No. _____

IN THE

Supreme Court of the United States

DEANGELO HORN,

Petitioner,

v.

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In cases such as *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court found deficient performance where trial counsel neglected to follow up on important leads in documents they received before trial. Crucial to this Court's rulings in those cases was the question of whether the attorney's decision not to follow up on the leads by investigating was reasonable. *See Rompilla*, 545 U.S. at 383-84; *Wiggins*, 539 U.S. at 521-22.

In this case, Petitioner DeAngelo Horn faced a serious charge of sexual battery of a minor, and a potential sentence of life without parole. Nevertheless, trial counsel failed to follow up on leads provided to him in pretrial documents or investigate some of the most critical aspects of Petitioner's case, including a prior false allegation of sex abuse by the alleged victim.

The United States Court of Appeals for the Eleventh Circuit refused to allow Petitioner the opportunity to appeal the denial of federal habeas corpus relief on this issue.

The questions presented are:

1. Did the Eleventh Circuit reach beyond the threshold inquiry for a certificate of appealability ("COA") prescribed by 28 U.S.C. § 2253(c)—whether reasonable jurists could debate the district court's decision—and deny a COA based on the merits of the appeal?

2. Could reasonable jurists debate whether the district court erred in ruling that trial counsel's performance was not deficient, given that the court failed to consider whether trial counsel's decision not to follow up on leads or investigate further was in itself reasonable?

3. Could reasonable jurists debate whether the district court erred in determining that trial counsel's performance was not deficient, given that the court conflated the deficient performance prong of the ineffective assistance of counsel standard with the prejudice prong?

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Petitioner DeAngelo Horn, a prisoner serving a sentence of life without parole in Florida, was the petitioner-appellant in the Eleventh Circuit Court of Appeals.

Respondent, the Secretary of the Florida Department of Corrections, was the respondent-appellee in the Eleventh Circuit Court of Appeals.

DECISION BELOW

The decision of the Eleventh Circuit is unreported but is included in the Appendix (App.) at 1a.

JURISDICTION

The judgment of the Eleventh Circuit was entered on August 6, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2253 provides in pertinent part:

(c)(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

A. Trial and Initial Appeal

DeAngelo Horn was convicted after a Florida jury trial of capital sexual battery and attempted lewd molestation and sentenced to life in prison without the possibility of parole. The alleged victim in those charges was "D.M." Mr. Horn was acquitted of three related charges for alleged offenses against D.M.'s older sister, and Mr. Horn's then girlfriend, "M.M."

Almost a year before the trial, a discovery response from the State provided trial defense counsel, Joel Remland, with the name of Child Protection Team ("CPT") investigator Kendra Walker as a witness, as well as a four-page report authored by Ms. Walker entitled "Summary of Forensic Interview." ECF No. 48, at 1; 2-5.[1] Included in the report was historical information regarding prior abuse investigations in the victim's family. *Id.* at 4-5. This included a report that CPT had been involved with D.M. the prior year regarding an allegation of "sexual abuse" of D.M. (and another family member) "by a cousin, Alphonso." *Id.* at 4. The report also contained conclusions by Ms. Walker that D.M. could not remember any details that had not been provided to D.M. about the incident. *Id*. at 366.

No discovery request was made, nor was any motion filed, by Mr. Remland regarding any of the information included in the report. Doc. 15-1, at 10-18. Mr. Remland did not investigate any of the other allegations contained in the report,

[1] ECF cites refer to the Electronic Court File available in this case for *Horn v. Secretary, Florida Dept. of Corrs.*, No. 4:15-cv-00101-RH-EMT (N.D. Fla.).

including the 2009 sexual abuse allegation involving D.M. by her cousin "Alphonso." Mr. Remland does not believe he requested the services of an investigator for this case. R. 84:2-3. On June 28, 2010, counsel deposed D.M. ECF No. 48, at 134. During her deposition, Mr. Remland did not ask any questions about the 2009 sexual abuse by Alphonso, or any prior allegation. See id. Mr. Remland did not ask any questions about that 2009 allegation in any deposition that he conducted. See ECF No. 48, at 14.

On April 7, 2011, just prior to the beginning of the trial, the state made a motion *in limine* to prevent the admission of evidence about the alleged victim's prior sexual conduct with people other than the defendant. ECF No. 15-1, at 379-380. Mr. Remland responded to the motion by arguing that the defense theory was that D.M and her older sister M.M. lied and made up a story about Mr. Horn raping D.M. ECF No. 15-1, at 381. Mr. Remland further argued:

> [O]ur defense theory here is based upon the sexual activity existing in an inappropriate way in the family and therefore - - and the attitudes and all the rest of it is not just character. It's the defense's theory that because of what this child was exposed to in the family, that she was led into this lie. And so I think it's relevant to the defense's theory to, in a limited way - - I'm not saying attacking her character. That's not what I'm talking about. *I'm talking about asking her what she's been exposed to and if she's ever been the victim of an assault before and what she's been exposed to and what she's seen and what she's been through*…
>
> …And if credibility of the opposing stories or the opposing points of view is an issue in this case, which I think it is, credibility is a big factor in this case because when the jury hears this, they're going to go, oh, my God, he's saying that was planted. Oh, my goodness. And that's why I think the influences of the home and everything else are relevant to the theory and credibility of our entire defense in this case.

ECF No. 15-1, at 382 – 15-2, at 1. Mr. Remland did not make any argument that the

defense should be allowed to admit evidence of, or ask D.M. a question about, a prior false allegation. ECF No. 15-1, at 379 – 15-2, at 5.

The trial court granted the State's motion in limine based on *Pantoja v. State*, 59 So. 3d 1092 (Fla. 2011). ECF No. 15-2, at 3. The court did tell Mr. Remland that he could question other witnesses about potential bias and motive, subject to the nature of the question and its relevancy. ECF No. 15-2, at 3-4.

The court also conducted a hearing right before the start of the trial to determine the admissibility of child hearsay pursuant to Section 90.803(23), Fla. Stat., specifically the recording of the 2010 CPT interview of D.M. During that hearing, the State elicited testimony from Ms. Walker regarding her opinion as to the veracity of D.M. during the 2010 interview. ECF No. 15-2, at 20. At that time, Mr. Remland chose not to cross-examine Ms. Walker at all, including failing to ask any questions about her observation that D.M. had difficulty remembering details other than those she had been provided by someone else or about the veracity of the prior allegation made by D.M. The trial court admitted the child hearsay statements. The trial court made the specific finding that D.M. understood the difference between a truth and a lie, and that her statements were trustworthy and reliable. ECF No. 15-2, 31-36.

Mr. Horn was the only witness to testify for the defense and his testimony best illustrates the defense at trial. Mr. Horn testified that the night before the alleged incident, Mr. Horn, M.M., D.M., and their brother were staying at a motel in Tallahassee. ECF No. 15-2 at 345. The children went to sleep about 10:00 or 11:00

p.m. *Id*. The next morning, M.M. and D.M went to a grocery store to withdraw some cash. *Id*.

While D.M. and M.M. were at the store, Mr. Horn had a verbal disagreement with an employee at the hotel front desk about cleaning the room. *Id*. at 348. When M.M. and D.M. returned, they went to the hotel's front desk to pay for another night. *Id*. The lady at the front desk told them "no" and called the police because Mr. Horn had yelled at her. *Id*. When the police arrived, they talked to M.M. while Mr. Horn left with some friends. *Id*. at 349.

Later that day, M.M. and the children rented another hotel room with Mr. Horn. *Id*. at 352. After dinner, D.M. received a phone call and went outside. *Id*. at 356. D.M. gave the phone to her brother, who then went outside, followed by M.M. *Id*. Mr. Horn asked M.M. what was going on. Id. M.M. said she did not know and that her mother, S.M., was just screaming and crying. *Id*. at 375. Mr. Horn initially thought that S.M. had found out that D.M. had taken his liquor and become intoxicated two nights before. *Id*. But then Mr. Horn received a text from his friend stating that M.M. and D.M. were lying about him touching D.M. *Id*. at 376. Mr. Horn panicked and went to his mother's house, where he was later arrested on the above charges. *Id*.

Mr. Horn testified that he did not have any sexual activity with D.M. ECF No. 15-2, at 378. Mr. Horn never lay on top of D.M., nor did he get on top of her during the night of the alleged incident. *Id*. Mr. Horn did not threaten M.M. or D.M. in any way. *Id*. Mr. Horn did not confine or hold M.M. or D.M. in any way. *Id*. at 379.

Both in an objection during the State's opening statement and during the defense opening statement, Mr. Remland asserted that challenging the credibility of D.M. and M.M. were of utmost importance to the defense. ECF No. 15-2, at 55; 62. The defense contention from the start of trial was that M.M. and D.M. had planted the semen, and they had fabricated the story of the sex assault on D.M. *Id.* at 65.

Testimony at the trial established that when D.M. was examined for sexual abuse, the results were inconclusive. *Id.* at 80. No injuries were found. *Id.* at 78. There was no physical indication of any intercourse between Mr. Horn and D.M., despite the fact that Mr. Horn is a 6 foot, 5 inch man weighing over 300 pounds. *Id.* at 79. D.M. had showered and changed before the examination. *Id.* at 74. D.M.'s panties were collected in evidence, but it was unclear whether the ones collected were ones she had been wearing both before and after she showered, or a fresh pair she had put on after showering. D.M. indicated to the nurse practitioner that she had seen "some white stuff in [her] panties." *Id.* at 74-75. DNA evidence matching Mr. Horn was developed from the sexual assault examination kit.

D.M. testified at the trial. ECF No. 15-2, at 199-218. Additionally, her recorded 2010 CPT interview was introduced through Ms. Walker's testimony. ECF No. 15-2, at 273-305. Mr. Remland did not ask any questions of Ms. Walker on cross-examination, including any questions about her observations that D.M. could not remember many details of the alleged incident outside of what she had been told, and that her findings as to any alleged sexual assault were inconclusive. ECF No. 15-2, at 305.

Mr. Horn was convicted of sexual battery on D.M. and attempted lewd molestation of D.M. He was acquitted on the three remaining counts. ECF No. 15-1, at 82-86. Mr. Horn was sentenced to mandatory term of life imprisonment on Count One and 15 years consecutive on Count Two. ECF. 15-1, at 92-102. He appealed the judgment and sentence to the First District Court of Appeal of the State of Florida (First DCA), Case No. 1D11-2695. On September 19, 2012, the First DCA affirmed the conviction and sentence on Count One, but reversed and remanded for a new trial on Count Two. *Horn v. State*, 120 So.3d 1 (Fla. 1st Dist. Ct. App. 2012). Mr. Horn's conviction on Count Two was vacated by the trial court on February 4, 2013. ECF No. 15-3, at 138.

B. State Habeas Motion and Denial

On June 5, 2013, Mr. Horn filed a pro se motion for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. ECF No. 15-3, at 179-227. Issue Six of that motion raised the claim of ineffective assistance of counsel for "failing to investigate and specifically argue in a pretrial motion in limine that Florida Evidence laws do not abrogate a Defendant's Constitutional rights to proffer and admit false accusation evidence violating Defendant's right to cross examination, confrontation, and due process of law under the Fifth, Sixth, and Fourteenth Amendments." *Id.* Specifically, Mr. Horn asserted that once he received the CPT report referencing the allegation of sexual abuse of D.M. by a cousin named Alphonso, Mr. Horn told counsel to investigate the allegation because he had been informed that no charges were ever brought against Alphonso and that D.M. had fabricated the

story. *Id.* The state circuit court denied this claim without a hearing, finding it without merit because "[a]ny such testimony regarding alleged prior false accusations of sexual abuse by the victim would be inadmissible as improper impeachment of the victim in a sexual battery case, as set forth in *Pantoja v. State*, 59 So.3d 1092, 1094-98 (Fla. 2011), cited by the Court as the basis for granting the state's motion in limine." ECF No. 15-4, at 89-90. The First DCA affirmed the decision without written opinion. ECF No. 15-5, at 16.

C. Federal Habeas Proceedings

Following his direct appeal and state post-conviction proceedings, Mr. Horn filed a pro se 28 U.S.C. § 2254 petition in the United States District Court for the Northern District of Florida. ECF No. 1. The District Court granted an evidentiary hearing and appointed the Federal Public Defender's Office for the Northern District of Florida to investigate Mr. Horn's claim that trial counsel was ineffective for failing to investigate a prior false allegation by D.M. ECF No. 19; 20.

After being appointed, undersigned counsel DeBelder and Newberry conducted this investigation. Most of the evidence uncovered had not previously been brought to light, either pretrial when Mr. Remland was developing his case, or after the conviction because Mr. Horn, as a pro se prisoner, was not able to do his own investigation. This investigation into the prior false allegation uncovered a wealth of evidence regarding the allegation against Mr. Peterson, a history of false allegations within D.M.'s family, and further evidence related to the case in general.

1. Allegation against Mr. Peterson

In 2009, less than a year before the allegations in this case, D.M. had been removed from her mother's custody and was living with an aunt in Georgia. ECF No. 48, at 211; 344. D.M. missed her mother and wanted to move back home. *Id.* at 223. While there, D.M. alleged that her cousin, "Alphonso," had sexually abused her. *Id.* at 355. Investigation by undersigned counsel determined that "Alphonso" is Alphonso Peterson, D.M.'s maternal cousin. The Department of Children and Families was notified. A Child Protective Investigator interviewed D.M. about the incident, and CPT marked the incident as "verified . . . due to the disclosure from the victims." *Id.* at 332. Kendra Walker, the CPT case specialist who also interviewed D.M. in Mr. Horn's case and testified at trial, interviewed D.M. on or about May 20, 2009. *Id.* at 338. At that 2009 interview, D.M. "disclosed sexual abuse by Alphonso." *Id.* The CPT confirmation regarding D.M. appears to have been based solely on the interviews with D.M. The matter was referred to the Georgia Bureau of Investigation. *Id.* at 330. As part of the investigation, DCF interviewed S.M. and M.M. to find out what they knew about the allegation against Peterson. S.M. denied that D.M. had ever told her about any problems in the home. *Id.* at 344. M.M. said that she "spoke with [D.M.] often and denied [D.M.] ever disclosed any problems in [her aunt] Shirley's care." *Id.* The sexual abuse report was never referred to the District Attorney's Office in Georgia, and charges were never filed against Alphonso. *Id.* at 13. The District Attorney's Office does not have a file for Peterson related to this matter. After these allegations, D.M. was sent back to Florida to live with her mother.

D.M. says that Alphonso Peterson has never done anything sexual to her. *Id.* at 6. She describes the incident by saying there was a time when he picked her up and put her down slowly. *Id.* They were facing each other and their bodies touched when this happened, but they were fully clothed when it occurred and she did not view it as sexual in any way. This contradicts any "disclos[ure]" of "sexual abuse" described in the DCF report. *Id.* at 338. D.M. has also confirmed that she would have provided this information about the prior allegation to trial counsel if he had asked her before or during the trial. *Id.* at 7.

Around the same time, another child in the household B.J., reported that another cousin, Willie Peterson, had sexually assaulted her. D.M. told DCF that she had witnessed this assault. *Id.* at 338. She said that she had walked into the room to find Peterson and B.J. in bed "humping," and that when she walked in, he jumped up and pulled his pants up. *Id.* D.M. was a witness to this assault and interviewed by DCF regarding that incident.

2. History of False Allegations

The DCF records indicate that this was not the first time a member of D.M.'s family had reported or been the subject of false allegations involving an ex-boyfriend. There was an ongoing pattern of using false reports as a form of retaliation for perceived wrongs. In July 2004, DCF responded to an incident at the household where S.M. was then residing. *Id.* at 211. S.M. had recently been dating Timothy Bibbins. A. 207. However, they had broken up two months before, and Bibbins had started dating another woman, Denise McCaffee. *Id.* at 211. That July, Bibbins called DCF

to make allegations about that S.M. *Id.* at 206-07. After DCF went to investigate that report, McCaffee indicated that DCF was questioning McCaffee and Bibbins because S.M. and and one of her relatives had called in a false report to retaliate. *Id.* at 207.

A couple weeks later, S.M. indicated that there was a false report involving her boyfriend, Reginald Turner. *Id.* at 211. Turner was accused of having sex with M.M., who at the time was fourteen. S.M. and others in the household denied the allegations, pointing out that M.M. did not even live in the house at the time. *Id.* S.M. described the allegations as a "false report," and accused her ex-boyfriend Bibbins and his new girlfriend McCaffree of making the allegation because they were mad at her. *Id.* Today, in 2018, S.M. and M.M. still continue to deny that the allegations against Turner were true. *Id.* at 15.

Besides false DCF reports, M.M. had also called the police in another instance after getting in an argument with her former boyfriend, Dexter Robins. *Id.* at 384. M.M. accused Robins of tussling with her, threatening her, and knocking down the door to his house to get to her. *Id.* The police who arrived at the scene did not find any signs of physical harm to M.M., and they did not see any damage to the door Robins had allegedly knocked down. *Id.* at 385. The police referred the case to the State Attorney's Office, which declined to prosecute Robins. *Id.*

3. Further Evidence Related to this Case

Further investigation also would have lent credibility to Mr. Horn's account of what happened on March 6, 2010. Around January 2010, M.M. and Mr. Horn started dating. M.M. was eager to get pregnant. A. 10. Mr. Horn told several of his friends,

his brother, and his mother that M.M. would perform oral sex on him and then save his semen in a jar. *Id.* at 10-11; 19; 21. He told his brother because he thought it was so bizarre. *Id.* at 21. Mr. Horn and M.M. shared a hotel room with their friends. M.M. openly performed oral sex on Mr. Horn in front of their friends in the hotel room. Two people, Cedric Davis and Kienyatte Powell, saw M.M. go into the bathroom immediately after performing oral sex to dispose of the semen. *Id.* at 14; 19. Davis knew before the accusations in this case that M.M. was spitting Horn's semen into a cup after oral sex. *Id.* at 17.

Mr. Horn and M.M. may have had different ideas about the status of the relationship, as Mr. Horn continued to see other women. This greatly upset M.M., especially when she found out that he was having sexual relations with one of her close friends. Tadarius Addison, M.M.'s cousin, saw M.M. get into fights and yell at Mr. Horn on several occasions because of his continued behavior with other women. In general, M.M. was upset and jealous that Mr. Horn seemed to have many women interested in him during the time that they were dating. *Id.* at 19.

While D.M. would later testify that she had not met Mr. Horn before staying with him and M.M., S.M. confirmed that M.M. had brought Mr. Horn to meet S.M. before. Mr. Horn had been around D.M., and S.M. did not have any concerns about Mr. Horn before the allegations in this case. *Id.* at 371.

Other people at the hotel room on March 4, 2010 saw D.M. drinking. *Id.* at 19. On March 6, after their eviction from the Collegiate Inn, Tenate Powell gave M.M. and D.A. a ride to The Meadows trailer park. *Id.* at 23. During the car ride, Mr. Horn

and M.M. were getting along and not arguing. *Id.* M.M. did not notify the police herself. She told her cousin Kienyatte Powell, who in turn told her sister, Tiffany Bivins, who then called S.M. S.M. called the police based on the information she had been provided. ECF No. 15-2, at 149.

During the investigation on this case, Child Protective Investigator Richardson closed the case and described it as a "not substantiated finding Sexual Assault." *Id.* at 360. The investigator also indicated that "[D.M.] was able to recall of [*sic*] lot of things that was told to her but she was unable to say directly what happen." *Id.* at 366. During the interview with Kendra Walker, who testified at the trial, "[D.M.] was unsure about what really happen [*sic*]." CPT refrained from making any recommendations at that time. *Id.* at 367.

Since the trial, M.M. has made statements to multiple people about setting Mr. Horn up. *Id.* at 9; 14; 25. She was distraught after the trial and made comments that she did not know that all of this was going to happen. *Id.* at 25. Her cousin, Tiffany Bivins, told M.M. that if she made this up, then she needed to write a letter to the judge and tell the truth. *Id.* M.M. said that she was afraid that she would go to jail. *Id.* at 25.

Addison, D.M.'s cousin and close friend at the time, overheard comments about M.M. suggesting this was a set-up. *Id.* at 15. He decided to talk to D.M. about it to find out the truth. *Id.* He asked her directly whether Mr. Horn had done this to her. D.M. would only look down. *Id.* Addison was confident that he had a close enough relationship with D.M. that this was the sort of thing about which she would have

been honest with him. *Id.* If D.M. had been assaulted, she would have told him. *Id.* He took her silence and inability to look him in the eye to mean that the assault had *not* actually happened and she was afraid to admit it. Addison said that D.M. and M.M. were very close at this point in time, and D.M. would have done anything her older sister asked her to do. *Id.*

4. Additional Evidence from the Federal Evidentiary Hearing

After completing its investigation, undersigned counsel submitted these findings to the district court. The district court held an evidentiary hearing on that claim on March 26, 2018.

In D.M.'s testimony at the evidentiary hearing, in response to questions regarding whether her cousin, Alphonso Peterson, had ever touched or fondled her, she testified as follows:

> Q. If anybody ever said that Mr. Peterson ever touched or fondled your butt that would be not true?
>
> A. Not true.
>
> Q. Just to make sure it's clear for the record, what you're saying is he never did that, those things, correct?
>
> A Right, he never did do that.
>
> Q. And if somebody said that, then they wouldn't be telling the truth about that, right?
>
> A Right.
>
> [. . .]
>
> Q. If you had said that, that would not be true, either, right?
>
> A. Yes.

TR: 17:23-18:16. That was, however, the exact nature of the allegation that D.M. had made against Alphonso Peterson in 2009. R. 110:11-25; Ex. 8. Kendra Walker, the CPT case specialist who interviewed D.M. in 2009 and 2010, reported that in the 2009 interview, D.M. "disclosed sexual abuse by Alphonso [Peterson] ..." Ex. 7. It was at least the second interview of D.M. in 2009 wherein she made allegations of sexual abuse by Alphonso Peterson. ECF No. 48, at 338; 355. D.M.'s description of Mr. Peterson's alleged abuse in 2009 was made in a recorded CPT interview with Kendra Walker. D.M.'s allegations against Mr. Peterson at that time were as follows:

> D.M. -And then one night I went in the kitchen to get some water I don't pee the bed I always get water before I go to bed, and I was drinking water then …inaudible. I said goodnight Uncle Pete he was hugging me, feeling on my booty, and then I went …inaudible….he was drunk and had the door closed and locked, and Uncle Pete picked me up by my arms and then he put me down
>
> Kendra Walker (K.W.). - Ok, but what did you say he did to you
>
> D.M. - When I hugged him good night he was feeling on my butt
>
> K.W. - He was feeling on your butt, what was he feeling on your butt with
>
> D.M. - His hands
>
> K.W. - Ok, did he feel on you anywhere else with his hands
>
> D.M. - [Answers with head gesture]
>
> K.W. - Ok, did he say anything to you
>
> D.M. – Hmmm
>
> K.W. - Did you say anything else to him
>
> D.M. - All I said was goodnight, and then he picked I said please don't

pick me up and then he picked me up, I was walking back to the front and he hit me on the booty

K.W. - He hit you on your booty, ok uh did he do anything with his hand when he felt on your booty

D.M. – [Answers with head gesture]

K.W. - No, is this the first time something like this has happened.

D.M. – [Answers with head gesture]

K.W. - How did it make you feel when that happened

D.M. - Nasty

Ex. 8. D.M. confirmed at the evidentiary hearing that if she been asked about what had occurred with Mr. Peterson during Mr. Horn's trial, she would have testified the same way as she did at the evidentiary hearing. R. 20:15-20.

Alphonso Peterson testified at the evidentiary hearing that he had never touched D.M. in any sexual manner; that he never touched D.M.'s butt; and that he had never rubbed up against D.M. R. 101:12-24. Mr. Peterson said he would have testified in that way if he had been called as a witness at Mr. Horn's trial. R. 102:12-16. Federal Public Defender ("FPD") investigator Ashley Perkins testified that she had interviewed D.M. less than two weeks prior to the evidentiary hearing, and D.M. stated several times that Mr. Peterson had never touched her in a sexual or inappropriate way. R. 97:15-98:4. D.M.'s mother, S.M., and D.M.'s sister, M.M., both testified that D.M. never told either of them that Mr. Peterson did anything to her. R. 118:7-13; 122:20-24.

Over ten months before the beginning of the trial, Mr. Remland received the

CPT report related to D.M.'s allegation against Mr. Horn in discovery. R. 46:4-48:21; Ex. 4. Prior to trial, Mr. Horn told Mr. Remland that the allegation against Alphonso was false. R. 91:1-6. Mr. Remland testified that "their [the alleged victim, D.M., and her sister, M.M.] credibility was not only important, the whole case was about credibility. The issue was credibility." R. 36:7-10. Despite recognizing the significance of D.M.'s credibility to the defense as well as her prior history to the defense, however, Mr. Remland failed to conduct any investigation into the prior allegations referenced in the CPT report in this case. R. 48:18-51:1. At a minimum, he did not even request the DCF records pertinent to the allegations summarized in the CPT report, nor did he contact or depose any of the witnesses named in the report. *Id.* In the depositions trial counsel did conduct, he did not ask any of the witnesses about any of the prior allegations. R. 127:13-128:1. Mr. Remland did not request additional documents or records in discovery to determine, among other things: whether there were similarities between the 2009 allegation and the allegation against Mr. Horn; whether the 2009 allegation would provide the basis of knowledge for D.M. to contrive the allegation against Mr. Horn; the identity of "Alphonso"; and *most significantly*, whether there was evidence that indicated that the 2009 allegation might be false. Mr. Remland decided not to investigate D.M's 2009 allegation against her cousin, Alphonso, even though Mr. Horn informed counsel that D.M. had fabricated those allegations prior to trial. Mr. Remland then told Mr. Horn it was "too late" when Mr. Horn re-raised the issue after the motion in limine hearing. R. 92:2-14.

Following the hearing, the district court found the state court's treatment of

the prior false allegation claim was contrary to or based on an unreasonable application of clearly established federal law under § 2254(d) but denied the claim on the merits and declined to issue a COA on any issue, Doc. 69. Despite the direct contradiction between D.M's hearing testimony and her prior allegation to CPT Specialist Walker and her admission that if anyone, including herself, said that Mr. Peterson had touched her butt this would be a lie, the district court found that D.M. did not willfully make a false allegation against Mr. Peterson then or now. R. 161:23-24. The district court did not address, nor apparently consider, in its findings any of the other evidence supporting the conclusion that D.M. had falsely accused Mr. Peterson. The district court did not make any findings as to the credibility of the other witnesses at the evidentiary hearing.

Mr. Horn filed a notice of appeal and sought a certificate of appealability from the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied the request for a certificate of appealability. ECF No. 78. The Eleventh Circuit found that the district court's conclusion that the state court unreasonably applied federal law was erroneous, however, even under the *de novo* standard of review, Mr. Horn failed to establish his counsel's performance was deficient. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Denial of COA Was Based On An Improperly Heightened Standard Because It Did Not Limit Its Examination At The COA Stage To A Threshold Inquiry Into Whether The District Court's Decision Was Debatable

The Eleventh Circuit denied Mr. Horn's application for a certificate of appealability because it found on the merits that Mr. Horn had not established that

trial counsel's performance was deficient. In doing so, the Eleventh Circuit confused the standard for reviewing an application for a certificate of appealability with the higher standard for actually deciding an appeal on the merits—an appeal over which the Eleventh Circuit would have no jurisdiction until the certificate of appealability had been granted.

A. The COA Standard is a Threshold Inquiry, Not a Decision on the Merits

This Court has repeatedly held that "when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). This threshold inquiry requires a petitioner to make "'a substantial showing of the denial of a constitutional right.'" *Id.* at 327 (quoting 28 U.S.C. § 2253(c)(2)). In turn, this standard is satisfied where "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*; *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("Where 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.").

This threshold inquiry "is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "In fact, the statute forbids it." *Miller-El*, 537 U.S. at 336. A court of appeals does not even have jurisdiction to make a decision on the

merits at the COA stage. *Id.* at 336. So "[w]hen a court of appeals sidesteps 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." *Id.* It is not enough for the court of appeals to indicate that it recognizes the COA standard while in reality deciding a case on the merits. For example, in *Buck*, this Court recognized such an illusory approach by the Fifth Circuit, stating: "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." *Buck*, 137 S. Ct. at 773 (internal citation omitted).

Nor does the threshold inquiry require the petitioner to show that he or she will ultimately succeed on the merits. It is well-established that "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." *Miller-El*, 537 U.S. at 337. Indeed, this Court has noted that "when a COA is sought, the whole premise is that the prisoner 'has already failed in that endeavor.'" *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Instead, "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." *Id.* at 338. This Court has explained:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that a 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 question is the *debatability* of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342 (emphasis added). To deny an application for COA, then, a court of appeals must find "that reasonable jurists would consider [the district court's] conclusion to be beyond all debate." *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016).

B. The Eleventh Circuit's Order on Mr. Horn's Application for a Certificate of Appealability Demonstrates that the Eleventh Circuit Decided This Case on the Merits

As the Fifth Circuit did in *Buck*, the Eleventh Circuit here "phrased its determination in proper terms—that jurists of reason would not debate that [Mr. Horn] should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." *See Buck*, 137 S. Ct. at 773 (internal citation omitted). In denying Mr. Horn's application for COA, the Eleventh Circuit merely paid lip service to the COA standard by hastily noting it at the beginning of its opinion while in reality making a merits ruling that Mr. Horn had not established that trial counsel's performance was deficient. The Eleventh Circuit here never addressed whether or not the district court's conclusion was debatable.

The extent of the Eleventh Circuit's reasoning in denying COA for Mr. Horn's ineffective assistance of counsel claim reads:

> As established at the evidentiary hearing before the district court, prior to the incident with Horn, the victim had reported that her cousin had touched her inappropriately. The allegation was investigated by the Child Protection Team, which issued a report on the incident stating that there were 'positive indicators of sexual abuse.' Believing that the

> victim's prior allegation against her cousin was true after reading the report, Horn's counsel declined to pursue further investigation of the matter, and concluded that introducing the evidence of the victim's prior victimization would make her more sympathetic to the jury and undermine the defense. Although the victim testified at the evidentiary hearing that she no longer believed that the encounter she had with her cousin was sexual in nature, Horn has failed to show that the victim willfully made a false allegation, or that his attorney acted unreasonably in failing to further investigate the matter. Accordingly, he failed to establish that his counsel's performance was deficient, and his ineffective assistance of counsel claim fails on that basis.

App. 3a-4a. The Eleventh Circuit made a merits-based decision that trial counsel was reasonable in not pursuing the matter further because, after reading the CPT report, he assumed the prior allegation was true. The circuit court did not determine whether the following points were debatable among reasonable jurists: whether trial counsel should have investigated further after reviewing only one document; whether there was a "clear" false allegation; and whether there were other benefits to conducting such an investigation regardless of the ultimate admissibility of the prior allegation. Instead, this was a decision based on merits, not debatability. Mr. Horn should have received a COA and the opportunity to brief and argue his appeal on the merits before the Court rendered a merits decision.

Accordingly, this Court should find that the Eleventh Circuit applied too high a standard in conducting its COA analysis and either hold that Mr. Horn was entitled to a COA, or remand Mr. Horn's case back to the Eleventh Circuit for further consideration under the correct standard.

II. Under a Proper COA Analysis, The District Court's Conclusion That Mr. Horn Did Not Establish Trial Counsel's Deficient Performance Is Debatable

The district court found that trial counsel's failure to investigate was not deficient performance because it did not find a "clear" false allegation, so it would be a "stretch" to say Mr. Remland should have "looked behind the CPT report and put more resources into this." R. 165. Reasonable jurists could debate the district court's conclusion that Mr. Horn failed to establish that trial counsel's performance was deficient because it (1) failed to inquire whether trial counsel had enough information at the time to even make a reasonable decision about whether and what to investigate; and (2) conflated the second prong of the ineffective assistance of counsel analysis—prejudice—with the first prong—deficient performance.

A. The Decision Not To Investigate Must Itself Be Reasonable

It is well-established that a petitioner raising ineffective assistance of counsel must first show deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Regarding a trial lawyer's duty to investigate, this Court has explained that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Thus, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . . ." *id.*; *see also id.* at 533 ("'Strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional

judgments support the limitations on investigation.'") (quoting *Strickland*, 466 U.S. at 690-91).

This Court has addressed the question of trial counsel's reasonableness in other cases where trial counsel received a document before trial, that document indicated further leads, and trial counsel failed to follow up on those leads. For example, in *Wiggins v. Smith*, this Court found deficient performance where trial counsel received a presentence investigation report and Department of Social Services records for their capital client, both of which contained leads for potential mitigation, and failed to investigate any of those leads. *Wiggins*, 539 U.S. at 524. In not doing so, this Court observed that "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.*

In finding deficient performance, the *Wiggins* Court took into account the timing of a trial court's rulings that may have affected trial counsel's investigation strategy. Trial counsel had filed a motion the month before the trial requesting a bifurcated penalty phase, making it clear that they intended on presenting mitigating evidence. *Id.* at 515. The court denied the motion during the trial and instead allowed trial counsel to make a mitigation proffer outside the presence of the jury. *Id.* at 515-16. Because trial counsel argued in this bifurcation motion that they had mitigation evidence they wished to present, and the trial court did not deny this motion until after the trial had started, this Court later explained that trial counsel's failure to more thoroughly investigate the client's background was unreasonable because

"counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible." *Id.* at 526. Since counsel had stopped investigating before knowing that the court would deny their motion, however, "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28.

Similarly, in *Rompilla v. Beard*, 545 U.S. 374 (2005), trial counsel knew that the Commonwealth would present a prior offense during the penalty phase in support of an aggravating factor. *Rompilla*, 545 U.S. at 383. Despite this notice, trial counsel failed to examine the file pertaining to this prior conviction, which contained potentially mitigating information. *Id.* at 384. This Court found trial counsel's actions unreasonable because it "[was] difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation." *Id.* at 386. In analyzing the reasonableness of counsel's decision not to investigate further, the *Rompilla* Court considered the "easy availability of the file," *id.* at 389-90, that the information contained in the file would have enlightened counsel's perception about their client and his family, *id.* at 391, and that the file would have led to further relevant records, *id.* at 393. As this Court observed, counsel "would have found a range of mitigation leads that no other source had opened up." *Id.* at 390.

These cases demonstrate all of these various factors contribute to the analysis of whether the decision not to investigate was itself reasonable.

B. In Mr. Horn's Case, There Was No Investigation At All, Which Was Unreasonable

Reasonable jurists could debate whether the district court erred in finding that trial counsel's failure to investigate the prior allegation was reasonable.

First, the evidentiary hearing established that Mr. Remland conducted virtually no investigation in this case, regarding either the prior false allegation or *any* aspect of Mr. Horn's defense. Mr. Remland testified that he had asked Mr. Horn early in his representation to make a list of the key facts about the night of the alleged offense. R. 61. Mr. Horn provided virtually the same account then that he testified to at trial. Yet, when asked if Mr. Remland conducted any investigation to confirm or negate Mr. Horn's assertions (what would become the defense at trial), Mr. Remland responded, "None. Basically, he was telling me there was nothing to investigate." R. 61. About his investigation, Mr. Remland testified:

Q: And what witnesses did you speak with to support these events?

A: Mr. Horn.

Q: What records did you request to support this defense?

A: Mr. Horn. I don't know – I spoke to my client.

R. 40-41. Regarding the contents of the CPT report specifically, Mr. Remland acknowledged that he did not request any DCF records or any other records relating to the incidents in the report. He did not follow up with any of the named witnesses, and he did not ask anyone about the allegations in any of the depositions. R. 48-49;

57. Despite the severity of the charge and sentence, Mr. Remland did not request the assistance of an investigator, even though the Public Defender's Office had one readily available. R. 71; 84.

Based on this testimony and the records in Mr. Remland's file, there does not seem to be any dispute that Mr. Remland's general investigation in this case was minimal to nonexistent, and he did not look into any of D.M.'s prior allegations at all.

This failure to investigate is questionable considering Mr. Remland's strategy at the pretrial hearings and during the trial itself. Because Mr. Horn's defense pitted Mr. Horn's word against D.M. and M.M.'s version of events, Mr. Remland recognized from the beginning that credibility was an important issue here. When the State filed a motion *in limine* right before the start of the trial to prevent Mr. Remland from using D.M.'s prior sexual activity, he argued: "[T]he victim's credibility, the sister's credibility, credibility is the only case by the defense . . . ." ECF No. 15-2, at 55. At the federal evidentiary hearing, Mr. Remland remembered that his motion in limine argument asserted that D.M.'s prior sexual conduct—not a false allegation—should be admissible because "it was a credibility issue . . . I should be allowed to bring up her prior sexual activity, because it affected her credibility and her ability to testify." R. 64. Yet, when asked what evidence he relied on in making these family misconduct arguments at the motion in limine and child hearsay hearings, Mr. Remland responded, "I guess the child protection team report." R. 64-65. He further testified that he did not request any other documents to back up his arguments, and that he had not relied on any witnesses to obtain this information and make his arguments.

He had "[j]ust the evidence itself, the CPT tape, . . . and the CPT report . . . ." R. 64-65. Following his argument that he should be allowed to present the prior sexual activity of an eleven-year-old child—as opposed to a prior false allegation—the trial court granted the State's motion in limine and permitted the child hearsay testimony.

The defense at trial was that D.M. had fabricated the allegations at the request of her older sister, M.M. ECF No. 15-2, at 31-36. While there was DNA evidence, Mr. Horn never doubted that it was his. Instead, he offered an alternative theory for how it had ended up on D.M.'s body. *Id.* at 65. Mr. Remland found this story to be not credible, but then he used this as the defense theory at trial and offered Mr. Horn as the only defense witness. *Id.* at 199-218.

As it turns out, had Mr. Remland taken the fundamental first step of requesting the DCF records relating to the CPT report, and/or if he had followed up with the witnesses named in the report, he would have found a multitude of evidence relevant to these arguments he was already making and to a prior false allegation, which had better grounds for admissibility than mere sexual conduct. This includes (1) that D.M. admitted to fabricating the most salient details of the incident with Mr. Peterson and that she did not believe the incident to be sexual, despite what she had told the CPT investigator; (2) that Mr. Peterson and D.M.'s closest relatives all denied that D.M. had been sexually abused by Mr. Peterson; (3) that the Georgia Bureau of Investigation and the District Attorney's Office in Georgia had declined to prosecute Mr. Peterson, despite the fact that Mr. Peterson is a registered sex offender whom law enforcement would have great incentive to investigate; (4) that the allegation

against Mr. Peterson came around the same time that DCF became involved with D.M. and her other minor cousins regarding a sexual assault that closely resembled the facts D.M. provided in this case; (5) that after making this prior allegation against Mr. Peterson, D.M. got what she wanted – she was removed from her aunt's home and returned to her mother; and (6) that D.M. and M.M.'s immediate family had a history of lodging false accusations as a way of feuding with others and had also claimed that false allegations had been made against them for similar reasons, so that both girls had grown up in an environment where making such serious false allegations was the norm. Even if some of this information was not admissible, a point to which Mr. Horn does not concede, at the least Mr. Remland could have used much of it to challenge D.M. and M.M.'s credibility in cross-examination. Indeed, the trial court specifically told Mr. Remland that he was permitted to attack the bias and credibility of the other witnesses. ECF No. 15-2, at 3-4.

Perhaps more importantly, this same investigation would have uncovered evidence relevant not just to the prior false allegation and Mr. Remland's purported strategy of attacking D.M. and M.M.'s credibility, but that also bolstered Mr. Horn's version of events—a version Mr. Remland relied on his years of experience to determine was not credible and "a very bad witness." R. 34. This included witnesses who confirmed (1) that M.M. had expressed regret over lying about Mr. Horn once she realized her lies resulted in his life without parole sentence; (2) that M.M. had made false allegations against scorned boyfriends in the past; (3) that M.M. had wanted to have Mr. Horn's baby so she started collecting his semen, and (4) that Mr.

Horn had cheated on her with multiple women, including one of her cousins, giving M.M. reason to make up these allegations.

Based on the limited information Mr. Remland had at the time he decided not to investigate, and the wealth of evidence available had he investigated the prior allegation, reasonable jurists could debate whether the district court erred in finding that this barebones investigation did not constitute deficient performance. In *Rompilla*, this Court found deficient performance because trial counsel failed to review the file on Mr. Rompilla's prior conviction. *Rompilla*, 545 U.S. at 389. The basis of this Court's decision was not just that trial counsel should have obtained the file for a better understanding of the aggravating evidence that would be presented against their client, but also because this would have ultimately led to more mitigation leads. *Id.* at 385. The file was easily available, *id.* at 389-90, and it would have "enlightened" counsel's perceptions of relevant witnesses and themes in their case, *id.* at 391. So too here. If Mr. Remland had conducted an investigation into D.M.'s prior allegation, he would have found evidence to support not just the arguments he made regarding the admissibility of D.M.'s prior allegation, but also evidence that diminished D.M.'s and M.M.'s credibility and bolstered Mr. Horn's. The DCF records were easily available. *See* R. 130, (testimony of Federal Public Defender's Office investigator Daniel Ashton on the process for obtaining the DCF records in this case). The consistency of the available evidence in supporting Mr. Horn's assertions likely would have "enlightened" Mr. Remland's perception of his own client and the overall truth in this case. That the investigative inquiry fit

squarely within Mr. Remland's strategy of attacking D.M. and M.M.'s credibility, his decision not to investigate appears even more apparently deficient.

It is also debatable whether Mr. Remland's purported excuses for not conducting further investigation were reasonable, or even logical. One reason he provided for not investigating the allegations in the CPT report during the evidentiary hearing was that because the CPT report noted "positive indicators" of sexual abuse, he took it as true and would not give anyone saying that the allegation was false "a lot of weight." R. 78-79. Mr. Remland also testified that because he assumed the report was true, he was fearful of investigating the incident further because "not only was she a victim in this case, the prior activity would bolster her credibility, because she was a victim in another case and creates more sympathy for the victim." R. 37-38. However, when asked if Mr. Remland would have presented any evidence he found establishing that D.M. had been sexually abused in the past, he quite understandably responded: "No. I can't picture myself wanting to bring out the fact that the victim had been raped before as part of my defense of Mr. Horn." R. 38. He also testified that he would have presented a prior false allegation if he knew that one existed. R. 65.

This testimony shows that Mr. Remland would have presented a prior false allegation, but that he would not have presented any true accusations he discovered. So this was not a reasonable basis not to investigate the allegations behind the CPT report because if Mr. Remland had investigated this potentially relevant lead and it resulted in evidence that would have hurt Mr. Horn, such as the veracity of the prior

allegation, *he simply would not have presented the prior allegation*. There was no risk of inciting juror sympathy in that scenario. However, Mr. Remland could only make this determination *after* a reasonable investigation. By making this determination prior to even the most rudimentary investigation, "counsel chose to abandon [his] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *See Wiggins*, 539 U.S. at 527-28.

Finally, Mr. Remland testified that he did not want to investigate any of the allegations in the CPT report because he "didn't feel the necessity to go in there and dig and dig and dig and try to find evidence that would find [Mr. Horn] more guilty than he was." R. 50-51. This rationale cannot be reasonable. The CPT report did not contain any allegations against Mr. Horn. The events predated Mr. Horn even knowing D.M. and M.M. Any investigation into these prior incidents would not have led to any information further inculpating Mr. Horn in the present case. Instead, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice" about what defense theories to pursue at trial. *See Wiggins*, 539 U.S. at 525. Reasonable jurists could debate whether trial counsel's less-than-informed decision not to conduct further investigation was reasonable.

C. In Finding That D.M. Did Not "Willfully" Make a Prior False Allegation, Reasonable Jurists Could Debate Whether the District Court Conflated the Deficient Performance Inquiry with the Prejudice Inquiry

Reviewing the finding that D.M. did not "willfully" make a prior false allegation, which was tantamount to finding that this investigation would not have

been fruitful, reasonable jurists could debate whether the district court conflated the deficient performance inquiry with the prejudice inquiry. The Eleventh Circuit endorsed the district court's conclusion that Mr. Horn did not establish Mr. Remland's deficient performance because Mr. Horn "failed to show that the victim *willfully* made a false allegation, or that his attorney acted unreasonably in failing to further investigate the matter." ECF No. 78, at 4. However, reasonable jurists could find the district court's conclusion was in error because it conflated the deficient performance inquiry with the prejudice inquiry.

This Court has previously approached deficient performance and prejudice as two separate questions. While both are needed to succeed on an ineffective assistance of counsel claim, they are standalone prongs. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court first analyzed deficient performance, finding "*Whether or not* [trial counsel's] omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. The Court then went on to find prejudice as well. *Id.*

Here, though, the Eleventh Circuit adopted the district court's conclusion that Mr. Horn failed to show that D.M. "willfully" made a prior false allegation, ECF No. 78, at 4, which was tantamount to a finding that the investigation would have proven fruitless and that the failure to investigate was therefore not deficient. This completely overlooked this Court's requirement that the "particular decision not to investigate must be directly assessed for reasonableness in all the circumstances."

Wiggins, 539 U.S. at 521. For all the reasons stated above, there was no reasonable decision made here because there was barely any investigation at all, and no investigation into D.M.'s prior allegations. Without that investigation, Mr. Remland did not have enough information to make a reasonable decision about what further investigation to do and what to present to the jury. The reasonableness, or lack thereof, of Mr. Remland's decision goes to deficient performance, not prejudice.

Whether this gets analyzed as deficient performance or prejudice is an important distinction because it affects what other evidence is considered in making the analysis. With a prejudice analysis, a reviewing court takes the entire record into account, including the evidence presented in habeas proceedings. Thus, this Court declined to take "state-law evidentiary findings" into account in *Wiggins* because it instead considered trial counsel's deficiencies with the totality of the evidence presented at trial and in habeas proceedings. *Wiggins*, 539 U.S. at 537. The district court here, in folding the prejudice analysis into deficient performance, declined to consider any prejudice analysis that considered whether "the defense had all of the evidence that the petitioner has been able to muster here about the rest of the family dynamic or withdrawing the allegations, changing testimony . . . ?" R. 167. Notably, because the Eleventh Circuit did not find deficient performance, it declined to conduct any prejudice analysis at all.

To the extent that these prejudice findings are relevant to any deficient performance analysis, reasonable jurists could debate the district court's conclusions. The district court found no ineffective assistance of counsel because it did not find

enough evidence of a prior false allegation to make the incident with Mr. Peterson admissible at trial. R. 163-64. In making its deficient performance finding, the Eleventh Circuit thought that the state courts did not err at all in not even granting Mr. Horn a hearing, implying that it did not think this evidence would be admissible regardless. ECF No. 78, at 3. To the extent that the admissibility of the prior allegation was pertinent to a deficient performance analysis, reasonable jurists could debate the district court's conclusion that the only relevant question here was whether the evidence ultimately would have been admissible.

Wiggins exemplifies how this Court has treated the question of admissibility and its effect on trial counsel's decision-making. In *Wiggins*, trial counsel did not know until after the trial had started that they would not be allowed to present mitigating evidence at a separate penalty phase. *Id.* at 526. This circumstance, however, could not be used as a rationale for the failure to investigate their client's background because "[u]ntil the court denied their motion, . . . they had every reason to develop the most powerful mitigation case possible." *Id.* at 526. In failing to do so, trial counsel "abandon[ed] their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28.

That principle applies equally here. The district court noted that it "[did not] know" if the state court would have allowed this evidence in, but even if it had been inadmissible, it was no less relevant to trial counsel's purported strategy up until the motion in limine hearing. R. 163. Mr. Remland did not know until the motion in limine hearing, right before the start of trial, that he could not present evidence of

D.M.'s character. He did not even have advance notice that the State was filing the motion in limine. So up until that point, he had every incentive to investigate the incidents in the CPT report. This is not the same situation where a lawyer investigates a lead, hopes to present it, and is precluded by the trial court from entering the evidence. This is also not a situation where a lawyer makes the reasoned decision that the path he wishes to pursue would be inadmissible, so he devotes his time and resources elsewhere. Instead, trial counsel made the decision not to investigate a relevant lead at a point when he was still pursuing the theory the investigation in question would have supported. Moreover, because this would have led trial counsel to make an argument about a prior false allegation rather than prior sexual conduct, the trial court's ruling at the pretrial hearings likely would have been different.

The district court also appeared to believe Mr. Remland's assertions that he would not have changed his strategy. *See* R. 164. But this Court has declined to take into account a trial lawyer's assertion that he would not have changed his trial strategy even if he had pursued the neglected line of investigation when trial counsel did not have enough information at the time of the decision to make a reasonable choice. As this Court explained in *Wiggins*, "The dissent nevertheless maintains that Wiggins' counsel would not have altered their chosen strategy of focusing exclusively on Wiggins' direct responsibility for the murder. But as we have made clear, counsel were not in a position to make a reasonable strategic choice . . . because the

investigation supporting their choice was unreasonable." *Id.* at 536 (internal citation omitted).

And, of course, this Court found it important that trial counsel in *Wiggins* made statements at trial suggesting that the undiscovered information would have been relevant, despite any arguments to the contrary trial counsel later made in post-conviction. *See, e.g.*, *id.* at 536 ("Moreover . . . Wiggins' counsel did *not* focus solely on Wiggins' direct responsibility. Counsel told the sentencing jury "[y]ou're going to hear that Kevin Wiggins has had a difficult life,' App. 72, but never followed up on this suggestion."). Similarly, Mr. Remland made arguments at the motion in limine hearing that indicated he wished to present D.M. and M.M.'s prior sexual conduct. Despite any assertions to the contrary, the DCF records related to the CPT report contained the type of evidence Mr. Remland intended to present up until the motion in limine hearing.

CONCLUSION

For the reasons stated above, this Court should grant the writ.

Respectfully submitted,

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