No. _____

In The
Supreme Court of the United States

ADAM DEAN BROWN,

Petitioner,

v.

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

On July 29, 2012, Adam Dean Brown and his friend, Nicholas Snow, were travelling in a vehicle that crashed. Brown and Snow were both intoxicated. Both were ejected from the vehicle upon impact. The State of Florida charged Brown with driving under the influence resulting in serious bodily injury. The sole issue at trial was whether Brown or Snow drove the vehicle on the night of the crash. The question presented is:

Did Petitioner satisfy the burden for the issuance of a certificate of appealability on his ineffective assistance of counsel claims where his trial attorney failed to (1) object when the prosecutor argued in rebuttal that Brown's injuries were consistent with him being the driver, where no evidence supported that argument; (2) offer evidence that corroborated the proposed testimony of a key witness, where the trial court excluded her testimony based on the lack of assurances of reliability; and (3) retain an accident reconstruction expert for trial, where a post-conviction accident reconstruction showed that Brown was not the driver?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Adam Dean Brown was the Petitioner-Appellant in the court below.

Respondent, the Florida Department of Corrections, was the Respondent-Appellee.

Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- *State of Florida v. Adam Dean Brown*, Case No. 2013-CF-1154 (Fla. 1st Jud. Cir. 2017). Order Denying Amended Motion for Postconviction Relief with Directions to the Clerk of Court entered on July 23, 2018.

- *Adam Dean Brown v. State of Florida*, 286 So. 3d 247 (Fla. 1st DCA 2019). Order denying postconviction relief per curiam affirmed on December 20, 2019.

- *Adam Dean Brown v. Florida Department of Corrections*, Case No. 3:20-cv-1377-LC-MJF (N.D. Fla. 2021). Order denying amended petition for writ of habeas corpus entered on December 30, 2021.

- *Adam Dean Brown v. Florida Department of Corrections*, Case No. 22-10084-E (11th Cir. 2022). Order affirming denial of certificate of appealability entered on July 27, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Adam Dean Brown, respectfully petitions the Court for a writ of certiorari to review the decision of United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's denial of a certificate of appealability.

DECISIONS BELOW

The Circuit Court of the First Judicial Circuit, in and for Okaloosa County, Florida, entered an Order Denying Mr. Dean's Amended Motion for Postconviction Relief. App. 61-71.

Florida's First District Court of Appeal issued an order per curiam affirming that decision without a written opinion. That order is published at 286 So. 3d 247 (Fla. 1st DCA 2019) and reproduced in the appendix. App. 59.

After Mr. Dean petitioned the United States District Court for the Northern District of Florida for a writ of habeas corpus under 28 U.S.C. § 2254, a magistrate issued a report and recommendation, App. 9-58, which the district court adopted and incorporated by reference. App. 5-7. The Eleventh Circuit's order denying Mr. Brown of a certificate of appealability is reproduced in the appendix. App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. Brown's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Eleventh Circuit, which had jurisdiction to review the denial of a certificate of appealability, 28 U.S.C. § 2253(c)(2), issued its order on July 27, 2022. App. 1-4. This petition is timely filed within 90 days of that order. This Court has jurisdiction to review the denial of a certificate appealability. *Hohn v. United States*, 524 U.S. 236, 239 (1998).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

Under 28 U.S.C. § 2253(c)(2), "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

On the evening of July 29, 2012, Petitioner Adam Dean Brown and his friend, Nicholas Snow, were travelling in a vehicle that crashed at a high rate of speed. App. 10. Brown and Snow were both intoxicated, and they were both found injured outside

from the vehicle at the scene of the accident. App. 10. Though an initial accident report listed Snow as the driver, the State charged Brown with driving under the influence resulting in serious bodily injury. App. 10. The sole issue at trial was whether Brown or Snow drove the vehicle on the night of the crash. App. 11.

The State presented no physical evidence or eyewitness testimony placing Brown as the driver. App. 34-35, 36, 39. Instead, it relied upon the following facts: (1) the car was registered to Brown; (2) Brown told an Emergency Medical Technician right after the crash that "his foot got stuck on the pedal'" and (3) Brown told a responding paramedic that, "I'm sorry, I never meant for this to happen." App. 39.

Brown testified that he remembered "nothing" about being in the car on the night of the crash, and "nothing" in regard to driving on the night of the crash. App. 39. However, another witness Alexandra Britton-Peters, testified to her recollections on the night of the accident. App. 39-40. She was leaving her work at a Domino's Pizza located on Racetrack Road when she saw the "light silver" car (Brown's car) speeding down the road just before it crashed. App. 39.

Peters observed the speeding car for 30-45 seconds and noticed that the driver was a "husky

guy" with a "shaved head or really short, like white blonde hair." App. 39. The driver was "looking around . . . like looking for something in the car." App. 39. Peters observed that the passenger was "very skinny" and "reclined back a little bit." The man in the passenger's seat had "dark brown hair." App. 39-40. Peters testified that she did not see the driver of the car in the courtroom, but that she "possibly" saw the passenger, and that Adam Brown "may be" the passenger although "he looks a lot different." App. 40.

The defense also sought to introduce the testimony of Sherri Williams, who would have testified that Nicholas Snow told her that he was the driver that night. App. 32. Williams, who was friends with Snow but did not know Brown, also would have testified that Snow had mentioned that he received $100,000 from Brown's insurance company. App. 35. The State made an oral motion in limine to exclude the testimony as inadmissible hearsay. App. 32.

The defense maintained that Williams's testimony fell under Florida's hearsay exception as a statement against interest by a declarant who was unavailable[1] as a witness. App. 32-33; *see also* Fla. Stat. § 90.804(2)(c). The trial court excluded the

[1] Snow died prior to trial, though the jury was not informed of this fact. App. 10.

evidence, finding it was not clothed with assurances of reliability. App. 34.

During the defense proffer of Williams's testimony, the only information Williams provided to court was the statement itself—that Williams asked Snow if he was driving the night of the accident, and he responded: "I was driving my friend[']s car and I could have killed my friend." App. 33. Defense counsel did not identify other evidence that could have demonstrated that the testimony of Williams was trustworthy.

During its rebuttal argument in closing, the State argued for the first time that the injuries Brown suffered were consistent with being the driver and being struck by the steering wheel:

> And last point with the injuries. Multiple injuries to the pelvic area and the center mass area of the torso area. I submit to you, that's exactly where a steering wheel would hit somebody if they were driving and that's exactly where his damage is, to the middle area. To his middle torso is exactly where a steering wheel would impact somebody at a high velocity, high rate of speed collision. That's what you can use your common sense to, when you apply the law and the evidence in this case and that's why he is guilty as charged. Thank you.

App. 20.

No evidence introduced at trial supported the State's argument, *i.e.*, no witness testified that the Brown's injuries were consistent with being behind the steering wheel. App. 21-22. Defense counsel failed to object or move for mistrial after the State pursued this improper line of argument. App. 19. Nor did the defense obtain a report from an accident reconstructionist prior to trial, even though much of the evidence presented at trial concerned where the two occupants of the vehicle were found and the type of injuries they sustained. App. 47.

The trial court adjudicated Brown guilty and sentenced him to 51 months of imprisonment followed by 9 months of probation. App. 62. The state appellate court per curiam affirmed his conviction without issuing a written opinion. App. 59-60.

On July 17, 2017, Brown filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850, which he later amended. App. 11. In the motion, he claimed he received ineffective assistance of counsel based on his defense attorney's failure to, *inter alia*: (1) object to prosecutorial misconduct during the State's rebuttal; (2) offer evidence that corroborated the proposed testimony of a key witness, Williams, whose testimony was excluded based on the lack of assurances of

reliability; and (3) retain an accident reconstruction expert for trial. App. 1-2.

With regard to the failure to object to prosecutorial misconduct, Brown maintained that attorneys must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence. He noted that the State presented no evidence that the injuries Brown suffered were connected to him being the driver, and the improper argument misled the jury into believing that the State possessed special knowledge about Brown's injuries. App. 20.

Brown also maintained that the State made this argument for the first time in the final part of rebuttal, which deprived the defense the opportunity to address it in closing. App. 20. Finally, in the view of Brown, the unsubstantiated argument went directly to the core issue at trial, the identity of driver, and could have easily influenced the jury in a close case with highly attenuated evidence of guilt. Brown maintained that he established both deficient performance and prejudice, as required under *Strickland v. Washington*, 466 U.S. 668 (1984) to establish this ineffective assistance of counsel claim. *See* App. 19.

With regard to the failure to corroborate the proposed testimony of Williams, Brown argued that defense counsel could have pointed to a number of

facts supporting the veracity of her testimony, including the following: (1) there was no direct evidence that showed either Snow or Brown was the driver; (2) no physical evidence excluded either as the driver; (3) a witness who observed the car just prior to the accident identified Snow as the driver; (4) Snow made the statement to a friend; (5) Williams did not know Brown at the time Snow made the statement; (6) at the time he made the statement, Snow expressed concern about the $100,000 policy he received from Brown's insurance company; (7) Snow could be criminally liable as the driver, which would make his admission a statement against his penal interest; and (8) Brown had permitted others to drive his car in the past, including Snow. App. 34-35.

Had his counsel relied on this corroborating evidence, Brown argued, the trial court would have permitted the testimony as a statement against interest under section 90.804(2)(c), Florida Statutes. And given the paucity of evidence supporting his conviction, Brown claimed that there was a reasonable likelihood that the jury would have found in his favor if Williams had been permitted to testify. App. 38-39.

With regard to the failure to secure an accident reconstructionist prior to trial, Brown provided the post-conviction court with the opinion of an accident reconstructionist, Dr. Charles E. Benedict, Ph.D., P.E. App. 47. Based on all the

available evidence, including photographs from the crime scene and impounded vehicle, the uniform traffic citation, the arrest report and addendum of probable cause, the hospital discharge summaries for Brown and Snow, the long form Florida traffic crash report, the updated Florida traffic report, the Florida Department of Law Enforcement forensic report, the major incident information sheet, and the recorded data from the vehicle, Dr. Benedict opined that Brown was the passenger and Snow was the driver. App. 48.

Critically, Dr. Benedict would have also testified, contrary to the State's unsubstantiated remarks during closing arguments, that the injuries Brown sustained were inconsistent with him being the driver and hitting the steering wheel. In sum, he argued, defense counsel's failure to consult and hire an accident reconstruction expert deprived Brown of valuable testimony that would have led to his acquittal. App. 48.

The state post-conviction court summarily denied all of Brown's claims, except for his argument related to the failure to obtain an accident reconstructionist, which the court set for an evidentiary hearing. App. 11, 47. At the hearing, defense counsel testified that he consulted with an accident reconstructionist but never obtained a final report because he feared it would be unfavorable and subject to discovery by the prosecution. App. 51-52.

Brown's accident reconstructionist, for his part, testified that Brown was the passenger in the vehicle and that his injuries were not attributable to being thrown forward and hitting the steering wheel. App. 48.

After the hearing, the state court denied the final outstanding claim in the motion. App. 61-68. Florida's First District Court of Appeal per curiam affirmed this ruling without issuing a written opinion. App. 59.

Brown filed a timely petition for writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Florida, raising the same claims he brought in the state post-conviction proceedings. App. 11-12.

The district court referred the matter to a magistrate judge, who issued a report and recommendation explaining why Brown should not be entitled to habeas relief. App. 9-57. With regard to the improper remarks of the prosecutor, the magistrate found that "an objection to the prosecutor's remarks was futile, given that (1) the prosecutor was advocating for a conclusion that reasonably could be reached from the evidence, and (2) the prosecutor was responding to defense counsel's remarks that advocated for the jury to reach the conclusion that the same injuries were caused by the passenger-side seat belt." App. 24.

Having found Brown's counsel did not provide deficient performance, the magistrate recommended that the district court deny the claim. App. 25.

The magistrate also recommended that the trial court deny Brown's claim related to counsel's failure to corroborate the testimony of Williams. App. 32. In reaching this conclusion, the magistrate found as follows: "There is ample room for reasonable disagreement about whether Brown established that there was a substantial likelihood that the result of his trial would have been different had trial counsel expanded her proffer as Brown suggests and had Williams's testimony been admitted. But for precisely that reason—because fairminded jurists could disagree on whether the state court's decision was correct—the standard for granting federal habeas relief is not satisfied." App. 40.

Finally, with respect to Brown's claim that his attorney provided ineffective assistance of counsel by failing to retain an accident reconstructionist, the magistrate recommended the court deny the claim, reasoning as follows:

> Trial counsel consulted with an accident reconstruction expert that his office had used in the past. After that expert, Mr. Biller, indicated that he needed additional information concerning the post-ejection locations of the vehicle occupants, Gates informed

> Biller specifically where that information was contained—in the depositions Gates provided him. Gates then emphasized to Biller the witness statement indicating that Brown was not the driver. Even after Biller considered this additional information, he still viewed the location of Brown's injuries as "problematic" for the defense, and indicated that if he prepared a report, it would indicate that Brown likely was the driver. Gates testified that his decision not to call Biller as a witness was a strategic decision. Brown has not presented any evidence to suggest that Gates's decision was anything other than a matter of strategy.
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> . . .
>
> Brown acknowledges the foregoing principles but argues that Gates's decision not to move forward with the expert report was 'based on an incomplete consultation.' Brown argues that Gates 'needed to pinpoint or gather the available information and provide it to Mr. Biller so that a final opinion could be rendered.'
>
> According to Gates's testimony, which the state court credited, he did just that—he informed Biller that the information about the postejection locations of the occupants was located in

> the depositions he provided Biller. In addition, Gates emphasized to Biller the statement of Ms. Britton-Peters which favored Snow as the driver and Brown as the passenger. Biller, however, remained firm that the location of Brown's injuries was problematic, and that based on all of the information he reviewed, his report would indicate that Brown likely was the driver of the vehicle.

App. 54-55 (internal citations omitted). Thus, the magistrate concurred in the conclusion of the state post-conviction court, which found that the conduct of defense counsel was a "strategic decision" that was not subject to second-guessing under *Strickland*. App. 55.

Brown objected to the report and recommendation. App. 5-6. He stressed that the position advocated by the prosecutor during rebuttal closing argument could not be reasonably reached from the evidence. That is because no evidence introduced at trial indicated that the injuries Brown suffered were consistent with being the driver and being struck by the steering wheel. As such, he argued the State's comment was not a fair inference and affirmatively misled the jury. Brown also asserted that, under *United States v. Young*, 470 U.S. 1 (1985), the improper argument of the prosecutor should not be considered an "invited reply" because it

went far beyond what was necessary to "right to the scale."

Brown also took issue with the magistrate's conclusions regarding the failure to corroborate the proposed testimony of Williams. He observed that the state court failed to consider the totality of the circumstances when deciding Brown did not satisfy the prejudice requirement, and cited *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000), where this Court found that it was error not to consider the totality of the circumstances when finding no prejudice pursuant to *Strickland*.

In this regard, he noted that the case against Brown was hardly a slam dunk. Though he acknowledged the jury heard evidence that could support a conviction, Brown maintained that the finding that he failed to establish *Strickland* prejudice completely ignores the lack of direct evidence supporting his conviction, as well as the conflicts that riddled the evidence the State did supply.

If Williams' testimony been admitted, he argued, the defense would have been able to corroborate Alexandra Peters' testimony that just prior to the accident someone other than Brown drove the vehicle. A corroborated admission by Snow to being the driver would have created reasonable doubt, particularly since there was no physical evidence or eyewitness account that suggested Brown

was the driver. Snow's corroborated admission would have gone to the crux of the contested issue at trial, the identity of the driver.

The admission would not have been cumulative or repetitious, and Snow's expression of concern regarding payments he received from Brown's insurance policy, coupled with the potential for his prosecution, would have explained his failure to come forward as the driver of his own accord. In sum, Brown argued that no fairminded jurist could dispute that defense counsel's deficient performance, which resulted in Williams not testifying to Snow's confession, clearly undermined confidence in the outcome.

He further argued that the failure to secure an accident reconstructionist could not be considered "strategic" because it resulted from an incomplete investigation. Brown pointed out that defense counsel testified only that he provided all available information to Mr. Biller. Defense counsel did *not* testify that he received a final opinion from Mr. Biller after the expert learned the position of the vehicle's occupants after the crash. Accordingly, Brown argued, defense counsel's decision to not move forward with an expert could not be deemed reasonable trial strategy, as it was based on an incomplete consultation.

The district court overruled the objections without comment, adopted the report and recommendation in its entirety, and denied Mr. Brown a certificate of appealability. App. 5-6.

Brown sought a certificate of appealability in the United States Court of Appeals for the Eleventh Circuit to review the denial of his habeas petition. App. 1. The Eleventh Circuit entered an order denying his request on July 27, 2022. App. 1-4. It agreed with the district court's finding that the argument of the prosecutor was "not improper," and so it concluded that Brown's attorney did not perform ineffectively by failing to lodge an objection. App. 2. It also concluded that, "in light of the evidence against him," Brown could not show prejudice from the failure to corroborate the proposed testimony of Williams. App. 3. Finally, the Eleventh Circuit concluded that the "preliminary expert consultation revealed that an expert likely would have concluded that Mr. Brown would have been the driver." App. 4. The Eleventh Circuit thusly denied Brown's motion for a certificate of appealability. App. 4.

Adam Dean Brown now petitions this Court for a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition and resolve the uncertainty as to what constitutes a "substantial showing of the denial of a constitutional

right" under 28 U.S.C. § 2253(c)(2). And, because Petitioner raised issues that satisfy that threshold, the Court should remand this case to the Eleventh Circuit for the issuance of a certificate of appealability.

This Court has described the writ of habeas corpus as "the precious safeguard of personal liberty" and held that "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U.S. 19, 26 (1939); *see also Johnson v. Avery*, 393 U.S. 483, 485 (1969). However, with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress erected a series of procedural obstacles to habeas corpus relief. Chief among them is the requirement that a prisoner obtain a "certificate of appealability" as a jurisdictional prerequisite to any appeal from the denial of habeas relief. 28 U.S.C. § 2253(c)(2).

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This provision has never been construed as an insurmountable hurdle; indeed, the Court has held a prisoner need only "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

As the Court explained in *Miller-El v. Cockrell*, "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. . . . 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." *Miller-El*, 537 U.S. at 336.

Notwithstanding this admonition, the federal circuit courts of appeals have remained exceedingly reluctant to grant certificates of appealability. *See generally* Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1614 (2015) (noting that 92 percent of all certificate of appealability rulings result in denials).

This case presents a classic example of an erroneous denial of a certificate of appealability. Take, for example, the Eleventh Circuit's denial of a certificate of appealability on Brown's ineffective assistance of counsel claim related to the failure to secure an accident reconstructionist. It was undisputed that his defense attorney never obtained the final report from the accident reconstructionist. Moreover, the accident reconstructionist retained by post-conviction counsel testified unequivocally that Brown was not the driver and that his injuries could not have been sustained by a steering wheel. There

can be no serious dispute that, given the lack of physical evidence, the unequivocal testimony from an expert negating that Brown was the driver could have changed the outcome. Yet the district court and the Eleventh Circuit denied a certificate of appealability based on a finding that the failure to present an accident reconstructionist at trial was a "strategic decision."

That ruling constitutes an unreasonable application of *Strickland* and its progeny. In *Strickland*, this Court cautioned against blindly accepting counsel's characterization of his conduct as a "strategic decision" when an investigation into the facts is incomplete. The Court reasoned as follows:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be

> directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

In the wake of *Strickland*, the Court has reiterated the importance of conducting a thorough factual investigation on several occasions. *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510, 519, 521-22 (2003). In both of those cases, the Court rejected counsel's attempt to justify their decision to limit the scope of their investigation as a tactical decision, precisely because the investigations were not complete or thorough.

Similarly, in this case, Brown's counsel conducted a "less than incomplete" investigation regarding the facts of the case. *Strickland*, 466 U.S. at 690. His attorney conducted a preliminary consultation with an accident reconstructionist, but the expert told defense counsel he needed to know the location of the occupants after their ejection to render an opinion as to the identity of the driver. App. 51. Yet defense counsel never followed up with the expert to find out what his final opinion would be after advising the expert where that information could be found. The expert never rendered a final opinion because defense counsel did not initially

provide the positioning of the vehicle occupants after their ejection from the vehicle.

As in *Wiggins v. Smith*, defense counsel here tried to explain away his failure to do so as a tactical decision rooted in his belief that a report that was unfavorable would have been subject to discovery by the prosecutor. However, defense counsel could have alleviated any such concerns by simply asking the expert to call him before reducing his opinion to a written report. The expert's unwritten oral work product would not be discoverable under Florida law. *See*, *e.g.*, *State v. Rabin*, 495 So. 2d 257, 261 (Fla. 3d DCA 1986) ("oral statements" made to attorney in anticipation of trial constitute protected work product and are "entitled to special protection").

It bears reiterating that there was only one line of defense available to Brown, *i.e.*, refuting the prosecutor's theory that he was the driver. Anything less than a robust, complete investigation of this defense was patently unreasonable. Furthermore, the *only* evidence presented to *any* of the courts below on what a full accident reconstruction would have revealed was the opinion of the expert retained by post-conviction counsel, Dr. Benedict, who opined that Brown was the passenger and Snow was the driver. App. 64. He also testified that the "injuries Brown obtained are not consistent with Brown being the driver and hitting the steering wheel." *Id.*

Based on these facts, the Eleventh Circuit should have issued certificate of appealability to review whether the state court's deference to the "strategic decision" not to obtain an accident reconstructionist "involved an unreasonable application of clearly established federal law" under *Williams v. Taylor* and *Wiggins v. Smith*.

The Eleventh Circuit also should have issued a certificate of appealability to review whether defense counsel performed deficiently in failing to object to the unsubstantiated argument in rebuttal that Brown's injuries were caused by the steering wheel. The district court rejected that claim because: (1) the prosecutor was advocating for a conclusion that reasonably could be reached from the evidence, and (2) the prosecutor was responding to defense counsel's remarks that advocated for the jury to reach the conclusion that the same injuries were caused by the passenger-side seat belt.

With regard to the former point, the district court's decision was an unreasonable determination of the facts in light of the evidence. There was no testimony or evidence showing that the injuries Brown suffered were consistent with being the driver and being struck by the steering wheel. Yet the prosecutor provided an injury causation opinion on rebuttal that the injuries came from the steering wheel. The State's argument was not a fair inference and misled the jury by suggesting that the prosecutor

was privy to certain facts that were revealed during investigation but not introduced at trial. The comment was improper, and any reasonable defense attorney would have objected to it.

As for the conclusion that the prosecutorial misconduct could be excused under the "invited reply" rule, this Court cautioned in *United States v. Young*, 470 U.S. 1, 11 (1985) that "two improper arguments—two apparent wrongs—do not make for a right result." The Court went on the opine that courts reviewing the propriety of such comments should consider whether the response was necessary to "right the scale." *Id.* at 13.

Here, the remarks of the prosecutor clearly crossed the line. Not only did the prosecutor offer what was essentially an unsubstantiated expert opinion, that opinion was wrong as a matter of fact. This was evidenced by Dr. Benedict's post-hoc analysis that showed that the injuries were not, in fact, caused by the steering wheel. The prosecutor misled the jury, and this issue, at the very least was "debatable." Therefore, a certificate of appealability should have issued regarding whether Brown received ineffective assistance of counsel where his attorney failed to object to this line of argument by the State.

Finally, the Eleventh Circuit should have issued a certificate of appealability to review whether

defense counsel's failure to provide corroborating evidence that would have allowed Williams to testify constituted ineffective assistance of counsel. The district court, echoing the state post-conviction court, ruled that Brown had not established prejudice. But that finding overlooked the lack of inculpatory evidence introduced at trial, as well as the conflicting accounts as to who was the driver.

In *Williams v. Taylor*, this Court found that the Virginia Supreme Court failed to consider the totality of the circumstances when finding no prejudice pursuant to *Strickland*. The same error occurred in this case. This was hardly a slam dunk case for the State. While the state court noted that there was still evidence that a jury could use to convict Brown ("Defendant's statements, that his foot "got stuck" on the gas pedal, that he was sorry and never meant for it to happen, and that, in reference to the accident, he said he wasn't going a 100 miles an hour"), its decision to find inadequate proof of prejudice overlooks the utter lack of physical evidence and conflicting evidence presented at trial. Had Williams' testimony been admitted, it would have dovetailed with Alexandra Peters' testimony that just prior to the accident she observed someone other than Brown as the driver. It should be noted that neither Peters, who had no prior dealings with Brown, nor Williams, who knew Snow but did not know Brown, had any motive to testify in favor of Petitioner. And Snow's admission to Williams that

he was the driver, which was corroborated by his concerns over money he received from Brown's insurance company, clearly could have made a difference in the outcome of this close case.

It is important to emphasize that Brown did not need to conclusively establish that he received ineffective assistance of counsel to receive a certificate of appealability. All he needed was to show was that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484. Brown made that showing. Therefore, this Court should grant this petition and instruct the Eleventh Circuit Court of Appeals to issue a certificate of appealability as to each of the three issues raised herein.

CONCLUSION

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 25th day of October, 2022.

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