No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANDREW HOFFMAN,
Petitioner,

v.

RICKY D. DIXON,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the court of appeals improperly denied the Petitioner a certificate of appealability under 28 U.S.C. § 2253(c) on his claim that his counsel were ineffective for failing to advise him regarding available defenses in this case – and whether the district court erred by ruling on this claim without first affording the Petitioner an evidentiary hearing.

B. PARTIES INVOLVED

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

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, ANDREW HOFFMAN, requests the Court to issue a writ of certiorari to review the judgment/order of the Eleventh Circuit Court of Appeals entered in this case on October 10, 2024. (A-3). [1]

D. CITATION TO ORDER BELOW

The order below was not reported.

E. BASIS FOR JURISDICTION

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

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).

G. STATEMENT OF THE CASE

In 2018, the Petitioner was convicted in Florida state court – following a guilty plea – of first-degree murder, kidnapping, and robbery, and the Petitioner was

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

sentenced to life imprisonment. After he was sentenced, the Petitioner timely filed a Florida Rule of Criminal Procedure 3.850 postconviction motion asserting that his defense counsel rendered ineffective assistance of counsel. However, the state postconviction court summarily denied (i.e., without first holding an evidentiary hearing) the Petitioner's rule 3.850 motion. Notably, the state postconviction court's order contains no independent analysis; rather, the state postconviction court merely "adopt[ed the facts, legal analyses, and conclusions of law contained in the State's Response as its own." On appeal, the Florida Fourth District Court of Appeal affirmed – without any reasoning – the denial of the Petitioner's rule 3.850 motion. *See Hoffman v. State*, 350 So. 3d 347 (Fla. 4th DCA 2022).

The Petitioner subsequently filed a petition pursuant to 28 U.S.C. § 2254. On November 8, 2023, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-8). On January 2, 2024, the district court issued an order adopting the report and recommendation. (A-6).

The Petitioner proceeded to appeal the denial of his § 2254 motion. On October 10, 2024, a single circuit judge denied a certificate of appealability on the Petitioner's § 2254 petition. (A-3).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

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

In his § 2254 petition (and in his state postconviction motion), the Petitioner alleged that defense counsel rendered ineffective assistance by failing to advise him regarding available defenses in this case. As a result, the Petitioner was denied his right to make a knowing, intelligent, and voluntary decision regarding his guilty plea (in violation of the Fifth Amendment to the United States Constitution)[2] and was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

The Sixth Amendment right to counsel implicitly includes the right to effective assistance of counsel. *See McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970). The familiar test utilized by courts in analyzing ineffective assistance of counsel claims is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance

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[2] *See Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969) (recognizing that a defendant's decision to plead guilty involves the simultaneous waiver of several constitutional rights and, hence, waiver must be knowingly and voluntarily made by defendant).

> prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The two-part *Strickland* test applies to challenges of guilty pleas based on ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Pursuant to *Hill*, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 57.

In his § 2254 petition (and in his state postconviction motion), the Petitioner explained that after being charged, he told his lawyers that his friend/codefendant (Herbert Savell) is actually the one who killed the victim in this case and that he (i.e., the Petitioner) did *not* kill the victim. The Petitioner explained that Mr. Savell had a girlfriend, but Mr. Savell was cheating on the girlfriend with the victim in this case. The victim subsequently threatened Mr. Savell that if he did not end the relationship with his girlfriend, she would inform the girlfriend of her relationship with Mr. Savell.

On the date of the incident, both the Petitioner and Mr. Savell were living in the victim's apartment – the Petitioner slept downstairs and Mr. Savell and the victim slept upstairs in the victim's bedroom. All three consumed drugs, and at some point Mr. Savell carried the victim's body downstairs and put her in the trunk of her car. Mr. Savell told the Petitioner that the victim had overdosed on drugs. Mr. Savell and the Petitioner then drove around in the victim's car and the two attempted to sell some

of her belongings to get more money for drugs (and at some point, Mr. Savell went inside a Target and bought what the Petitioner later found out was a bat). Subsequently, Mr. Savell stopped the car in a secluded area and moved the victim's body out of the trunk. When the Petitioner approached Mr. Savell, he observed Mr. Savell hitting the victim with the bat.[3] The Petitioner informed his lawyers about all of the details provided in this paragraph.

However, despite knowing this information, the lawyers told the Petitioner that he had no defense to the charges in this case. Moreover, the lawyers told the Petitioner that if he did not enter a guilty plea and accept the State's offer of a life sentence, he would be found guilty at trial and the jury would recommend the death penalty. As a result of defense counsel's advice, the Petitioner entered a guilty plea.

Following the guilty plea, the Petitioner – upon talking to others and conducting his own research – learned that his lawyers misadvised him. Specifically, the Petitioner had a valid defense in this case: Mr. Savell had a motive (the victim threatening to end the relationship between Mr. Savell and his girlfriend), Mr. Savell tied up the victim and put her in the trunk, and Mr. Savell killed the victim with the bat. Although the Petitioner may have been guilty of being an accessory after the fact, he is not guilty of first-degree murder. Moreover, Mr. Savell is not a believable witness – Mr. Savell provided statements to law enforcement officials implicating the

[3] The evidence establishes that the bat was swung by a left-handed person, and the Petitioner is right-handed.

Petitioner and minimizing his own role in an effort to receive a favorable sentence;[4] and had Mr. Savell testified at trial, the jury would have been instructed to consider his testimony with "caution." *See In re Standard Jury Instructions in Criminal Cases*, 122 So. 3d 302 (Fla. 2013) (Appendix containing "Accomplices and Informants" amendment to Florida Standard Jury Instruction (Criminal) 3.9). But the Petitioner's lawyers failed to tell him any of this. Rather than tell the Petitioner that he had a valid defense (i.e., that Mr. Savell is guilty of murder; Mr. Savell had a motive; if Mr. Savell testified, the jury would be instructed to use "caution" considering his testimony; and that the Petitioner was guilty only as an accessory after the fact), the lawyers told the Petitioner that he had *no defense* and that he would receive the death penalty if he proceeded to trial. If the lawyers had properly advised the Petitioner, the Petitioner would *not* have entered a guilty plea and instead would have proceeded to trial.

"A trial attorney's failure to investigate a factual defense or a defense relying on the suppression of evidence, which results in the entry of an ill-advised plea of guilty, has long been held to constitute a facially sufficient attack upon the conviction." *Williams v. State*, 717 So. 2d 1066, 1067 (Fla. 2d DCA 1998). In the instant case, the Petitioner has raised a facially and legally sufficient claim that defense counsel failed to advise him regarding available defenses.

The state postconviction court summarily denied this claim without first conducting an evidentiary hearing. In his § 2254 petition, the Petitioner asserted that

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[4] Mr. Savell was ultimately convicted of second-degree murder and received a sentence of sixty years in prison.

(1) the state postconviction court's summary denial of this claim constituted an unreasonable application of clearly established federal law and was based on an unreasonable determination of facts under § 2254(d)(1) and (2) he is entitled to an evidentiary hearing in the district court. Because the Petitioner's claim was denied on the merits in state court, the district court's review was limited to the state court record and the Petitioner is entitled to evidentiary development only if his claim satisfies § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 180-181 (2011). *See also Henry v. Ryan*, 720 F.3d 1073, 1093 n.15 (9th Cir. 2013) (explaining that *Pinholster* bars evidentiary hearing unless petitioner satisfies § 2254(d)). Accordingly, before taking up the Petitioner's petition for evidentiary development, the district court should have first addressed whether the Petitioner has cleared the § 2254(d) hurdle. *See Brumfield v. Cain*, 576 U.S. 305, 324 (2015). When conducting this analysis, the district court was required to review the "last reasoned state court opinion." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). When the state's appellate court denies the claim summarily, the federal court looks through to the last reasoned decision. *See Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013). In the instant case, the last reasoned decision is that of the state postconviction court.

As explained in the § 2254 petition, the Petitioner asserts that the state postconviction court unreasonably determined that this claim is refuted by the record. The state postconviction court's finding was unreasonable because the state postconviction court merely relied on the documents attached to the State's response

to the Petitioner's state postconviction motion for the proposition that the State's case against the Petitioner was "strong." But as explained in the § 2254 petition, the alleged "strength" of the State's case is *not* established by these documents. As noted in the § 2254 petition, the vast majority of the documents attached to the State's response are hearsay (i.e., (1) a police report/probable cause affidavit; (2) a "case report" from a forensic consultant; (3) a "forensic biology report" from the sheriff's office; and (4) statements made by the codefendant (Mr. Savell). *See Louismeme v. State*, 932 So. 3d 359, 359 n.1 (Fla. 2d DCA 2006) ("Hearsay documentation contained in the trial court record, such as a police report, cannot conclusively refute a defendant's claim."). And as explained in the § 2254 petition, the "factual basis" from the plea agreement and plea colloquy also does not refute the Petitioner's ineffective assistance of counsel claim. Logic dictates that if a defendant is unaware of a legal defense at the time of the plea, the prosecutor's recitation of a "factual basis" during the plea hearing has no bearing on the matter. *See, e.g.*, *Parhm v. State*, 227 So. 3d 172, 174 (Fla. 2d DCA 2017) ("Furthermore, the prosecutor's statement of the factual basis for the plea did not refute Mr. Parhm's claim that his trial counsel failed to advise him of the availability of specific defenses to the racketeering and conspiracy to commit racketeering charges . . . .").

Ultimately, the state postconviction court did not provide the Petitioner with an opportunity to present evidence and testimony regarding the "facts" relied upon by the state postconviction court. Thus, in the absence of an evidentiary hearing, and in light of the lack of sufficient evidence supporting the Respondent's position, the state

postconviction court's conclusion that the Petitioner did not have a viable defense was an unreasonable determination of fact.

The ultimate question is "whether an appellate court would be unreasonable in holding that an evidentiary hearing was not necessary in light of the state court record." *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012). *Cf. Brumfield*, 576 U.S. at 317-320 (holding that state habeas court's refusal to grant petitioner an evidentiary hearing on his intellectual disability claim, as permitted by state law, was based on an unreasonable determination of the facts within the meaning of § 2254(d)(2)). The Petitioner submits that in light of the record before the state postconviction court, the evidence required further factual development. The evidence before the state postconviction court was not sufficient to resolve this claim.

"[W]here a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, 'the fact-finding process itself is deficient. . . . .'" *Hurles v. Ryan*, 752 F.3d 768, 790-791 (9th Cir. 2014) ("If for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts."). The state postconviction court's determination that the facts of this case do not establish a viable defense – without considering *any* testimony – resulted in an "unreasonable determination" of the facts, and therefore does not bar the Petitioner's claim for habeas relief. *See* 28 U.S.C. § 2254(d)(2); *Taylor v. Maddox*, 366 F.3d 992, 1001, 1008 (9th Cir. 2004).

Because the state postconviction court's decision "was based on an unreasonable determination of the facts," the claim is evaluated *de novo*, and the district court could consider evidence properly presented for the first time in federal court. *See Hurles*, 752 F.3d at 778; *Pinholster*, 563 U.S. at 185 (explaining that if a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d) on the record that was before the state court in order to be entitled to an evidentiary hearing).

If a petitioner has not failed to develop the factual basis of a claim in state court, the district court considers whether a hearing is appropriate or required under the criteria set forth in *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Because AEDPA[5] did not change the standards by which a federal court exercises that discretion, *see Schriro v. Landrigan*, 550 U.S. 465, 473 (2007), the Court's decision in *Townsend* governs when a federal district court reviewing a habeas petition *de novo* must grant an evidentiary hearing. *See Hibbler*, 693 F.3d at 1147. Pursuant to this standard, the Petitioner is entitled to an evidentiary hearing to determine whether he had a viable defense in this case and whether counsel were ineffective for failing to investigate this defense and advise the Petitioner regarding the defense. *See Stanley v. Schriro*, 598 F.3d 612, 624 (9th Cir. 2010) ("Where a petitioner has not failed to develop the factual basis of his claim in State court, as required by 28 U.S.C. § 2254(e)(2), an evidentiary hearing is required

[5] Antiterrorism and Effective Death Penalty Act of 1996.

where the petitioner's allegations, if true, would entitle him to relief, and the petitioner has satisfied the requirements of *Townsend*.").

First, the Petitioner has not "failed to develop the factual basis of [the] claim in State court proceedings," as § 2254(e)(2) requires. The Petitioner sought and was denied an evidentiary hearing to establish that his attorneys failed to conduct an adequate investigation into defenses in this case and failed to advise him accordingly. *See Stanley*, 598 F.3d at 623-624 (finding petitioner did not fail to develop the factual basis of the claim when state court found, without holding an evidentiary hearing or making findings regarding the investigation underlying trial counsel's decision, that Petitioner's determination not to waive physician-client privilege was a matter of reasoned trial strategy); *Hurles*, 752 F.3d at 791 ("A petitioner who has previously sought and been denied an evidentiary hearing has not failed to develop the factual basis of his claim.").

Second, under *Townsend*, an evidentiary hearing is justified where, as in this case, "the state factual determination is not fairly supported by the record as a whole" and "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing." *Townsend*, 372 U.S. at 313. An evidentiary hearing is therefore justified in this case based on the same factors set forth above regarding the state postconviction court's unreasonable factual determinations under § 2254(d)(2). *See Hibbler*, 693 F.3d at 1147 (framework for considering whether a district court erred in failing to conduct an evidentiary hearing provides guidance in determining what

sort of procedural deficiencies will render a state court's fact-finding unreasonable). Finally, the Petitioner has alleged facts which, if true, present a colorable claim for relief. *See Landrigan*, 550 U.S. at 474.

Hence, having established: (1) that the Petitioner did not fail to develop the factual basis of the claim in state court proceedings as § 2254(e)(2) requires; (2) that "the state factual determination is not fairly supported by the record as a whole" and "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing," *see Townsend*, 372 U.S. at 313; and (3) that the Petitioner has alleged facts which, if true, would present a colorable claim for relief, and cannot be resolved solely by reference to the state court record, *see Landrigan*, 550 U.S. at 474, the district court should have granted the Petitioner an evidentiary hearing on this claim. *See Winston v. Pearson*, 683 F.2d 489, 501 (4th Cir. 2012) ("Winston was hindered from producing critical evidence to buttress his[] ineffectiveness claim – such as the 66 IQ score – by the state court's unreasonable denial of discovery and an evidentiary hearing."). As explained by the Sixth Circuit Court of Appeals in *Barnes v. Elo*, 231 F.3d 1025, 1029 (6th Cir. 2000), without conducting an evidentiary hearing, it is impossible to determine whether counsel's actions were reasonable:

> Barnes argues that he was denied effective assistance of counsel by his trial attorney's failure to investigate or call a medical witness to establish Barnes's inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes's medical condition, and why he failed to contact Dr. Waring. *Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound trial strategy*, or was constitutionally deficient performance. Given Dr. Waring's ability to

> testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. *Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of Strickland* [*v. Washington,* 446 U.S. 668, 687 (1984)].

(Emphasis added) (citations omitted). *See also United States v. Kauffman*, 109 F.3d 186 (3rd Cir. 1997) (holding that defense counsel's failure to investigate an insanity defense was ineffective assistance of counsel).

Numerous courts have held that a petitioner asserting that counsel failed to advise him or her of a viable defense is entitled to an evidentiary hearing. *See West v. State*, 915 So. 2d 257, 259 (Fla. 5th DCA 2005) ("As in many cases which involve a [*Hill*] analysis, *an evidentiary hearing is needed* in this case to determine whether West would have gone to trial had he been informed of the defense."); *Munroe v. State*, 28 So. 3d 973, 976 (Fla. 2d DCA 2010) ("Accordingly, we reverse and remand for an evidentiary hearing to determine whether Munroe's counsel failed to advise him of a viable defense and, if so, whether Munroe would have gone to trial if he had been informed of the defense."); *Watts v. State*, 136 So. 3d 1225, 1226 (Fla. 1st DCA 2014) (holding that a sufficient claim of ineffective assistance of counsel for advising a defendant to enter a plea without informing him that an insanity defense was available should be addressed in an evidentiary hearing); *Baker v. State*, 879 So. 2d 663, 664 (Fla. 5th DCA 2004) ("The state concedes that had Baker also alleged that but for the misadvice by counsel he would not have entered his plea, and that he seeks to withdraw it, an evidentiary hearing would be required."). Consistent with the cases

cited above, the district court should have granted an evidentiary hearing on the Petitioner's claim that defense counsel were ineffective for failing to advise him regarding available defenses.

But the district court did *not* grant an evidentiary hearing prior to ruling on the Petitioner's § 2254 petition. Instead, the magistrate judge issued a report and recommendation recommending the § 2254 petition be denied (and the district court subsequently adopted the magistrate judge's recommendation). In the report and recommendation, the magistrate judge concluded that the Petitioner has failed to establish prejudice:

> In this case, a reasonable probability does not exist that Defendant would have insisted on going to trial instead of pleading guilty had he been aware of his alleged defense that his co-defendant was wholly responsible for the murder.

(A-19). Respectfully, it was improper for the magistrate judge to reach this conclusion without first conducting an evidentiary hearing. *See Iaea v. Sunn*, 800 F.2d 861, 865-866 (9th Cir. 1986) (remanding "for an evidentiary hearing to determine whether there is a reasonable probability Iaea would not have pled guilty absent counsel's erroneous advice"). Pursuant to *Iaea*, the Petitioner is entitled to an evidentiary hearing on the question of whether he would have pleaded not guilty but for counsel's erroneous advice regarding the accessory defense.

Accordingly, for all of the reasons set forth above, the Petitioner maintains that he was entitled to an evidentiary hearing.

To be entitled to a certificate of appealability, the Petitioner needed to show only

"that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Petitioner has satisfied this requirement because he has shown that reasonable jurists could disagree with the district court's conclusion that the Petitioner was not entitled to an evidentiary hearing. The Petitioner therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Eleventh Circuit for the consideration it deserves. Guidance from the Court is needed as to when a § 2254 petitioner is entitled to an evidentiary hearing.

I. CONCLUSION

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

Respectfully Submitted,

/s/ Michael Ufferman

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