No.

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER WILLIAM MANIKOWSKI,
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

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A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on the basis that the Petitioner failed to make a substantial showing of the denial of a constitutional right that jurists of reason would find "debatable."

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, CHRISTOPHER WILLIAM MANIKOWSKI, 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 July 19, 2019. (A-1).[1]

D. CITATION TO ORDER 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(1) to review the final judgment of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb."

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).

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

G. STATEMENT OF THE CASE

In 2007, the Petitioner was charged with leaving the scene of an accident involving death (Count I); DUI manslaughter/failure to render aid (Count II); leaving the scene of an accident involving injury (Count III); leaving the scene of an accident with damage (Count IV); and DUI with injury (Count V). The accident in question occurred in Panama City during the early morning hours of April 14, 2007.

The case proceeded to trial in October of 2007. The Petitioner's defense at trial was that Mark Borelli was driving his vehicle at the time of the accident – which was confirmed by eyewitness Marisa Caparelli, who was driving a taxi cab and observed the accident (and driver of the vehicle) in her rearview mirror. At the conclusion of the trial, the jury found the Petitioner guilty of Counts I, II, III and V. The state trial court sentenced the Petitioner to twenty years' imprisonment and ten years' probation. On direct appeal, the Florida First District Court of Appeal affirmed the Petitioner's convictions and sentence. *See Manikowski v. State*, 23 So. 3d 113 (Fla. 1st DCA 2009).

Following the direct appeal, the Petitioner timely filed a Florida Rule of Criminal Procedure 3.850 motion. The state postconviction court summarily denied several of the claims and the court granted an evidentiary hearing on two of the claims. An evidentiary hearing was held on October 1, 2014. On November 4, 2014, the state postconviction court denied the remaining two claims. On appeal, the Florida First District Court of Appeal *per curiam* affirmed the denial of the Petitioner's rule 3.850 motion. *See Manikowski v. State*, 190 So. 3d 637 (Fla. 1st DCA 2016).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. the

Petitioner raised several claims in the petition – four of which are the focus of the instant pleading: (1) the state trial court erred by allowing Counts I-III to be presented to the jury after the State conceded that convictions on them would violate double jeopardy; (2) defense counsel rendered ineffective assistance of counsel by misadvising the Petitioner that if he testified at trial, his pretrial statements could be used by the State to impeach him; (3) defense counsel rendered ineffective assistance of counsel by failing to object to the State's presentation of Dr. Charles Siebert's testimony at trial; and (4) defense counsel rendered ineffective assistance of counsel by failing to retain an independent accident reconstruction expert and failing to present the expert as a defense witness at trial. On May 10, 2018, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-5). Thereafter, on December 11, 2018, the district court denied the Petitioner's § 2254 petition. (A-3, A-2).

The Petitioner thereafter filed an application for a certificate of appealability in the Eleventh Circuit Court of Appeals. On July 19, 2019, a single circuit judge denied a certificate of appealability. (A-1).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

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

The provisions of 28 U.S.C. § 2253(c)(1) were included in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended the statute governing appeals in habeas corpus and postconviction relief proceedings. In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Court observed that a certificate of appealability ("COA") will issue only if the requirements of § 2253 have been satisfied. "§ 2253(c) permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Court in *Miller-El* recognized that a determination as to whether a COA

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

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893 n.4. [(1983)].

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

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims

debatable or wrong." 529 U.S. at 484.

Id. at 338.

The Petitioner contends that the Eleventh Circuit Court of Appeals erred by concluding that he does not have a valid constitutional claim "debatable" among jurists of reason. As explained below, in his § 2254 petition, the Petitioner raised several viable claims involving the denial of his constitutional rights, including the denial of his double jeopardy rights and the denial of his Sixth Amendment right of effective assistance of counsel.

1. The Petitioner's § 2254 claims.

a. The state trial court erred by allowing Counts I-III to be presented to the jury after the State conceded that convictions on them would violate double jeopardy.

In his § 2254 petition (and on direct appeal), the Petitioner argued that the state trial court erred by allowing Counts I-III to be presented to the jury after the State conceded that convictions on them would violate double jeopardy. The Petitioner was charged with the following offenses:[2]

> COUNT I: Christopher William Manikowski on or about April 14, 2007, in the County of BAY and State of Florida, as a driver of a motor vehicle involved in an accident which resulted in the death of Harley Davidson Reed, did willfully fail to remain at the scene of the accident and fulfill the requirements of Florida Statute 316.062, contrary to Florida Statute 316.027(1)(b). (1 DEG FEL)
>
> COUNT II: Christopher William Manikowski on or about April 14, 2007, in the Count of BAY and State of Florida, unlawfully did drive or be in actual physical control of a motor vehicle while under the influence of

[2] Count IV is not included here as the Petitioner was acquitted of that count.

alcoholic beverages, chemicals or any substance controlled under Chapter 893 or any combination thereof, to the extent that normal faculties were impaired, or did have a blood or breath alcohol level of .08 or higher, and during the course of driving a vehicle while under the influence of alcoholic beverages, chemical or any substance controlled under Chapter 893 or any combination thereof, did cause or contribute to the cause of the death of Harley Davidson Reed, a human being, and did willfully fail to remain at the scene of the accident and give information and render aid as required by F.S. Section 316.082, contrary to Florida Statute 316.193(3)(a), (b), (c)3.b. (1 DEG FEL)

COUNT III: Christopher William Manikowski on or about April 14, 2007, in the County of BAY and State of Florida, as a driver of a motor vehicle involved in an accident which resulted in injury to Kory McConnell, did willfully fail to remain at the scene of the accident and fulfill the requirements of Florida Statute 316.062, contrary to Florida Statute 316.027(1)(a). (3 DEG FEL)

COUNT V: Christopher William Manikowski on or about April 14, 2007, in the County of BAY and State of Florida, unlawfully did drive or be in actual physical control of a motor vehicle while under the influence of alcoholic beverages, chemicals or any substance controlled under Chapter 893 or any combination thereof, to the extent that normal faculties were impaired, or while having a blood or breath alcohol level of .08 or higher, and during the course of driving a vehicle while under the influence of alcoholic beverages, or chemical substances as set forth in F.S. 877.111, or a controlled substance as set forth in Chapter 893 or any combination thereof, was accompanied in the vehicle by a person under the age of 18 years or did have a blood or breath alcohol level of .20 or above, and during the course of driving a motor vehicle while under the influence of alcoholic beverages, chemical or substance controlled under Chapter 893 or any combination thereof, did cause damage to the person of Kory McConnell, contrary to Florida Statute 316.193(3)(a), (b), (c)(1), and (4). (1 DEG MISD) (ENHANCED DUI)

On the morning of the trial and before the jury was sworn, defense counsel moved to strike Counts II and III as violative of the Petitioner's double jeopardy rights because he could not be charged with multiple "leaving the scene of an accident" counts (Counts I and III plus the "failure to render aid" enhancement to Count II) as to one accident.

(T-3-5).[3] The State acknowledged a conviction under Counts I and II would violate double jeopardy. (T-5). However, it asserted this argument was premature because the jury might find the Petitioner guilty of any combination of the crimes charged or their lesser included offenses that did not violate double jeopardy. (T-5). The state trial court agreed the "leaving the scene of an accident" counts as violated double jeopardy, but it refused to dismiss them based on its ruling that double jeopardy bars only the conviction, not the trial, on those counts. (T-8-10). Accordingly, the jury was sworn and the amended information, including the multiplicitous counts, was read to it. (T-13-14).

After trial, the jury returned a verdict finding the Petitioner guilty of Counts I, II, III and V. In an effort to avoid violating double jeopardy, the state trial court orally set aside the verdict as to Counts I, III, and V and only sentenced the Petitioner on Count II (DUI Manslaughter/Failure to Render Aid).

The Petitioner maintains that submission of Counts I-III to the jury was error in light of defense counsel's pretrial motion requesting that they be stricken and the State's agreement that these counts alleged the same offense and would violate double jeopardy upon conviction.

The double jeopardy doctrine is an integral part of American jurisprudence. The

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[3] References to the state court trial transcripts will be made by the designation "T" followed by the appropriate page number. References to the state court direct appeal record will be made by the designation "R" followed by the appropriate page number. References to the state court postconviction record on appeal will be made by the designation "PC" followed by the appropriate page number.

Constitution prohibits a defendant from being twice put in jeopardy for the same offense. *See* U.S. Const. amend. V. Justice Black aptly described the purpose of the clause as follows:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-188 (1957). The Double Jeopardy Clause provides three basic rights: 1) protection against a subsequent prosecution for the same offense after conviction; 2) protection against a subsequent prosecution for the same offense after acquittal; and 3) protection against multiple punishments for the same offense. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The third protection is implicated here. To ascertain whether two offenses are the same for purposes of double jeopardy, courts generally use the *Blockburger* test, which is satisfied if each offense requires proof of an element the other does not. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932)); *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975).

Here, both sides agreed the Petitioner could not be convicted of the crimes alleged in Counts I-III without violating double jeopardy. (T-3-8). *See Goldman v. State*, 918 So. 2d 442, 444 (Fla. 4th DCA 2006) (conviction on DUI manslaughter/leaving the scene plus one count of leaving the scene of an accident

violates double jeopardy); *Tellier v. State*, 754 So. 2d 88, 89 (Fla. 5th DCA 2000) ("[C]onvictions for both leaving the scene of an accident with injury and leaving the scene of an accident with death violate the double jeopardy clause because there was only one scene and one failure to stop.").

Although Florida courts have generally stated that the proper remedy for a double jeopardy violation of this kind is to "vacate the conviction for the lesser offense while affirming the conviction for the greater one," *Hardy v. State*, 705 So. 2d 979, 981 (Fla. 4th DCA 1998), the Petitioner submits that presenting these counts to the jury was improper where, as here, the violation was raised pretrial and not disputed by the State and was prejudicial to him.

When both sides agree that multiple counts violate double jeopardy, the appropriate remedy is to dismiss the violative counts or require the State to elect between them before jeopardy attaches. Otherwise, the defendant's constitutional double jeopardy rights are violated as soon as the jury is sworn. *See Crist v. Bretz*, 437 U.S. 28, 38 (1978) (holding that the federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn is an integral part of the Fifth Amendment guarantee against double jeopardy and is applicable to the states by the Fourteenth Amendment).

The purpose of the double jeopardy clause further bolsters this argument. In explaining its protections, the Court has stated: "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it . . . ." *Witte v. United States*, 515 U.S. 389, 396 (1995). *See also*

Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 303 (1984) (double jeopardy rights cannot be fully vindicated on appeal after final judgment because the clause protects "against being twice put to trial for the same offense."). Although these statements were made in a former jeopardy context, these cases demonstrate that the double jeopardy clause protects a defendant against being twice tried for the same crime. Whether in simultaneous or successive prosecutions, a defendant's rights are violated when he is tried multiple times for the same crime.

In *United States v. Turner*, 2007 WL 1300462, pgs. 1-5 (W.D. Wash. 2007), the court discussed the propriety of the pretrial dismissal of an indictment, which the court had previously held would be multiplicitous if presented in the manner the Government desired. *See id.* at 1. The Government argued, as did the State here, that a double jeopardy argument was premature because any multiplicitous convictions could be cured by dismissal before sentencing. *See id.* at 3. In making this argument, it relied on cases holding that double jeopardy violations may be remedied at or before sentencing because the clause primarily prohibits "multiple punishments" and because multiple convictions are harmless if the same evidence would have been presented to the jury in any event.[4] *See id.* The court disagreed, stating that a multiplicity error

[4] *See United States v. Nash*, 115 F.3d 1431 (9th Cir. 1994) (multiplicity error did not require new trial because prosecution would have presented same evidence regardless); *United States v. Matthews*, 240 F.3d 806, 817-818 (9th Cir. 2001) (dismissal prior to sentencing was an adequate remedy to multiplicitous indictment because prosecution would have introduced exactly the same evidence either way); *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991) (defendant's conviction on a multiplicitous indictment was "harmless error" under the "same evidence" test).

ought to be avoided pretrial even if it would not change the presentation of the evidence because a "'multiplicitous indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes – not one.'" *Id.* at 3-4 (quoting *United States v. Langford*, 946 F.2d 798, 802 (11th Cir. 1991)). The court emphatically stated: "Simply because a post-trial remedy may render an eventual error harmless does not mandate this Court to proceed with the knowledge of a possible multiplicity error but nevertheless ignore it." *Id.* at 5. This is precisely what happened here – the court proceeded to trial despite a blatant, openly acknowledged double jeopardy violation – and this should not be tolerated. The proper remedy was to require the State to file a second amended information, either pretrial or immediately after the jury was sworn (but before it was presented with the charges) that did not include jeopardy-barred charges.

Several other courts have also dismissed multiplicitous indictments pretrial based on the reasoning expressed in *Turner*. *See United States v. Nakashian*, 635 F. Supp. 761 (1986) ("Upon a finding that the indictment is multiplicitous, the appropriate remedy is to require the prosecution to elect among the multiplicitous counts, with all but the one elected dismissed."), *overruled on grounds that counts not multiplicitous*, 820 F.2d 549 (2d Cir. 1987); *United States v. Gardner*, 417 F. Supp. 2d 703, 717-718 (D. Md. 2006) (dismissing multiplicitous counts and stating "[t]he prohibition on multiplicity in an indictment is within the core protections of the Double Jeopardy Clause, and specifically bars the charging of a single offense in more than one indictment count"); *United States v. McCall*, 2006 WL 1071771, pg. 2 (N.D. Iowa 2006)

(requiring the Government to elect between two counts because presentation of the multiplicitous indictment to the jury would create a "risk of false impressions" that would unfairly prejudice defendant); *United States v. Elizarraras-Sepulveda*, 2006 WL 2414055 (N.D. Iowa 2006) (ordering dismissal of one count of a two-count multiplicitous indictment); *United States v. Erickson*, 2001 WL 1176316 (D.S.D. 2001) (requiring the Government to consolidate multiplicitous assault counts into a single count for each victim); *United States v. Vest*, 913 F. Supp. 1345, 1346 (W.D. Mo. 1995) (affirming recommendation that multiplicitous murder/drug counts be dismissed and stating "[f]irm in its conviction that the war on drugs must be fought with precision weapons and not open-choke shotguns, this Court is even more pessimistic (or realistic) than the magistrate judge in anticipating the unwarranted prejudicial effect on a jury of prosecution of these multiple counts").

A new trial is warranted here where an information acknowledged to violate double jeopardy was presented to the jury several times throughout the trial (immediately after the jury was sworn, in opening statements, in closing statements, and in the jury instructions). But for the presentation of these multiplicitous charges, the jury may not have found the Petitioner guilty of Count II or any of the crimes charged. This has been demonstrated in improper consolidation cases such as *Crossley v. State*, 596 So. 2d 447, 450 (Fla. 1992), where the court explained how the existence of one count can improperly bolster another:

> The danger . . . lies in the fact that evidence relating to each of the crimes may have the effect of bolstering the proof of the other. While the testimony in one case standing alone may be insufficient to convince a

> jury of the defendant's guilt, evidence that the defendant may also have committed another crime can have the effect of tipping the scales.

This is precisely the prejudice the double jeopardy clause was designed to prevent. *See Green*, 355 U.S. at 187-188 ("The underlying idea [behind the double jeopardy clause] is that the State . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby . . . enhancing the possibility that even though innocent he may be found guilty."). Indeed, the Tenth Circuit recognized the risks inherent in a multiplicitous indictment when it stated:

> The risk of a trial court not requiring pretrial election is that it may falsely suggest to a jury that a defendant has committed not one but several crimes. *See also United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986) (multiple indictments create the impression of more criminal activity than in fact occurred). Once such a message is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis of the conduct at issue, and will reach a compromise verdict or assume the defendant is guilty on at least some of the charges.

United States v. Johnson, 130 F.3d 1420, 1426 (10th Cir. 1997) (some citations omitted).

In conclusion, a defendant's double jeopardy rights are at the core of the protections provided by our constitution. They should not be loosely tossed aside, especially in a situation where both sides acknowledge that an information contains multiplicitous charges. Allowing these rights to be trampled underfoot is a slippery slope. Should this practice be allowed to continue, what is to deter prosecutors from purposely including multiplicitous counts in the hope that they will somehow push the State's case over the edge? As defense counsel accurately stated at trial: "The State is trying to throw everything up here to see what sticks . . . ." (T-7). This practice should

not be tolerated.[5] The Petitioner should be afforded a new trial that is not tainted by blatantly multiplicitous charges.

In the report and recommendation (which was adopted by the district court), the magistrate judge concluded that the Petitioner is not entitled to federal habeas relief because there is no case from this Court dealing with this exact fact patter. (A-21-22). The Petitioner submits that the magistrate judge is reading 28 U.S.C. § 2254(d) too narrowly. To obtain relief, the Petitioner is not required to establish that this Court has granted relief on a case involving *identical* facts. If that was the standard, then virtually no one would be eligible for federal habeas relief. Contrary to the magistrate judge's interpretation of § 2254(d), this Court has clarified that a petitioner is entitled to federal habeas relief if a "general standard" is applied by a state court in an unreasonable manner:

> AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.

Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The "general standard" at issue in the instant case is that the Double Jeopardy Clause protects a defendant against being twice tried for the same crime.

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[5] Clearly, if a defendant is charged with murder of a single victim, the prosecution would not be permitted to charge three separate counts of first-degree murder, second-degree murder, and manslaughter (especially since the latter two would be given as lesser offense instructions at trial).

The Court has stated that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it . . . ." *Witte*, 515 U.S. at 396. *See also Lydon*, 466 U.S. at 303 (double jeopardy rights cannot be fully vindicated on appeal after final judgment because the clause protects "against being twice put to trial for the same offense."). Whether in simultaneous or successive prosecutions, a defendant's rights are violated when he is tried multiple times for the same crime.

b. Defense counsel rendered ineffective assistance of counsel by misadvising the Petitioner that if he testified at trial, his pretrial statements could be used by the State to impeach him.

In his § 2254 petition (and in his state postconviction motion), the Petitioner alleged that defense counsel was ineffective for misadvising him that if he testified at trial, his pretrial statements could be used by the State to impeach him. During the state court postconviction evidentiary hearing, defense counsel (Ben Bollinger) conceded that he told the Petitioner that if he testified at trial, his pretrial statements could be used against him:

> I know that in all my cases when there is a prior statement that's been excluded I go through with the clients if you come up to the stand you're going to get impeached with it, they can bring it in then. And I've had several cases where that has happened before so I know, I've done it and I've done it with him, I just can't tell you what day I did it or if I did it in trial or when I did it but I know that it was done.
>
> Q But no question you gave him that advice and that warning or that caveat, if you take the stand what, what did you tell him would happen or what was your protocol as to the statement in this case?
>
> A *That everything that we had excluded you could be impeached on.* That was the law and you are going to have problems with that,

especially in this case.

(R-1474) (emphasis added). At the state court postconviction evidentiary hearing, the Petitioner explained that he based his decision to refrain from testifying at trial on Mr. Bollinger's legal advice that his pretrial statement could be used to impeach him if he did testify. (R-1485).

Contrary to Mr. Bollinger's legal advice, if the Petitioner had testified at trial, the State would not have been able to use the Petitioner's statements against him. There is no dispute in the record that prior to obtaining the statement from the Petitioner on the date of the accident, the law enforcement official taking the statement (Assistant State Attorney Mark Graham) failed to read the Petitioner his *Miranda*[6] rights.[7] Therefore, the statement was not admissible in the State's case-in-chief during the trial. However, Mr. Bollinger told the Petitioner that if he testified at trial, the State could use his pretrial statement for impeachment purposes. Contrary to Mr. Bollinger's legal advice, in *Carlisi v. State*, 831 So. 2d 813, 814-15 (Fla. 4th DCA 2002), the Florida Fourth District stated the following:

> Although a defendant's statement that is suppressed as a result of *Miranda* violations is unavailable to the state during its case-in-chief, the statement may be admissible as a prior inconsistent statement and used by the state for impeachment purposes. *See Harris v. New York*, 401 U.S. 222, 224-226 (1971). *Before a suppressed statement can be used for impeachment purposes, the statement must be shown to have been made*

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[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[7] The record is clear that the Petitioner was in custody at the time that the statement was obtained.

voluntarily. *See Nowlin v. State*, 346 So. 2d 1020, 1024 (Fla. 1977). *Nowlin* states the rule to be applied in this case:

> [W]henever the state, in order to impeach a defendant's credibility, chooses to present evidence of a defendant's incriminating statements which are inconsistent with trial testimony of the defendant and which are inadmissible in the case-in-chief because of the failure of custodial officers to give *Miranda* warnings, *the statements must be shown to be voluntary before they may be admitted.*

Id.

(Emphasis added). In *Reddish v. State*, 167 So. 2d 858, 862-63 (Fla. 1964), the Florida Supreme Court recognized that intoxicants/narcotics can render a defendant's statements involuntary. *See Reddish*, 167 So. 2d at 863 ("[W]e must decide whether at the time the critical statements were made the mind of the accused was sufficiently clear and unhampered by the combination of his physical condition and the impact of the narcotic medication that it can be said that he freely and voluntarily related his connection with the crime. . . . A careful and thorough study of this record, in the light of our obligation under Section 924.32, Florida Statutes, has brought us to the conclusion that these confessions should not be permitted to stand as evidence against this appellant. The totality of all the circumstances, such as the man's physical condition, in combination with the impact of the narcotics, as well as the lack of clear-cut testimony regarding his mental condition at the time he gave the statements, leads us to conclude that these confessions were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination.").

In the instant case, the record establishes that the Petitioner's statements on the

date of the accident were *not* voluntary. As argued by the prosecutor during the October 1, 2014, evidentiary hearing, the Petitioner "couldn't even spell his name." (R-1479).[8] The Petitioner explained that he has *no memory* of even giving a statement to law enforcement officials. (R-1494). In light of the Petitioner's inability to spell his name correctly/complete lack of memory, in the instant case – just as in *Reddish* – it is clear that the Petitioner's statements "were not obtained in a manner consistent with constitutional standards against compulsive self-incrimination" and therefore were involuntary. *Reddish*, 167 So. 2d at 863. Thus, contrary to Mr. Bollinger's advice to the Petitioner, if the Petitioner had testified at trial, the State would *not* have been able to use the Petitioner's pretrial statements against him (because the statements were involuntary and thus, pursuant to *Carlisi*, inadmissible – even for impeachment purposes).

Accordingly, Mr. Bollinger's advice to the Petitioner was legally incorrect. His misadvice is analogous to a defense attorney erroneously informing a defendant that if he testifies at trial, the jury would automatically be told of the specific nature of his prior convictions. In *Everhart v. State*, 773 So. 2d 78, 79 (Fla. 2d DCA 2000), the appellate court explained that erroneous legal advice regarding the consequences of a defendant testifying at trial constitutes deficient performance sufficient to require relief:

> Everhart alleges that counsel interfered with his right to testify by

[8] At the time of the statements, the Petitioner was extremely intoxicated. In fact, when the recording of the statements was played in court during the pretrial proceedings, the recording confirmed that the Petitioner could not even spell his name.

> erroneously informing him that if he testified, the jury would automatically be told of the specific nature of his prior convictions. *If counsel told him this, it would be an incorrect statement of the law*, *see Britton v. State*, 604 So. 2d 1288 (Fla. 2d DCA 1992), *and would constitute deficient performance by counsel sufficient to require relief*, provided that Everhart can show that he was prejudiced. *See Jackson v. State*, 700 So. 2d 14 (Fla. 2d DCA 1997).

(Emphasis added).

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Court recognized that a criminal defendant has a constitutional right to testify on his own behalf at trial. The Court declared that the right "is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)). The Court held that the right is derived from several constitutional provisions, including the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, the Sixth Amendment right to self-representation, and as a corollary to the Fifth Amendment privilege against self-incrimination. The Court acknowledged that "[o]n numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental right." *Rock*, 483 U.S. at 53 n.10. It follows that a criminal defendant cannot properly weigh the option of foregoing this "fundamental" constitutional right unless the defendant is properly advised as to whether pretrial statements can be used for impeachment purposes. Pursuant to *Everhart*, Mr. Bollinger's misadvice that the Petitioner's pretrial statements could be used against him "constitute[d] deficient performance by counsel sufficient to require relief." *Everhart*, 773 So. 2d at 79. The Petitioner's decision not to testify at trial was based

solely on defense counsel's erroneous advice.

The Petitioner was prejudiced by Mr. Bollinger's ineffectiveness. In *Everhart*, the appellate court stated the following:

> Everhart goes on to allege that, but for this incorrect advice, he would have testified. He asserts that he would have told the jury that he did have permission to enter the apartment, that the officer mischaracterized his statement, and that he told the officer that Ford had asked him not to come back to the apartment until the following day, which was when the burglary occurred. *Based on the record before us, it appears that the issue of whether Everhart had consent to enter the apartment was disputed and that the resolution of it turned on a credibility determination. Under these circumstances, we believe that Everhart has adequately shown prejudice.*

Everhart, 773 So. 2d at 79 (emphasis added). As in *Everhart*, the issue of who was driving the vehicle was disputed. The State presented Mark Borelli as a witness, who claimed that the Petitioner was driving the vehicle (and the Petitioner asserts that Mr. Borelli's trial testimony was influenced by his own self-interest). However, the defense presented the testimony of eyewitness Marisa Caparelli (an unbiased third party) – who was driving a taxi cab and observed the accident (and driver of the vehicle) in her rearview mirror. Ms. Caparelli testified that *Mr. Borelli* was driving the vehicle – *not* the Petitioner. (R-1257). *Yet, the jury did not hear from the Petitioner at trial* (and the jury did hear from Mr. Borelli). There is a reasonable probability that had the jury heard the Petitioner tell them that he remembers getting in the *passenger* side of his vehicle, the jury would have had a reasonable doubt as to who was driving the vehicle and therefore the jury would have returned a not guilty verdict. As in *Everhart*, the Petitioner has "adequately shown prejudice." *Everhart*, 773 So. 2d at 79.

In *Riggins v. State*, 168 So. 3d 322, 325 (Fla. 2d DCA 2015), the appellate court

discussed the significant impact that a criminal defendant's testimony can have on a jury:

> Turning to the postconviction court's alternate basis for denial – that Riggins was not prejudiced because his testimony would have been cumulative – we must disagree for two reasons. First, regardless of whether a defendant has presented other evidence in support of his theory of defense, the defendant has the absolute right to testify in his own defense. The trial court simply cannot preclude the defendant from exercising his right to testify on the grounds that any such testimony would be cumulative. Therefore, this rationale cannot support the postconviction court's ruling.
>
> Second, a defendant's testimony cannot be "cumulative" because *the impact of a defendant's own testimony is qualitatively different from the testimony of any other witness* – even a witness as aligned with the defendant as his girlfriend. *In the minds of the jurors, the defendant's testimony would not be "cumulative" of that of any other witness.* While the trial court may have discretion to limit the number of other witnesses a defendant may call to present cumulative evidence, the defendant's own testimony simply is not "cumulative" to that of any other witness *because of its different effect on the jury*. Therefore, this rationale cannot be the basis for denying postconviction relief.

(Emphasis added) (citation omitted). The Petitioner's testimony that he remembers getting in the *passenger* side of his vehicle would have had a significant impact on the jurors. Had the jurors heard the Petitioner's testimony, they would have had a reasonable doubt as to who was driving the vehicle and therefore the jurors would have returned a not guilty verdict.

c. Defense counsel rendered ineffective assistance of counsel by failing to object to the State's presentation of Dr. Charles Siebert's testimony at trial.

In his § 2254 petition (and in his state postconviction motion), the Petitioner alleged that defense counsel was ineffective for failing to object to the State's presentation of Dr. Charles Siebert's testimony at trial. During the trial, the State

presented the testimony of Dr. Siebert, a medical examiner. Dr. Siebert testified and gave the jury his opinion regarding the victim's cause of death. Notably, during Dr. Siebert's testimony, the State presented autopsy photographs of the victim (photographs that the Petitioner submits were extremely prejudicial and had a negative impact on the jury). However, Dr. Siebert did *not* perform the victim's autopsy – rather, the autopsy was performed by Dr. Wilson Broussard (and Dr. Siebert claimed that he reviewed Dr. Broussard's notes). A review of the trial transcripts establishes that Dr. Siebert did not testify regarding his own opinions and never reached an independent conclusion:

> Q Now, Dr. Siebert, were you the medical examiner who performed the autopsy on the victim in this case, Harley Reed[?]
>
> A No, I was not.
>
> Q Who did perform this, the autopsy?
>
> A The autopsy was performed by Dr. Wilson Broussard who is a part-time associate medical examiner for my district.
>
> Q But you have access to the records and the photographs of that autopsy, correct?
>
> A That is correct.
>
> . . . .
>
> Q Now, as a part of your duties, Dr. Siebert, do you sometimes testify in court about the results of autopsies even though you didn't perform them?
>
> A Yes, it is something that is commonly done.
>
> . . . .
>
> Q And have you had an opportunity to review the notes and

photographs of the autopsy that was performed on Mr. Reed?

A Yes, I have.

Q *And based upon that particular autopsy and the notes* and photographs that you've reviewed, within the bounds of reasonable medical certainty have you formed an expert opinion concerning Mr. Reed's cause of death?

A Yes, I have.

Q And what is that opinion?

A The cause of death *as listed on the report* in the death is blunt force cranial cerebral trauma, in other words blunt head trauma.

(A-112-114) (emphasis added). Thus, Dr. Siebert's testimony was hearsay (i.e., the hearsay testimony of Dr. Broussard as conveyed through Dr. Broussard's notes).

Whether a hearsay statement admitted at trial violates the Sixth Amendment Confrontation Clause is controlled by *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Court held that when the prosecution offers evidence of out-of-court statements of a declarant who does not testify, and the statements constitute "testimonial hearsay," the Confrontation Clause requires (1) that the declarant be unavailable and (2) a prior opportunity to cross-examine the declarant. *See Crawford*, 541 U.S. at 51-69. Dr. Siebert's testimony in the instant case violates *Crawford*. Defense counsel was ineffective for failing to object on this basis.

d. Defense counsel rendered ineffective assistance of counsel by failing to retain an independent accident reconstruction expert and failing to present the expert as a defense witness at trial.

In his § 2254 petition (and in his state postconviction motion), the Petitioner

alleged that defense counsel was ineffective for failing to retain an independent accident reconstruction expert (and failing to present the expert as a defense witness at trial). The prosecution's theory at trial was that the driver of the vehicle[9] caused the accident in question. Defense counsel failed to retain an independent accident reconstruction expert in order to establish that it was the pedestrians – and not the driver of the vehicle – who caused the accident (i.e., the pedestrians stepped in front of the oncoming vehicle, thereby causing the accident). Had an accident reconstruction expert been presented at trial, the expert would have refuted the theory of the State and would have demonstrated that the pedestrians caused the accident.

Prior to filing his state postconviction motion, the Petitioner retained accident reconstruction expert Donald J. Fournier, Jr. Mr. Fournier has reviewed the circumstances surrounding the accident in the instant case. Notably, Mr. Fournier has concluded that the pedestrians caused the accident.

The state postconviction court summarily denied this claim, asserting that "the focus of the defense in this trial was that Defendant was not the driver of the vehicle." (PC-780). As explained above, it is irrelevant that one of the Petitioner's defenses was that he was not the driver of the vehicle – regardless of who was driving the vehicle at the time of the accident, if the driver of the vehicle did not cause or contribute to the accident, *then the Petitioner could not be found guilty of DUI manslaughter*.

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[9] The Petitioner continues to assert that he was not the driver of the vehicle (and the parties disagree on this matter). However, if the driver of the vehicle did not cause the accident, then there is no DUI manslaughter offense (regardless of who was driving the vehicle).

In its order, the state postconviction court cited to the State's version of the facts to find that the driver of the vehicle caused the accident and that an accident reconstruction expert "would not have changed the outcome of the proceeding." (PC-780-81). But that is the point of the Petitioner's claim – the jury was never presented with the opinion of an independent expert who could establish that the accident was caused by the pedestrians. This claim cannot be resolved without first hearing Mr. Fournier's testimony/opinion (and neither the state postconviction court nor the district court held a hearing on this claim).

"At the heart of effective representation is the independent duty to investigate and prepare [the client's case.]" *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). "Permissible trial strategy can never include the failure to conduct a reasonably substantial investigation." *Douglas v. Wainwright*, 714 F.2d 1532, 1556 (11th Cir. 1983). "'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Putman v. Head,* 268 F.3d 1223, 1244 (11th Cir. 2001) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000)). In *Biagas v. Valentine*, 265 Fed. Appx. 166, 172 (5th Cir. 2008), the Fifth Circuit Court of Appeals stated that "[w]e have recognized the distinction between strategic judgment calls and plain omissions, and we have emphasized that we are not required to condone unreasonable decisions parading under the umbrella of strategy . . . ." Additionally, in *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991), the Eleventh Circuit Court of Appeals stated that "our case law rejects the notion that a 'strategic' decision can be reasonable when the

attorney has failed to investigate his options and make a reasonable choice between them." Without consulting with an expert, defense counsel could not determine whether the presentation of an independent reconstruction expert was viable.

In support of his argument, the Petitioner relies on *State v. Whittaker*, 973 A.2d 299 (N.H. 2009). In *Whittaker* – a negligent homicide case – the New Hampshire Supreme Court held that defense counsel was ineffective for failing to consult with an accident reconstruction expert:

> Further, had trial counsel consulted an expert, such as Lakowicz, he could have learned that another defense was available to him – that the accident was unavoidable, regardless of the driver's impairment. Had trial counsel consulted an expert, such as Lakowicz, he could have been able to present an affirmative case that the defendant's impairment did not cause the accident.
>
> . . . .
>
> Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence. Failing to present exculpatory evidence is not a reasonable trial strategy.

Whittaker, 973 A.2d at 309-10 (citations omitted). As in *Whittaker*, defense counsel's failure to consult with an accident reconstruction expert cannot be considered a reasonable trial strategy.

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

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

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

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

I. CONCLUSION

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

Respectfully Submitted,

/s/ Michael Ufferman

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