for a finding that Crockett's claim was not even debatable. *Buck* and its predecessors teach that the distinction is crucial and cannot be glossed over: "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck*, 137 S. Ct. at 774.

The deficiency of the district court's Opinion and Order in this respect was compounded in the Seventh Circuit's one-page Order. It cites the requirement of 28 U.S.C. § 2253(c)(2) that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," but not the complementary requirement of *Buck* and its predecessors that a certificate of appealability may be *denied* only if no reasonable jurist could debate whether the district court should have denied habeas corpus relief.

Rather than any explanation indicating and reflecting the required inquiry, the Seventh Circuit cites as the basis for its own independent denial of a certificate of appealability only its review of "the final order of the district court and the record on appeal." But again, because the final order of the district court contains only an ultimate merits analysis, which *Buck* held insufficient to justify the denial of a

certificate of appealability, the unreasoned one-page order of the Seventh Circuit is likewise insufficient to justify the denial of a certificate of appealability – even if the Seventh Circuit, like the district court, had recited the applicable standard set forth in *Buck* and its predecessors.

If the Seventh Circuit is not alone in denying certificates of appealability in this perfunctory fashion, then this is all the more reason why the writ should be granted, to decide an important question of federal law that has not been, but should be, settled by this Court, if it has not already been clearly settled by *Buck* and its predecessors. If these cases are to mean anything and be taken seriously, then it is not too much to ask that federal courts – both district courts and courts of appeal – be required to provide in their decisions denying certificates of appealability a reasoned explanation reflecting the required "debatability" inquiry distinct from the ultimate merits analysis.

Even were this Court to hold that, even in the absence of the Seventh Circuit's citation to *Buck*, and even in the absence of any reasoned explanation reflecting the "debatability" inquiry required by *Buck* in either the Seventh Circuit's order or the district court's opinion and order, it can nevertheless be assumed that the Seventh Circuit did carry out the required inquiry and apply the proper standard, the writ should still be granted, to correct the Seventh Circuit's misapplication of the standard in Crockett's case. Although "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Supreme Court Rule 10, there are

cases in which such error correction is appropriate. *See, e.g.*, *Trevino v. Davis*, 138 S. Ct. 1793 (2018); *Cavazos v. Smith*, 132 S.Ct. 2 (2011). One of the contexts in which this Court has thought it appropriate to engage in such error correction is when it has been thought that a United States court of appeals has not given a state court decision the deference owed to it under AEDPA that it professed to give. It is at least as important for this Court to police the borders of an individual's right to appeal a federal district court's denial of his petition for a writ of habeas corpus, as it is to maintain the respect due to states' rights under AEDPA. The facts of the case as described above, in the state post-conviction trial court's findings of fact and conclusions of law, and in Crockett's Request for Certificate of Appealability filed in the Seventh Circuit, should demonstrate to this Court that at the very least a reasonable jurist could disagree with the district court's denial of Crockett's habeas corpus petition.

Moreover, in Crockett's case, half of the district court's (and therefore the Seventh Circuit's) error does not implicate AEDPA deference. Specifically, the district court believed that the last reasoned state court decision held that the performance of Crockett's appellate counsel was *not* deficient. App. B, at 7. Crockett thinks, and argued to the Seventh Circuit in his Request for Certificate of Appealability, that it's crystal clear that the Indiana Court of Appeals held the opposite, when it stated:

> Crockett's appellate counsel clearly misunderstood the state of the law insofar as it was his "opinion" that presenting claims of ineffective assistance of counsel on direct appeal would not foreclose Crockett from presenting additional claims of ineffective assistance of counsel during post-conviction

> proceedings. Since our Supreme Court's decision in Woods v. State, supra, it has been clear that such is in fact the effect of presenting a claim of ineffective assistance on direct appeal – any additional claims of ineffective assistance of counsel are foreclosed from collateral review. While appellate counsel's decision to present such issue on direct appeal was, in part, a tactical decision, it cannot be said that his misunderstanding or "opinion" of the law could serve as the basis for sound appellate strategy. That said, the post-conviction court properly concluded that Crockett's claim of ineffective assistance of appellate counsel nonetheless failed because Crockett did not establish prejudice resulting from appellate counsel's decision to raise an ineffective assistance of trial counsel claim on direct appeal.

Appendix D, p. 9.

It is only after it is determined whether the Indiana Court of Appeals meant to say that the performance of Crockett's appellate counsel *was* deficient or was *not* deficient that it can be determined in which direction AEDPA deference must lie. Crockett thinks it's crystal clear that the former is the case, and that the district court was wrong on this issue. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). "These principles apply with equal force to appeals." *Vinyard v. United States*, 804 F.3d 1218, 1225 (7th Cir. 2015). But at the very least, a reasonable jurist could have seen it differently than did the district court judge, which is all that should have mattered to the district court judge and the Seventh Circuit in determining whether Crockett was entitled to a certificate of appealability. Here is a clear instance of the significant distance between an ultimate merits determination and the threshold "debatability" determination required by *Buck* and its predecessors. And yet neither the district

court nor the Seventh Circuit said a word about it in denying a certificate of appealability. This gives no confidence that the required inquiry was in fact carried out.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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