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

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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

The Commonwealth never attempts to rebut Petitioner Cameron Crockett's central claim: upon presentation of expert forensic evidence of a belted driver, it is reasonably likely that Mr. Crockett—who was found unconscious and unbelted in the backseat with no seatbelt injuries—would not have been convicted. Instead, the Commonwealth argues only that 28 U.S.C. § 2254(d) nonetheless compels affirmance. The Commonwealth is wrong. The Virginia Supreme Court's opinion concluding Mr. Crockett was not prejudiced by his undisputedly deficient trial counsel was unreasonable under both § 2254(d)(1) and § 2254(d)(2), and each provision forms an independent basis for reversal.

The Commonwealth gets the § 2254(d) analysis wrong from the outset by asking this Court to come up with *any* reasonable basis to defend the Virginia Supreme Court's conclusion on prejudice, instead of assessing the state court's actual reasoning. That distinction matters. As the Commonwealth concedes, the state court did not conduct the explicit totality-of-the-evidence analysis this Court's § 2254(d)(1) precedents require, instead "bas[ing]" its decision on a single item of evidence: the Pape Report. JA1858–59. But even if this Court accepts

the Commonwealth's improper invitation to make up for the state court's failure to "show its work," Response Br. 45, the Commonwealth's skewed account of the trial and post-conviction evidence cannot conjure up a reasonable basis for the state court's prejudice conclusion. The Commonwealth's account ignores multiple grounds for reasonable doubt in the trial record. And it asks whether evidence of a belted driver would have conclusively established innocence, even though the correct question is whether such evidence would have been reasonably likely to have put reasonable doubt in a single juror's mind.

The Commonwealth's § 2254(d)(2) analysis also improperly heightens the applicable legal standard in an attempt to justify a state-court factual finding devoid of record support and refuted by all relevant evidence. The Commonwealth argues that it was reasonable for the Virginia Supreme Court to discount an expert's exculpatory conclusion and all the evidence supporting it even though the state court's sole reason for doing so was an idiosyncratic interpretation of a single word in the expert's report. But this Court has held to the contrary: for a state court to ignore highly probative evidence in conducting its factfinding is unreasonable.

This Court should reverse the district court's judgment, whether under § 2254(d)(1) or § 2254(d)(2) or both, and remand with instructions to grant habeas corpus relief.

Alternatively, and at minimum, the Commonwealth's unsupported conjecture about how expert evidence of a belted driver might or might not have influenced the jury reaffirms the need for an evidentiary hearing. Mr. Crockett has shown that he would not have been convicted had such evidence been presented to the jury. An evidentiary hearing will confirm as much. Upon concluding that § 2254(d) does not foreclose habeas relief, this Court should remand with instructions for the district court to conduct an evidentiary hearing if this Court does not decide to order habeas relief outright.

I. The Commonwealth incorrectly applies § 2254(d) by ignoring the Supreme Court of Virginia's actual reasoning in favor of what its reasoning theoretically could have been.

The Commonwealth does not dispute that plenary review of the trial and post-conviction evidence reveals that trial counsel's constitutionally deficient performance prejudiced Mr. Crockett.[1] *See*

[1] Contrary to the Commonwealth's characterization, Mr. Crockett has not argued that this case is "unconstrained" by § 2254(d). Response Br. 34.

Opening Br. 28–39. Instead, it argues only that habeas relief is unwarranted because the Virginia Supreme Court's opinion to the contrary was reasonable under 28 U.S.C. § 2254(d). Response Br. 35.

The Commonwealth tethers its entire § 2254(d) argument to an irrelevant legal standard. Quoting *Cullen v. Pinholster* and *Harrington v. Richter*, the Commonwealth argues that Mr. Crockett "must demonstrate that there is 'no reasonable basis' upon which the state court judgment could rest" to show that the state court's decision was unreasonable under § 2254(d). Response Br. 29 (citations omitted). Wrong. Both *Pinholster* and *Richter* addressed circumstances "[w]here a state court's decision is unaccompanied by an explanation." *Harrington v. Richter*, 562 U.S. 86, 98 (2011); *see also Cullen v. Pinholster*, 563 U.S. 170, 187–88 (2011) (applying the "no reasonable basis" standard to a state court's summary denial of habeas relief). Mr. Crockett's was not such a case. When, as here, the state's highest court has issued a "reasoned opinion," federal habeas courts must "review[] the specific

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He simply argued that the district court's analysis of his ineffective assistance claim did not appear to rely on § 2254(d) and that this Court is free to reverse and remand on the basis of the district court's flawed *de novo* analysis alone. *See* Opening Br. 39.

reasons given by the state court." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *see also Grueninger v. Dir., Virginia Dep't of Corr.*, 813 F.3d 517, 525–26 (4th Cir. 2016) (clarifying that "[b]y its terms," "the *Richter* rule requiring deference to 'hypothetical reasons [a] state court might have given for rejecting [a] federal claim' is limited to cases in which no state court has issued an opinion giving reasons for the denial of relief" (alterations in original) (citations omitted)).

This Court's § 2254(d) analysis is therefore limited to reviewing the Virginia Supreme Court's actual reasoning, which rested only on the Pape Report and not on the Commonwealth's *post hoc* rationalizations.

II. The Commonwealth's § 2254(d)(1) argument overlooks precedent and misconstrues the evidentiary record.

The Commonwealth cannot defend the opinion the Virginia Supreme Court actually wrote. This Court's precedents hold it categorically unreasonable under § 2254(d)(1) for a state court to omit a totality-of-the-evidence prejudice analysis. The Commonwealth cannot credibly justify the state court's decision to base its prejudice-prong analysis on a flawed reading of a single piece of evidence. That alone is sufficient to require reversal.

But even if this Court were to seek some alternative, reasonable basis for the Virginia Supreme Court's determination under *Richter*'s inapposite any-reasonable-basis standard, *see supra* Part I, the Commonwealth again gets the analysis wrong. It starts off on the wrong foot by imposing an excessive burden for showing prejudice under *Strickland v. Washington* that would require Mr. Crockett to convince every juror of his innocence rather than introduce doubt into the mind of one. From there, it discounts exculpatory evidence, exaggerates the prosecution's case at trial, and misinterprets the forensic testimony the jury would have heard if Mr. Crockett's trial counsel had performed effectively. Even under the Commonwealth's preferred standard, then, reversal is required.

A. The Commonwealth concedes that the Supreme Court of Virginia did not perform an explicit totality-of-the-evidence analysis of *Strickland* prejudice—an error this Court's precedents have deemed "fatally unreasonable."

The Commonwealth apparently accepts that *Strickland* requires a totality-of-the-evidence analysis of the trial and post-conviction records, and that it is unreasonable under § 2254(d)(1) not to perform one. Response Br. 45–46. And it does not dispute that the Virginia Supreme

Court "based" its decision on the Pape Report alone and never explicitly conducted, or even purported to conduct, such an analysis. *Id.*; *see* Opening Br. 40–43. These concessions leave the Commonwealth's § 2254(d)(1) argument dead on arrival. In an attempt to avoid this result, the Commonwealth asks this Court to assume that the state court did what it was supposed to, despite not "show[ing] its work." Response Br. 45. This Court's precedents foreclose that request.

The Commonwealth glosses over this Court's decision in *Elmore v. Ozmint*. There, this Court held that it is "fatally unreasonable" for a state court to "neither acknowledge[] nor obey[]" *Strickland*'s mandate to consider the totality of the evidence "adduced at trial, and . . . in the [state] habeas proceeding." *Elmore v. Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 695 (1984) and quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)). And the Commonwealth completely ignores *Gray v. Branker*, in which this Court similarly held that it is an unreasonable application of *Strickland* to not even attempt the "explicit reweighing" of the evidence in its totality. 529 F.3d 220, 238 (4th Cir. 2008); *see* Opening Br. 41. Here, as in *Elmore*, the state court's failure to explicitly reweigh the trial record together with

the testimony the jury would have heard if Mr. Crockett's counsel had conducted a "reasonable investigation of the . . . forensic evidence" rendered its prejudice analysis unreasonable under § 2254(d)(1). *Elmore*, 661 F.3d at 868.

The Commonwealth does not contest that the state court conducted no explicit totality-of-the-evidence analysis. Instead, the Commonwealth relies on this Court's decision in *Valentino v. Clarke* and the Supreme Court's decision in *Shinn v. Kayer* to suggest—contrary to *Elmore* and *Gray*—that no such analysis is required. Response Br. 45. But *Valentino* and *Kayer* are inapposite.[2] Both held only that federal courts must apply § 2254(d) even where a state court chooses to issue a summary decision. *See Valentino v. Clarke*, 972 F.3d 560, 580 (4th Cir. 2020) (noting that a "lack of explanation" means a "petitioner must show there was no reasonable basis" supporting the state court's decision (citation omitted)); *Shinn v. Kayer*, 141 S. Ct. 517, 524 (2020) (per curiam) (noting that

[2] In any event, despite the Commonwealth's insinuation that *Valentino* superseded it, Response Br. 45 (citations omitted), this Court has never disavowed *Elmore*, let alone *Gray*. *See Norfolk & W. Ry. Co. v. Dir., Office of Workers' Comp. Programs*, 5 F.3d 777, 779 (4th Cir. 1993) (confirming that "a panel of this court may not overrule another panel's decision").

"[i]nsofar as the state court" decided "the prejudice question without articulating its reasoning," *Richter*'s any-reasonable-basis standard applies).[3] But the Virginia Supreme Court did not issue such a decision—it *did* provide an opinion with a "specific reason[]" for its conclusion on *Strickland* prejudice. *See Wilson*, 138 S. Ct. at 1192. The state court exclusively "based" its decision on its erroneous reading of the Pape Report, JA1858–59; *see infra* Part III, without assessing the totality of the evidence. Like it or not, the Commonwealth is stuck with that decision. *See Grueninger*, 813 F.3d at 525–26. Because the Virginia Supreme Court unreasonably applied *Strickland*, neglecting the bulk of the evidence, reversal is necessary.

[3] The Commonwealth suggests that state courts that explain their reasoning should not be afforded less deference because "[s]uch a rule would only encourage state courts to avoid explaining their decisions altogether." Response Br. 45. The Supreme Court disagrees: "Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court." *Richter*, 562 U.S. at 99.

B. The Commonwealth misstates the *Strickland* standard, exaggerates the prosecution's case, and unduly minimizes the significance that evidence of a belted driver would have had for the jury.

If this Court does not conclude the state court's failure to conduct a totality-of-the-evidence analysis alone requires remand, *see supra* Part II.A, the Commonwealth cannot justify the state court's prejudice determination, even under *Richter*'s inapplicable any-reasonable-basis standard. But before turning to the Commonwealth's flawed assessment of the trial and post-conviction evidence, two threshold errors deserve mention.

First, the Commonwealth relies on *Pinholster* to argue that § 2254(d)(1) and *Strickland*, in concert, are "doubly deferential" to the state court's prejudice determination. Response Br. 33 (citation omitted). Not so. *Pinholster*'s "doubl[e] deferen[ce]" applies only to *Strickland*'s performance prong. *See Pinholster*, 563 U.S. at 190 (citation omitted). This is because, first, under *Strickland*, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. And second, under § 2254(d)(1), there is a presumption that a state court's decision that trial

counsel acted reasonably under *Strickland* was *itself* reasonable.[4] In this case, though, the state court correctly found trial counsel deficient under *Strickland*'s performance prong, and the Commonwealth does not dispute that finding. JA1858. *Strickland* creates no presumption that trial counsel's deficiencies were nonprejudicial. As such, no rationale exists for assigning double deference to the state court's conclusion on prejudice.

Second, the Commonwealth flatly misstates Mr. Crockett's burden. It argues that Mr. Crockett cannot show prejudice unless, in light of expert evidence of a belted driver, the "jury would have to believe" Mr. Crockett's side of this case's factual disputes and accept that a third party—Jacob Palmer—was the driver. Response Br. 27, 41. But Mr. Crockett need only show that the addition of such expert testimony to the evidentiary picture would have created a *"probability* that *at least one*

[4] *See, e.g.*, *Burt v. Titlow*, 571 U.S. 12, 15 (2013) ("[O]ur cases require that the federal court use a 'doubly deferential' standard of review that gives both the state court and the *defense attorney* the benefit of the doubt." (emphasis added)); *Grueninger*, 813 F.3d at 524 ("Under *Strickland*, courts are to 'take a highly deferential look at *counsel's performance*,' so that review of a *state-court finding on deficiency* becomes 'doubly deferential' under [§ 2254(d)]." (emphasis added) (quoting *Pinholster*, 563 U.S. at 190)).

juror would have" had a *reasonable doubt* as to his guilt. *Hope v. Cartledge*, 857 F.3d 518, 524 (4th Cir. 2017) (emphases added) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)).

The question then, is whether a court could reasonably perceive *no* probability that *even one* juror would have harbored reasonable doubt as to whether Mr. Crockett was the driver had the jury known that (1) expert mechanical engineer Dr. David Pape observed "cupping" on the seatbelt that he "would not expect" unless the driver had been belted, JA1609; *see* JA1614, and (2) Mr. Crockett was undisputedly found unconscious and unbelted, without any seatbelt injuries, at least partly in the backseat of the car. JA325–326, JA357, JA361, JA568. A court could not reasonably fail to see prejudice when considering these points in the context of a trial record containing ample evidence suggesting a third-party driver and no evidence directly implicating Mr. Crockett. The Commonwealth can argue otherwise only by distorting the record: (1) unduly minimizing exculpatory trial evidence while overstating inculpatory trial evidence, and (2) offering only unsubstantiated speculation as to how Mr. Crockett could have been the driver if, as Dr. Pape's testimony would have confirmed, the driver was belted.

1. The Commonwealth unduly minimizes the exculpatory trial evidence while overstating the inculpatory trial evidence.

The Commonwealth presents the trial record as fully supportive of its theory that Mr. Crockett was the driver. Response Br. 36–37. It is not. The Commonwealth downplays critical strands of exculpatory trial evidence and offers no coherent explanation for its own failure to conduct any forensic testing. Viewed properly, the record shows that Mr. Palmer could have plausibly been the belted driver, escaped the wreck out of the open driver's side window, shed his jacket next to the car, and rushed back relatively unharmed to the party he had been attending with Mr. Crockett and the decedent, Jack Korte, that night. Meanwhile, Mr. Crockett was left unbelted and unconscious in the backseat, as all of the Commonwealth's on-scene witnesses confirm.

The Commonwealth avoids addressing evidence inculpating Jacob Palmer as the driver. It concedes that Mr. Palmer asked the party's host if he needed anything from the store and then went missing for at least an hour at the same time as Mr. Crockett and Mr. Korte, continuously texting people at the party during his absence. Response Br. 18. But the Commonwealth fails to account for the suspicious timing of the several

phone calls Mr. Palmer made to Mr. Crockett within minutes of the crash. *See* Opening Br. 32. And it offers no explanation for a fellow partygoer's unrebutted testimony that Mr. Palmer then returned after a "long" absence, acting "weird and sketchy," "breathing kind of heavy" as if he had been running, and asking about Mr. Crockett and Mr. Korte.[5] JA683–84; *see* Response Br. 43.

The Commonwealth attempts to dismiss Mr. Palmer as a suspect by claiming that the car was too "mangled" following the crash to allow him to escape, particularly with Mr. Crockett's body in the way. Response Br. 19; *see id.* at 41. But post-accident photographs show the entire front driver's side largely intact, with the driver's-side window "wide open" such that a driver could have quickly escaped. JA462; *see* JA357, JA1350. And the Commonwealth neglects that a first responder testified that he was able to fit through the driver's side window to attempt to administer aid to Mr. Crockett. JA461–62; *see* JA1353. Mr.

[5] The Commonwealth remarks that nobody testified to seeing any injuries on Mr. Palmer from a seatbelt or the deployed driver's-side airbag. Response Br. 43. But such injuries would not be visible over Mr. Palmer's clothing. And the Commonwealth never disputes that trained hospital staff observed no such injuries on *Mr. Crockett* after the crash, even though he was clad only in boxer shorts. JA480, JA504.

Palmer could have climbed out of the driver's side window after the crash, the same way the first responder later climbed in—all he needed to do was unbuckle a seatbelt and potentially shift Mr. Crockett's legs out of the way.

The Commonwealth likewise disregards photographic evidence when addressing the fact that the jacket Mr. Crockett testified to loaning Mr. Palmer was discovered on the ground at the scene of the accident. The Commonwealth suggests that, rather than being discarded by a fleeing Mr. Palmer, it is "far more plausible that the jacket was thrown out of the rear window when it was shattered in the crash." Response Br. 44. But photographs taken by a police forensics team instructed to document "significan[t]" details of the crash scene show the jacket far behind the car and to its left. JA614–15; *see* JA1349. The Commonwealth's argument cannot square with these photographs: suggesting the same force that shattered the back window and brought the car to rest against a tree somehow simultaneously caused an object inside the car to fly in a perpendicular direction out of the shattering window flies in the face of rudimentary physics.

Even beyond the evidence implicating Mr. Palmer, the record casts further doubt on the prosecution's theory that Mr. Crockett had been driving. The Commonwealth admits that the witnesses "*all* testified that the upper portion of [Mr.] Crockett's body was in the backseat." Response Br. 36 (emphasis added). And the only two witnesses who saw Mr. Crockett's position inside the car before he regained consciousness—Pamela Patrick and James Reid—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.[6] JA322, JA337; *see* JA325–26. The Commonwealth tries to explain away Mr. Crockett's position in the backseat as a product of the driver's seat "bending or breaking . . . backwards towards the backseat, and apparently knocking [Mr.] Crockett backwards and towards the rear window at the same time." Response Br. 39. But trial testimony and photographic exhibits contradict this narrative. JA357 (testimony that the driver's seat was "intact"); JA1355–56 (photographs showing same).

[6] While damning to the prosecution's case even in the context of the trial evidence, this testimony is completely inconsistent with Mr. Crockett's guilt in light of the post-conviction evidence showing the driver was belted. *See infra* Part II.B.2.

Nor does the Commonwealth attempt to defend the substandard investigatory practices that deprived the jury of any forensic evidence that could have confirmed the driver's identity. The Commonwealth admits that officers were "not instructed to swab the vehicle for trace evidence," Response Br. 13 (internal quotation marks omitted), despite there being "speckles of something," possibly blood, on the driver's seat. JA610–11; *see* JA1355–56 (crash site photographs showing a red substance on the driver's seat). And although the Commonwealth points to a Crockett family friend's later confusion about whether there was blood on the driver's side airbag, Response Br. 43, a layperson's uncertainty regarding her observations of an impounded, totaled car ten days after a fatal car crash is immaterial to the question of whether the lack of forensic testing undermined the Commonwealth's case.[7] As expert fatal crash investigator and police academy instructor Robert Bagnell testified at trial, there would have been DNA evidence on the airbags as

[7] The defense's investigator later filed a post-conviction affidavit in which he stated that he observed stains on the airbag three years after it was pulled from the car. JA1672. His sworn statement emphasized how "evasive and reluctant to cooperate with [his] queries pertaining to the airbag" the Commonwealth had been. *Id.*; *see* JA2024–27 (detailing the defense team's struggles to gain information from the Commonwealth about the airbag).

a result of the collision, even if there was no blood, and such testing is "very, very important." JA651; *see* JA650–53.

On top of minimizing the significance of evidence exculpating Mr. Crockett, the Commonwealth overstates the circumstantial evidence the prosecution presented at trial. In reality, the Commonwealth's case against Mr. Crockett relies almost exclusively on the fact that none of the "[f]ive witnesses" present around the time of the accident, Response Br. 26, saw a third-party driver escaping into the "pitch black" wooded area around the crash site, JA343. These accounts from startled witnesses to a traumatic, low-visibility crash scene left unmonitored for critical moments after the accident are hardly as compelling as the Commonwealth implies.

Only one witness, Antoine Smith, was actually present at the time of the accident and, as the Commonwealth concedes, her testimony was "impeach[ed]" at trial. Response Br. 36. For example, Ms. Smith testified that prior to the crash she witnessed a traffic light turn green, and that she then saw the car "sp[i]n around two or three times" before colliding with a tree. JA285. But although she was "as sure" about those details as she was about "everything else" she told the jury, JA285–86, testimony

from a crash team investigator and a professional surveyor flatly contradicted both points, JA575–80, JA589–93. And while the Commonwealth claims that Ms. Smith "stood staring at" the crash, Response Br. 36, she herself admitted that her attention was diverted elsewhere for a time, JA276. Moreover, Ms. Smith testified at trial that the sudden crash was "a very surprising event," JA273, and the next witness to arrive, Ms. Patrick, confirmed that Ms. Smith was "hysterical" and "really shaken up" after seeing the crash, JA1528.

The Commonwealth concedes that the next witness to arrive, Ms. Patrick, did not see the crash because she "turned and called back inside [her] house for her son to call 911." Response Br. 4. But contrary to the Commonwealth's claim that she thereafter proceeded to the scene immediately without distraction, *id.*, Ms. Patrick "didn't see anything" when she first turned her attention back to the street. JA295. It was only after speaking with Ms. Smith—whom Ms. Patrick believed might have emerged from the wreck, *see* JA1528—that she "looked across the street, and . . . saw the car." JA295. Neither person directly observed the car during the entirety of this critical period, nor did any of the other witnesses who arrived on the scene only thereafter.

Beyond these flawed witness accounts, the *only* potentially inculpatory evidence the Commonwealth is able to muster is a single, confused question—"I mean, did I hit someone or I mean?"—asked by a wounded, concussed, drunk, handcuffed, and amnesiac Mr. Crockett at the hospital after the crash. Response Br. 10; *see id.* at 42. The Commonwealth concedes there was unrebutted testimony suggesting Mr. Crockett's memory was suffering as a result of the accident, Response Br. 14–16, and the record indicates that Mr. Crockett's statements were not an expression of guilt, but rather of *confusion*.[8] Opening Br. 6 (explaining the basis for Mr. Crockett's fragmented memory), 12–13 (recounting disinterested witness testimony and post-conviction evidence reflecting Mr. Crockett's extreme disorientation and memory loss following the crash).

[8] In a post-conviction affidavit, forensic and clinical neuropsychologist Dr. John Fabian voiced particular concern about the "usefulness and utility of any of the statements [Mr. Crockett] made [at the hospital] due to [his] fragile mental state that was affected by not only alcohol but also the effects of a concussion." JA1626. Dr. Fabian found that Mr. Crockett was likely suffering from a "full blackout or a partial fragmentary brownout," which can have "acute effects," including "dizziness, confusion, . . . deficits in processing information, . . . memory, communication and language processing, [and] understanding information." JA1626–27.

2. The Commonwealth improperly discounts the significance of post-conviction evidence showing that the driver was belted.

Having laid the groundwork by exaggerating the prosecution's case against Mr. Crockett, the Commonwealth argues that the state court reasonably could have concluded that post-conviction evidence of a belted driver was insufficient to establish *Strickland* prejudice. Response Br. 37–39. Not only does this argument fail to account for ample grounds for reasonable doubt already in the trial record, *see supra* Part II.B.1, but the Commonwealth—like the Virginia Supreme Court and district court before it—mischaracterizes the strength of the post-conviction evidence. It emphasizes one word of Dr. Pape's expert report, "suggests," at the expense of its context and the report's conclusions. Response Br. 38. And although it characterizes a belted driver as just "one more circumstance for the jury to consider in in determining the driver's identity," Response Br. 47, it fails to account for just how "dramatically" that circumstance would have "alter[ed] the entire evidentiary picture" available to the jury. *See Elmore*, 661 F.3d at 871 (citation omitted) (internal quotation marks omitted).

The Commonwealth principally argues that the report only "'suggested' that the seatbelt was being worn at the time of the accident" and "does not state conclusively that it was in use," and it posits that "some other explanation exists" for the cupping Dr. Pape observed on the belt. Response Br. 38. As explained below, this overreading of the word "suggests" ignores critical context within the report, as well as additional evidence making clear that Dr. Pape believed there was "absolutely no other way" the cupping could have occurred. JA1101; *see infra* Part III.

This leaves the Commonwealth with its argument that even if the driver was belted, Mr. Crockett still may have been the driver. Response Br. 38. The Commonwealth's three theories as to how this would have been possible are speculative, finding no support in the record. *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). At trial, the Commonwealth presented no evidence—or even any argument—suggesting Mr. Crockett was belted. *See* JA847–51. It cannot change its strategy now. *See 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.").

In its first theory, the Commonwealth suggests that Mr. Crockett could have been the driver, but that he "unlatched the seatbelt as he started to regain consciousness." Response Br. 39. But the first two witnesses to arrive, Ms. Patrick and Mr. Reid, stated that Mr. Crockett was unconscious and motionless when they reached the car—and neither they nor any other witnesses observed Mr. Crockett unbuckling himself as he came to. JA330, JA338. Indeed, no witnesses ever stated that they saw Mr. Crockett in a seatbelt at any time.

The Commonwealth's second theory alleges that Mr. Crockett "slipped out" of the belt during the crash and was thrown into the rear of the car. Response Br. 39. Nothing in the record indicates that this was possible: photographs of the car taken immediately following the collision, JA1355, show that the seatbelt was unlatched and the seat was in an upright position that would not have allowed Mr. Crockett's "six-foot-two-inch, two hundred pound" body room to move into the backseat. Response Br. 41. Furthermore, Mr. Crockett's trial counsel's notes from his meeting with Ronald Kirk, an expert crime scene investigator, show

that Mr. Kirk believed that a belted driver would have remained in the driver's seat as a result of the passenger-side impact. JA1457–62.

In its third theory, the Commonwealth suggests that Mr. Crockett may have been wearing the belt, but that it may have been cut off him during rescue operations. Response Br. 39. As with the Commonwealth's first two theories, the third is also unsupported by the record. Police photographs show the driver's seatbelt intact on the scene. JA1355. No witness testified to cutting the driver's seatbelt—or seeing it cut—on the scene. To the contrary, the evidence shows that the seatbelt was cut only after Mr. Crockett had been evacuated and the vehicle had been taken to the firehouse. May 24, 2011 Trial Tr. 110–15. More to the point, not a single witness reported seeing a seatbelt on Mr. Crockett at any time—even before the first responders arrived.

The Commonwealth cannot rely on any of these theories, or otherwise conjure up what the prosecution's case at trial could have been.[9] *Hardy*, 849 F.3d at 823. What the record *does* show is that Mr. Palmer disappeared from the party at the same time as Mr. Crockett and

[9] At a minimum, the Commonwealth's speculation emphasizes the importance of holding an evidentiary hearing to determine what expert testimony the jury would have heard but for trial counsel's deficiency.

Mr. Korte after asking others if they needed anything from the store. Opening Br. 31–32. He later returned to the party out of breath and visibly shaken, having called Mr. Crockett several times. *Id.* The two witnesses immediately on the scene, and the other eyewitnesses who arrived soon thereafter, all described Mr. Crockett as being positioned largely in the back seat. JA322, JA337. The driver's seat was empty, with the driver side window wide open and a discarded jacket some way off. JA319–20, JA1349. No one saw Mr. Crockett wearing a seatbelt, let alone undoing a seatbelt after gaining consciousness or having a seatbelt cut off him. A fire captain who responded to the accident testified that the person "on the back of the vehicle," who was "half in and half out of the back window" was not "belted in." *See* May 24, 2011 Trial Tr. 114–15. The Commonwealth's own witness, a police officer who was specially trained to identify crash-related injuries, testified that Mr. Crockett exhibited no seatbelt injuries. JA504. A paramedic and an emergency room doctor agreed. JA466, JA702. And an expert has confirmed that the seatbelt was in use when the vehicle collided with the tree. JA1607.

What is more, additional post-conviction expert evidence that the Commonwealth fails to rebut fortifies the significance that evidence of a

belted driver would have held for the jury. Opening Br. 35–36. For example, expert engineer Mr. Kirk found it "self-evident" that Mr. Crockett could not have been the belted driver given his position in the car. JA1630. The Commonwealth disregards this sworn finding because Mr. Kirk "did not observe where [Mr.] Crockett's body came to rest inside the vehicle" and because he "does not explicitly state which witness's testimony he is relying on." Response Br. 40. But Mr. Kirk, an accident reconstruction expert, did not need to observe the crash or its aftermath firsthand; instead, he examined the wrecked vehicle, accident site, and case documents and determined that "Mr. Crockett could not have been found where he was by the first witness to respond to the accident [*i.e.*, Ms. Patrick] if he had been the belted driver." JA1630. Mr. Bagnell, the expert fatal crash investigator who testified at trial, similarly found Mr. Crockett's position "highly inconsistent" with him having been the belted driver. JA1653. The Commonwealth claims Mr. Bagnell's conclusion rested on assumptions about Mr. Crockett's body position that were "not borne out by the evidence" at trial. Response Br. 40. But Mr. Bagnell, like Mr. Kirk, based his opinion on "witness statements and court testimonies" and not on some untethered assumption. JA1653.

Finally, the Commonwealth fails to adequately address that sworn juror affidavits put the unreasonableness of the state court's conclusion on prejudice beyond any lingering dispute by demonstrating that expert evidence of a belted driver would have caused at least two jurors, if not more, to doubt Mr. Crockett's guilt. The Commonwealth contends for the first time on appeal that this evidence—unchallenged by the Commonwealth in state post-conviction proceedings and thus squarely *within* the evidentiary record—holds no water because the state court supposedly could have found them "inadmissible" under Virginia's rules of evidence. Response Br. 44. But the state courts never excluded the affidavits from the post-conviction record—and the Commonwealth never asked them to.[10]

Because the record refutes the state court's conclusion on *Strickland* prejudice, there is no reasonable basis upon which the

[10] Because the Commonwealth's argument on appeal hinges entirely on § 2254(d), this Court need not reach the Commonwealth's claim that Federal Rule of Evidence 606(b) bars consideration of the juror affidavits on *de novo* review of Mr. Crockett's ineffective assistance claim. Response Br. 44. In any event, Mr. Crockett has demonstrated that Rule 606(b) is inapposite because the juror affidavits do not impeach the verdict. Opening Br. 38. They address the hypothetical effect of post-deliberation, post-verdict evidence on the jurors' votes.

Commonwealth can defend it. Reversal is therefore required even if this Court accepts the Commonwealth's invitation to assume that the Virginia Supreme Court conducted the requisite totality-of-the-evidence analysis.

III. The Commonwealth wrongly defends a state-court factual determination that is refuted by all relevant record evidence and so is unreasonable under § 2254(d)(2).

Section 2254(d)(2) provides an independent and alternative basis for relief because the Virginia Supreme Court read Dr. Pape's report as "only 'suggest[ing]'" the driver was belted—even though all relevant evidence directly refutes that reading. JA1858–59. The Commonwealth concedes that it is unreasonable for a state court to ignore highly probative evidence but does not attempt to explain how the Virginia Supreme Court's unsupported reading of the Pape Report coheres with the evidence contradicting it. Response Br. 46. The Commonwealth simply tells this Court to assume the state court considered and rejected this unrebutted evidence. Response Br. 46–47. The Commonwealth offers no basis for that assumption.

As an initial matter, the Commonwealth overstates Mr. Crockett's burden for disproving the Virginia Supreme Court's erroneous reading of

the Pape Report. To be eligible for federal habeas relief under § 2254(d)(2), Mr. Crockett need only show that the Virginia Supreme Court's decision involved "an unreasonable determination of the facts in light of the evidence" before it. 28 U.S.C. § 2254(d)(2). But the Commonwealth claims that he must also rebut the state court's findings by "clear and convincing evidence" on the present record under § 2254(e)(1). Response Br. 47 (quoting 28 U.S.C. § 2254(e)(1)). This argument is wrong.

This Court and the Supreme Court have cautioned that § 2254(d)(2) and § 2254(e)(1) are "independent requirements" that "should not . . . be merged." *Winston v. Kelly*, 592 F.3d 535, 554–55 (4th Cir. 2010) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003)). While a finding that a state court decision was unreasonable under § 2254(d)(2) must be made "in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), a federal court may be able to admit new evidence in conducting the § 2254(e)(1) inquiry. *Cf. Winston*, 592 F.3d at 554–55 (concluding that § 2254(d)(2), but not necessarily § 2254(e)(1), should be assessed on the state court record). Because Mr. Crockett has not yet had a chance to present new evidence in federal habeas proceedings to

supplement the state-court record, he need only meet § 2254(d)(2)'s "unreasonable determination" standard. He has done so, *see* Opening Br. 44–47, and should at minimum have the opportunity to present further evidence confirming Dr. Pape's high level of confidence that the driver was belted. *See infra* Part IV.

But even if Mr. Crockett must meet both the § 2254(d)(2) and § 2254(e)(1) standards on the existing record, he has. The Virginia Supreme Court's conclusion that Dr. Pape's Report expressed meaningful uncertainty over whether the belt was in use at the time of the accident runs contrary to all relevant record evidence. JA1858–59; Opening Br. 44–47. The rest of the report itself rejects this conclusion: "If the seatbelt was not in use during the collision one *would not expect*" the damage observed on the seatbelt mechanism.[11] JA1609 (emphasis added).

[11] The Commonwealth also argues that if Dr. Pape were sufficiently certain about a belted driver, he would have submitted an affidavit to that effect in state or federal post-conviction proceedings. Response Br. 41 n.9. This argument understates the difficulty an incarcerated, *pro se* litigant faces in securing an expert affidavit. It also forgets that the state trial court refused to hear Dr. Pape's testimony when he was present in court, ready to testify "very emphatically and clearly" as to his certainty regarding a belted driver. JA1101. And the Commonwealth moreover disregards that Mr. Crockett has requested and been denied an evidentiary hearing at every turn. JA1758–59, JA1953–54.

Nothing in the record supports concluding that Dr. Pape was uncertain. To the contrary, sentencing counsel's proffer, sentencing counsel's affidavit, and Dr. Pape's own email, all demonstrate his confidence in a belted driver. Opening Br. 46–47. Indeed, despite claiming that the Virginia Supreme Court's reading of the Pape Report "is consistent with the facts and circumstances" of Mr. Crockett's case, Response Br. 47, the Commonwealth points to *nothing* in the record that supports it.

Instead, the Commonwealth theorizes that the state court simply found all the evidence supporting Dr. Pape's high level of confidence in a belted driver "unpersuasive." Response Br. 46. The Commonwealth offers no basis upon which the state court reasonably could have found this evidence unpersuasive, nor does it offer any reason to believe the state court did so. When the state court mischaracterized the Pape Report, it did not reference *any* other piece of evidence—let alone rule on its persuasiveness. The Commonwealth wrongly argues that the Virginia Supreme Court must have made its determination "in light of the evidence . . . recounted earlier in the order" where it "referenced [Mr.] Crockett's 'habeas exhibits.'" Response Br. 46–47. While the state court referenced two exhibits in a separate discussion finding trial counsel

deficient, JA1858, the court did not similarly reference others in its prejudice analysis, nor did it "recount" *any* of the evidence relevant to the Pape Report at *any* point in its opinion.

Unable to counter this point, the Commonwealth misquotes *Moore v. Hardee* to suggest that a state court's failure to acknowledge pertinent evidence "*may*" not amount to an unreasonable determination of fact under § 2254(d)(2). Response Br. 46 (citation omitted). But *Moore* held the opposite. When a state court "'has before it, yet apparently ignores, evidence that supports [the] petitioner's claim,' the state court fact-finding process *is* defective," and the resulting factual findings are unreasonable. *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013) (emphasis added) (alteration in original). While a state court need not rattle off every item in the record to "avoid the accusation that it unreasonably ignored the evidence," Response Br. 46, it must not "'overlook[] or ignore[]' '*highly probative*' evidence." *Moore*, 723 F.3d at 499 (emphasis added) (quoting *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004)); *cf. Gray v. Zook*, 806 F.3d 783, 791–92 (4th Cir. 2015) (holding that a state court that ruled on the admissibility of a "minimal[ly] probative" affidavit after the parties "traded five briefs on the issue" had

not ignored it). The Commonwealth never disputes that the unrebutted record evidence confirming Dr. Pape's high confidence in a belted driver is highly probative. Nor could it.

In isolating the word "suggest" to support its misreading of the Pape Report, the Virginia Supreme Court ignored the remainder of the report itself and did not once mention additional evidence undermining its reading—including sworn statements made by a member of the Bar and an undisputedly authentic email from the report's own author. *See* Opening Br. 44. Because the Commonwealth cannot defend this as reasonable, this Court should reverse.

IV. The Commonwealth's underdeveloped arguments against an evidentiary hearing rest on its mistaken § 2254(d) analysis and its misappraisal of the strength of the prosecution's case.

The Commonwealth does not respond to Mr. Crockett's argument that if this Court holds that the state court's decision was unreasonable under either § 2254(d)(1) or § 2254(d)(2), *see supra* Parts II–III, the district court's reliance on § 2254(d) to deny an evidentiary hearing was

misplaced and remand is required.[12] *See* Opening Br. 48; Response Br. 48 (arguing that the state court's decision was reasonable under § 2254(d)).

To the extent the Commonwealth does suggest further development of the facts would be unproductive even if Mr. Crockett prevails under § 2254(d), it misappraises the existing record. Response Br. 48; *see supra* Part II.B. The Commonwealth claims that Mr. Crockett has "not proffered" what relevant new evidence such a hearing would produce. Response Br. 48. But Mr. Crockett has explained that it would offer a chance for experts like Dr. Pape, Mr. Kirk, and Mr. Bagnell to resolve any uncertainty over exactly what testimony the jury would have heard had trial counsel not been ineffective—the very uncertainty that drove the district court to deny a hearing. *See* Opening Br. 51–52. These experts' post-conviction filings lay out in detail that this testimony would have established that the driver was belted and that Mr. Crockett would not have been found where he was had he been the belted driver. *See supra* Part II.B.2. Such expert testimony is reasonably likely to have

[12] The Commonwealth does not dispute Mr. Crockett's demonstration that § 2254(e)(2) does not foreclose a hearing. *See* Opening Br. 48; Response Br. 48.

swayed at least one juror, so Mr. Crockett is at minimum entitled to an evidentiary hearing if this Court does not grant the writ outright.

CONCLUSION

For the foregoing reasons, Mr. Crockett is entitled to habeas relief. Alternatively, and at a minimum, this Court should reverse and remand with instructions to conduct an evidentiary hearing at which Dr. Pape and others may testify.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,268 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I, Nicolas Sansone, certify that on February 1, 2021, a copy of Appellant's Reply Brief was served on counsel for Appellee via the Court's ECF system.

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