

QUESTION PRESENTED

1. Should a certificate of appealability issue in a Section 2254 proceeding where counsel learned directly from a juror that the jury had deadlocked 10-2 only because of character evidence that could not be admitted at the second trial, but counsel failed to revisit his strategy of relying on perceived weakness of the state's expert, rather than investigating and presenting expert testimony to establish that the victim could have died from an accidental fall or from regurgitating and choking on food found in his lung?

LIST OF PARTIES

All parties appear in the caption.

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OPINIONS BELOW

The order denying a certificate of appealability is unpublished, and reproduced at page 1 of the appendix. The district court's order denying the original petition for a writ of habeas corpus is unpublished, and reproduced at page 11 of the appendix. The state appellate court's per curiam affirmance without opinion of the order denying Mr. Lenz's state postconviction motion is unpublished and not included in the appendix. The state trial court's order denying certain claims after an evidentiary hearing is unpublished, and reproduced at page 50 of the appendix.

JURISDICTION

Mr. Lenz seeks review of the decision of the United States Court of Appeals for the Eleventh Judicial Circuit, denying a motion for a certificate of appealability. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2254 provides in relevant part that:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2253(c) provides in relevant part that:

- (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; or
 - (B) the final order in a proceeding under section 2255.
- (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.

The Sixth Amendment provides in relevant part that “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”

INTRODUCTION

Jason Lenz lived at his mother's home with EG, his girlfriend, and her son AJC. EG found AJC dead in his bed at Jason's home on a Sunday morning. Jason, babysitting AJC alone until 9:30 on Saturday night, was the last person to see him alive. Jason admitted to slipping and falling while holding AJC, but contended he was awake and alert when Jason put him to bed, and alive around 8 p.m.

The state's expert, Dr. Predrag Bulic, would testify that no accidental fall could have caused the skull injuries he observed, and that AJC could not have died from choking on the chunk of hot dog found in his right lung. Nevertheless, Jason's first trial for AJC's death resulted in a mistrial because two jurors could not believe that Mr. Lenz would ever intentionally hurt AJC. As trial counsel explained at an evidentiary hearing, the state opened the door to character evidence that "frankly, he loved the child more than the child's mother," and an email from a juror showed that two jurors "were convinced that he loved the child and that there's no way he could have done this."

Accordingly, at the second trial, the prosecution decided not to open the door to that evidence. The state withdrew its notice of intent to introduce bad acts evidence ("Williams rule evidence" in Florida), and filed a motion in limine to exclude any evidence of Jason's positive, loving relationship with AJC. The motion was granted.

Even though he understood how significant Jason’s loving relationship with AJC was to the first jury, trial counsel failed to revisit his decision to retain any expert to testify at trial. Dr. Ipser, a biomechanical expert with whom he initially consulted but failed to follow up, would later testify that an accidental fall could have generated enough force to account for AJC’s injuries. Dr. Willey, a forensic examiner, would testify that Bulic’s autopsy was incomplete, that the height of a fall was relatively unimportant, and that Jason’s version of events was plausible.

Jason argues that counsel rendered ineffective assistance. Jurists of reason could debate whether the district court erred by dismissing the Section 2254 petition. The Eleventh Circuit erred when it denied a certificate of appealability.

STATEMENT OF THE CASE

A 10-2 deadlocked jury failed to convict Petitioner Jason Lenz of charges arising from the death of his girlfriend’s three-year old son (“AJC”). Mr. Lenz was convicted of aggravated child abuse and felony murder at his second trial. (App. 7).

The trial focused on the source of AJC’s injuries, which occurred when he was home alone with Mr. Lenz. Mr. Lenz was involved with AJC’s mother (“EG”). AJC and EG lived with Mr. Lenz and his mother (“Peggy”). On the day of his death, Jason watched AJC while his mother and EG were gone. Peggy and EG returned home around 9:30 p.m., whereupon Jason explained that AJC was already in bed. The next morning, EG discovered that AJC was dead. (App. 32).

Mr. Lenz by all accounts enjoyed a loving relationship with AJC, evidence of which deadlocked the first jury. The normally inadmissible evidence was introduced in rebuttal to the state's bad acts (*Williams*¹ rule in Florida) evidence that Mr. Lenz had a bad temper. The *Williams* rule evidence tended to show that Mr. Lenz "frankly, he loved the child more than the child's mother." It also allowed counsel to introduce evidence proving that the incidents of "alleged abuse really weren't caused by him but were typical child's play, because they were all pretty well documented." After the trial, a juror e-mailed Mr. Hornsby to explain that this evidence had led to the two holdout votes to acquit, because those jurors "were convinced that he loved the child and that there's no way he could have done this." (App. 36).

Trial counsel later explained that "the second trial came around so quickly [the month after the first trial], and with my wife being pregnant . . . the trial almost bankrupted me." (App. 31). In his own words, the state had "cut [counsel] off at the knees" by withdrawing its notice of intent to use the Williams rule evidence, in turn precluding counsel from presenting that favorable character evidence. (App. 36). Nevertheless, trial counsel did not revisit his decision to rely exclusively on cross-examination of Dr. Bulic instead of presenting his own witness because "the medical issue hadn't changed." (App. 42).

¹ *Williams v. Florida*, 110 So. 2d 654 (Fla. 1959).

Jason also called two experts: Dr. Ipser, a biomechanical expert with whom counsel consulted before trial, and Dr. Willey, a forensic pathologist. Dr. Ipser had concluded before the first trial that, for Jason to have caused the injuries by accidentally dropping or falling with AJC, he would have to have been moving more than five miles per hour. At the evidentiary hearing Dr. Ipser testified that the type of carpeting on the floor could have substantially altered his conclusion. Counsel did not follow up after the initial report was provided, and did not provide the autopsy report. (App 41-42).

The state court concluded that:

Trial counsel's strategy not to call Dr. Ipser was also reasonable. He believed that the net result of calling Dr. Ipser would have been negative because it would have resulted in the State calling Dr. Alexander and Dr. Hermann. The overarching trial strategy was to create reasonable doubt by virtue of discrediting Dr. Bulic. Trial counsel felt this strategy had a strong possibility of success at the second trial because he felt that Dr. Bulic's testimony was rejected by jurors in large part during the first trial. He was able to get Dr. Bulic to concede that a short fall, as described by the Defendant, could not be ruled out as the cause of the injuries and death. While Dr. Ipser would have corroborated this testimony, it would have resulted in two witnesses, one a nationally-renowned child abuse expert, testifying that Dr. Bulic's assessment of the injuries was correct. Causing these witnesses to be called would have completely rehabilitated Dr. Bulic.

(App. 55).

Dr. Willey, a forensic pathologist, concluded that Dr. Bulic's faulty and incomplete procedures could not support his conclusions. Dr. Bulic had not sampled enough lung to determine whether AJC had choked on regurgitated hot dog, had failed to construct a differential diagnosis to account for other possible causes of death, had not preserved primary notes of the autopsy, and failed to collect data about AJC's eyes. (App. 40-41). Moreover, he would have testified that the distance of a fall was immaterial to the degree of injury, that head injuries cause vomiting, that AJC's blocked lung could have contributed to cerebral hemorrhaging, and that Mr. Lenz's explanation was ultimately plausible. (App. 41). He would also have advised trial counsel on effective cross-examination to demonstrate that Mr. Lenz's version of events could not be ruled out. (App. 41).

With respect to Dr. Willey, the state court reasoned only that "Trial counsel is not ineffective simply because collateral counsel has discovered a witness who is willing to give more favorable testimony." (App. 56).

Dr. Willey testified that he had reviewed Dr. Bulic's deposition testimony, testimony from both trials, and the autopsy report, including certain slides from the autopsy. Dr. Willey criticized Dr. Bulic's work in many respects. Dr. Bulic did not take samples that could have established the age of some of the child's injuries. Dr. Willey agreed that

the cause of death was a traumatic injury to the brain, but he would not say how the injury occurred.

Dr. Willey believes that the lack of oxygen caused by the blockage in the lung could have been a contributory cause of death because it could have exacerbated the child's distress. A subdural or subarachnoid hemorrhage could have been aggravated by the blockage, but the blockage would not have caused the hemorrhages, which were the results of external trauma. Dr. Willey believes that the height of a fall is largely immaterial, rather it is the surface, velocity, and the rate of deceleration that dictate the type and severity of a person's injuries.

(App. 55-56). The District Court concluded that the state habeas court's conclusion that counsel's performance was not deficient was not based on any unreasonable law or fact. (App. 16-21). The Eleventh Circuit denied a motion for certificate of appealability, holding without explanation that Jason "failed to make a substantial showing of the denial of a constitutional right." (App. 1).

REASONS FOR GRANTING PETITION

The issue here is whether Jason's claims "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (summarizing standard for granting certificate of appealability). Although "this Court is not equipped to correct every perceived error coming from the lower federal courts," the Court's attention is warranted here to correct the "clear misapprehension" of the Court's precedents. *Tolan v. Cotton*, 572 U.S. 650, 659-60, 134 S. Ct. 1861, 1867-68 (2014) (citations omitted). Because reasonable jurists could debate whether Mr. Lenz's claims could

have been resolved in a different manner, a certificate of appealability should issue. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

It was evident before that first trial that the jury would hear that Jason took better care of AJC than his own mother. Arguably, in that context Counsel's mistakes in handling Dr. Bulic and securing expert testimony fell short of violating Jason's right to effective assistance of counsel. Had Jason been convicted at the first trial, the state court could have permissibly concluded that counsel made "a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

At the second trial, however, counsel knew that the jury would not hear that key evidence. Counsel nevertheless failed to revisit his earlier cursory investigation, and never sought a second opinion on the autopsy report. Reasonable jurists could debate whether the state court's decision was unreasonable.

CONCLUSION

The undersigned respectfully requests that the Court grant certiorari in this case.

Respectfully Submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Lenz v. Secretary, Department of Corrections, No. 18-12366

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