No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DIRK WILLIAMS,
Petitioner,

v.

MARK S. INCH,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his counsel rendered ineffective assistance of counsel by failing to present the testimony of a toxicologist at trial to refute the prosecution's contention that the alleged victim was "physically helpless" at the time of the sexual encounter.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF CITED AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other

The Petitioner, DIRK WILLIAMS, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on August 6, 2018 (A-4)[1] (reconsideration/rehearing denied on September 26, 2018). (A-10).

D. CITATION TO OPINION BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

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

---

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970).

G. STATEMENT OF THE CASE

In 2005, the Petitioner was charged in Florida state court with sexual battery on a physically helpless person. The case proceeded to trial in August of 2006. At the conclusion of the trial, the jury returned a verdict of guilty as charged. The Petitioner appealed his judgment and sentence to the Florida Fifth District Court of Appeal, which *per curiam* affirmed the

conviction. *See Williams v. State*, 985 So. 2d 1104 (Fla. 5th DCA 2008).

Following the direct appeal, the Petitioner timely filed a *pro se* state postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. The state postconviction court summarily denied the Petitioner's state postconviction motion (without holding an evidentiary hearing). The Petitioner appealed the denial of his state postconviction motion and the Florida Fifth District Court of Appeal *per curiam* affirmed – without any explanation – the denial of the Petitioner's state postconviction motion. *See Williams v. State*, 75 So. 3d 295 (Fla. 5th DCA 2011).

Thereafter, the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. Initially, the district court dismissed the Petitioner's § 2254 petition as

untimely, but the Eleventh Circuit reversed the district court's order and held that the Petitioner's § 2254 petition was timely filed. *See Williams v. Sec'y, Fla. Dep't of Corr.*, 674 Fed. Appx. 975 (11th Cir. 2017). On remand, the district court denied the Petitioner's § 2254 petition. (A-12, 14).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit. On August 6, 2018, the Eleventh Circuit denied a certificate of appealability on the Petitioner's § 2254 claim. (A-4). The Petitioner timely filed a motion for reconsideration, and the Eleventh Circuit denied the motion on September 26, 2018. (A-10).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

The Petitioner contends that the Eleventh Circuit erred by denying him a certificate of appealability on his ineffective assistance of counsel claim. As explained below, the Petitioner has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In his § 2254 petition, the Petitioner alleged that his defense counsel rendered ineffective assistance of counsel by failing to present the testimony of a toxicologist at trial to refute the prosecution's contention that the alleged victim was "physically helpless." The Petitioner was convicted of sexual battery on a "physically helpless person" pursuant to section 794.011, Florida Statutes. At trial, one of the elements that the prosecution was required to prove

was that the alleged victim was "physically helpless" at the time of the sexual encounter. "Physically helpless" means "that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to act." § 794.011(1)(e), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 11.3.

The claim raised in the Petitioner's § 2254 petition was the same claim that the Petitioner raised in his *pro se* state postconviction motion. Specifically, the Petitioner asserted that had a toxicologist been presented as a witness at trial, the toxicologist would have opined – relying on the alleged victim's subsequent blood test and using generally accepted retrograde extrapolation rates – that the alleged victim's alcohol level at the time of the encounter

would *not* have rendered her "physically helpless."[2] The Petitioner explained that had this testimony been presented to the jury, he would not have been convicted (because – based on the toxicologist's testimony, the prosecution could not prove the essential element that the alleged victim was "physically helpless"). Notably, during the trial, the parties introduced exhibits establishing that the alleged victim was tested at the hospital shortly after the encounter and the test results demonstrated that the alleged victim did not have any drugs in her system and the alleged victim's blood-alcohol concentration ("BAC") at the time of the test was *only*

---

[2] In *Clark v. State*, 969 So. 2d 573 (Fla. 1st DCA 2007), the state appellate court specifically held that the testimony of a defense expert opining that the victim of an alleged sexual battery was not physically helpless to resist during the sexual encounter as alleged was admissible, as the testimony was relevant to whether victim was physically helpless to resist and tended to establish reasonable doubt as to consent.

.036 (A-56-58).[3]

Notably, after the Petitioner filed his *pro se* state postconviction motion, the prosecutor filed a response to the *pro se* motion. However, in the response, the prosecutor misrepresented to the state court the facts regarding the alleged victim's BAC. Specifically, the prosecutor stated (in part):

> It is rank speculation on the part of the defendant to suggest that a toxicologist or medical expert would have testified that a blood alcohol level of 038 would not have rendered the victim physically helpless to resist. *In the experience of the undersigned such a level of blood alcohol would be nearly fatal.*

(A-59) (emphasis added). It seems clear that the prosecutor mistakenly believed that the alleged victim's BAC was 0.36 (or 0.38)– not .036. Obviously

---

[3] *See* State's Exhibit 12 – the Florida Department of Law Enforcement report demonstrating that the alleged victim's BAC was *only .036* (A-56-58).

a BAC of .036 is not "nearly fatal" – in fact, it is less than ½ of the legal limit (.08) to drive in Florida. *See* § 316.193(1)(b), Fla. Stat.

Unfortunately, the state court relied upon the prosecutor's misrepresentation when denying the Petitioner's state postconviction motion. The entirety of the state court's ruling on this claim is quoted below:

> Because the Defendant falls to identify the prospective witness and the specific substance of his testimony, this claim remains insufficiently pled. In addition, the Court agrees with the State that it is rank speculation on the part of the Defendant to suggest that a toxicologist would have testified that a blood alcohol level of 038 would not have rendered the victim physically helpless. Postconviction relief cannot be based on speculative assertions. Furthermore, it is an inherently incredible claim. It is common knowledge that a blood alcohol level of 08 raises a presumption of impairment under the DUI laws of the State of Florida. *That a blood alcohol content of almost five times that amount, essentially almost 40 percent of the*

> *victim's blood consisted of alcohol, would not sustain a jury's finding of "physically helpless," is so contrary to common sense as to be inherently incredible.*
>
> Moreover, ineffective assistance of counsel may not be found in defense counsel's failure to seek to introduce evidence of a meritless defense at the guilt phase of a trial, or in defense counsel's failure to present expert testimony or evidence, where such testimony was not required.

(A-61-62) (emphasis added) (citations omitted).[4] As explained above, the alleged victim's BAC was *not* "five times" the legal limit – it was less than ½ the legal limit. *Clearly the state postconviction court's reason for denying this claim is based on an unreasonable determination of the facts in light of the evidence contained in the state record.* *See* 28 U.S.C. §

[4] The state court judge who denied the Petitioner's state postconviction motion was not the same judge who presided over the trial (because obviously the trial judge was aware that the alleged victim's BAC was not "five times" the legal limit).

2254(d)(2).[5]

In the district court's order denying the Petitioner's § 2254 petition, the district court did not address – or even acknowledge – the state

---

[5] Undersigned counsel notes that when the Eleventh Circuit issued a certificate of appealability after the Petitioner's § 2254 was dismissed as untimely, the Eleventh Circuit concluded that the Petitioner's claim was a "facially valid constitutional claim":

> In his § 2254 petition, Williams alleged, among other things, that counsel was ineffective for failing to present the testimony of a toxicologist or medical expert at trial to refute the state's contention that the alleged victim was "physically helpless" due to alcohol intoxication. He argued that the state post-conviction court's denial of the claim was based on an unreasonable determination of the facts in light of the evidence contained in the record. Williams argued that the record showed that the parties had stipulated that the victim's blood alcohol level near the time of the offense was 0.038 grams of alcohol per 100 milliliters of blood, but the state court incorrectly stated that the victim's blood alcohol level was 0.38. . . . *Because Williams presented at least one facially valid constitutional claim*, and the district court did not consider its merits, reasonable jurists could debate whether the motion stated a valid claim of the denial of a constitutional right.

(A-70-71) (emphasis added).

postconviction court's incorrect factual premise regarding the alleged victim's BAC (i.e., State's Exhibit 12 – the Florida Department of Law Enforcement report demonstrating that the alleged victim's BAC was *only .036*. *See Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, *conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence*.") (emphasis added). Rather, the district court cited witness testimony from the trial and asserted that "ample evidence established that the victim was physically helpless at the time of the offense." (A-24-25). Contrary to the district court's reasoning, the lay witness testimony presented by the prosecution during the trial does *not* refute the Petitioner's claim that a toxicologist would have

provided expert testimony that the alleged victim was not physically helpless at the time of the sexual encounter. *See, e.g., Ibar v. State*, 190 So. 3d 1012 (Fla. 2016) (remanding for a new trial due to counsel's failure to present a facial identification expert at trial – expert testimony that would have refuted the lay witness identifications that were offered at trial). At the very least, the Petitioner is entitled to an evidentiary hearing on his § 2254 claim so that a court can consider and evaluate the testimony of the Petitioner's toxicologist. *See Paine v. Massie,* 339 F.3d 1194 (10th Cir. 2003) (concluding, in a § 2254 proceeding, that counsel was ineffective for failing to present expert testimony at trial and remanding for a hearing in order to allow the petitioner an opportunity to present the expert testimony so that the court could determine whether the petitioner was prejudiced by

counsel's failure to present the expert at trial).[6]

Accordingly, for all of the reasons set forth above, the Petitioner submits that he has made "a substantial showing of the denial of [his] constitutional right" to the effective assistance of counsel. 28 U.S.C. § 2253(c)(2). Whether the state postconviction court's resolution of this claim was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding" is a matter debatable among jurists of reason – especially in light of the state postconviction court's misunderstanding regarding the alleged victim's actual BAC. Undersigned counsel recognizes that § 2254 petitions rarely meet the "unreasonable determination of the

[6] The Petitioner filed in the district court an affidavit from an expert toxicologist (Lawrence Masten). (A-49). In the affidavit, Dr. Masten opined that the alleged victim was *not* "physically helpless" at the time of the encounter.

facts" standard set forth in § 2254(d)(2). However, based on the state postconviction court's erroneous factual conclusion that the alleged victim's BAC was *"five times" the legal limit*, the instant case is one of the rare cases that meets the § 2254(d)(2) standard. Thus, the Petitioner satisfies the test for obtaining a certificate of appealability – this issue is "adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336.

In the Eleventh Circuit's August 6, 2018, order, the Eleventh Circuit agreed that the state postconviction court's reason for denying this claim was based on an unreasonable determination of the facts in light of the evidence contained in the state record:

> Here, the state habeas court's decision was based on an unreasonable determination of fact, because the BAC

> figure used in the state court's analysis (0.38) clearly contradicted the BAC indicated in the stipulated reports admitted at trial (0.036).

(A-8). However, the Eleventh Circuit concluded that the district court nevertheless properly rejected the Petitioner's § 2254 petition because the prosecution's theory was *not* based on the alleged victim being intoxicated by alcohol:

> However, even applying *de novo* review, reasonable jurists would not debate that the district court properly rejected Williams's claim. As reflected by the state's opening statement, the prosecution's theory of the case was that the victim was physically helpless, though such helplessness was not necessarily a result of her alcohol consumption.
>
> Thus, it was not deficient for Williams's counsel to decline to call a toxicologist to testify that the amount of alcohol in the victim's system would not have been sufficient to render her physically helpless, as such testimony would not have contradicted the

prosecution's theory.

(A-8-9). As explained below, the Eleventh Circuit overlooked other testimony and argument presented by the prosecution at trial which demonstrates that the prosecution did, in fact, rely upon a theory that the alleged victim was rendered "physically helpless" by alcohol consumption.

During the trial, the prosecution presented the testimony of several law enforcement officers. First, Officer Jeff Hershone testified that when he came into contact with the alleged victim, he smelled alcohol emanating from her. (A-41). Second, Officer John Askins stated the following about his observations when he first came into contact with the alleged victim:

> But the more you talked to her, she still didn't wake up. She was still asleep, passed out from drugs, alcohol, whatever

> the occasion may be. She wasn't waking up like you normally would. There was a problem.

(A-43). When Officer Askins was asked by the prosecutor whether he smelled alcohol emanating from the alleged victim, he responded, "She appeared to be intoxicated." (A-44). Finally, Detective Sharon Waggoner stated the following about her observations when she first came into contact with the alleged victim:

> She was what I would determine as out of it. Somebody who appeared – who had been – had a lot to drink the night before and it took them a while to come around.

(A-46).

Most importantly, during the prosecutor's closing argument, the prosecutor argued the following to the jury:

> Mr. Reiss [defense counsel] told

> you there were certain mysteries in regards to this case, and I believe I said that in opening statement, that there was a 0.03 alcohol content in [the alleged victim's] blood. Drugs found in the system? No drugs found in the water. Okay, well, let's think about this. Keep in mind that [the alleged victim's] last taste of alcohol was 2:00 a.m. She wasn't at the Sexual Assault Treatment Center until 8:00 and then the blood was drawn. So we're talking five or six – at least four hours.
>
> Now, use your common sense. Anybody that has gone out drinking, *alcohol dissipates, it leaves the body after period of time that blood alcohol level. Was it reasonable to think that the blood alcohol level was higher at 4:00 a.m. or 3:45, whatever time frame up to put on this, 3:00 or 4:00, as it was at 8:00? And I submit to you, sure, it was. Was it because [the alleged victim] was intoxicated? Yes.* Now, you can split hairs about whether she was intoxicated or wasted, but the fact remains that she was intoxicated. That is one reasonable explanation for why the report that you will see has a blood alcohol level of 0.03.

(A-47-48) (emphasis added).

The testimony and argument quoted and cited above – and, in particular, the prosecutor's closing argument – refutes the Eleventh Circuit's conclusion that the prosecution's theory in this case was that the alleged victim's "helplessness was not necessarily a result of her alcohol consumption." The prosecutor clearly argued during his closing argument that *the alleged victim was intoxicated from alcohol*, and the prosecutor asserted that the reason the alcohol test showed that her blood-alcohol level was low was because the alcohol had dissipated by the time the test was taken. This argument would have been *directly* refuted by a defense toxicologist. The Petitioner filed in the district court an affidavit from an expert toxicologist (Lawrence Masten). (A-49). In the affidavit, Dr. Masten opined the following:

> 3. I have reviewed the trial

transcripts of *State v. Williams*. The transcripts establish that on the evening of June 11, 2005, [the alleged victim] had dinner with some of her friends. [The alleged victim] stated that the meal at dinner was spaghetti and meatballs, and she said that she had a "couple of drinks" at dinner. She said that she did not feel any effects of the alcohol at that time. [The alleged victim] stated that she subsequently went to one or more bars. Between 10 and 10:30, she ordered a drink, but she said that she did not consume the drink because it was "too strong." Later in the evening, she said she ordered one or more "Jack and Cokes," but she again repeated that she did was not intoxicated as a result of consuming these drinks. Sometime before 2 a.m., [the alleged victim] had her last drink (another "Jack and Coke"). She said that she was not sure if she finished this drink. The encounter between [the alleged victim] and Mr. Williams occurred shortly before 4:10 a.m. on June 12, 2005 (because [the alleged victim]'s friend called the police minutes after the encounter, and the police said that they were first called at 4:10 a.m.). [The alleged victim's] blood was drawn at approximately 9 a.m. (when she was taken to the Sexual Assault Treatment Center).

4. A report from the Florida Department of Law Enforcement establishes that [the alleged victim's] blood-alcohol concentration ("BAC") at the time her blood was drawn was *only .036%*. The legal limit to drive in Florida is .080%. *See* § 316.193(1)(b), Fla. Stat.

5. It is generally established in the toxicology/medical community that people eliminate alcohol at a rate of approximately .015% an hour. Thus, conducting a retrograde extrapolation, [the alleged victim's] approximate BAC at the time of her encounter with Mr. Williams (i.e., approximately five hours before her blood was drawn) was .111%.

6. "Physically helpless" means "that a person is unconscious, asleep, or for any other reason physically unable to communicate unwillingness to act." § 794.011(1)(e), Fla. Stat.; Fla. Std. Jury Instr. (Crim.) 11.3.

7. It is my expert opinion that a person with an approximate BAC of .111% would *not* be "physically helpless." It is also my opinion that for someone to be "physically incapacitated," the person's BAC would need to be above .20%.

8. Based on my review of the trial transcripts, [the alleged victim's] BAC at the time of her encounter with

> Mr. Williams could not have been above .20%.

(A-51-54). Again, as stated above, Dr. Masten's opinion regarding retrograde extrapolation would have refuted the prosecutor's closing argument as to whether the alleged victim was "physically helpless" from alcohol consumption at the time of the sexual encounter (i.e., an essential element in this case).

To be entitled to a certificate of appealability, the Petitioner needed to show only "that 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." *Miller-El*, 537 U.S. at 327. The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's

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

I. CONCLUSION

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

Respectfully Submitted,

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

COUNSEL FOR THE PETITIONER