No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT NATHANIEL BROWN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the state appellate court in this case misapplied this Court's holding in *Harrington v. Richter*, 562 U.S. 86 (2011).

B. PARTIES INVOLVED

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The Petitioner, ROBERT NATHANIEL BROWN, requests the Court to issue a writ of certiorari to review the opinion of the Florida First District Court of Appeal entered in this case on January 19, 2022 (A-6)[1] (rehearing denied on April 26, 2022 (A-5)).[2]

D. CITATION TO ORDER BELOW

Brown v. State, 337 So. 3d 454 (Fla. 1st DCA 2022).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida First District Court of Appeal.

F. CONSTITUTIONAL PROVISION 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).

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

[2] The Petitioner timely sought review in the Florida Supreme Court, and on September 22, 2022, the Florida Supreme Court denied the petition for review. (A-3).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

In 2014, the Petitioner was charged in Florida state court (Jacksonville, Florida) with one count of DUI[3] manslaughter and two counts of DUI causing serious bodily injury. The charges stemmed from an accident that occurred on July 7, 2013. The case proceeded to a jury trial in 2015. The key issue at trial was causation – and there were differing witness accounts as to which vehicle was traveling in the wrong direction at the time of the accident. As acknowledged in the opinion below:

> some witnesses believed it was the victim's car that was driving in the wrong direction.

(A-7). At the conclusion of the trial, the jury returned a verdict finding the Petitioner guilty as charged for all three counts. The state trial court sentenced the Petitioner to a total sentence of twenty years' imprisonment. On direct appeal, the state appellate court affirmed the convictions and sentence. *See Brown v. State*, 203 So. 3d 158 (Fla. 1st DCA 2016).

Following the direct appeal, the Petitioner timely filed a state postconviction motion pursuant to Florida Rule of Criminal Procedure 3.850. In the state postconviction motion, the Petitioner raised several grounds – one of which is the subject of the instant proceeding: 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. The "Factual History" section of the

[3] "Driving under the influence."

rule 3.850 motion stated the following:

> 6. The state listed two experts in the area of accident reconstruction. The defense in this case placed great emphasis on a defense involving causation. Despite that being the preferred line of defense, defense counsel elected not to call any experts in accident reconstruction. George Rotolou was listed as one of the two experts in this area, yet the defense failed to take his deposition.

(A-30-31). For the claim involving the failure to present an accident reconstruction expert, the Petitioner alleged:

> An attorney cannot be effective who realizes in the pre trial phase what their defense will be at trial yet conducts no independent investigation of its own regarding that theory of defense. Counsel for defense never conferred with it's own expert in accident reconstruction nor did he retain one to review the case or to testify at trial in a manner that would have not only refuted the state's experts, but that would have also supported their defense.

(A-43-44). Ultimately, the Petitioner argued that (1) defense counsel failed to present an accident reconstruction expert who would have opined that the victims' vehicle was driving the wrong way at the time of the accident and (2) had an accident reconstruction expert been presented at trial, the expert would have refuted the testimony of the State's reconstruction experts and would have opined that the victims' vehicle was driving the wrong way at the time of the accident.

The state trial court subsequently ordered an evidentiary hearing on one of the Petitioner's postconviction claims – but *not* the claim involving the failure to present an accident reconstruction expert. On June 24, 2020, the state trial court denied the Petitioner's rule 3.850 motion. (A-9). On appeal, the state appellate court affirmed the order denying the Petitioner's rule 3.850 motion. The state appellate court asserted

that the Petitioner's claim was "pure speculation" – despite acknowledging that witnesses observed the victims' vehicle traveling in the wrong direction:

> The State charged Brown with one count of DUI manslaughter and two counts of DUI causing serious bodily injury. One of the key issues at trial was a dispute over whether it was Brown's or the victim's [sic] vehicle that was travelling the wrong way into oncoming traffic. The State asserted that it was Brown and presented the testimony of two crash reconstruction experts to support this theory. The experts explained their reconstruction methodologies and concluded that Brown's vehicle was driving against traffic, resulting in the crash. On cross-examination, Brown's trial counsel highlighted several inconsistencies in witness accounts of the crash. He pointed out that *some witnesses believed it was the victim's [sic] car that was driving in the wrong direction*. Trial counsel also challenged the experts' analysis of the crash and highlighted the uncertainties inherent in a reconstruction.
>
> Brown alleged that his trial counsel was ineffective for failing to retain and present an independent accident reconstruction expert to refute the State's witness testimony. Brown argued that, had trial counsel retained a defense expert, the expert would have opined that it was the victims' vehicle driving in the wrong direction. On appeal from the trial court's summary denial, Brown argues this claim was facially sufficient and not conclusively refuted by the record and so it should have been heard at an evidentiary hearing. We disagree.
>
> First, Brown's claim is pure speculation. He assumes a hypothetical third expert would have analyzed the crash differently than the first two and that the new analysis would have been favorable.

(A-7).[4] Then, the state appellate court cited this Court's holding in *Harrington v. Richter*, 562 U.S. 86 (2011), and asserted the following:

> Second, regardless of the speculative nature of the claim, "*Strickland* does not enact Newton's third law for the presentation of

[4] Undersigned counsel questions how the state appellate court could conclude that it is "pure speculation" that a defense expert would opine that the accident was not caused by the Petitioner (because the victims' vehicle was driving the wrong way at the time of the accident) – *when the court itself*, in the four corners of its opinion – *acknowledged* that "some witnesses believed it was the victim[s'] car that was driving in the wrong direction."

> evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. 86, 111 (2011). This is exactly what happened here. Even if the claim were facially sufficient, the trial strategy of Brown's trial counsel is both obvious and sufficient. The record conclusively refutes the claim.

(A-7-8). As explained below, the state appellate court in this case misapplied this Court's holding in *Richter*.

H. REASON FOR GRANTING THE WRIT

There is a split of authority regarding the proper application of this Court's holding in *Harrington v. Richter*, 562 U.S. 86 (2011).

In the opinion below, the state appellate court relied on this Court's holding in *Harrington v. Richter*, 562 U.S. 86 (2011), for the proposition that there is no need to present a defense expert who would opine in favor of the criminal defendant's theory of defense if defense counsel cross-examines the expert presented by the prosecution. In reaching this conclusion, the state appellate court misapplied this Court's holding in *Richter*. *See Army & Air Force Exchange v. Sheehan*, 456 U.S. 728, 733 (1982) (granting certiorari because the ruling below "appeared to be in conflict with our precedents"); *Schlaude v. Commissioner*, 372 U.S. 128, 130 (1968) ("We brought the case back once again to consider whether the lower court misapprehended the scope of *American Automobile Association*, 370 U.S. 902 (1961)."). Moreover, as explained below, there is a split of authority regarding the proper application of this Court's holding in *Richter* (i.e., a split between the court below and several federal circuit courts).

Contrary to the holding below, the circumstances of *Richter* are *vastly different* from the circumstances of the Petitioner's case. As best explained by the Fourth Circuit Court of Appeals in *Elmore v. Ozmint*, 661 F.3d 783, 862-863 (4th Cir. 2011):

> Notably, the facts of this case distinguish it from *Harrington v. Richter*, in which the Supreme Court recently rebuffed the theory that, "because Richter's attorney had not consulted forensic blood experts or introduced expert evidence, the [state habeas court] could not reasonably have concluded counsel provided adequate representation." 131 S. Ct. at 788. There, at the trial of Richter and his codefendant for the attempted

murder of one man (Johnson) and the murder of another (Klein), Richter's lawyer introduced the theory that the codefendant had fired on Johnson in self-defense and that Klein had been killed in the crossfire. *See id.* at 781-782. Although "[b]lood evidence [did] not appear to have been part of the prosecution's planned case prior to trial," the introduction of the self-defense theory prompted the prosecution to put on two unnoticed blood experts to refute Richter's account. *Id.* at 782. Richter's lawyer's cross-examination of those two expert witnesses "probed weaknesses in the[ir] testimony," and the lawyer called seven fact witnesses for the defense, including Richter and others who "provided some corroboration for Richter's story." *Id.* In the subsequent habeas proceedings, Richter asserted that his trial counsel was deficient in failing to present blood experts in support of the self-defense theory. *See id.* at 783.

The *Richter* Court concluded that "[i]t was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here." 131 S. Ct. at 788. The Court observed that "it was far from a necessary conclusion that [the importance of the blood evidence] was evident at the time of the trial," and that, "[e]ven if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it." *Id.* at 789. For, the Court explained,

> making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter's case. Even apart from this danger, there was the possibility that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether Johnson was telling the truth, or transform the case into a battle of the experts.
>
> True, it appears that defense counsel's opening statement itself inspired the prosecution to introduce expert forensic evidence. But the prosecution's evidence may well have been weakened by the fact that it was assembled late in the process; and in any event the prosecution's response shows merely that the defense strategy did not work out as well as counsel had hoped, not that counsel was incompetent.

Id. at 790 (citation omitted). Highlighting the proposition that "it is difficult to establish ineffective assistance when counsel's overall

> performance indicates active and capable advocacy," the Court also recognized that "Richter's attorney represented him with vigor and conducted a skillful cross-examination. [D]efense counsel elicited concessions from the State's experts and was able to draw attention to weaknesses in their conclusions." *Id.* at 791.
>
> Here, *in stark contrast to Richter*, forensic evidence *was always and obviously vital to the State's case*, which otherwise relied on James Gilliam's account of Elmore's spontaneous jailhouse confession and Elmore's guilty demeanor and lack of a corroborated alibi for Saturday night. *As such, the defense did not risk "making a central issue out of [the forensic] evidence," because the State was already certain to do so. Cf. Richter*, 131 S. Ct. at 790. Rather, *the circumstances necessitated that the defense work to engender doubt about the forensic evidence.* Elmore's lawyers attempted as much in their cross-examinations of the State's witnesses, but, because the lawyers had twice squandered opportunities to investigate the forensic evidence (prior to the 1982 and 1984 trials), they were unarmed for the battle.

(Emphasis added).

Similarly, in *Showers v. Beard*, 635 F.3d 625, 630-631 (3d Cir. 2011), the Third Circuit Court of Appeals distinguished *Richter* and stated:

> The *Richter* Court held that in a habeas proceeding whether a state court is "within the bounds of a reasonable judicial determination . . . to conclude that defense counsel follow a strategy that did not require the use of experts" depends on the specific circumstances of the case. *Id.* at 789. Based on the facts in *Richter*, the Supreme Court concluded that it was reasonable for the state court to find that Richter's defense counsel was not ineffective for failing to consult forensic blood experts or introduce expert evidence. *Id.* at 789-790. In discussing the circumstances, the Supreme Court stated that *the potentially exculpatory forensic evidence was not apparent at the time of the trial. Id.* at 789 (*Strickland* and [the Antiterrorism and Effective Death Penalty Act] prevent "[r]eliance on the harsh light of hindsight to cast doubt on a trial that took place now more than 15 years ago.") (quotation omitted). Further, the Supreme Court reasoned that even if expert testimony had been available, defense counsel was entitled not to use it because there was a "serious risk" that it could have "destroy[ed]" the defendant's case and distracted the jury from assessing the credibility of the defendant's testimony. *Id.* at 790. The Court concluded that counsel in *Richter* put

> on a thorough defense, vigorously cross-examined the prosecution's expert, and called seven witnesses, including the defendant himself. *Id.* at 782, 791.
>
> The facts in *Richter* were radically different from the facts and circumstances here.

(Emphasis added). *See also State v. Denz*, 306 P.3d 98, 103 (Ariz. Ct. App. 2013) ("*Harrington* is also factually distinguishable. . . . The Supreme Court observed that '[b]lood evidence d[id] not appear to have been part of the prosecution's planned case prior to trial' and that the state ultimately presented expert evidence regarding the blood spatters apparently only in response to defense counsel's opening statement . . . . *Here, in contrast, it was apparent from the outset that the state would rely heavily on expert testimony in Denz's prosecution – effectively eliminating the strategic option of attempting to minimize that evidence.*") (emphasis added).[5]

Just as in *Elmore* and *Showers*, the facts of the Petitioner's case are in "stark

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[5] Undersigned counsel notes that in *Richter*, the court reviewing counsel's conduct had the benefit of counsel's testimony:

> The Court recognizes that there is one distinguishing factor between *Harrington* and the matter at hand that neither party mentions in briefing: in the early stages of the *Harrington* litigation, *the Eastern District of California ordered the deposition of the trial counsel of both petitioners. See Richter v. Hickman*, No. S-01-CV-0643-JKS, 2006 WL 769199, at *1 (E.D. Cal. Mar. 24, 2006). Here, the Court has no such evidence in the record. It is difficult to reconstruct "the circumstances of counsel's challenged conduct" and evaluate "the conduct from counsel's perspective at the time," when the Court has no statement from counsel before it.

Potter v. Litteral, 2018 WL 2341579 at *11 (W.D. Ky. May 23, 2018) (emphasis added). In contrast, in the instant case, *no evidentiary hearing* has ever been held on the Petitioner's claim.

contrast to" and "radically different from" the facts in *Richter*. Unlike *Richter*, it was apparent from the outset of the Petitioner's case that the State would rely heavily on expert testimony (and not just one – but *two* experts). In fact, opinion below acknowledged this point:

> The State asserted that it was Brown [who was traveling the wrong way] and presented the testimony of *two crash reconstruction experts* to support this theory. The experts explained their reconstruction methodologies and *concluded that Brown's vehicle was driving against traffic, resulting in the crash.*

(A-7) (emphasis added). As such, the defense did not risk "making a central issue out of [accident reconstruction analysis]" *because the State was already certain to do so.* Rather, – as in *Elmore* – the circumstances necessitated that the defense "work to engender doubt" about the testimony of the State's reconstruction experts by presenting expert testimony to contradict it.

Merely cross-examining the State's experts was ineffective in this case. In *Leonard v. State*, 930 So. 2d 749 (Fla. 2d DCA 2006), the state appellate court considered the defendant's postconviction claim that defense counsel was ineffective for failing to present an expert at trial who would have opined that the necklace pawned by the defendant could not have been altered as argued by the State – thereby eliminating that necklace from the jury's consideration. The trial court summarily denied the claim, finding that defense counsel was not ineffective because counsel presented other evidence to support the defendant's theory. The appellate court reversed the trial court's order, reasoning:

> In his motion for postconviction relief, Leonard contended, among other things, that his counsel was ineffective for "fail[ing] to obtain an

expert to microscopically examine the necklace pawned by [Leonard]." Leonard asserted that, given the dearth of evidence against him, counsel should have fully investigated every available avenue to attack the limited physical evidence. Leonard alleged that had counsel retained such an expert, the expert would have determined that the necklace Leonard pawned could not have been altered as argued by the State, thus eliminating that piece of evidence from the jury's consideration. Leonard also asserted that had such an expert testified, the outcome of the trial would have been different.

In summarily denying Leonard relief on this issue, the trial court noted that Leonard had presented the testimony of his girlfriend at trial and that she testified that Leonard had owned the pawned necklace for several years before his arrest. The trial court then stated that Leonard's allegations were insufficient to state a claim for postconviction relief because Leonard "fail [ed] to indicate that an expert's opinion would have contradicted the testimony of his own witness."

It is apparent from the trial court's order summarily denying relief that the trial court misconstrued Leonard's claim. Leonard does not deny that he was able to present some evidence to support his theory of defense. However, the testimony of Leonard's girlfriend that he had owned a 14-karat gold rope necklace for several years would likely have been greeted with some skepticism by the jury given the long-term relationship between Leonard and his girlfriend. *Further, the fact that Leonard was able to introduce some evidence in support of his theory of defense does not negate his claim that his trial counsel was ineffective for failing to seek expert testimony that would have conclusively rebutted the State's theory*.

In order to state a facially sufficient claim for postconviction relief, a defendant must allege that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Leonard's motion sufficiently alleges these two elements, and his claims are not conclusively rebutted by any of the attachments to the trial court's order summarily denying relief. *See* Fla. R. Crim. P. 3.850(d) (allowing trial court to summarily deny relief "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief"). Because this claim is facially sufficient and is not rebutted by the record attachments, Leonard is entitled to an evidentiary hearing on this issue.

We caution that our opinion does not require defense counsel to retain experts in every case to examine every piece of physical evidence. However, when the State's evidence against a defendant is as slim as it was in this case, defense counsel has an obligation to consider every possible avenue for discrediting that evidence. It may be that counsel did

> so in this case; however, we have no way to making that determination without an evidentiary hearing. *See Flores v. State*, 662 So. 2d 1350, 1351 (Fla. 2d DCA 1995) (noting that it is difficult without the benefit of an evidentiary hearing to determine whether or why defense counsel would have failed to explore a particular defense). Accordingly, we remand for an evidentiary hearing on this single issue.

Leonard, 930 So. 2d at 751-752 (emphasis added). As in *Leonard*, in the instant case, "the fact that [defense counsel] was able to introduce some evidence in support of [the Petitioner's] theory of defense [by cross-examining the State's two accident reconstruction experts] does not negate [the Petitioner's] claim that [] trial counsel was ineffective for failing to seek expert testimony that would have *conclusively rebutted* the State's theory." *Id.* (emphasis added). As acknowledged in the opinion below, despite defense counsel's cross-examination during the trial, *both State experts nevertheless* "concluded that Brown's vehicle was driving against traffic, resulting in the crash." (A-7). *Imagine how much stronger* the Petitioner's argument would have been at trial if defense counsel – during closing argument – could have argued to the jury that a defense expert (or experts) *completely disagreed* with the State's experts and instead had "concluded that [the victims'] vehicle was driving against traffic, resulting in the crash."

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). *Whittaker* clearly demonstrates that courts in this country have recognized that counsel are ineffective if they fail to present a defense expert who would completely refute the prosecution's theory of a case.

By granting the petition in the instant case, the Court will have the opportunity to (1) clarify the scope of its holding in *Richter* and (2) resolve the split of authority cited above. The issue in this case is important and has the potential to affect all postconviction cases nationwide that concern a claim of ineffective assistance of counsel for failing to present an expert.

Accordingly, the Petitioner requests the Court to grant his petition.

I. CONCLUSION

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

Respectfully Submitted,

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