No. 19-6636

United States Court of Appeals
FOR THE FOURTH CIRCUIT

CAMERON PAUL CROCKETT,
Petitioner - Appellant,

v.

HAROLD W. CLARKE,
Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF APPELLANT

Erica Hashimoto, Director
Counsel of Record

Nicolas Sansone
Supervising Attorney

Hassan Ahmad
Meredith Manuel
Student Counsel

Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
ns1218@georgetown.edu

Counsel for Appellant
Cameron Paul Crockett

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

The district court had jurisdiction over Petitioner Cameron Crockett's petition for habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254. Following the district court's March 26, 2019 final order dismissing the petition, JA2184–85, Mr. Crockett filed a timely notice of appeal on April 24, 2019, JA2186–88. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Crockett's release from prison on May 20, 2019 does not render this case moot. *See Leonard v. Hammond*, 804 F.2d 838, 842 (4th Cir. 1986) (describing collateral consequences exception to mootness doctrine).

STATEMENT OF THE ISSUES

I. Whether Mr. Crockett's trial counsel's failure to present expert forensic testimony that would have substantially undermined the Commonwealth of Virginia's circumstantial case prejudiced Mr. Crockett's defense at his criminal trial.

II. Whether, at minimum, the district court abused its discretion in denying Mr. Crockett's request for an opportunity to present that expert forensic testimony—along with evidence of the effect it would have had on the jury—at an evidentiary hearing.

STATEMENT OF THE CASE

Late on the night of December 28, 2008, a 1998 Honda Accord coupe belonging to then-20-year-old Cameron Crockett struck a tree on Wolfsnare Road in Virginia Beach, killing its front-seat passenger—Mr. Crockett's best friend, Jack Korte. Since the accident, Mr. Crockett has consistently maintained that he was not driving, and that the driver was Jacob Palmer, an acquaintance who had been with Mr. Crockett and Mr. Korte that night. Based principally on the facts that Mr. Crockett was found inside the car and no witness who found the car after the wreck saw a third party leaving the scene, however, the Commonwealth of Virginia charged Mr. Crockett with Mr. Korte's death. He was convicted of involuntary manslaughter following a five-day jury trial.[1]

Prior to sentencing, Mr. Crockett retained new counsel. She moved for a new trial based on evidence from an expert engineer who evaluated damage to the driver's seat belt mechanism and determined that the driver on the night of the accident had been belted. Undisputed trial

[1] The Commonwealth initially charged Mr. Crockett with aggravated involuntary manslaughter. In May 2011, a jury acquitted Mr. Crockett of that offense but convicted him of the lesser-included offense of involuntary manslaughter. JA14. That 2011 trial ultimately ended in a mistrial, however, because the jury failed to agree on a sentence. JA15.

evidence established that Mr. Crockett had been discovered, unbelted and unconscious, at least partially in the *back* of the car. The trial court denied the new trial motion on the grounds that the expert evidence could have been procured prior to trial. After Mr. Crockett's conviction became final, he raised a Sixth Amendment claim in state post-conviction proceedings, alleging that trial counsel had been constitutionally ineffective for failing to investigate and present exculpatory expert forensic evidence. The Supreme Court of Virginia agreed that trial counsel's performance had been constitutionally deficient. But it concluded that trial counsel's failure to investigate had not prejudiced Mr. Crockett's defense at trial.

Because the facts and evidence presented at all stages of this case are critical to this Court's review, they are detailed below.

I. Trial Evidence

Over the course of the five-day trial, the Commonwealth's prevailing theory was that Mr. Crockett was the driver because no one else was seen getting out of the car. *See, e.g.*, JA848. The defense, in turn, maintained that the Commonwealth had failed to prove its case beyond a reasonable doubt because Mr. Crockett was found "in the back

seat" without any injuries consistent with having been the driver. JA857. Additionally, the defense presented evidence suggesting Mr. Palmer was the driver and emphasized that the Commonwealth did not rebut that evidence. *See* JA858 (arguing that the Commonwealth "did not call Mr. Palmer" to testify because "for Mr. Palmer to testify under oath truthfully, he would have to admit he was driving"). The parties' arguments to the jury were based on the following trial evidence.

A. The Party

Around 10:00 p.m. on December 28, 2008, Mr. Crockett and his best friend Mr. Korte decided to join Mr. Palmer at a party at their friend's apartment. JA739–40, JA745–46; *see* JA1585–86 (cell phone record reflecting multiple pre-party texts between Mr. Crockett and Mr. Palmer). After arriving, Mr. Crockett and Mr. Korte waited outside the party for 30–45 minutes to chat and quickly drink some beers. JA743, JA745–46. At 10:45 p.m., Mr. Palmer came outside to let the pair in to the party. JA745–47.

About ten minutes after entering the party, the three young men discussed going out to buy rolling papers so they could smoke some marijuana. JA751–55. Mr. Crockett testified that he had spent all his

money on beer and that he offered the use of his car since only Mr. Palmer had marijuana and money to buy papers. JA752–53, JA813; *see* JA638, JA782 (no money found in Mr. Crockett's car or wallet). Mr. Crockett also testified that, because he and Mr. Korte were too drunk to drive, he gave Mr. Palmer the car keys and asked him to drive. JA754–55. The party's host testified that around this time Mr. Palmer approached to ask if the host "needed anything from the store" and that, "just at that time," Mr. Palmer, as well as Mr. Crockett and Mr. Korte, "disappeared" from the party. JA673.

At trial, Mr. Crockett testified that his memories from the period between leaving the party and the accident's immediate aftermath were fragmented due to his inebriation and the head injuries he sustained in the accident.[2] JA755–56. He recalled Mr. Korte or Mr. Palmer asking him for a jacket before their departure. JA762–63. He then recalled standing beside the car's passenger side with Mr. Korte and inviting Mr. Korte, who was taller than him, to sit in front. *Id.* Mr. Crockett sat in

[2] Following the accident, Mr. Crockett lost consciousness due to traumatic brain injury and excessive alcohol consumption, and only recalled his memories from his time in the car in flashbacks as a result of later revisiting the crash site—evidence of a medical condition known as a "fragmentary brownout." JA1626; *see* JA704.

the middle of the backseat, angled "awkwardly" toward the passenger side, talking to Mr. Korte and the driver while texting a friend. JA758–63 (describing cell phone record showing Mr. Crockett sent four text messages between 11:04 p.m. and 11:12 p.m.), JA819.

B. The Accident

Around 11:14 p.m., Mr. Crockett's car lost control, slid sideways off Wolfsnare Road, and struck a tree in the middle of the passenger side, devastating the front passenger's compartment but leaving the driver's side and rear compartment intact. JA409, JA415, JA419; *see* JA1344–69 (photographs); JA1539–40 (crash diagram). Both the driver- and passenger-side airbags "exploded open" and deployed. JA422, JA523, JA610. The lead investigative officer preliminarily concluded that the driver's side seat belt had been in use at the time of the accident. JA1535.

Seven Commonwealth witnesses—a witness who testified that she saw the car crash, five neighbors who left their homes to respond to the wreck after it had occurred, and a responding officer—described the scene of the accident. Every witness, including the only two to reach the crash site prior to Mr. Crockett's regaining consciousness, remembered

Mr. Crockett being mostly in the backseat. None of the witnesses testified that he was wearing a seat belt.

Antoine Smith, the prosecution's self-described "best witness," was walking down Wolfsnare Road when the accident occurred. JA269, JA849–50. Ms. Smith testified that she noticed the car when she saw a stoplight turn green, and she watched the car from the "top of Wolfsnare" until it lost control, spun twice or thrice, and collided with the tree.[3] JA270–71. While Ms. Smith testified that she did not see anyone flee the scene, she also stated it was "dark all around that area," and she neither approached the car nor kept her eyes on it after it crashed. JA275–77.

Pamela Patrick and James Kelly Reid did not witness the crash but were the first to reach the car. JA306, JA309, JA326, JA341. Ms. Patrick initially struggled to find the car because the area was "very dark," but she eventually noticed Ms. Smith standing in the front yard and followed

[3] There is some evidence that Ms. Smith may have been mistaken when she testified at trial. A crash team investigator testified that the car slid straight into the tree rather than spinning. JA589–93; *see* JA1539–40 (police crash diagram). And there was other testimony that it was impossible to see the stoplight in question from where Ms. Smith was standing. JA306, JA350, JA394, JA575–80; *see* JA1488.

her gaze to locate the wreck.[4] JA295, JA309. Upon arrival, both Ms. Patrick and Mr. Reid observed that Mr. Crockett was unconscious. JA330, JA345. They described Mr. Crockett as "curved in the back window," with "roughly about his whole body" in the backseat, and with his arm sticking out the rear windshield. JA322, JA337. Ms. Patrick also related that Mr. Crockett was "the one in the backseat" in a 911 call. JA325–26; *see* Digital Media Appendix (911 call recording). Shortly thereafter, Mr. Crockett "started coming to" and began "thrashing about," putting his arm up on the back deck of the car. JA345, JA348–49. Neither Ms. Patrick nor Mr. Reid testified to seeing a seat belt on or around Mr. Crockett.[5] JA333, JA350.

Three other neighbors arrived at the scene after Mr. Crockett began moving inside the car. JA367, JA374, JA386. One of them initially described Mr. Crockett as the "guy in the backseat" but did not recall that description at trial. JA361–62, JA563–69. Like Ms. Patrick and Mr.

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[4] In an earlier police interview the Commonwealth disclosed to the defense only post-trial, Ms. Patrick clarified that she was not sure who had been in the accident, and had asked a "hysterical" and "really shaken up" Ms. Smith, "[y]ou weren't in that car, were you?" JA1528.

[5] Both Mr. Crockett and a family friend testified that Mr. Crockett had a habit of "[n]ever" wearing his seat belt. JA640, JA826–27.

Reid, none of these three neighbors described seeing a seat belt on Mr. Crockett. JA364, JA394.

Officer Kenneth Buechner arrived several minutes after the neighbors. JA339, J409. Although Mr. Reid had recalled watching Mr. Crockett regain consciousness prior to Officer Buechner's arrival, Officer Buechner testified that upon arrival he observed Mr. Crockett unconscious with his head and shoulders in the backseat and his feet under the steering wheel.[6] JA402–04, JA412–14, JA418–19. This description conflicted with Ms. Patrick's testimony that Mr. Crockett's legs were in the driver's side window, not in the pedal area, and Mr. Reid's testimony that "some [part] of [Mr. Crockett's] feet" were "up on top of the [driver's] seat." JA322, JA337–38; *see* JA1356 (photograph depicting driver's seat angled slightly into backseat area). Like the other witnesses, Officer Buechner testified that "there are . . . dark areas" on Wolfsnare Road where a person could hide "[a]t any given time of the day," and that he did not see a seat belt on Mr. Crockett. JA410–11.

[6] Officer Buechner's testimony was also inconsistent with a Fatal Accident Crash Team member's prior testimony that "[Mr. Crockett] was conscious when the officers got" to the scene of the accident. JA499.

When rescue personnel arrived, they could not reach Mr. Crockett through the rolled-down driver's side window and had to extricate him through the rear windshield. JA416, JA461–62; *see* JA1355. The police forensics team photographed items of "significance," including a jacket on the ground behind the car. JA614–15; *see* JA1349. Mr. Crockett testified that this was the jacket he had given to Mr. Palmer or Mr. Korte before they left. JA763–64. Neither he nor Mr. Korte had been wearing it at the time of the accident. JA465–66, JA524.

Mr. Palmer called Mr. Crockett twice within ten minutes of the accident, and once again a few hours later. JA793–94; *see* JA1577, JA1585–86. Throughout this time, Mr. Palmer was also in regular phone contact with the party's hosts. *See* JA1576–77, JA1585–86. According to a party attendee, Mr. Palmer returned to the party late in the evening following a "long" absence. JA682–83. The attendee testified that after returning, Mr. Palmer acted "really like weird and sketchy," was "breathing kind of heavy," and "ask[ed] about [Mr. Crockett] and [Mr. Korte]." JA684.

C. The Hospital

After being loaded into an ambulance, Mr. Crockett asked one of the paramedics caring for him several times what happened. JA690–92. The paramedic testified these questions were consistent with a head injury. JA692.

At 12:15 a.m., Officer Fitz Wallace met Mr. Crockett—who was covered in glass and strapped onto a medical backboard attached to a gurney—in the hospital's trauma bay. JA492–93, JA1639. Officer Wallace—who was trained to identify crash-related injuries—testified that Mr. Crockett, clad only in his boxers and a neck brace, had no visible injuries consistent with having been struck by an airbag or with having been belted during the collision. JA493, JA504. A second paramedic and the emergency room doctor who treated Mr. Crockett concurred. JA466, JA702; *see also* JA653 (expert crash investigator testifying that airbags cause contusions or scrapes when deployed).

Officer Wallace then questioned Mr. Crockett for two hours, and Mr. Crockett's responses indicated that he was "unsure about whether

he had even been in an accident."[7] JA495–98, JA510; *see* JA1515–18. Mr. Crockett testified he "had no idea what had transpired that led to [him] being in the hospital," and that he was "[v]ery confused." JA774. Officer Wallace asked Mr. Crockett whether he remembered a "traffic accident," and, as he had in the ambulance, Mr. Crockett asked several times what had happened.[8] JA1524–25. Eventually, Mr. Crockett asked, "I mean did I hit someone or I mean?" JA1525; *see also* Digital Media Appendix (partial recording of interrogation played at trial). At trial, Mr. Crockett testified that he had been "thr[owing] a guess out" to "find out what had transpired" when Officer Wallace "wouldn't tell" him anything but had implied there had been a "car incident." JA775; *see* JA769–80. Officer Wallace intentionally never directly asked Mr. Crockett if he was

[7] In 2014, as part of a civil lawsuit, Mr. Crockett's mother issued a subpoena *duces tecum* for the entire police investigative file and received several items of evidence that the prosecution had not previously disclosed to the defense. The file showed that for an hour prior to the interrogation, Mr. Crockett was handcuffed to the medical backboard to "prevent him from getting up," and was under the guard of three officers. JA1490; *see* JA1492. When Officer Wallace uncuffed him, Mr. Crockett "didn't even know [he had been] cuffed." JA1639.

[8] Officer Wallace did not provide a *Miranda* warning prior to this exchange. *See* JA481–486.

the driver. JA510, JA1636. Midway through the interrogation, Officer Wallace arrested Mr. Crockett. JA776.

D. The Investigation

While Officer Wallace was questioning Mr. Crockett, other officers investigated the crash site without conducting forensic testing at the scene. JA606, JA620–21. Officers later impounded the car after rescue personnel had removed its roof. JA471.

A few weeks later, a Crockett family friend went to the police impound lot to pick up Mr. Crockett's personal effects. JA631. The friend testified that the roofless car was "outside in the rain," and she noticed blood splatter on the driver's side airbag. JA633, JA641; *see also* JA1740 (defense investigator also observing "faint stains" on the airbag). An officer testified that the airbag was left protruding from the steering column while the car was exposed to the elements in the impound lot for 46 days. JA619–20. The officer testified that the airbag was later removed, but he was not instructed to send it anywhere for forensic testing.[9] JA623–24. Expert fatal crash investigator Robert F. Bagnell

[9] The Commonwealth told the defense that the airbag was "not productively testable." JA1606, JA1652. While Mr. Crockett has

later testified at trial that airbags are "excellent material" for recovering DNA from the driver in a crash and should be removed "at the scene or very closely" after impounding. JA651–52.

II. Sentencing, New Trial Motion, and Direct Appeal

In March 2012, the jury convicted Mr. Crockett of involuntary manslaughter and recommended a five-year sentence. JA988–89. After the verdict but before sentencing, Mr. Crockett retained a new attorney. *See* JA991–92.

At a pre-sentencing hearing, sentencing counsel sought a court order to test the seat belt mechanism to determine whether it had been in use at the time of the accident. JA1011–12. According to sentencing counsel, "knowing whether or not that seatbelt mechanism was in use" would "get to the bottom of the truth" of the case because "Mr. Crockett was not belted at the time of the accident" and "was found in the backseat of the vehicle." JA1012. After receiving the court's authorization, sentencing counsel retained the services of Dr. David A. Pape, Ph.D., to

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repeatedly asked the prosecution to identify what forensic procedure was used to arrive at this conclusion, the Commonwealth has never responded. *See, e.g.*, JA1573–74, JA1637.

analyze the seat belt mechanism. JA1017–20, JA1607. Dr. Pape's report stated that "cupping" seen in the driver's side seat belt webbing indicated that the driver had worn the belt—which was fully functional—at the time of the collision, and that "[i]f the seatbelt was not in use during the collision one would not expect this cupping."[10] JA1607–09; *see* JA1623.

At Mr. Crockett's sentencing hearing, sentencing counsel cited this new expert evidence as grounds for a new trial.[11] JA1099–1101. As sentencing counsel explained to the court, Dr. Pape, who was present in the courtroom, would

> be able to state very emphatically and clearly that th[e] cupping on the lap belt is consistent to a reasonable degree of engineering certainty that it was a significant collision that resulted in that cupping and that there is absolutely no other way that that cupping would have occurred on that lap belt

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[10] An affidavit sentencing counsel submitted during state habeas proceedings states: "Dr. Pape verbally stated to me that the 'cupping' . . . could *only* have occurred if the seat belt were worn during a high impact collision of such a nature as to result in a *total loss* of the vehicle." JA1623 (emphases added).

[11] Sentencing counsel also presented evidence of "a third party confession" as additional support for the new trial motion. JA1131. A student who attended high school with Mr. Crockett and Mr. Palmer testified that she had overheard Mr. Palmer confess to his then-girlfriend that he was the true driver, thought he had "killed . . . both" Mr. Crockett and Mr. Korte in the crash, "got free," and "got away with his . . . crime." JA1167, JA1173. The court "determined that her testimony was vague and was unlikely to produce a different result in another trial." JA1246.

> but for someone being belted in that seat belt at the time of the collision. . . . It is that significant and that clear.

JA1101; *see* JA1099.[12]

The court denied Mr. Crockett's motion for a new trial without allowing Dr. Pape to testify because the expert testing could have been done prior to trial if trial counsel had been reasonably diligent. JA1152, 1245; *see also* JA1189–90 ("essentially seeking a writ of habeas corpus"). The court then sentenced Mr. Crockett to a term of five years for the involuntary manslaughter conviction. JA1240–41.

Mr. Crockett appealed the conviction and the denial of his new trial motion to the Virginia Court of Appeals. JA1242. That court affirmed, concluding in relevant part that Dr. Pape's report only "suggest[ed]" that the driver's seat belt was in use at the time of the accident and holding that "[t]he trial judge did not abuse his discretion in finding reasonable diligence would have produced the [seat belt] evidence and in denying a new trial based upon this after-discovered evidence." JA1245.

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[12] In a 2015 email to Mr. Crockett's uncle, Dr. Pape confirmed his report was accurate to a reasonable degree of engineering certainty. JA1343, JA1616.

After Mr. Crockett unsuccessfully petitioned the Court of Appeals for rehearing en banc, JA1249, he then unsuccessfully sought review in the Supreme Court of Virginia and the United States Supreme Court, JA1250–51. With the denial of Supreme Court review on October 15, 2015, Mr. Crockett's conviction became final. JA1251.

III. State Post-Conviction Relief

In April 2016, Mr. Crockett petitioned the state trial court for a writ of habeas corpus. JA1253–1309. In this petition, Mr. Crockett claimed among other things that his trial counsel had rendered ineffective assistance by failing to investigate and present expert evidence showing the driver's side seat belt mechanism had been in use at the time of the accident. JA1292–1300. Mr. Crockett also sought an evidentiary hearing in connection with his petition. JA1758–59.

In support of his ineffective assistance claim, Mr. Crockett presented sworn affidavits from two of the jurors from his trial, conveying that Dr. Pape's report would have changed their vote. The first juror stated that she harbored doubt at trial and would have voted differently had she been presented with evidence "that the seatbelt was in use during the collision":

> I can say with confidence that this evidence would have definitely changed the verdict. . . . [T]his evidence would have changed the minds of the majority of the jurors. . . . [W]e were unanimous on at least one thing: that [Mr. Crockett] was *not* belted. Had we known the driver *was*, everyone would have been forced to conclude that *[Mr. Crockett] was not the driver*.

JA1674 (emphasis in original). The second juror similarly stated, "I would have voted differently if we, the jury, had the [Pape Report] available to us." JA1675; *see also* JA1604–05 (second juror stating in an interview that "[t]hey never proved he drove the car," and that if she had known of the Pape Report she "would have voted not guilty, it would have been a hung jury"). The Commonwealth did not object to the state court's consideration of these affidavits.

Mr. Crockett also presented the affidavit of Ron Kirk, a senior engineering consultant. Mr. Kirk's affidavit stated that it was "self-evident" that "Mr. Crockett could not have been found where he was by the first witness to respond to the accident if he had been the belted driver." JA1630. Expert fatal crash investigator Mr. Bagnell corroborated that conclusion in an affidavit, stating that since "Mr. Crockett was found initially unconscious in the back seat," unbelted, by the first witnesses, "it immediately occurred to" him that Mr. Crockett's "positioning [following] a sideways impact, was highly inconsistent with

his having allegedly been the belted driver—which was what the police had contended all along." JA1653.

The state trial court "denied and dismissed" Mr. Crockett's petition for a writ of habeas corpus without a hearing. JA1851. The court concluded that, under *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel had not been deficient for failing to test the seat belt mechanism and the lack of testing did not prejudice Mr. Crockett's defense, because "standing alone," and in the face of potential rebuttal by the Commonwealth, Dr. Pape's report was "meaningless." JA1842–44.

Mr. Crockett then appealed to the Supreme Court of Virginia, which affirmed, concluding that trial counsel had been deficient but that this deficiency did not prejudice Mr. Crockett. JA1852–59. The court based its deficiency holding in relevant part on its factual finding that, "for unknown reasons, counsel simply failed to follow-up" with an expert who had offered to examine the seat belt for free prior to trial.[13] JA1858; *see* JA1666–68. But the court held that, "based on" the Pape Report, "it

[13] The Virginia Supreme Court also found that Mr. Crockett's trial counsel was deficient for failing to investigate and present a motion to suppress Mr. Crockett's hospital statements on both *Miranda* and voluntariness grounds. JA1854–57.

cannot be said there is a reasonable probability that the result of the proceeding would have been different" because Dr. Pape "only 'suggest[ed]'" that the driver's seat belt was in use at the time of the crash. JA1858–59.

IV. Federal Habeas Corpus Proceedings

In February 2018, Mr. Crockett filed a *pro se* petition for habeas corpus in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 2254, alleging among other things that the Virginia Supreme Court's decision had unreasonably rejected his ineffective assistance claim based on a misconstruction of the Pape Report. JA1866–67, JA1880, JA1948–53. He also sought an evidentiary hearing to present Dr. Pape's oral testimony about the seat belt mechanism to aid the court's determination of *Strickland* prejudice. JA1953–54.

The district court dismissed the petition, concluding that "there is not a reasonable probability that the jury would have had a reasonable doubt as to [Mr.] Crockett's guilt if the seatbelt evidence was presented" because Dr. Pape did not "conclusively find that [Mr.] Crockett was not the driver of the vehicle." JA2163–64. The district court explained that

"Dr. Pape did not conclusively find that the driver" was belted, and "he made no findings as to whether" Mr. Crockett was belted—nor did any other evidence "conclusively show[] that [Mr. Crockett] was not wearing a seatbelt"—so the report likely would not have resulted in a different outcome when considered against the "overwhelming" evidence of Mr. Crockett's guilt. JA2164. And the district court concluded that, in any event, the jury would not "be required to believe" Dr. Pape. JA2164. As for the juror affidavits, the district court "doubted" they were "admissible for purposes of the *Strickland* inquiry" but ultimately concluded that, regardless, they "d[id] not establish" prejudice because it was unclear what evidence the juror-affiants had seen before saying Dr. Pape's report would have changed their votes. JA2165–68. Ultimately, because Dr. Pape's report did not contradict "all of the evidence" or "repudiate" any specific piece of evidence, the district court rejected Mr. Crockett's ineffective assistance of counsel claim. JA2165. And because that claim "lack[ed] merit," the district court also concluded that an evidentiary hearing was "not warranted." JA2182.

On April 24, 2019, Mr. Crockett filed a notice of appeal. JA2186–88. This Court appointed counsel and granted a certificate of

appealability on the issue of "whether [Mr.] Crockett established that he was prejudiced by counsel's failure to investigate and present evidence about the driver's seatbelt mechanism and, if not, whether he was entitled to an evidentiary hearing on the issue."

SUMMARY OF THE ARGUMENT

Contrary to the district court's conclusion, expert forensic evidence that the driver was belted at the time of the accident would have been reasonably likely to establish reasonable doubt in the mind of at least one juror. Despite the district court's characterization of the evidence against Mr. Crockett as "overwhelming," the prosecution's case relied almost entirely on the fact that no witness happened to see a third-party driver fleeing the accident scene, and no evidence affirmatively refuted Mr. Crockett's defense that Mr. Palmer had been the driver.

Evidence that the driver had been belted would have meaningfully fortified that defense. Critically, it is "self-evident" that Mr. Crockett would not have been found, unbelted, where he undisputedly was—all or partially in the car's backseat—had he been restrained by a seat belt during the accident. JA1630. Moreover, Mr. Crockett undisputedly exhibited none of the injuries one would have expected to see had he been belted. Finally, when asked, not a single witness testified to having seen a seat belt on Mr. Crockett. In concert with this uncontested record evidence that Mr. Crockett was *not* belted, the fact that the seat belt had been worn in the accident would have controverted the primary element

of the crime the Commonwealth had to prove beyond a reasonable doubt—that Mr. Crockett was the driver. This Court should reverse the district court's judgment, vacate its opinion, and remand with instructions to grant habeas corpus relief.

Although this Court need not reach the issue, 28 U.S.C. § 2254(d) does not provide an independent basis for affirmance because the Virginia Supreme Court's decision was unreasonable on two counts. The state court's decision first failed to analyze prejudice through a totality-of-the-evidence analysis—as *Strickland* mandates—by offering *no* analysis of how Dr. Pape's testimony would have influenced a jury that had before it undisputed evidence that Mr. Crockett had not been wearing a seat belt at the time of the accident. Second, the state court's decision unreasonably minimized the certainty of Dr. Pape's expert conclusion that the driver had been belted by focusing on one word in Dr. Pape's report—"suggests"—and disregarding other language in the report and record evidence that made clear Dr. Pape concluded the driver had been belted during the collision.

Alternatively, and at minimum, the district court abused its discretion in relying on doubt about the meaning of Dr. Pape's report and

the influence his testimony would have had on the jurors to reject Mr. Crockett's ineffective assistance claim while at the same time denying Mr. Crockett the opportunity to resolve that doubt in an evidentiary hearing. Accordingly, even if this Court is not prepared to order habeas relief on the record before it, this Court should reverse and remand with instructions to conduct an evidentiary hearing at which Dr. Pape and others may testify.

ARGUMENT

The jury convicted Mr. Crockett based on largely circumstantial evidence that was fully consistent with the defense's theory that Mr. Palmer was the driver—not Mr. Crockett. Had Mr. Crockett's trial counsel presented evidence that the driver was belted and so was unlikely to have landed where Mr. Crockett did—unconscious in the backseat of the car, with no corresponding seat belt injuries—it is reasonably likely that at least one juror would have found reasonable doubt as to whether Mr. Crockett was the driver. And although the district court did not appear to rely on 28 U.S.C. § 2254(d) in dismissing Mr. Crockett's petition, that provision does not preclude habeas relief here because the Virginia Supreme Court's decision unreasonably misapplied *Strickland* and misinterpreted Dr. Pape's expert report. As a result, this Court should reverse the district court's denial of habeas relief. Alternatively, and at minimum, this Court should remand for an evidentiary hearing to settle any remaining doubt regarding the substance of Dr. Pape's potential trial testimony and its likely effect on the jurors.

I. Expert testimony of a belted driver, along with ample trial evidence that Mr. Crockett was found unbelted in the backseat, would have made it reasonably likely that at least one juror would have doubted Mr. Crockett was the driver.

Trial counsel's failure to investigate and present expert evidence demonstrating that the driver was belted violated Mr. Crockett's right to effective assistance of counsel because "there is a reasonable probability that," but for counsel's deficiency, "the result of the [trial] would have been different." *Strickland*, 466 U.S. at 694. Because Virginia requires juror unanimity for a conviction, *see* Va. Const. art. I, § 8, Mr. Crockett need only establish "a reasonable probability that at least one juror would have" had a reasonable doubt as to his guilt if trial counsel had presented such evidence. *Hope v. Cartledge*, 857 F.3d 518, 524 (4th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)). Mr. Crockett clears that hurdle.

An expert's conclusion that the driver was belted would have contravened the central fact the prosecution had the burden to prove—that Mr. Crockett was driving the night of the accident—and supplied the jury a throughline to reasonable doubt. Undisputed trial testimony placed Mr. Crockett unbelted and unconscious in the car's backseat, with his arm sticking out of the rear windshield. Expert testimony

establishing a belted driver would have been the missing link the jury needed to reject the inference that Mr. Crockett could have been thrown from the driver's seat into the back during the accident. Absent that potential inference, the jury would have been left to draw the obvious conclusion from, among other things, the unbelted Mr. Crockett's position in the car and lack of seat belt injuries: that he was not the driver and that Mr. Palmer was.

A. Contrary to the district court's suggestion that there was overwhelming evidence against Mr. Crockett, the Commonwealth's circumstantial case against him was replete with doubt.

The district court repeatedly stated that "the evidence of [Mr.] Crockett's guilt was overwhelming." *See, e.g.*, JA2164. It was not. The Commonwealth's case was thin and riddled with deficiencies: it presented no direct evidence, physical or testimonial, to carry its burden of proving beyond a reasonable doubt that Mr. Crockett was driving the car involved in the accident. No witness saw him drive or prepare to drive, and the prosecution conducted no forensic testing to prove who was behind the wheel although the evidence—an airbag with bloodstains—was readily available. JA606, JA619–21. Instead, the Commonwealth rested its case on the circumstantial inference that since Mr. Crockett

and the deceased passenger, Mr. Korte, were the only ones found in the crashed car, Mr. Crockett must have been the driver. But the evidence at trial demonstrated that this inference was hardly beyond doubt.

The prosecution's porous case was grounded in three main points. First, the prosecution relied on an absence of evidence—seven witnesses arriving at various points after the accident who did not see a third party fleeing a dark scene. JA851 (prosecution emphasizing in closing that "[Mr. Crockett] was driving [the] car because nobody [else] got out of it"). Of these witnesses, the Commonwealth's "best" appeared quite shaken and was not fully attentive to the scene. JA275–77, JA849–50, JA1528. Second, the Commonwealth mischaracterized one of many confused questions that a strapped-down, concussed, and inebriated Mr. Crockett asked during his interrogation at the hospital—if he had "hit someone"—as a confession to having caused an accident he could not even remember. JA495–98, JA510, JA774–75, JA1524–25. Finally, the Commonwealth hammered home five separate times in its closing argument that a single witness had described Mr. Crockett's feet as being "under the steering wheel." JA402, JA848. But the first two witnesses to arrive on the scene explicitly contradicted that point, placing Mr. Crockett's feet in the

window or on the top of the driver's seat. JA904–05. Moreover, a Commonwealth witness explained that Mr. Crockett had been awake and "thrashing about" prior to the officer's arrival. JA345, JA348–49, JA403.

Meanwhile, the jury heard considerable evidence casting doubt on the prosecution's theory that Mr. Crockett had been driving. Most notably, every witness to arrive at the scene testified that Mr. Crockett was located fully or partially in the car's backseat. In addition, Mr. Crockett had sustained no injuries consistent with having hit the steering wheel or the driver's side airbag that had deployed and exploded on impact. JA504–05, JA702. And, crucially, the jury heard no forensic evidence because the Commonwealth failed to take basic investigatory steps. For example, there was blood spatter on the airbag and, contrary to best practices for preserving biological evidence, the Commonwealth left the airbag exposed to the elements for a month and a half and conducted no confirmatory forensics due to its unexplained view that it was no longer "productively testable." JA619–20, JA633, JA641, JA651–52, JA1672.

Uncontested evidence inculpating a third party—Mr. Palmer—cast further doubt on the prosecution's circumstantial case, and yet the

Commonwealth never called him to the stand in rebuttal.[14] Mr. Palmer had been with Mr. Crockett and Mr. Korte prior to the accident, disappeared from the party the same time they did after asking the host if he "needed anything from the store," and called Mr. Crockett several times in the moments immediately following the crash. JA673. Since the driver's side of the car was intact, it would have been possible for Mr. Palmer to climb out of the rolled-down driver's side window after the crash, just as the paramedics were able to climb *into* the car through that same window later on. JA415, JA416, JA419, JA461–62; *see* JA1355. And the unexplained fact that officers found the jacket Mr. Crockett remembered giving to Mr. Palmer or Mr. Korte on the ground, discarded, behind the vehicle after the accident suggests that Mr. Palmer did exactly that. JA614, JA762–64, JA886. Further supporting the defense narrative, undisputed trial testimony established that Mr. Palmer came back to the party late at night, looking shaken, out of breath, and asking others if they had heard from Mr. Crockett and Mr. Korte. JA683–84.

[14] After a complaint about the prosecutors in this case, the Virginia State Bar investigated and stated that it was "troubled" that "many factors" implicated Mr. Palmer, "yet the prosecution did not seem interested in pursuing them" or "ascertaining whether Jacob Palmer was the driver of the car on the fatal night of the accident." JA2045.

Far from being "overwhelming," the Commonwealth's circumstantial case against Mr. Crockett was fully consistent with the theory that Mr. Palmer was the driver.

B. Expert testimony that the driver was wearing a seat belt would have meaningfully fortified the defense theory of a third-party driver and undermined the prosecution's inference that Mr. Crockett's torso was thrown into the backseat during the collision.

Overwhelming trial evidence shows that Mr. Crockett was discovered *unbelted* with at least his upper body in the car's backseat. *See, e.g.*, JA333, JA350, JA493, JA504, JA702. Unrefuted expert evidence in the post-conviction record confirms that the driver was *belted* in the front seat. JA1607–08. Had counsel presented these facts, side by side, to the jury, it is reasonably likely that the outcome of the trial would have been different. *See Tice v. Johnson*, 647 F.3d 87, 110 (4th Cir. 2011) (cautioning against "view[ing] the facts in the light most favorable to the prosecution" when assessing *Strickland* prejudice); *see also Hardy v. Chappell*, 849 F.3d 803, 823 (9th Cir. 2017) ("*Strickland* does not permit the court to reimagine the entire trial. We must leave undisturbed the prosecution's case.").

Uncontroverted trial evidence establishes that Mr. Crockett was not belted when found in the backseat at the accident site. A police expert trained to identify crash-related injuries, a paramedic, and the emergency room doctor all assessed Mr. Crockett and noted that he had no injuries consistent with "having been belted at the time of the accident." JA466, JA504; *see also* JA702. No eyewitness testified that they saw Mr. Crockett belted, and three affirmatively said he had been unbelted. JA333, JA350, JA364, JA394, JA1545, JA1554, JA1565. The defense also showed that Mr. Crockett had a habit of "never" wearing his seat belt. JA640, JA826–27. Absent evidence that the driver was belted, all of these undisputed points reinforced the prosecution's claim that Mr. Crockett was thrown, unbelted, into the backseat from the driver's seat—turning exculpatory evidence *inculpatory*.

Testimony from a sworn expert like Dr. Pape would have provided the missing link by establishing that the driver *was* belted at the time of the collision. In his report, Dr. Pape first ascertained that cupping seen in the seat belt webbing would have been seen *only* if the driver had been restrained by the belt during a collision so severe that it totaled the car—meaning no other prior accident could have caused the cupping. JA1608–

09, JA1623. Second, Dr. Pape determined that the seat belt mechanism was fully functional. JA1608–09. Testimony to this effect would have dispelled any suspicion that Mr. Crockett—particularly while unconscious—could have slipped out of the seat belt to get into the backseat. Mr. Crockett therefore could not have been the person belted into the driver's seat *and* the person found unbelted in the backseat. This point, alongside evidence inculpating Mr. Palmer, would have demonstrated that Mr. Crockett was not driving and, at minimum, would be reasonably likely to cause at least one juror to have reasonable doubt about whether Mr. Crockett was the driver.

Indeed, Mr. Crockett's position in the car would have been inexplicable had he been the belted driver. Mr. Kirk, an expert engineer, believed it "self-evident" that Mr. Crockett "could not have been found where he was by the first witness to respond to the accident if he had been the belted driver." JA1630. Mr. Bagnell, an expert fatal crash investigator, concurred, stating that it "immediately" occurred to him that Mr. Crockett's position in the car "was highly inconsistent with [Mr. Crockett] having allegedly been the belted driver." JA1653. Such evidence, along with any additional expert evidence trial counsel might

have chosen to present on the issue, would have provided jurors ample space for reasonable doubt had they been aware that the driver was belted.

The district court never grappled with this exculpatory evidence. Although it deemed Mr. Kirk's affidavit "[in]conclusive[]" in its discussion of Mr. Crockett's actual innocence claim, the district court did not reference or address it in consideration of his ineffective assistance of counsel claim. JA2143 ("[A]lthough Mr. Kirk indicates that in his opinion, as an engineer, Crockett was not the *belted* driver, Mr. Kirk does not conclusively state that Crockett was not driving the vehicle."). But the exacting standard for establishing actual innocence is distinct from *Strickland*'s inquiry into whether a single reasonable juror would be swayed by the totality of the evidence. *Hope*, 857 F.3d at 524 (citation omitted); *Elmore v. Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011), as amended (Dec. 12, 2012) (requiring that probative scientific evidence be considered in the context of the full trial and post-conviction records rather than "evaluat[ed] piecemeal" for *Strickland* purposes).

The district court erred when it imposed an unduly stringent legal standard which minimized the prejudicial effect of trial counsel's failure

to investigate the seat belt mechanism. Contrary to the district court's suggestion, Dr. Pape's report, standing alone, need not contradict "all of the evidence" or "repudiate" any specific piece of evidence to satisfy *Strickland*'s prejudice requirement. JA2165. Mr. Crockett was not required to show that the Commonwealth's "evidence was insubstantial, or that it could not have supported a guilty verdict," but rather that the exculpatory evidence trial counsel should have presented, considered as part of the totality of trial and postconviction evidence, prevented the court from "be[ing] confident that there is no 'reasonable probability'" counsel's error affected the trial. *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 532 (4th Cir. 2016). As explained above, the expert testimony Dr. Pape could have presented at trial satisfies that standard.

Confirming this independently sufficient showing of prejudice, unambiguous sworn affidavits from jurors who sat on Mr. Crockett's trial make clear that the trial would have ended differently but for counsel's deficiency. The affidavits, which the Commonwealth never addressed in state postconviction proceedings, make clear that at least two of the trial jurors would have voted "not guilty," if counsel had presented Dr. Pape's

conclusions on the seat belt mechanism, alongside the totality of the trial evidence. JA1741–44.

Contrary to the district court's suggestion, nothing in Federal Rule of Evidence 606(b), nor in *Fullwood v. Lee*, limits this Court's consideration of these affidavits. *Fullwood* refused to consider testimony from one juror attesting to external influences on another juror's decision-making. *Fullwood v. Lee*, 290 F.3d 663, 676 (4th Cir. 2002). The jurors here, in contrast, do not claim there was something wrong with the jury deliberations, nor that their mental processes were affected by undue influence from non-jurors. While they recall their deliberations, they instead focus on their *post*-trial experience with the newly discovered expert evidence of a belted driver, and how they personally would vote if presented with the new evidence. *See Nields v. Bradshaw*, 482 F.3d 442, 460–61 (6th Cir. 2007) (casting doubt on the idea that a state-law analogue to Rule 606(b) would bar consideration of juror affidavits describing the hypothetical effect of post-deliberation, post-verdict evidence).

Had the jurors been privy to expert forensic testimony confirming that the driver was belted, they would have weighed it alongside

eyewitness—and potentially expert—testimony showing that Mr. Crockett could not have been found where and how he was, if he had been belted. And they would have weighed it in the context of a trial record that already contained considerable evidence pointing to a runaway third-party driver. With expert forensic testimony defeating the primary element of the involuntary manslaughter charge—that Mr. Crockett was the driver—it is reasonably likely that at least one juror, if not more, would have changed their votes no matter what the Commonwealth's witnesses said they did not see.

II. Because the Supreme Court of Virginia's decision both unreasonably misconstrued the Pape Report and unreasonably failed to apply *Strickland*'s totality-of-the-evidence analysis, 28 U.S.C. § 2254(d) imposes no bar to habeas relief.

In dismissing Mr. Crockett's petition, the district court did not appear to rely on 28 U.S.C. § 2254(d), which typically precludes habeas relief based on "any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). This Court may therefore remand for the reasons given in Part I, *supra*, without reaching that provision's application. But to the extent this Court chooses to do so, 28 U.S.C. § 2254(d) poses no bar to relief here because the Virginia Supreme

Court's decision (i) "unreasonabl[y] appli[ed]" *Strickland* by failing to conduct a totality-of-the-evidence review of the trial and post-conviction records and (ii) involved an "unreasonable determination of the facts" of Mr. Crockett's case by misapprehending Dr. Pape's report. 28 U.S.C. § 2254(d)(1)–(2).

A. The Supreme Court of Virginia unreasonably applied *Strickland* by failing to conduct a totality-of-the-evidence prejudice analysis.

The Virginia Supreme Court unreasonably contravened Supreme Court and Fourth Circuit precedent by disregarding *Strickland*'s requirement that it consider the Pape Report not in isolation but in the context of the trial and post-conviction records in their totality. *See* 28 U.S.C. § 2254(d)(1) (providing that a federal court may grant habeas relief where a state court's rejection of a claim "involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States").

The state court's prejudice analysis examined just one item of evidence: the Pape Report. In a single sentence, the state court held that "based on [Dr. Pape's] report, it cannot be said" that there is a reasonable probability of a different result at trial. JA1858–59. But *Strickland*

required the Virginia Supreme Court to go further than a superficial review of a single item of evidence to reasonably determine whether one juror would have voted differently—it was required to factor "*all* of the trial and [post-conviction] evidence favoring [Mr. Crockett's] acquittal" into the decision the jury made. *Elmore*, 661 F.3d at 868; *see Strickland,* 466 U.S. at 695 (holding that "a court . . . must consider the totality of the evidence").

Worse, beyond failing to conduct a totality-of-the-evidence prejudice analysis, it is "fatally unreasonable" that the Virginia Supreme Court's decision, which was affirmatively "based on" the Pape Report alone, failed to even "*acknowledge[]*" the need for such an evaluation. *Elmore*, 661 F.3d at 868; *see also Gray v. Branker*, 529 F.3d 220, 235 (4th Cir. 2008) (holding that it is unreasonable to "not even attempt" the "explicit reweighing" of evidence). The state court's failure to factor the Pape Report into a reweighing of the record evidence was particularly unreasonable here in light of the paucity of the Commonwealth's circumstantial case and the scientific heft that expert forensic testimony would have given the existing evidence of a third-party driver. *See supra* Part I.

The totality-of-the-evidence standard also "required" the Virginia Supreme Court, in determining prejudice, to consider both the trial and post-conviction records *as if* Mr. Crockett's counsel had conducted a "reasonable investigation . . . of the forensic evidence" and then "to reweigh that evidence against the [Commonwealth's] evidence of guilt." *Elmore*, 661 F.3d at 868; *see Sears v. Upton*, 561 U.S. 945, 956 (2010) (unreasonable to rely on the sufficiency of the defense presented without considering the defense that could have been presented after a full investigation); *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (unreasonable to fail to reweigh "totality of" evidence for and against guilt). Yet the Virginia Supreme Court did not consider any of the additional evidence trial counsel could have presented at trial to drive home the significance of the belted driver. For example, the state court never considered how jurors would have reacted to testimony from an expert engineer who, as Mr. Kirk did, found it "self-evident" that Mr. Crockett's position in the car was inconsistent with him being the belted driver. JA1630.

Even when it comes to the lone item of post-conviction evidence the Virginia Supreme Court did briefly consider, Dr. Pape's report itself, the

court "unduly minimiz[ed] the import" the jury would have placed on the expert's conclusions about the seat belt mechanism and summarily declared that it "it cannot be said there is a reasonable probability that [the outcome of Mr. Crockett's trial] would have been different" if the report had been admitted before the jury. *Elmore*, 661 F.3d at 868; JA1926–27. The Supreme Court has held that to "discount entirely the effect that [expert] testimony might have had on the jury" is an unreasonable application of *Strickland*. *Porter v. McCollum*, 558 U.S. 30, 43 (2009). In keeping with *Porter*'s essential holding, here, a sworn expert explaining that the driver was belted surely would have had some impact on the jurors in reaching a verdict.

Consideration of the Pape Report in the context of the entire trial and post-conviction record shows that the outcome of Mr. Crockett's trial likely would have been different if trial counsel had presented expert forensic testimony that the driver was belted. *See supra* Part I. The Virginia Supreme Court failed to conduct, or even purport to conduct, a totality analysis. Because that failure "involved an unreasonable application of[]" *Strickland*, § 2254(d) imposes no barrier to habeas relief. 28 U.S.C. § 2254(d)(1).

B. The Supreme Court of Virginia's decision extracted one word of the Pape Report and decontextualized it, discounting the expert's confidence in his exculpatory conclusion and unreasonably determining the facts of Mr. Crockett's case.

The Virginia Supreme Court's three-sentence analysis of *Strickland* prejudice also rested on an "unreasonable determination of the facts in light of the evidence" before it, providing an additional reason that 28 U.S.C. § 2254(d) stands as no barrier to habeas relief. 28 U.S.C. § 2254(d)(2). The state court unreasonably concentrated on one word from the Pape Report—"suggest[ed]"—to dismiss Dr. Pape's confidence in his conclusion that the driver was belted at the time of the accident. The relevant passage from the report reads in full:

> Th[e] cupping was consistent with loading from occupant forces during the collision and suggested that the seatbelt was being worn by the driver at the time of the collision.
>
> If the seatbelt was not in use during the collision one would not expect this cupping.

JA1608–09. This Court has held that where, as here, the state court "'has before it, yet apparently ignores, evidence that supports [the] petitioner's claim' the state court fact-finding process is [unreasonably] defective." *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013); *see also Miller-El v.*

Cockrell, 537 U.S. 322, 346 (2003) (same). The Virginia Supreme Court's analysis reads in full:

> Crockett relies on the report of David A. Pape, Ph.D., an expert engineer retained post-trial by Crockett's sentencing counsel to support his motion for a new trial. Dr. Pape's report however *only "suggest[ed]"* the driver's seatbelt was in use at the time of the crash based on "cupping" on the belt. Thus, based on this report, it cannot be said there is a reasonable probability that the result of the proceeding would have been different had this evidence been obtained and admitted before the jury.

JA1858–59 (emphasis added).

The state court's modification of "suggest[]" with "only," to have it mean "hint"—as if the report intimated one of many possibilities about the seat belt—was unreasonable. The Virginia Supreme Court read out all but one word of Dr. Pape's report, glossing over his conclusions and analyses. The report did not "only" suggest that the seat belt was in use at the time of the accident. It determined that cupping on the driver's side seat belt showed it had been in use; had it not been, such cupping would not be where it was. Had Dr. Pape testified orally, the jurors would have heard him in person and assessed the credibility of his opinion as an *expert* engineer, discussing the significance of the only physical evidence present in the case. *Cf., e.g.*, *Dennis v. Sec'y, Pa. Dep't of Corr.*,

834 F.3d 263, 301 (3d Cir. 2016) (en banc) (citing *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995)) ("The [*Kyles* Court] oriented its analysis around how the jury would have weighed the information, not the credibility of the post-conviction testimony itself."). In context, expert testimony and reports about scientific evidence, like Dr. Pape's, that use phrases like "consistent with," "suggest," and "expect to see" do not indicate inconclusiveness and can "destroy[]" the opposition's case. *See, e.g.*, *Williams v. Brown*, 208 F. Supp. 3d 713, 731 (E.D. Va. 2016) (considering an expert report that included phrases such as "I *would not expect to see* such injuries in a single assailant crime," "[t]hese facts *suggest* compellingly the crime was committed by a solo assailant," and "injuries are all *consistent with* a single offender").

Further, despite the Virginia Supreme Court's allusion to a lack of confidence on Dr. Pape's part, all of the record evidence relevant to the Pape Report and Dr. Pape's potential testimony underscores that the Virginia Supreme Court misconstrued his use of "suggest"—and that Dr. Pape may well not even use the word "suggest" in his oral testimony. Sentencing counsel's proffer at the motion for new trial stage affirmed that Dr. Pape would state that "there is *absolutely no other way* that th[e]

cupping would have occurred on that lap belt but for someone being belted in that seatbelt at the time of the collision." JA1101 (emphasis added). Her sworn habeas affidavit likewise confirms that "Dr. Pape verbally stated to me that the 'cupping' . . . could *only* have occurred if the seat belt were worn during a high impact collision of such a nature as to result in the total loss of the vehicle." JA1623 (emphasis added); *see also* JA1616 (Dr. Pape agreeing that his "conclusions were accurate to a reasonable degree of engineering certainty"). The state court unreasonably ignored this evidence confirming the high level of certainty already apparent from the report itself.

III. In the alternative, this Court should remand for an evidentiary hearing so the district court can supplement the record in assessing the prejudicial effect of trial counsel's failure to investigate the seat belt mechanism.

At minimum, the district court abused its discretion when it denied Mr. Crockett habeas relief without holding an evidentiary hearing at which it could have considered the strength of the expert testimony trial counsel failed to introduce. *See Schriro v. Landringan*, 550 U.S. 465, 473 (2007) (observing that the decision to grant an evidentiary hearing is within the discretion of the district court provided it is not barred by § 2254).

As a threshold matter, 28 U.S.C. § 2254 does not prevent an evidentiary hearing. Mr. Crockett diligently sought to "develop the factual basis" of his ineffective assistance claim by repeatedly seeking to present Dr. Pape's oral testimony in the state courts. 28 U.S.C. § 2254(e)(2); *see* JA1099 (sentencing counsel representing at Mr. Crockett's sentencing hearing that Dr. Pape was available to testify); JA1758–59 (moving for an evidentiary hearing in state habeas proceedings). And the Virginia Supreme Court's decision rejecting that claim was unreasonable. *See supra* Part II. Because § 2254(d) does not bar habeas relief, the district court was permitted to "take new evidence in an evidentiary hearing." *Brumfield v. Cain*, 576 U.S. 305, 311 (2015) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011)). To the extent the district court relied on § 2254 in determining that an evidentiary hearing was not warranted in Mr. Crockett's case, *see* JA2181–82 (referencing the need to "consider the standards set forth in Section 2254 when considering whether an evidentiary hearing is appropriate" (footnote omitted)), it abused its discretion. *See, e.g.*, *Gordon v. Braxton*, 780 F.3d 196, 204 (4th Cir. 2015) ("[T]he district court's error in applying . . . deference [under § 2254(d)] led it to conclude mistakenly that it had

no discretion to grant a hearing. We therefore think it proper to remand for the district court to exercise its discretion in the first instance on this question.").

Further, to the extent that the district court denied an evidentiary hearing based on the merits of Mr. Crockett's ineffective assistance of counsel claim, this reasoning was also problematic for two reasons. First, its conclusion that Mr. Crockett's claim "lack[ed] merit" was based on its mistaken view that the evidence of Mr. Crockett's guilt was "overwhelming." JA2164, JA2182. As explained above, *see supra* Part I.A, this analysis overstates the strength of the prosecution's circumstantial case and fails to accord the appropriate weight to the full extent of the exculpatory evidence, including the fact that Mr. Crockett was found in the backseat, without any injuries consistent with having been the driver, and the wealth of evidence implicating Mr. Palmer.

Second, the district court's analysis committed the same misreading of the Dr. Pape's report that the Virginia Supreme Court's did. *See supra* Part II.B. In noting that "Dr. Pape did not conclusively find that the driver was in fact wearing a seatbelt," JA2164, the district court relied on only one word of Dr. Pape's report rather than the

confidently phrased expert conclusions jurors would have heard during Dr. Pape's oral testimony. The district court concluded that Dr. Pape's potential testimony was "overstate[d]" in terms of its "exculpatory nature" without appropriately giving regard to Dr. Pape's confidence in his conclusions demonstrated in the report itself or elsewhere in the record, *see supra* Part II.B, or conducting an evidentiary hearing to clarify the strength of this assessment. JA2164. At trial, the jurors would not have just heard the word "suggests" but would have been able to assess Dr. Pape's underlying rationale and level of confidence, including whether his theories could remain sound under the prosecution's cross-examination. Fundamentally, the district court relied on its uncertainty as to the strength of Dr. Pape's assessment as a rationale for denying an evidentiary hearing that would shed light on exactly that question.

The district court was similarly dismissive of the strength of Mr. Kirk's testimony that would have been made clear at an evidentiary hearing. Just as with Dr. Pape's testimony, Mr. Crockett pursued Mr. Kirk's expert opinion regarding his placement in the wrecked vehicle. JA2142–43. And just as the district court dismissed both the strength of

Dr. Pape's opinion and its ability to sway at least one juror, it likewise dismissed the strength of Mr. Kirk's potential testimony that "Crockett was not the *belted* driver" by stating that Mr. Kirk did not "conclusively" establish that Mr. Crockett was not driving the vehicle. *Id.* This analysis, again, denies an evidentiary hearing on the basis of a preemptive assumption about what Mr. Kirk's oral testimony would have revealed to the jurors, including his methodology and confidence in his opinions.

Supplementing the factual record on what Dr. Pape's or Mr. Kirk's trial testimony would have been and whether the exclusion of such testimony prejudiced Mr. Crockett is precisely the role of an evidentiary hearing in the context of federal habeas. *See, e.g.*, *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990) ("When there are issues of credibility, disputed questions of fact, and rational explanations of purpose given, an evidentiary hearing may well be necessary to resolve the issues."). Thus, at minimum, if this court finds the record inconclusive with respect to Mr. Crockett's claims, remand to the district court for an evidentiary hearing is appropriate. Such a hearing would allow the court to properly consider the totality of the expert evidence Mr. Crockett's counsel

deficiently failed to present and appropriately assess its impact on the jurors who never had the chance to hear it.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Mr. Crockett's petition for habeas corpus, vacate the district court's opinion, and remand the case to the district court with instructions to issue a writ of habeas corpus, or, alternatively, to hold an evidentiary hearing.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Crockett respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a), which would give this Court an opportunity to address the appropriate standard for *Strickland* prejudice in the context of a 28 U.S.C. § 2254(d) habeas petition alleging that meaningful, exculpatory forensic evidence would have resulted in a different outcome at trial. This Court's disposition of this decade-long, fact-intensive case would be greatly aided by oral presentation.

Respectfully Submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel for Appellant
Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

November 6, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,157 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

Respectfully Submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel for Appellant
Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

November 6, 2020

CERTIFICATE OF SERVICE

I, Nicolas Sansone, certify that on November 6, 2020, Appellant's Brief and Joint Appendix Volumes I–IV were served on counsel for Appellee via the Court's ECF system. The digital media files associated with Joint Appendix Volume IV were served by email.

/s/ Nicolas Sansone
Nicolas Sansone
Counsel for Appellant
Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555