

No. _____

IN THE
Supreme Court of the United States

TAI A. PHAM,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, AND
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Tai A. Pham, through undersigned counsel, raises the following issue in this petition for a writ of certiorari:

1. Whether the Eleventh Circuit Court of Appeal's analysis of Tai A. Pham's application for a certificate of appealability conflicts with the relevant standards the United States Supreme Court has set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 580 U.S. 100 (2017).

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Tai A. Pham, was the appellant in the United States Court of Appeals for the Eleventh Circuit. Respondents, Secretary, Florida Department of Corrections, and Attorney General, State of Florida, were the appellees in the United States Court of Appeals for the Eleventh Circuit.

LIST OF RELATED CASES

Trial

Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida
State of Florida v. Tai Pham; Case number: 2005-CF-4717

Judgment entered: Found guilty by jury of first-degree murder, attempted first degree murder, kidnapping, and armed burglary of a dwelling on March 7, 2008.

Death recommendation by jury on May 22, 2008. Death sentence imposed by trial court on November 14, 2008. Death sentence vacated by trial court on March 30, 2017. Life-sentence imposed by trial court on September 23, 2019.

Direct Appeal

Supreme Court of Florida

Pham v. State, 70 So. 3d 485 (Fla. 2011); Case Number: SC08-2355

Judgment entered: June 16, 2011; Rehearing denied: September 9, 2011.

Certiorari

Supreme Court of the United States

Pham v. Florida, 565 U.S. 1266 (2012); Case Number: 11-8281

Judgment entered: March 19, 2012; *cert denied*.

Postconviction Motion

Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida
State of Florida v. Tai Pham; Case Number: 2005-CF-4717

Judgment entered: December 20, 2013; Order denying postconviction relief.

Appeal of Denial of Postconviction Motion

Supreme Court of Florida

Pham v. State, 177 So. 3d 955 (Fla. 2015); Case Number: SC14-142, SC14-1248

Judgment entered: November 5, 2015.

Federal Habeas Petition

United States District Court, Middle District of Florida, Orlando Division.

Pham v. Sec'y, Fl. Dep't of Corr., et al.: Case Number: 6:15-cv-2100-RBD-EJK

Judgment signed: February 27, 2023; Judgment entered: February 28, 2023.

Appeal from the Denial of Federal Habeas Petition

United States Court of Appeals, Eleventh Circuit.

Pham v. Sec'y, Fl. Dep't of Corr., et al.: Case Number: 23-11009-H

Judgment entered: September 22, 2023; Motion for Reconsideration denied: November 13, 2023.

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Appendix C	Application for a Certificate of Appealability, filed April 13, 2023.
Appendix D	Motion to Reconsider, Vacate, or Modify Order, filed October 12, 2023.
Appendix E	United States District Court for the Middle District of Florida Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, dated February 27, 2023.
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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Tai A. Pham (“Pham”) respectfully petitions for a writ of certiorari to review the errors in the order of the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”).

OPINIONS BELOW

This is a petition regarding the errors of the Eleventh Circuit in denying a certificate of appealability to appeal the denial of Pham’s petition for a writ of habeas corpus. The unpublished order at issue is reproduced at Appendix A. The United States District Court for the Middle District of Florida’s unpublished Order Denying Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus is reproduced at Appendix E.

JURISDICTION

The order of the Eleventh Circuit was entered on September 22, 2023. Pham timely filed a Motion to Reconsider, Vacate, or Modify Order, which was denied on November 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Procedural History

Pham is currently serving a life sentence for one count of first-degree murder, one count of attempted first-degree murder, one count of armed kidnapping, and one count of armed burglary of a dwelling. Pham was convicted and originally sentenced to death by the state trial court on November 14, 2008. Pham subsequently appealed, and the Florida Supreme Court (“FSC”) affirmed Pham’s convictions and sentences. *Pham v. State*, 70 So. 3d 485, 491 (Fla. 2011). Pham then filed a petition for a writ of certiorari to the United States Supreme Court, which was denied on March 19, 2012. *Pham v. Florida*, 565 U.S. 1266 (2012).

Pham was originally sentenced to death for the count of first-degree murder. However, on March 30, 2017, the Circuit Court for the Eighteenth Judicial Circuit in and for Seminole County issued an order vacating Pham’s death sentence pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016). On September 23, 2019, the trial court resentenced Pham to life in prison.

Capital Collateral Regional Counsel-Middle Region was originally appointed to represent Pham in his post-conviction collateral proceedings on September 26,

2011. Pham timely filed a Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 on February 25, 2013, raising several claims of ineffective assistance of counsel. P1/33-171.¹ The evidentiary hearing on the motion was conducted on October 8, 28, 29, 30, and 31, 2013. On December 20, 2013, the post-conviction trial court entered an Order Denying Defendant's Motion to Vacate Judgment and Sentence of Death. *See Appendix H*; P11/2060-74. Pham appealed, and the FSC upheld the denial of post-conviction relief in an opinion rendered November 5, 2015. *Pham v. State*, 177 So. 3d 955 (Fla. 2015).

Pham filed a Petition Under 28 U.S.C. § 2254 For Writ of Habeas Corpus by a Person in State Custody on December 15, 2015, raising both guilt phase and penalty phase claims. Appendix F. On April 1, 2016, Pham filed a memorandum of law in support of his petition for writ of habeas corpus. Appendix G. On August 1, 2016, the State Attorney's Office filed a response to Pham's petition for writ of habeas corpus. The federal district court issued an order denying Pham's habeas petition on February 27, 2023. Appendix E. Judgment was entered on February 28, 2023. Appendix I.

A notice of appeal from the federal district court's order denying relief was timely filed on March 27, 2023. The federal district court declined to issue a certificate of appealability ("COA") in its order denying relief. Appendix E at 17. On April 13, 2023, Pham filed an application for a COA with the Eleventh Circuit Court of

¹ The citations to the record on appeal in this current petition mirror the citations in the April 13, 2023 application for a certificate of appealability that was filed with the Eleventh Circuit.

Appeals. Appendix C. On September 22, 2023, the Eleventh Circuit issued an Order denying Pham's application for a COA. Appendix A. On October 12, 2023, Pham filed a Motion to Reconsider, Vacate, or Modify Order. Appendix D. The Eleventh Circuit denied the motion to reconsider on November 13, 2023. Appendix B. This timely petition for a writ of certiorari from the Eleventh Circuit's decision follows.

II. Summary of Relevant Facts

Pham was indicted by a grand jury on November 8, 2005, for one count of first-degree murder, one count of attempted first-degree murder, one count of armed kidnapping, and one count of armed burglary of a dwelling. R1/21-23. The deceased victim for the first-degree murder charge was Pham's wife Phi Amy Pham. R1/21-23. The alleged victim for the attempted first-degree murder charge was Phi's boyfriend, Christopher Higgins. R1/21-23. Pham's guilt-phase trial was conducted from March 3, 2008 to March 7, 2008. R4-11. On March 7, 2008, Pham was found guilty by a jury on all counts. R25/1469-70.

At trial, the State called Christopher Higgins to testify in support of the charge of attempted first-degree murder. Higgins had previously been convicted of nine felonies and seven crimes of dishonesty, but Pham's trial counsel failed to impeach Higgins with his prior convictions at trial. Pham consistently raised an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, 366 U.S. 668 (1984) in his state and federal post-conviction proceedings arguing that he was prejudiced by trial counsel's failure to impeach Higgins. The lower state and federal courts denied relief, and the Eleventh Circuit declined to grant a COA on the issue.

At trial, the State also called medical examiner Dr. Predrag Bulic to testify in lieu of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of Phi Pham. Trial counsel did not object to Dr. Bulic testifying in lieu of Dr. Parsons, and consented to an out-of-court agreement with the State that Dr. Bulic could testify about the contents of the files, deposition, and autopsy report of Dr. Parsons. Pham consistently raised an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, 366 U.S. 668 (1984) in his state and federal post-conviction proceedings arguing that he was prejudiced by trial counsel's failure to object to Dr. Bulic testifying in lieu of Dr. Parsons. The lower state and federal courts denied relief, and the Eleventh Circuit declined to grant a COA on the issue.

The additional relevant facts for this petition are incorporated under each argument below.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DENIAL OF A CERTIFICATE OF APPEALABILITY IN PHAM'S CASE CONFLICTS WITH THIS COURT'S STANDARDS IN *MILLER-EL V. COCKRELL*, 537 U.S. 322 (2003) AND *BUCK V. DAVIS*, 580 U.S. 100 (2017).

This Court has promulgated clear standards that the federal appellate courts must follow when determining whether to grant a certificate of appealability to a state prisoner seeking an appeal of a federal district court's denial of the prisoner's petition for a writ of habeas corpus. The Eleventh Circuit disregarded these standards by effectively determining the merits of Pham's requested appellate claims before finding that he was not entitled to a COA. Pham has made a substantial showing that he was denied his Sixth Amendment constitutional right to effective

assistance of trial counsel during his trial, and reasonable jurists could disagree with the federal district court's resolution of the claims raised in Pham's habeas corpus petition. This Court should grant Pham's current petition because the Eleventh Circuit failed to follow this Court's standards in its order denying Pham a certificate of appealability.

A. This Court has clearly defined the standard that appellate courts may use in their COA analysis.

This Court has outlined clear standards for how the federal appellate courts may conduct their COA analysis in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Buck v. Davis*, 580 U.S. 100 (2017). A state prisoner seeking a writ of habeas corpus is not automatically entitled to appeal a federal district court's denial of his petition. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003); 28 U.S.C. § 2253. The state prisoner must first request and obtain a certificate of appealability from a circuit justice or judge in order to proceed with his appeal. *Miller-El*, 537 U.S. at 335. The granting of a COA is a jurisdictional prerequisite to an appeal in this context. *Id.* at 336. As a result, federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners until a COA has been issued. *Id.*

This Court has promulgated clear standards for when the federal appellate courts may issue a COA. Those standards are extremely low. Federal appellate courts may issue a COA where a petitioner has made a "substantial showing of the denial of a constitutional right." *Miller-El*, 537 U.S. at 336 (quoting 28 U.S.C. § 2253). Under the controlling standard, a petitioner must show that reasonable jurists could debate

whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 336 (internal citations omitted).

This Court has emphasized that the COA inquiry “is not coextensive with a merits analysis.” *Buck v. Davis*, 580 U.S. 100, 115 (2017). In *Buck v. Davis*, this Court determined that the Fifth Circuit Court of Appeals had conducted an erroneous COA analysis because that court first decided the ultimate merits of Buck’s case and then subsequently determined that Buck was not entitled to a COA because the court decided that Buck’s appeal would be unsuccessful. This Court explained:

At the COA stage, the only question is whether the applicant has shown that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Id.*, at 327, 123 S.Ct. 1029. This threshold question should be decided without “full consideration of the factual or legal bases adduced in support of the claims.” *Id.*, at 336, 123 S.Ct. 1029. “When a court of appeals sidesteps [the COA] 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.” *Id.*, at 336–337, 123 S.Ct. 1029.

Buck, 580 U.S. at 115 (quoting *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). This Court further stated that a “court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,” and ask “only if the District Court’s decision was debatable.” *Buck*, 580 U.S. at 116 (quoting *Miller-El*, 537 U.S. at 327). A COA does not require a showing that the requested appeal will succeed, and an appellate court should not decline a petitioner’s application for a COA merely because that court believes the petitioner will not demonstrate entitlement to

relief during the actual appeal. *Miller-El*, 537 U.S. at 337.

B. The Eleventh Circuit denied Pham a COA based on an erroneous COA analysis.

Despite a clear prohibition on the practice from this Court, the Eleventh Circuit denied Pham a COA after effectively deciding his potential appellate claims on the merits. Similar to the Fifth Circuit in *Buck v. Davis*, the Eleventh Circuit phrased its COA determination in proper terms – finding that “reasonable jurists would not debate the district court’s denial of Pham’s § 2254 petition”- but then the Eleventh Circuit went on to support that conclusion by essentially deciding Pham’s claims on the merits. 580 U.S. 100 at 115-116; Appendix A at 2. The very next sentence in the Eleventh Circuit’s order reaches the ultimate determination of Pham’s potential appeal, stating; “Specifically, the state courts did not unreasonably apply, nor reach a decision contrary to, *Strickland v. Washington*, 466 U.S. 668 (1984), in rejecting any of his claims. *See* 28 U.S.C. § 2254(d)(1).” Appendix A at 2. The Eleventh Circuit concludes its denial order by stating: “Because the state courts reasonably applied federal law in rejecting Pham’s claims, reasonable jurists would not debate the district court’s denial of his § 2254 petition.” Appendix A at 4; *see Buck*, 580 U.S. at 116.

This petition will separately address the Eleventh Circuit’s analysis of two of the claims for which Pham requested a COA.

- a. The Eleventh Circuit conducted an erroneous COA analysis on Pham’s claim that trial counsel rendered prejudicial ineffective assistance for failing to impeach State’s witness Christopher Higgins with his prior convictions.**

Pham's Sixth Amendment right to effective assistance of counsel was violated when Pham's trial counsel failed to impeach State's witness Christopher Higgins with his convictions for nine felonies and seven crimes of dishonesty. Pham consistently raised this claim of ineffective assistance of counsel under *Strickland v. Washington*, 366 U.S. 668 (1984) throughout his post-conviction state and federal proceedings, and the federal district court's determination of this claim is debatable among jurists of reason. Despite this, the Eleventh Circuit denied Pham a COA on this claim based on an erroneous COA analysis under this Court's precedent.

Higgins' testimony at trial was the most crucial evidence the State used to support the charge of attempted first-degree murder. Higgins testified that on the night of October 22, 2005, Pham attacked and stabbed Higgins with a butcher knife when Higgins entered Phi Amy Pham's ("Phi") apartment after he and Phi had been having dinner at Phi's coworker's house. R8/924-953. Higgins and Phi were dating at the time. R8/922. Phi entered the apartment first, and then Higgins entered a few minutes later after locking up his motorcycle. R8/927. Higgins testified that he swung his motorcycle helmet at Pham in self-defense after Pham had attacked him with a butcher knife, and that he and Pham then struggled over the knife that was in Pham's hand. R8/932-33. Higgins testified that, at one point during the struggle, he was positioned behind Pham and tried to pull Pham's hand that was still holding the butcher knife up to Pham's throat. R8/933-36.

Pham also testified in his defense at trial, and he told a drastically different story of the altercation that he and Higgins had that night. Pham testified that he

arrived at Phi's apartment around 10:00 p.m. R10/1232. Pham's stepdaughter, Lana Pham, let him into the apartment. R10/1232-33. Pham intended to give Phi money from his paycheck and mail for her from their old address. R10/1237. Phi and Higgins arrived at the apartment, and Pham told Higgins to "get the fuck out of here, boy." R10/1242-43. Pham testified that Higgins then came at him with a knife that was on the counter. R10/1244. Pham testified that he grabbed both of Higgins' wrists and tried to flip him. R10/1245. Pham then ran to the kitchen and grabbed the butcher knife while Higgins followed him with the knife he was holding. R10/1245. Pham and Higgins then struggled in the kitchen for some time, and both were injured. R10/1254-55. The altercation ended when the police arrived at the apartment. R10/1255.

Pham always maintained and testified at trial that he was acting in self-defense during the physical altercation between himself and Higgins because Higgins had attacked Pham first. Pham was prejudiced by trial counsel's failure to impeach Higgins because the evidence that Higgins was a nine-time convicted felon likely would have affected the jury's determination of Higgins's credibility. Had the jury been aware of this evidence affecting the credibility of Higgins's testimony, there is a reasonable probability that the jury would have acquitted Pham on the attempted first-degree murder charge or found him guilty of one of the lesser-included offenses.

In his state post-conviction proceedings, Pham argued that trial counsel rendered prejudicial ineffective assistance of counsel under *Strickland* for failing to impeach Higgins at trial with his prior convictions for nine felonies and seven crimes

of dishonesty. After holding an evidentiary hearing on the claim, the post-conviction trial court found that the deficient performance prong of the *Strickland* claim had been met. Appendix H at 6; P11/2065. However, the court found that the prejudice prong had not been met, holding that “[i]n light of the fact that the State’s evidence was substantially consistent, there is no possibility that the introduction of Higgins’ prior convictions for purposes of impeachment would have changed the result of the trial.” Appendix H at 6; P11/2065.

On appeal, the FSC stated:

The postconviction court found that counsel was aware of Higgins' convictions and “could not offer any strategic explanation for failing to ask the witness whether he had been convicted of any felonies or crimes of dishonesty.” Nevertheless, the circuit court found that Pham could not establish prejudice because the evidence of his guilt was overwhelming.

Pham, 177 So. 3d at 962. The FSC found that the post-conviction trial court properly denied relief on this claim. *Id.*

Pham raised the same ineffective assistance of counsel claim as Ground Two of his federal habeas petition and memorandum of law. Appendix F at 56-59; Appendix G at 64-67. Pham further argued that the state courts made an unreasonable determination of the facts in light of the state court evidence under 28 U.S.C. § 2254 (d)(2) when determining that Pham was not entitled to relief on this claim. Appendix G at 64-67. The federal district court found that Pham was not entitled to relief. Appendix E at 7-9. Pham requested a COA on this claim, which the Eleventh Circuit denied.

In its denial order, the Eleventh Circuit effectively decides the ultimate issue

of whether Pham's appeal of this claim would be successful by finding that Pham is unable to meet the prejudice prong of *Strickland*. The Eleventh Circuit finds:

To the extent that Pham's first claim alleged that trial counsel failed to introduce prior convictions to impeach his deceased wife's boyfriend, he could not demonstrate prejudice, in light of the state court's finding concerning the overwhelming evidence of guilt. *See Strickland*, 466 U.S. at 694 ... Accepting that the evidence at trial overwhelmingly established Pham's guilt, he could not demonstrate a reasonable probability that impeaching his wife's boyfriend would have produced an acquittal. *See Strickland*, 466 U.S. at 694.

Appendix A at 2-3. This language reflects an ultimate merits determination on Pham's ineffective assistance of counsel claim that the Eleventh Circuit should not have reached. *Buck*, 580 U.S. at 116.

The only question for the Eleventh Circuit to determine was whether the district court's decision on Pham's claim was debatable among jurists of reason. The district court's determination of this claim was absolutely debatable among jurists of reason, and a COA should issue. In its order denying relief, the district court cited to the FSC's finding that Pham could not prove prejudice "because the evidence of his guilt was overwhelming." Appendix E at 7 (citing *Pham*, 177 So. 3d at 962). The district court also cited the FSC's finding that Lana Pham's testimony at trial corroborated Higgins' account. Appendix E at 8. The district court concluded that "[c]onsidering Lana's testimony, which was consistent with Higgins's testimony, a reasonable probability does not exist that the outcome of the trial would have been different had counsel impeached Higgins with his prior convictions." Appendix E at 9. However, reasonable jurists could disagree with the district court's finding, and could instead conclude that Pham was prejudiced by trial counsel's failure to impeach

Higgins with his previous convictions.

Higgins was a major witness for the prosecution and the most crucial witness for the charge of attempted first-degree murder, as he testified as the alleged victim. The jury never heard that Higgins was convicted of *9 felonies and 7 crimes of dishonesty*. Trial counsel prejudiced Pham by failing to impeach the credibility of this crucial witness. This failure deprived the jury of relevant information that painted Higgins as a dishonest person and a multi-convicted felon. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“[c]rossexamination is the principal means by which the believability of a witness and the truth of his testimony are tested” and a “cross-examiner has traditionally been allowed to impeach, i.e., discredit [a] witness.”). Therefore, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” and the jury would have weighed Higgins’ credibility differently in comparison to Pham’s credibility. *Strickland*, 466 U.S. at 694.

There is sufficient probability to undermine confidence in the outcome of the verdict because Higgins’ testimony as a multi-convicted felon would be found to be less credible compared to Pham’s testimony. Pham asserted in his testimony that he was defending himself against Higgins, so attacking Higgins’ credibility was vital for Pham’s defense. A jury would certainly reconsider Higgins’ credibility when faced with Higgins’ extensive criminal background, especially when determining if Pham acted in self-defense as to the attempted murder charge. Pham and Higgins were still fighting in the kitchen when law enforcement officers arrived, and Pham asserted

that Higgins attacked him first. Reasonable jurists could debate whether Pham was prejudiced under *Strickland* by trial counsel's failure to properly impeach Higgins.

The Eleventh Circuit conducted an erroneous COA analysis and failed to grant Pham a COA even though he meets the requirements under this Court's precedent. This Court should grant the petition.

b. The Eleventh Circuit conducted an erroneous COA analysis on Pham's claim that trial counsel rendered prejudicial ineffective assistance of counsel by allowing Dr. Predrag Bulic to testify in lieu of Dr. Thomas Parsons.

Pham's Sixth Amendment right to effective assistance of counsel was violated when Pham's trial counsel allowed Dr. Predrag Bulic to testify to the contents of the autopsy report authored by Dr. Thomas Parsons, the medical examiner who performed the autopsy of Phi Pham. Pham consistently raised this claim of ineffective assistance of counsel under *Strickland v. Washington*, 366 U.S. 668 (1984) throughout his post-conviction state and federal proceedings, and the federal district court's determination of this claim is debatable among jurists of reason. Despite this, the Eleventh Circuit denied Pham a COA on this claim based on an erroneous COA analysis under this Court's precedent.

Pham's trial counsel had an out-of-court agreement with the prosecution that Dr. Predrag Bulic could testify about the contents of the files, deposition, and autopsy report of Dr. Thomas Parsons, the attending medical examiner who performed the autopsy of Phi Pham. R9/1171-73. The State was having difficulty securing Dr. Parsons' presence for the guilt phase proceedings, and they were unable to arrange video testimony. R9/1171-72. Trial counsel agreed to allow Dr. Bulic to "review Dr.

Parson's file, testify to cause of death, the injuries, [and] type of injuries . . . and nothing beyond that." R9/1171. Trial counsel objected when Dr. Bulic testified that "[w]hat is interesting with this wound is that the right side of the wound--" because Dr. Bulic's testimony went beyond what was agreed upon by the parties. R9/1171. The trial court directed the State to confine Dr. Bulic's testimony to the agreement between the prosecution and defense counsel. R9/1173. Dr. Bulic's testimony continued, and the following exchange took place:

Assistant State Attorney Stone: Doctor, with respect to number two injury, you were about to say something with – Well, is there anything of note that you observed on that particular wound number two?

Dr. Bulic: Yes, there was. This wound has a contusion on one end, more specifically on the right side of the wound there's a contusion which is usually in stab wounds is made by a hand guard or so-called hilt. It's the handle with the little hand guard at the end where the blade begins. When the force is applied –

Defense Attorney Caudill: Objection, Your Honor. May we approach?

The Court: Yes. (Whereupon, a discussion was had out of the hearing of the jury.)

Mr. Caudill: Judge, this is getting into – now we're into issues of amount of force.

Mr. Stone: That's not – he – he's saying enough force was applied to cause a contusion. He's not going to try to quantify the force.

Mr. Caudill: Well, I don't know. I thought we were going to stick to – that was our understanding, we were going to stick to these injuries that Dr. Parsons noted in the autopsy.

Mr. Stone: That's what he – Excuse me. He noted that in the autopsy report.

The Court: Obviously the Court's not privy to your agreement. Assuming that that is the agreement as you represented, if it's described in the

autopsy, he's not going beyond that into his opinions or extrapolations or trying to comment on opinions that Dr. Parsons would have made, then obviously that's not an agreement then.

Mr. Caudill: It starts to get into issues that go to aggravation.

Mr. Stone: It also goes to premeditation.

The Court: I mean, I understand what you're saying, but almost anything regarding the autopsy could, in theory, go to aggravation.

Assistant State Attorney Feliciani: Judge, my intent when I spoke to Mr. Caudill was obviously he may have an opinion as to the resulting pain this injury caused this victim, and we weren't going to go into that because that's inappropriate.

The Court: Those kind of things.

Mr. Caudill: As long as their witness understands that if he starts talking about interesting things and amount of force.

Mr. Stone: Why can't he talk about interesting things?

The Court: He can preface his speech. No one can control his manner of speech as long as the content is confined to your agreement.

R9/1174-76.

Pham raised a claim in his state post-conviction proceedings that trial counsel rendered prejudicial ineffective assistance under *Strickland* when he allowed Dr. Bulic to testify as a "surrogate" for Dr. Parsons during the guilt phase. The legal basis was stated in Pham's Florida Rule of Criminal Procedure 3.851 motion:

Trial counsel rendered deficient performance by agreeing to the admission of hearsay testimony by Dr. Bulic regarding the contents and findings of Dr. Parsons' medical examiner files and his deposition. C. Ehrhardt, Florida Evidence §801.2 defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Furthermore, by agreeing to allow Dr. Bulic to testify as a conduit for

Dr. Parsons, trial counsel waived Mr. Pham's right to confront the witness pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

P1/49-52.

The post-conviction trial court denied a hearing on this claim, finding that this issue "could have been raised on appeal but was not," P6/1018. The post-conviction trial court concluded that:

There was no legal basis upon which trial counsel could have successfully objected to Dr. Bulic's testimony because he was qualified to opine on the victim's cause of death. *See Schoenwetter v. State*, 931 So. 2d 857, 870-71 (Fla. 2006). Trial counsel objected when he felt that Dr. Bulic strayed into areas where the witness was not qualified to offer an opinion. (See ROA Vol. 9, p. 1162-90). However, as to Dr. Bulic's testimony in general, any objection would have been futile, and counsel cannot be deemed to be ineffective for failing to make a futile motion. *Gordon v. State*, 863 So. 2d 1215, 1223 (Fla. 2003).

Appendix H at 4; P11/2063. The FSC affirmed without any analysis, finding only that "[t]he summary denial of a postconviction claim will be upheld if the motion is legally insufficient or its allegations are conclusively refuted by the record" and "the circuit court properly summarily denied these claims." *Pham*, 177 So. 3d at 959.

Pham raised the same ineffective assistance of counsel claim as Ground Three of his federal habeas petition and memorandum of law. Appendix F at 56-59; Appendix G at 64-67. Pham also argued that he was entitled to relief pursuant to 28 U.S.C. § 2254 (d)(2) because the state courts unreasonably determined the facts in light of the state court evidence when finding that Pham was not entitled to relief on this claim. Appendix G at 71. The district court found that Pham was not entitled to

relief on this claim. Appendix E at 9-12. Pham requested a COA on this claim, which the Eleventh Circuit denied.

In its denial order, the Eleventh Circuit effectively decides the ultimate issue of whether Pham's appeal of this claim would be successful by finding that Pham "likewise could not establish ineffective assistance in his two claims alleging that trial and appellate counsel failed to challenge the state's medical examiner's testimony." Appendix A at 3. While the Eleventh Circuit's language in this portion of its denial order does not specifically reference *Strickland*, it still determines the ultimate issue of whether Pham's ineffective assistance of counsel claim would be successful on appeal. The Eleventh Circuit states:

Pham likewise could not establish ineffective assistance in his two claims alleging that trial and appellate counsel failed to challenge the state's medical examiner's testimony, on the ground that the medical examiner did not perform the autopsy on his wife ... Accepting that Florida law permitted the medical examiner's testimony, any challenge to that testimony would have lacked merit. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

Appendix A at 3. The Eleventh Circuit determines the ultimate issue of whether Pham's appeal on this ineffective assistance of counsel claim would be successful by stating that "any challenge to [the medical examiner's] testimony would have lacked merit." *See Deparvine v. State*, 146 So. 3d 1071, 1093 (Fla. 2014) (citing *Owen v. State*, 986 So .2d 534, 543 (Fla. 2008) and *Melendez v. State*, 612 So. 2d 1366, 1369 (Fla. 1992) ("Trial counsel cannot be ineffective for failing to pursue meritless arguments."))

The Eleventh Circuit's language reflects an ultimate merits determination on Pham's ineffective assistance of counsel claim that the court should not have reached.

Buck, 580 U.S. at 116. The only question for the Eleventh Circuit to determine was whether the district court’s decision on this claim was debatable among jurists of reason. The district court’s determination of this claim was absolutely debatable among jurists of reason, and a COA should issue.

In its order denying relief, the district court found that “[t]rial counsel had no basis to object to the testimony of Dr. Bulic. Under the circumstances, trial counsel did not act deficiently, and there has been no showing of prejudice.” Appendix E at 12. The district court further found that Pham was not entitled to relief under 28 U.S.C. § 2254(d)(2). Appendix E at 12. Reasonable jurists could disagree and instead find that Pham was prejudiced by trial counsel’s deficient performance because there was a legal basis to object to the testimony of Dr. Bulic under *Crawford v. Washington*, 541 U.S. 36 (2004), and Pham was denied his Sixth Amendment right to confront witnesses when counsel failed to make that objection.

Trial counsel never should have agreed to allow Dr. Bulic to testify in lieu of Dr. Parsons in the first place, or alternatively, should have moved to exclude Dr. Bulic’s hearsay testimony because it violated *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause of the Sixth Amendment provides that “[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” “Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Crawford*, 541 U.S. at 59.

Dr. Bulic's testimony as to the description of Phi's injuries and her cause and manner of death relied on and were directly taken from the findings and conclusions in Dr. Parson's autopsy report. Dr. Bulic's testimony was inadmissible testimonial hearsay that violated the Confrontation Clause. The district court stated in its order that "autopsy reports are non-testimonial because they are prepared pursuant to a statutory duty, and not solely for use in prosecution." Appendix E at 12 (citing *Banmah v. State*, 87 So. 3d 101, 103 (Fla. 3rd DCA 2012)). However, there is conflicting case law stating that autopsy reports are testimonial evidence subject to the Confrontation Clause, and this issue is certainly debatable among jurists of reason. In *U.S. v. Ignasiak*, the Eleventh Circuit found that autopsy reports admitted into evidence in conjunction with a medical examiner's testimony, where that specific medical examiner did not personally observe or participate in those autopsies, and where no evidence was presented to show that the coroners who performed the autopsies were unavailable and the accused had a prior opportunity to cross-examine them, violated the Confrontation Clause. 667 F.3d 1217, 1231 (11th Cir. 2012)²; *see*

² When reaching the decision in *U.S. v. Ignasiak*, the Eleventh Circuit relied, in part, on the decisions of this Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Melendez-Diaz*, this Court held that an affidavit reporting the results of forensic analysis, which identified evidence that had been seized and connected to the defendant as cocaine, was testimonial. 557 U.S. at 307, 310. This Court subsequently rejected the use of "surrogate testimony" in *Bullcoming*, holding that the Confrontation Clause precludes the prosecution from introducing "a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." 131 S. Ct. at 2710, 2713.

also Rosario v. State, 175 So. 3d 843, 854-56 (Fla. 5th DCA 2015) (finding that autopsy report admitted at defendant's trial for aggravated child abuse and first-degree murder was testimonial hearsay under the Confrontation Clause). Pham acknowledges that the actual autopsy report prepared by Dr. Parsons was not entered into evidence during his guilt-phase trial. However, Dr. Bulic's testimony was based on his review of the autopsy report and extensively described findings in the autopsy report, including the location and description of Phi's injuries and the cause and manner of death listed in the report. Even though the actual report was not admitted, the testimonial hearsay within the report, particularly the cause and manner of death found by Dr. Parsons, was testified to in front of the jury by Dr. Bulic. Pham was certainly prejudiced by the admission of Dr. Bulic's testimony, as Pham was denied his fundamental Sixth Amendment right to confront the witnesses brought against him at trial. Dr. Bulic's testimony regarding the contents of Dr. Parsons' autopsy report, particularly Dr. Parsons' conclusion in the report that the manner of death was "homicide," constituted inadmissible testimonial hearsay.

The Eleventh Circuit conducted an erroneous COA analysis and failed to grant Pham a COA even though he meets the requirements under this Court's precedent. This Court should grant the petition.

CONCLUSION

For all of these reasons, this Court should grant the petition for a writ of certiorari; order further briefing; and/or vacate and remand this case to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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