No. 19-6636

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAMERON PAUL CROCKETT,

Petitioner-Appellant,

v.

HAROLD W. CLARKE, Director,
Virginia Department of Corrections,

Respondent- Appellee.

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

BRIEF OF RESPONDENT-APPELLEE

MARK R. HERRING
Attorney General of Virginia

K. SCOTT MILES
Deputy Attorney General

DONALD E. JEFFREY, III
Senior Assistant Attorney General

VICTORIA JOHNSON
(VSB NO. 68282)
Assistant Attorney General
OagCriminalLitigation@oag.state.va.us
vjohnson@oag.state.va.us

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071 – Telephone
(804) 371-0151 – Facsimile

Counsel for Respondent-Appellee

January 11, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-6636 Caption: Cameron Paul Crockett v. Harold W. Clarke

Pursuant to FRAP 26.1 and Local Rule 26.1,

Harold W. Calrke
(name of party/amicus)

who is Respondent-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Victoria Johnson Date: November 12, 2020

Counsel for: Harold W. Clarke

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

CORPORATE DISCLOSURE STATEMENT

INTRODUCTION

Appellant Cameron Paul Crockett appeals the district court's dismissal of his 28 U.S.C. § 2254 federal habeas petition challenging his state conviction.

Virginia juries have twice convicted Crockett of the involuntary manslaughter of Jack Korte.[1] JA 14-15, 988. Three days after Christmas 2008, Crockett—whose blood alcohol concentration was almost twice the legal limit—lost control of his car. Korte was sitting in the passenger side, which collided with a tree in a residential neighborhood in Virginia Beach. Korte died at the scene.

One witness saw the collision; five neighborhood residents converged on the scene within a very short period, with two arriving within approximately one minute after the crash. The witnesses found Crockett unconscious, lying across the collapsed front driver's seat. His legs were even with the driver's side window, his feet at the steering wheel, his upper torso and head in the back seat. Crockett nevertheless claimed that he had not been driving the car, but that the actual driver had somehow escaped injury, disentangled himself from the seatbelt, extricated himself from underneath the deployed airbag as well as Crockett himself, and fled, before he could

[1] Crockett originally was charged with aggravated involuntary manslaughter, but the first jury to hear his case acquitted him of that charge and convicted him of the lesser-included offense of involuntary manslaughter. JA 14. Crockett's first trial ended in mistrial when the jury could not agree as to punishment. JA 15.

be seen by any of the witnesses, including a police officer who arrived on scene in fewer than four minutes.

In state habeas proceedings, Crockett attacked his conviction on the theory that his trial attorney was constitutionally ineffective for failing to adequately investigate and present evidence related to the driver's seatbelt mechanism. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The state habeas trial court found that Crockett had not established either part of the *Strickland* test. On appeal, the Virginia Supreme Court concluded that trial counsel should have investigated and presented the evidence, but that the attorney's omission did not prejudice Crockett's defense.

Crockett then filed a federal habeas petition again raising his *Strickland* claim. 28 U.S.C. § 2254. Applying the highly deferential standard of review for state court convictions, the district court concluded that the state court's adjudication was neither unreasonable nor inconsistent with Supreme Court precedent, dismissed Crockett's habeas petition, and rejected his request for an evidentiary hearing. Because the district court correctly concluded that the state court adjudication of the claim was reasonable, this Court should affirm.

ISSUE PRESENTED

Whether the state court's determination that Crockett had not established that he was prejudiced by counsel's failure to investigate and present evidence about the driver's seatbelt mechanism resulted in a decision that was contrary or in resulted in a decision that was unreasonable application of clearly established federal law and whether Crockett was entitled to an evidentiary hearing on the issue.

STATEMENT

A. The crash and its aftermath

At 11:15 p.m. on December 28, 2008, Paula Patrick, who lived on Wolfsnare Road in Virginia Beach, Virginia, heard an unusually loud "speeding" noise from the street outside. JA 292, 303. At the same time, the sound of a car engine accelerating caught Antoine Smith's attention as she walked along Wolfsnare Road. JA 269-72, 285. Smith turned and watched as a speeding car "slammed on [its] brakes," and "turned sideways." JA 270-72.

Meanwhile, Patrick had opened her front door and stepped outside to investigate. JA 292-93. Turning in the direction of the sound, she saw a car speeding much faster than the posted limit. JA 290, 293-94. Patrick also watched as the car lost control and began to slide sideways and turn perpendicular to the roadway, with its headlights aimed at Patrick's home. JA 293-94, 304. Fearing the

car would crash, Patrick turned and called back inside the house for her son to dial 911. JA 294.

Despite turning sideways, the car traveled with such velocity that it continued sliding, passing between cars parked on the street, leaving the roadway, and crossing the front lawn of 2140 Wolfsnare Road, where the passenger side collided with a tree. JA 270-71, 275-75, 286, 305, 353, 382-84, 588, 591-94, 601. Smith saw the collision and continued to stand outside watching the car. JA 270-72. From the time she saw the car strike the tree until neighbors ran up to the car, Smith only took her eyes off the car for "[m]aybe five seconds, if that." JA 287.

After hearing the impact, Patrick walked down the steps, located the car, and walked "quickly" across the street towards it, arriving at the car less than a minute after the crash. JA 295-97, 310-12, 315. As she walked across the street, Patrick did not see anyone get out of the car. JA 297. Upon arriving at the car, Patrick saw Crockett's legs at the level of the front driver's side window; she put her hand on Crockett's leg and "told him to hold on" because help was coming. JA 297, 299, 319, 402. Crockett was not moving or talking. JA 298.

Patrick thought Crockett's legs were on top of the driver's seat, with his body curved around so that his upper body was in the rear window with his arm protruding through the window onto the top of the car. JA 286, 320-22, 326. Patrick explained that Crockett's "legs were in the front and he was—he was also

in the back window . . . . . So he was in the front and the back." JA 326. Patrick did not see Crockett wearing a seatbelt. JA 333.

James Kelly Reid, who lived "two doors down," arrived approximately a minute after hearing the impact. JA 336, 341-42. Reid looked inside the car and saw Crockett's legs lying on top of the collapsed front driver's seat, with the rest of his body in the back seat. JA 337, 351. Reid did not see Crockett wearing a seatbelt and testified that Crockett "started coming to" as Reid got to the car. JA 338, 345, 348-49. After the police arrived, Reid observed Crockett struggling with the police. JA 346-48.

Three other area residents—Bill Daniels, Holly Dickson, and Kolden Dickson—all heard the car crash into the tree in their front yard. JA 353-54, 369-70, 378-79. Daniels described the noise as "sound[ing] like an airplane crash . . . ." JA 353-54. "Within thirty seconds," Daniels rushed outside and saw a white car wrapped around a tree: "it was like it was cut in half, like you couldn't even see the passenger side." JA 354-56, 358, 754, 1348, 1352-54. Daniels looked inside the car and saw someone—whom Daniels called "the driver"—lying with his legs in the front seat and his head in the backseat. JA 356-57, 361-62, 563-70. Daniels, whose house was equipped with motion sensor lights in the back, did not see anyone getting out of the car or running or walking away from the area. JA 359, 363. Daniels did not see Crockett wearing a seatbelt. JA 364.

When Holly Dickson heard the crash, she went outside and immediately walked up to the crashed car. She saw a person—whom she called "the driver"—lying across the driver's seat with his feet "where the steering wheel would be" and his arm extended back and "touching behind the backseat."[2] JA 371, 375-76. When defense counsel asked Holly Dickson if someone could have escaped out the driver's window before she got to the vehicle, Dickson responded, "What I saw was someone passed out in that driver's seat, so it didn't seem likely to me." JA 373.

Kolden Dickson heard the crash, looked out the front door, and saw the car wrapped around a tree in his front yard. JA 379. He did not see anyone moving inside the car, getting out of the car, or walking away from the car. JA 380, 387. Kolden Dickson went back inside his house to call 911 and then walked out to the car a few minutes later. JA 386. When he looked inside the car, he saw Crockett "laying there on top of the driver's seat." JA 381. The driver's seat "looked like it had just flattened out in the wreck," and fully extended backward, such that it touched the backseat bench. JA 381, 389. Kolden Dickson explained that the seat's headrest was at Crockett's "middle back" while the "rest of [his] lower body was on the driver's seat." JA 381. When asked by trial counsel whether he saw

[2] Defense counsel objected when Daniels and Dickson referred to the person in the front seat—who turned out to be Crockett—as "the driver," but the trial court did not rule on either objection. JA 356, 371.

Crockett wearing a seatbelt, Kolden Dickson replied, "I don't remember about the seatbelt." JA 394.

Virginia Beach Police Officer Kenneth Buechner arrived at the scene approximately three-and-a-half minutes after the 911 call. JA 397, 409. Officer Beuchner found Crockett positioned "on what remained of the driver's side of the vehicle in the front seat." JA 402. "[Crockett's] feet were under the steering wheel," "[h]is waist was where the center console would be," and his shoulders "were behind the passenger seat." JA 402. Officer Buechner added that the driver's seat had broken, so Crockett "wasn't in what would be considered a seated position in the seat, but he was still in the area that was the driver's position." JA 402-403.

When Officer Buechner arrived, Crockett was moving "[s]lightly, but he was unconscious." JA 403. Officer Buechner noticed that the passenger, Jack Korte, had his head "up against Mr. Crockett's waist area." JA 403-04. As Crockett began to wake up, he began moving around and kicking inside the car, causing the passenger's head to move around "aggressively." JA 404. Officer Buechner and another police officer had to physically subdue Crockett, who continued fighting them and yelling at them to get off him. JA 404. Officer Buechner noticed a strong odor of alcohol coming from the car JA 406. He did not recall Crockett wearing a seatbelt. JA 406, 411.

As Officer Buechner and another officer struggled to subdue Crockett, Virginia Beach Police Officer Paul Bradley tried to help Korte. JA 404-06, 427-28. Korte, though unresponsive, initially exhibited some involuntary eye and mouth movements. JA 430. By the time paramedic James Dickey arrived, however, Korte had ceased making any sounds or movements. JA 430, 457. Dickey could not detect a pulse or heartbeat and pronounced Korte dead. JA 459. Later examination established Korte's cause of death was blunt trauma to the head, chest, and pelvis as a result of the collision. JA 521. Korte was six feet, three inches tall and weighed approximately 180 pounds. JA 1572.

The Virginia Beach Fire Department did not extract Korte's body at the scene. JA 470. The Honda was taken to the fire station, where the vehicle's roof was cut off and the doors removed. JA 471-72. Because the front seat and dash had "rolled over on top of" Korte, members of the fire department had to pull the "dash row . . . forward" and "physically pull" Korte's remains from the wreckage. JA 471. Extraction of remains after a fatal crash typically takes "fifteen, twenty minutes," but in this case, it took "an hour, hour and a half." JA 471.

Because of the car's position, emergency personnel extricated Crockett, who is approximately six feet, two-inches tall and "weighed approximately 200-210 pounds," through the car's broken back windshield. JA 403, 416, 460, 464, 736, 1329. Dickey, the paramedic, had "no idea" whether Crockett had been wearing a

seatbelt or whether it had been removed before Dickey arrived. JA 465. He removed Crockett's shirt to examine him at the scene; he did not remember seeing "any injuries consistent with a seatbelt having been across [Crockett's] chest." JA 466.

Crockett was transported to the hospital by ambulance and was able to answer questions and recall the accident, although he "did ask" the medic who rode with him "a couple of times what had happened." JA 460, 692. Crockett did not consume any alcoholic beverages from the time of his extrication until his arrival at the hospital. JA 460-61. When Crockett's blood was tested approximately a half-hour later, it revealed a blood alcohol content level between .14 and .15 percent. JA 538-40.

When examined by the emergency room doctor that night, Crockett was "alert, oriented," "communicating properly," and "showed no distress." JA 693, 699, 704-05, 708-09. A physical examination revealed only "superficial" lacerations on Crockett's right ankle, left elbow, and left hand; the doctor did not find any injuries to Crockett's "chest striking a steering wheel or an airbag . . . ." JA 702-03. A CT scan showed a "small, right pulmonary contusion," a "small pneumothorax" on the left lung, and findings consistent with two small pieces of glass embedded in Crockett's scalp. JA 702-03, 710-11. On neurologic

examination, Crockett was "alert, oriented, knew where he was" and "communicat[ed] properly." JA 704-05.

At the hospital, Virginia Beach Police Officer Fitz Wallace interviewed Crockett. JA 479. Officer Wallace observed that Crockett's breath smelled of alcohol and that his eyes were bloodshot and his face was flushed. JA 481-82. Officer Wallace also observed small cuts on Crockett's left hand and elbow and noted that Crockett was wearing a neck brace. JA 480, 503-04. Crockett's clothing had been cut away, and he was dressed in boxer shorts. JA 480. Wallace did not see "any injuries on his body that would be consistent with him having been belted at the time of the accident . . . ." JA 504.

Crockett admitted to having consumed a forty-ounce bottle of beer. JA 482. When asked, at 12:17 a.m., whether he had been involved in a traffic accident, Crockett claimed to have no knowledge of a "traffic accident," but indicated his awareness of a "traffic incident." JA 483. At the end of the first interview, Crockett asked Officer Wallace, "I mean, did I hit someone or I mean?" JA 483; see also ECF No. 32, Digital Media Appendix (JA vol. IV), State Habeas Exhibit #430 at 5:43-45.

After Crockett performed poorly on field sobriety tests, Officer Wallace placed him under arrest and read Crockett his *Miranda* rights. JA 487. Crockett agreed to continue speaking with Officer Wallace and told the officer that no one

else had been in the vehicle with him. JA 488. The vehicle, a 1998 Honda Accord two-door coupe, was registered to Crockett's mother, but Crockett was its primary driver. JA 734.

Later, Officer Wallace asked Crockett whether he knew Korte; Crockett said Korte was his friend. JA 489, 508. Initially Crockett denied Korte had been in the car, although, ultimately, he conceded Korte was there. JA 489. When Crockett was asked if he knew Korte's condition, Crockett responded, "I'm fine, he should be in the same condition as me." JA 489. When told that Korte had died, Crockett responded, "That figures." JA 489.

B. Pertinent trial proceedings

At trial, the defense theory was that Crockett was not driving the car and that the true driver had escaped the accident scene by bolting out of the wrecked car's driver's side window, fleeing into the woods, and leaving Crockett and Korte behind. JA 228-29.

In support of this strategy, the defense attacked the credibility of the Commonwealth's witnesses. Smith testified that she first heard Crockett's car when she noticed the traffic signal at Wolfsnare and Greatneck Roads turned green. JA 270, 285, 572, 581-84. The defense called professional surveyors who testified that

no line of sight made a direct view of the traffic light possible. JA 577, 579-80, 584.[3] The defense also attacked Smith's trial testimony that Crockett's car spun, presenting evidence from crash team investigators that skid marks were found as opposed to evidence suggesting complete revolutions of the car. JA 270, 286, 588, 591-94.

Defense counsel also confronted Patrick with her prior statement describing Crockett as "the one in the backseat." JA 325-26. Patrick explained that Crockett was not "totally in the backseat" but "in the front and the back," as she had described. JA 326. The defense similarly confronted Daniels with his prior statement describing Crockett as the "guy in the backseat." JA 361. Daniels also maintained that "what he saw" was Crockett's legs in the front seat, with his upper body in the backseat. JA 357, 361. Daniels' prior statement was made to a defense investigator while he was "in a hurry" and "late for work." JA 567.

The defense criticized the thoroughness of the police investigation. To that end, the defense called Officer Forrest Dean Godwin, a member of the fatal crash team assigned to the Wolfsnare Road scene and questioned him about his collection of evidence. JA 604-06. Officer Goodwin explained that he directed forensic investigators to take various pictures of the scene, and that because he

[3] Smith's testimony, however, was not that she had seen the light itself, but the reflection it made on the wet pavement. JA 285.

was, at the time, unaware of other aspects of the investigation he tried to "photograph everything [s]hould it be deemed necessary later on." JA 617-18.

Officer Goodwin agreed that, based on his observations, the driver's side window was open, the car's airbags had deployed, and that mud and grass debris was deposited on both the outside of the car and the driver's seat area as the car slid through the yard, as depicted in photographs taken from the scene. JA 610-13. Officer Goodwin was not instructed to "swab the vehicle" for trace evidence. JA 616.

Karlene Carkhuff, a family friend who considered Crockett's mother "like a sister," accompanied Crockett's mother to the impound lot to recover personal property from Crockett's Honda. JA 631-32. Carkhuff testified that the car was parked outside and exposed to the elements. JA 633-35. When asked if she "notice[d] anything on any of the airbags," Carkhuff testified that she noticed what she was "pretty sure" was blood, explaining "I wouldn't think it would be anything else." JA 636, 641. On cross-examination, Carkhuff admitted that her prior testimony at the mistrial was, "I did not notice any blood on the [airbag] on the driver's side." JA 641. When asked if Crockett smoked cigarettes or whether he "typically [wore] his seatbelt," Carkhuff replied, "Never." JA 640.

Kevin J. Kelly, a forensic technician with the City of Virginia Beach, testified that Officer Kellogg instructed him to remove the driver's side airbag

from the Honda on February 12, 2009, while the car was at the open air impound lot. JA 619-20. Kelly removed the airbag, sealed it, and took it to Property and Evidence. JA 620-22. Kelly was not instructed to send the airbag to a "lab for processing." JA 620-21.

Robert F. Bagnell, a retired crime scene investigator for the Portsmouth Police Department, testified regarding investigative techniques following a car crash. JA 647-60. Bagnell particularly highlighted the forensic value of testing deployed airbags for DNA material. JA 651-52. On cross-examination, Bagnell admitted he had not spoken to any witnesses to the Wolfsnare Road crash, and had "no idea" whether the police officers investigating the scene at Wolfsnare Road were aware of statements of the defendant or witnesses to the crash. JA658-60.

Dr. Reuben Koller, a defense expert in the area of behavioral medicine and forensic psychology testified that, as a general principle, a traumatic experience can affect an individual's memory. JA 712-13, 716, 719. Dr. Koller had neither examined Crockett nor reviewed any of his medical records prior to testifying. JA 712-13, 719. The emergency room doctor who treated Crockett agreed with defense counsel that "unconsciousness" or an "altered state of consciousness" could be indicative of a head injury, that an individual could have difficulty with recall after a head injury, and could "have amnesia for an event and still be alert and follow commands." JA 706-07, 709. When defense counsel asked the medic

who accompanied Crockett to the hospital if Crockett exhibited a lack of memory that could be consistent with a head injury, she answered, "It is a potential, yes." JA 692.

Finally, the defense presented evidence to suggest the driver was Jacob Palmer. Crockett testified that he and his friend Korte planned to "hang out" the night of December 28. JA 738. Crockett, driving the white 2008 Honda Accord coupe his mother purchased for his use, picked Korte up at around 9 p.m., and Crockett eventually drove Korte to a party at a friend's apartment. JA 738-43, 811-17. In addition to the alcohol they had already consumed, they sat in the apartment complex parking lot for approximately 45 minutes "speed drinking" malt liquor. JA 743.

According to Crockett, as he and Korte sat in the apartment parking lot drinking, another friend, Jacob Palmer, contacted him to find out where he and Korte were and whether they were coming to the party. JA 746. Crockett testified that he asked Palmer to come get him and Korte, so Palmer could direct them to the correct apartment. JA 747. According to Crockett, they arrived at the party around 10:50 and stayed for a short period of time, as the party was "crowded." JA 750-51.

Crockett testified that, at some point during the party, he and Palmer had a conversation about "smoking a blunt." JA 752. Crockett maintained that Palmer

had marijuana but that that neither he nor Korte had any money or rolling papers. JA 752-53, 780-84. According to Crockett, his last coherent memory of the evening was deciding that he was too intoxicated to drive and offering his keys to Palmer for the purpose of driving him and Korte to purchase rolling papers for marijuana cigarettes. JA 753-55.

Crockett testified his next coherent memory was waking up in the hospital and being interviewed by the police; he explained that his statements to police were a product of confusion and a lack of memory. JA 769-80. Crockett claimed that in the weeks following the collision, he had three distinct "recollections" of the time for which he claimed to be unable to account. JA 756, 817-19. These "recollections" consisted of short, distinct memories of the putative errand to purchase rolling papers.

Crockett asserted that he was able to recall sitting in the back seat and looking forward at Korte in the front passenger seat and being asked by a faceless unknown driver where they wanted to go to make the purchase. JA 757-58, 768, 819-21. Crockett told the jury that he remembered looking down at his cell phone and texting at the same time, which Crockett said he confirmed by later reviewing his own cell phone records. JA 757, 760. Crockett also claimed to recall a moment where he and Korte were in the car, while it was parked at a gas station at which they had frequently purchased rolling papers in the past. JA 758-59, 785-786.

In this "memory," Crockett maintained he could not see a driver, and "assum[ed]" that person had stepped out of the car. JA 760. In addition, Crockett claimed to recall climbing into the back seat of the vehicle and offering Korte the front passenger seat as they entered the vehicle. In this final "recollection," Crockett claimed that a person whom he could not identify asked him for a jacket. JA 762-63. Crockett identified a jacket photographed at the scene of the car wreck as the jacket he "believe[ed he] gave someone . . . ." JA 764.

Crockett also testified that he reviewed cell phone records showing the time stamps of text messages and telephone calls made on December 28 and 29 by Palmer, Joshua Reddy, and himself, which Crockett maintained supported his version of events. JA 750, 790-808.[4] Crockett testified that he and Korte frequented two local stores that sold rolling papers, and that the "quickest" route back to the party from one of the stores, a Citgo, would involve traveling on Wolfsnare Road. JA 764-68. The defense later presented testimony from the managers of each of the stores establishing that only the Citgo would have been open at the relevant time. JA 720-23, 726-28. Crockett testified that he "frequently" did not wear a seatbelt. JA 826-27.

[4] The cell phone records were admitted as an exhibit at trial. JA 792, 794, 799.

Two people who also attended the party testified for the defense. Ammerelle Barretto said that at some time during the party, she lost track of Palmer's whereabouts. JA 679-80, 682-83, 686. JA 683. Barretto recalled Palmer later going outside to smoke a cigarette, coming back inside, and then asking whether anyone had heard from Crockett and Korte. JA 676, 685. Barretto characterized Palmer as "breathing kind of heavy" and being "really weird and sketchy about it." JA 684.

Joshua Reddy, who cohosted the party, spent part of the evening in his back bedroom while the party went on in the living room and kitchen area. JA 675. While Reddy was there, Palmer informed him that Crockett and Korte were going to the store, and asked Reddy if he needed anything. JA 673, 675. When defense counsel asked Reddy, "And was it just at that time that the three of them disappeared and you didn't see Mr. Palmer again for at least an hour or so?" Reddy replied, "That I did not know where they were, yes." JA 673. During that period of time, Palmer sent Reddy some text messages. JA 672. Reddy did not know whether Palmer was still at the apartment during that period, and Reddy did not see Palmer leave with Crockett and Korte. JA 672, 675. Reddy did not observe any injuries to Palmer. JA 676

Reddy did not go to work the next day because he was hungover. JA 677. At some point, Reddy was also accused of driving Crockett's car at the time of the accident and had to "verify" that he was not. JA 677.

After both sides rested, trial counsel moved to strike the Commonwealth's evidence on the issue of the identification of Crockett as the driver of the car, arguing that the Commonwealth's evidence was speculative. JA 555-56. The trial court denied the motion, stating that it was the jury's province to determine "whether or not the circumstantial evidence is such to establish that beyond a reasonable doubt that [Crockett] was driving the vehicle or whether or not the fact that there could or maybe was somebody else was a reasonable hypothesis consistent with innocence." JA 557.

During closing argument, the prosecutor emphasized not only the eyewitness accounts of the collision and Crockett's physical position in the car, she also pointed to the serious nature of the wreck and the "mangled" condition of the car to argue the unlikelihood that a third person would have been able to quickly flee. JA 847-50.

Trial counsel vigorously argued for the defense theory. He contended there was sufficient time between the collision and the arrival of the witnesses for the supposed driver of the car to escape and maintained that Crockett had been sitting, unbelted, in the backseat of the car at the time of the collision, JA 851, 856, 870-71, 876-77, 881-83, 884-88. JA 887, 890-91. According to trial counsel, Palmer was able to escape injury and quickly flee because he had been seat-belted in the driver's seat. JA 870-71, 863-64, 891-94. Trial counsel attacked the thoroughness of the Commonwealth's investigation and particularly argued that the Commonwealth

neglected an important opportunity to develop DNA material from the airbag and have it tested to establish the driver's identity. JA 886-89. He concluded by emphasizing the prosecution's failure to rebut Crockett's evidence by calling Palmer to testify. JA 858, 868-69, 870-72.

In rebuttal, the prosecutor emphasized Crockett's statements to police, JA 897, attacked the credibility of the defense witnesses, including Crockett, and identified weaknesses in the evidence adduced to claim Palmer was the driver. JA 896-900, 905. The prosecutor called attention to the unlikely nature of Crockett's version of events, arguing that he asked the jury to "believe a lot of unrealistic stuff." JA 905-906.

The jury convicted Crockett of involuntary manslaughter and fixed his sentence at five years in prison. JA 911, 989.

C. Crockett's motion to test the seatbelt mechanism, motion for new trial, and sentencing hearing, a direct appeal.

Before the final sentencing order, the trial court granted Crockett's motion[5] to grant an expert access the car to perform testing of the seatbelt system.[6] JA 1246-47. Crockett also moved for a new trial. JA 1025-92.

---

[5] Crockett had retained new counsel. JA 1213-20.

[6] The order authorizing testing was not included in the Joint Appendix. It was entered by the trial court on December 7, 2012, and appears at page 323-24 of the trial court manuscript record.

In the motion, Crockett highlighted Officer Kellogg's conclusion in the "Crash Scene Worksheet" that Crockett, whom Officer Kellogg described as being in the driver's position, was "belted."[7] JA 1026, 1042. Crockett attached to the motion the report of a professional engineer, David Pape, Ph.D. JA 1035-41. Dr. Pape concluded that the damage to the car "was consistent with impact with a tree on the right side"; "[t]he driver's seatbelt latch and retractor functioned properly at the time of [the] inspection"; the driver's side "seatbelt webbing had been cut in two places during the extraction process"; and that "one section of the driver's seatbelt webbing had cupping." JA 1035. Dr. Pape stated, "This 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." JA 1035. Dr. Pape identified the relevant portion of the seatbelt webbing as a "cut section of webbing, approximately 17 inches in length, containing the latch. This section of webbing had cupping . . . . There were cuts in the webbing that appeared to be from saw cuts during extraction." JA 1036, 1039. Dr. Pape opined:

> The primary direction of impact in this accident was in the lateral direction. The loading on the seatbelt webbing would not be expected to be as severe as that found in a frontal collision. However, one section of seatbelt webbing had cupping. This section of webbing was

[7] This document was not admitted at trial, and neither party questioned Kellogg regarding the document or his conclusions in it. JA 585-98, 1119-20. The Crash Scene Worksheet was provided to the defense prior to Crockett's first trial. JA 1119.

> the section that would have been in the buckle area during use. This 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.

JA 1036-37.

At a hearing, defense counsel advised the trial court that Dr. Pape was available to testify. JA 1099. Defense counsel told the trial court that, based on her conversations with him, she expected Dr. Pape would testify that the cupping on the seatbelt:

> 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 but for someone being belted in that seatbelt at the time of that collision. A minor fender bender is not going to result in that kind of cupping. It's going to have to be a significant collision that, in essence, results in a total – a total destruction of the vehicle.

JA 1101.

After hearing argument, the trial court concluded the seatbelt evidence could have been obtained for use at trial and denied the motion. JA 1162. The trial court then sentenced Crockett to five year in prison for involuntary manslaughter. JA 1235, 1240.

On July 15, the Virginia Court of Appeals affirmed Crockett's conviction and, on August 12, 2014, denied rehearing en banc. JA 1242-49. The Virginia Supreme Court refused Crockett's appeal by order dated April 7, 2015 and denied

his petition for rehearing on October 15, 2015. JA 1250-51. The Supreme Court of the United States denied Crockett's petition for writ of certiorari on February 29, 2016. JA 1252.

D. State habeas proceedings

Crockett's state habeas petition alleged, in part, that trial counsel rendered ineffective assistance in failing to adequately investigate and present evidence related to the driver's seatbelt mechanism. JA 1259-64, 1292-1300. In support of that claim, Crockett attached Dr. Pape's report, JA 1607-12, and one page of an email exchange between Dr. Pape and a family member, where Dr. Pape confirmed that he "would . . . be comfortable adding that the conclusions were accurate to a reasonable degree of engineering certainty at the time of the inspection." JA 1616. Crockett also submitted an affidavit from sentencing counsel, repeating his trial proffer that "Dr. Pape verbally stated" to counsel "that the 'cupping' on the Honda Accord's driver's side seatbelt 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. Therefore, excluding any other possible collisions that this same vehicle could have been involved in prior to the accident on December 28, 2009." JA 1622-23.

Crockett also submitted affidavits from Ronald Kirk, an engineer, JA 1630; Robert F. Bagnell, the retired crime scene investigator who testified for the defense

at trial, JA 1646-63; Alan R. Donker, a private investigator initially retained by Mrs. Crockett who later began working for trial counsel, JA 1669-72; and Paul Lewis, a Biomedical Engineer, JA 1666-68. Crockett also attached to his petition the affidavits of two jurors, Donna Smitter and Barbara Addison, impeaching their verdicts. JA 1673-76.

In his affidavit, Kirk stated:

> I am confident, to a reasonable degree of engineering certainty, 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. Although this opinion appears self-evident, I believe that I specifically expressed this opinion to [trial counsel].

JA 1630.

Bagnell's affidavit stated that he had encouraged trial counsel to have the driver's seatbelt mechanism tested, based on his understanding that Crockett was found "unconscious in the back seat/rear deck of the vehicle with no seatbelt on." JA 1652-53. Bagnell explained he was not qualified to determine whether a seatbelt was in use at the time of a collision but that he observed "what appeared to be signs of stress on the seatbelt." JA 1653.

Donker's affidavit stated that Crockett and his mother both expressed a desire to have the seatbelt examined and that Donker, believing that examination of the seatbelt was "important," had "urged" trial counsel to have the seatbelt tested. JA 1670-71. Donker recalled contacting Paul Lewis in Georgia, an expert who

could perform the examination, but Donker believed that "the seatbelt examination just fell through the cracks" and was not completed. JA 1071-72.

In his affidavit, Lewis stated he performed a preliminary investigation into this case but was never contacted by trial counsel to inspect the seatbelt. JA 1666-67. Lewis stated that, if requested, he would have inspected the seatbelt. JA 1668.

The respondent moved to dismiss Crockett's petition, relying in part on an affidavit proffered by Crockett's trial counsel. JA 1760-1817. The state trial court dismissed the petition, finding that trial counsel elected not to pursue the expert testimony for tactical reasons and that Crockett was not prejudiced by counsel's omission. JA 1841-44.

Crockett appealed the trial court's decision to the Virginia Supreme Court, which granted the appeal, but affirmed under different reasoning. JA 1853. Unlike the trial court, the Virginia Supreme Court concluded that counsel's failure to investigate and present evidence related to the driver's seatbelt constituted deficient performance. JA 1858. The Virginia Supreme Court concluded Crockett failed to establish prejudice. JA 1858-59.

E. Federal court proceedings

The district court determined that it was not necessary to reach the issue of trial counsel's deficient performance because Crockett had not demonstrated prejudice from counsel's failure to present evidence regarding the seatbelt

mechanism and denied Crockett's motion for an evidentiary hearing. JA 2159-68, 2183-85. This Court granted Crockett a certificate of appealability on the following issues: "Whether 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 ARGUMENT

Under the doubly deferential AEDPA standard, the district court correctly held that the state court's rejection of Crockett's ineffective assistance of counsel claim was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor was it based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

The proffered seatbelt mechanism evidence does not, as Crockett argues, establish that he was not driving his car at the time of the collision. Even assuming that Dr. Pape would testify as Crockett claims he would have, that testimony would be only one more circumstance for a jury to consider in determining whether Crockett was the driver. Five witnesses, two of whom were at the car within about one minute of the crash, described Crockett's position in the car.

Crockett, who is six feet, two inches tall, and weighed about two hundred pounds, was lying unconscious across the collapsed driver's seat, with his legs in

the front seat even with the driver's side window and his upper body in the back seat. To accept Crockett's version of events, a jury would have to believe that another person disentangled himself from the seatbelt, the deployed airbag, and from underneath Crockett himself, bailed out of the driver's side window, and ran away without being seen—all within a matter of seconds. Given the evidence presented at trial, it was reasonable for the Virginia Supreme Court to conclude that the likelihood of a different result was not "substantial" even if the jury had heard the proffered evidence.

The district court did not abuse its discretion when it denied Crockett's motion for an evidentiary hearing.

STANDARDS OF REVIEW

A. General merits standard of review

This Court reviews "the district court's legal conclusions *de novo* and its findings of fact for clear error." *Walker v. Kelly*, 589 F.3d 127, 140 (4th Cir. 2009). This inquiry is guided, however, by the strict constraints of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013).

Under AEDPA, federal courts may not grant habeas relief in a § 2254 action unless the underlying state-court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law only if it is "substantially different" from the relevant Supreme Court precedent; it is "an unreasonable application of" clearly established federal law only if it is "objectively unreasonable." *Williams (Terry) v. Taylor*, 529 U.S. 362, 405, 409 (2000). The phrase "clearly established law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of" decisions of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004).

"The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."); *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) ("Under § 2254(d)'s 'unreasonable application' clause, a federal habeas court may

not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly.").

To prove unreasonableness, the petitioner must demonstrate that there is "no reasonable basis" upon which the state court judgment could rest. *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011). If there is any conceivable basis for the federal courts to find the state court rulings "reasonable," then § 2254(d) mandates that the writ "shall not be granted" and the federal court's "analysis is at an end." *Id.* at 203 n.20. In other words, "to obtain federal habeas relief, 'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in the existing law beyond any possibility for fairminded disagreement.'" *Jackson v. Kelly*, 650 F.3d 477, 492 (4th Cir. 2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. *Richter*, 562 U.S. at 102. "If this standard is difficult to meet, that is because it was meant to be." *Id.* Section 2254(d) codifies the view that habeas corpus is a "'guard against extreme malfunctions in the state criminal

justice systems,' not a substitute for ordinary error correction through appeal." *Id.* at 102-03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

Furthermore, AEDPA provides two "independent requirements" for federal court review of state court factual findings in habeas petitions. *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Under § 2254(d)(2), a federal court may not grant a state prisoner's application for a writ of habeas corpus based on a claim already adjudicated on the merits in a state court unless that adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." And, under § 2254(e)(1), "a determination on a factual issue made by a State court shall be presumed correct," unless the petitioner satisfies his "burden of rebutting the presumption of correctness by clear and convincing evidence."

The two provisions require that "[t]o secure habeas relief, petitioner must demonstrate that a state court's finding . . . was incorrect by clear and convincing evidence, and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. at 348; *Green v. Johnson*, 515 F.3d 290, 299 (4th Cir. 2008). As with the state court's legal conclusions, "[a] state-court factual determination is not unreasonable merely

because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

B. Ineffective assistance of counsel standard of review and applicable law

Strickland v. Washington, 466 U.S. 668 (1984), provides a highly demanding standard for claims of ineffective assistance of counsel. Under *Strickland*, Crockett had the burden to show the state habeas court that his attorney's performance was deficient and that he was prejudiced as a result. *See Strickland*, 466 U.S. at 687; *Bell v. Cone*, 535 U.S. 685, 695 (2002).

In determining whether counsel's performance was deficient, "judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 688. Accordingly, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* A petitioner must prove "both deficient performance and prejudice to the defense," to establish a *Strickland* claim.

> "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

The first prong of the *Strickland* test, the "performance" inquiry, "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

The second prong of the *Strickland* test, the "prejudice" inquiry, requires showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.*

The Supreme Court has explained that the relevant "question [in determining *Strickland* prejudice] is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Richter*, 562 U.S. at 111 (citation omitted). Rather, "*Strickland* asks whether it is reasonably likely the result would have been different." *Id.* A petitioner is not required to "show[] that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case." *Id.* at 111-12. But, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

An ineffective counsel claim may be disposed of on either prong because deficient performance and prejudice are "separate and distinct elements." *Spencer v. Murray*, 18 F.3d 229, 232-33 (4th Cir. 1994); *see also Strickland*, 466 U.S. at 697.

Under § 2254(d), a federal court may grant habeas relief to a state petitioner "only if the state-court decision unreasonably applied the more general standard for ineffective-assistance-of-counsel claims established by *Strickland*[.]" *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). "Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard," "[t]he question is not whether a federal court believes the state court's determination under the *Strickland* standard 'was incorrect but whether that determination was unreasonable – a substantially higher threshold.'" *Id.* at 1420 (internal quotation marks and citation omitted); *see also Pinholster*, 563 U.S. at 202 (applying doubly deferential standard to prejudice determination). "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.*

C. Denial of evidentiary hearing standard of review

This Court reviews for abuse of discretion a district court's decision not to hold an evidentiary hearing in a postconviction proceeding. *See Gordon v. Braxton*, 780 F.3d 196, 204 (4th Cir. 2015).

ARGUMENT

I. The Virginia Supreme Court's rejection of Crockett's ineffective assistance claim was not based upon an unreasonable application of federal law or upon an unreasonable application of the facts.

A. Crockett is not entitled to de novo review of his ineffective assistance of counsel claim.

Without citing any authority, Crockett contends that this Court's review of his habeas petition is unconstrained by 28 U.S.C. § 2254(d) because "the district court did not appear to rely" on that statute. Opening Br. 39. That contention is meritless for two reasons.

For one thing, the district court framed its analysis by recognizing the limitations applicable to its review of a §2254 petition. JA 2159-60.

At any rate, Section 2254(d)'s applicability is not determined by the district court's invocation of the statute. *See Richter*, 562 U.S. at 99 ("There is no merit either in Richter's argument that § 2254(d) is inapplicable because the California Supreme Court did not say it was adjudicating his claim "on the merits."). "Instead, the statute applies to *any* claim 'adjudicated on the merits' in the state court. 28 U.S.C. § 2254(d). When a federal claim has been presented to a state

court and the state court has denied relief" courts "presume[] that the state court adjudicated this claim on the merits." *Richter*, 562 U.S. at 99 (emphasis added). Crockett has not argued to the contrary, much less rebutted this "strong but rebuttable" presumption. *Johnson v. Williams*, 568 U.S. 289, 301 (2013).

Because the Virginia Supreme Court adjudicated the claim on the merits, this court's review is "cabin[ed] . . . to determining 'whether there is any reasonable argument'" that Crockett did not establish prejudice. *Owens v. Stirling*, 967 F.3d 396, 411 (2020) (quoting *Morva v. Zook*, 821 F.3d 517, 528 (4th Cir. 2016).

B. The Virginia Supreme Court reasonably dismissed Crockett's ineffective assistance of counsel claim.

1. The Virginia Supreme Court reasonably determined that Crockett was not prejudiced by trial counsel's performance.

Despite Crockett's protestations to the contrary, the seatbelt mechanism evidence does not disprove his identity as the driver of the car. Given the evidence presented at trial, it was reasonable for the Virginia Supreme Court to conclude that the likelihood of a different result was not "substantial" even if the jury had heard the proffered evidence. *See Richter*, 562 U.S. at 111-12.

1. The Virginia Supreme Court specifically concluded that "Crockett ha[d] failed to establish prejudice under *Strickland*." JA 1858. The court

emphasized that "Dr. Pape's report . . . only 'suggest[ed]' the driver's seatbelt was in use at the time of the crash based on 'cupping' on the belt," and that "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." JA 1858-59.

That conclusion is fully supported by the evidence and is, at minimum, far from unreasonable. The evidence at trial established that Smith saw the car strike the tree and stood staring at it. JA 270-72. While trial counsel sought to impeach some aspects of Smith's testimony, JA 270-71, 285-86, 588, 591-94, 601, she steadfastly maintained that, as she watched from across the street, she did not see anyone flee from the car. JA 272.

Patrick, Reid, Daniels, and the Dicksons all arrived at the scene of the crash very quickly. Patrick and Reid reached the wrecked, and severely damaged, vehicle within about one minute, and the others soon arrived. JA 295-97, 310-12, 315, 336, 342, 358, 372, 380. While there were some discrepancies among the witnesses' recollections, they all testified that the upper portion of Crockett's body was in the backseat and his legs were in the front seat.[8] JA 297, 299, 319, 326,

[8] Patrick initially described Crockett as being in the backseat, but she clarified in her testimony at trial that "he was in the front and the back," describing his position in some detail. JA 325-26, *see* Digital Medial Appendix (JA vol. IV), Exhibit #429 at 2:45-3:10. Reid also described Crockett as being "in the backseat," but clarified that Crockett's legs were on the "collapsed front seat." JA 337, 351.

336-37, 351, 356-57, 361-62, 371, 375-76, 381, 389. Patrick specifically described Crockett's legs as being up even with the driver's side window, and Holly Dickson said Crockett's feet were "where the steering wheel would be." JA 297, 299, 319, 371. Reid and Kolden Dickson both testified that the drivers' side front seat had broken and was extended backward. JA 381, 389. Patrick, Holly Dickson, and Kolden Dickson described Crockett as unconscious. JA 298, 373, 381. None of the witnesses testified to having seen a third person flee from the car. JA 272, 297, 359, 373, 380-87.

Officer Buechner, who arrived at the scene approximately three-and-a-half minutes after the 911 call, gave the most detailed description of Crockett's position: his "feet were under the steering wheel, his waist was where the center console would be," and his "shoulders were behind the passenger seat." JA 402. Crockett was "in the area that was the driver's position," and unconscious. JA 402-03. Officer Buechner also described the driver's seat as "broken." JA 402.

Viewing the evidence as a whole, Dr. Pape's report does not add much to the evidentiary mix. Dr. Pape's report states that, upon examining the front driver's side seatbelt, he discovered "cupping" on the seatbelt that was "consistent with

---

On cross-examination, Daniels allowed that he had told an investigator two weeks after the accident that there was a passenger in the backseat, but explained that "what [he] saw" at the accident scene was Crockett "between the front seat and the back seat." JA 359-60.

loading from occupant forces during the collision and suggested that the seatbelt was being worn by the driver at the time of the collision." JA 1607. According to the report, "If the seatbelt was not in use during the collision one would not expect this cupping." JA 1609. Dr. Pape also added that, during his testing, there was "no indication that any of the seat belt components malfunctioned during the collision." JA 1608.

Thus, while the cupping "suggested" that the seatbelt was being worn at the time of the accident, the report does not state conclusively that it was in use. JA 1607. It remains possible that the seatbelt was not being worn by the driver at the time of the accident, and that some other explanation exists for the "cupping" that Dr. Pape believes he observed.

Moreover, even assuming Dr. Pape's conclusion is correct, the report neither contradicts any of the evidence at trial, nor establishes that Crockett was not the driver. None of the witnesses who testified at trial based on their personal knowledge remembered seeing Crockett wearing a seatbelt, but none of them testified conclusively that he was *not* wearing a seatbelt. For example, Kolden Dickson testified that he did not remember anything about the seatbelt. JA 394. He could not say that he knew whether Crockett was wearing a seatbelt "one way or the other." JA 394. Similarly, Officer Buechner testified that he did not recall

seeing a seatbelt on Crockett. JA 411. And Patrick, Daniels, and Reid testified that they did not see a seatbelt on Crockett. JA 333, 350, 364.

Their testimony, nor that of Crockett and his family friend claiming he does not wear a seatbelt, does not foreclose the possibility that Crockett was wearing a seatbelt at the time of the accident and slipped out of it when the crash occurred — causing the front airbag to deploy, bending or breaking the driver's seat backwards towards the backseat, and apparently knocking Crockett backwards and towards the rear window at the same time. JA 308, 381, 422. Furthermore, Dr. Pape saw "cuts in the seatbelt webbing that appeared to be from saw cuts during extraction." JA 1036. While Officer Buechner did not recall Crockett wearing a seatbelt, JA 411, it is possible that another responder cut the belt away while they were attempting to remove the (by then) struggling Crockett from the car.

Nor does it foreclose the possibility that Crockett unlatched the seatbelt as he started to regain consciousness. It also does not bar the possibility that the seatbelt malfunctioned, notwithstanding Dr. Pape's statement that he saw "no indication" it had malfunctioned when he tested it later. JA 1608. After all, Crockett survived the crash with minor injuries. JA 702-03.

2. Crockett's counter arguments are without merit. Both at trial and in postconviction proceedings, Crockett has placed great weight on his claim that he does not wear a seatbelt and on the absence of evidence documenting injuries

consistent with being struck with a deploying airbag or wearing a seatbelt. But Crockett — who bears the burden to establish ineffective assistance — has never proffered an expert medical opinion establishing what kind of seatbelt injuries are to be expected in a passenger-side collision complicated by a collapsed driver's seat. The absence of injury does not establish that Crockett was not wearing a seatbelt at the time of the crash.

Crockett further argues that Kirk and Bagnell's affidavits establish that he was not the belted driver. Opening Br. 35. Kirk stated that he was "confident, to a reasonable degree of engineering certainty, 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." JA 1630. But Kirk did not observe where Crockett's body came to rest inside the vehicle after the accident, and he does not explicitly state which witness's testimony he is relying on or what portion of that testimony. Similarly, Bagnell based his conclusion that Crockett's position in the car was "inconsistent with his having been the allegedly belted driver" on his belief that Crockett was "found initially unconscious in the back seat/rear deck of the vehicle with no seatbelt on or around him." JA 1653. However, that belief was not borne out by the evidence at trial. JA 297, 299, 319, 326, 336-37, 351, 356-57, 361-62, 371, 375-76, 381, 389.

Crockett argues that Dr. Pape's evidence at trial would have gone further than his written report and included his opinion that the cupping would only have occurred had the seatbelt been worn in a collision serious enough to result in a total loss of the car. Opening Br. 34.[9] But even that formulation of Dr. Pape's opinion does not create a reasonable probability of a different result on this record.

Even if the jury had heard and believed the proffered seatbelt evidence, it would have only been one more circumstance for the jury to reconcile within the full evidentiary picture. *See, e.g.*, *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 853 (1st Cir. 1985) (noting that "the jury was not required to believe" the expert testimony proffered by the defense). To accept that Crockett was not the driver, the jury would have to believe that this other driver survived the fatal crash, extricated himself from the seatbelt, the deployed airbag, and out from under the six-foot-two-inch, two hundred pound Crockett; that Crockett's feet and legs somehow had been thrown forward and upward from the backseat into the front seat during the accident, rather than pinned under the broken driver's seat; that the "other" driver then climbed out the driver's side window, over Crockett's legs, and then disappeared into the night unseen and unhurt; and that all this occurred within the

[9] In the eight years since Dr. Pape prepared his report, Crockett has never proffered an affidavit or sworn statement from Dr. Pape to support that claim, and instead relies on sentencing counsel's affidavit recounting hearsay statements Dr. Pape made to her. JA 1616, 1622.

few seconds that Smith's attention was directed away from the car and during the minute or less that it took neighbors to begin arriving at the car. JA 295-97, 299, 319, 310-12, 315, 336, 342, 358, 371-72, 380-81, 389, 402-03, 610, 736, 1329.

A jury also would have to believe that Crockett forgot that he had been riding in the backseat—not driving—when he asked Officer Wallace if he had "hit someone," and when he denied that anyone else was in the car. *See* ECF No. 32, Digital Media Appendix (JA vol. IV), Exhibit #430 at 5:43-45.[10]

There was ample basis on this record for the state court to "think any real possibility of [Crockett's] being acquitted was eclipsed by the remaining evidence pointing to guilt." *See Richter*, 562 U.S. at 112-13 (rejecting Richter's argument that he was prejudiced by trial counsel's failure to obtain forensic testing in light of the evidence supporting his guilt).

Nor does the proffered seatbelt evidence cast Crockett's unlikely story in a better light. Although the defense presented evidence that Palmer was at the party during the same time Crockett and Korte were, no one saw Palmer leave with Crockett and Korte. JA 672, 675, 789-800. The evidence only showed that two of

[10] Despite undisturbed state court findings to the contrary, Crockett appears to claim that he was in custody when he was interviewed. Opening Br. 13, n.7, n.8. Crockett was handcuffed to a backboard because he was combative at the scene, had possibly hit an officer, and needed to remain still so he could be assessed for medical injuries. While several officers were at the hospital, there was no evidence they were "guarding" him. JA 1490, 1492, 1855.

the people attending the "crowded" party lost track of Palmer's whereabouts for a period of time, that Palmer used his cell phone that night, and that one of them thought Palmer later inquiring about his friends' whereabouts was "sketchy" and "weird." JA 676, 678, 789. No one testified that Palmer had mud or grass on his clothes or bore any injuries indicating he had been struck by an airbag, restrained by a seatbelt, or otherwise involved in a serious, fatal vehicle collision. Even now, Crockett does not proffer any persuasive evidence that Palmer or any other third party was the driver.

Crockett draws particular attention to two pieces of evidence: the driver's side airbag and Crockett's own jacket, discovered near the car after the collision. Crockett asserts that there was "blood spatter" on the airbag. Opening Br. 31. But the police officer who examined the car at the scene testified only that there were "speckles" of mud and dirt inside the passenger compartment on the driver's side. JA 610. The only evidence that there was blood on the airbag came from a Crockett family friend who viewed the car at the impound lot after the accident. JA 634. Immediately after testifying that she thought she saw blood on the airbag, she was impeached by her prior testimony at the mistrial, where she specifically testified to the opposite. JA 641. The record simply does not establish that there was blood on the airbag.

Nor does the presence of Crockett's *own jacket* on the ground at the scene of the accident somehow implicate Palmer. Opening Br. 32. In his trial testimony, Crockett claimed that he recalled giving the jacket to a person whom he could not identify based on his incomplete recovered memory, but it is far more plausible that the jacket was thrown out of the rear window when it was shattered in the crash. JA 321, 764.

Finally, Crockett relies on affidavits from two jurors at Crockett's trial impeaching the jury verdict. However, the jurors' statements are inadmissible under state and federal rules of evidence. *See Caterpillar Tractor Co. v. Hulvey*, 353 S.E.2d 747, 750-51 (Va. 1987); *see also* Va. R. Evid. 2:606 (eff. July 1, 2012) (substantially identical to Fed. R. Evid. 606(b)). Even on de novo review, moreover, the district court would have been bound by Federal Rule of Evidence Rule 606(b) that juror testimony may not be used to impeach a jury verdict. *Robinson v. Polk*, 438 F.3d 350, 365 (4th Cir. 2006). The prohibition of Rule 606(b) also extends to the forecast of evidence in affidavits when assessing the necessity of an evidentiary hearing. *Bacon v. Lee*, 225 F.3d 470, 485 (4th Cir. 2000). The juror affidavits therefore provide no support for Crockett's ineffective assistance claim.

2. The Virginia Supreme Court reasonably applied *Strickland* and reasonably determined the facts.

Relying on this Court's decision *Elmore v. Ozmint*, 661 F.3d 783, 868 (4th Cir. 2011), Crockett argues that the state court judgment unreasonably applied *Strickland* because it did not undertake an explicit re-balancing of the seatbelt mechanism evidence along with the trial evidence. Opening Br. at 40-43. But this Court specifically held—post-*Elmore*—that a lack of explanation by the state court does not foreclose application of the § 2254(d)'s deferential standard of review. *See Valentino v. Clarke*, 972 F.3d 560, 580 (4th Cir. 2020). And, in *Shinn v. Kayer*, the United States Supreme Court reiterated the principle that it is the state court's conclusion, not its underlying reasoning, that is crucial. *Shinn v. Kayer*, 2020 U.S. LEXIS 6092 at *12, __ S.Ct. __, 2020 WL 7327827 (2020) (per curiam); *see also Richter*, 562 U.S. at 98. Under *Richter*, the state court is not obliged to articulate any of its reasoning to merit deference. 562 U.S. at 99. When a state court explains its reasoning, its decision should not be afforded less deference. *Id*. Such a rule would only encourage state courts to avoid explaining their decisions altogether.

Thus, to the extent the Virginia Supreme Court did not show its work in denying Crockett's ineffective assistance claim this Court "must determine what arguments or theories . . . could have supported the state court's determination that [Crockett] failed to show prejudice." *Kayer*, 2020 U.S. LEXIS at *12. (internal quotation marks and citation omitted). "Failure to do so "ignore[s] 'the only question that matters under § 2254(d)(1).'" *Richter*, 562 U.S. at 102 (quoting

Lockyer v. *Andrade*, 538 U.S. 63, 71 (2003)). As argued above, the record amply supports the Virginia Supreme Court's conclusion.

Crockett further argues the Virginia Supreme Court's prejudice analysis was based on an unreasonable determination of the facts because, Crockett posits, the state court mischaracterized and failed to fully address Dr. Pape's report and failed to take into account sentencing counsel's proffer of Dr. Pape's potential testimony and the email from Dr. Pape. Opening Br. 46-47; JA 1101, 1616, 1623. The record, however, does not indicate that the state court ignored or mischaracterized the evidence. It simply found the evidence unpersuasive. JA 1858-59.

"When a state court apparently ignores a petitioner's properly presented evidence, its fact-finding process *may* lead to unreasonable determinations of fact under § 2254(d)(2). *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013) (citation omitted; emphasis added). But as the Court explained in *Moore*, a state court need not refer specifically to each piece of a petitioner's evidence to avoid the accusation that it unreasonably ignored the evidence. 723 F.3d at 499; *cf. Bell v. Jarvis*, 236 F.3d 149, 158 (4th Cir. 2000) (en banc) (holding that courts "may not 'presume that [the] summary order is indicative of a cursory or haphazard review of [the] petitioner's claims'" (alteration in original) (citation omitted)).

Here, the state court highlighted the conclusion in Dr. Pape's opinion, noted its non-conclusive nature, and determined that, in light of the evidence it had

recounted earlier in the order, Crockett had not met *Strickland*'s challenging burden to establish prejudice. JA 1856, 1858. *See Moore*, 723 F.3d 488 at 499 (concluding state court's "terse" treatment of evidence satisfied standard). Moreover, the state court referenced Crockett's "habeas exhibits" in evaluating this ineffectiveness claim. JA 1858.

Furthermore, to prevail on this ground, Crockett has the burden to show that the "state court's [factual] finding . . . was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), *and* that [it] was 'objectively unreasonable' in light of the record before the court." *Winston v. Kelly*, 592 F.3d 535, 555 (4th Cir. 2010) (quoting *Miller-El v. Cockrell*, 537 US. 322, 341 (2003)) (emphasis added in *Winston*). An unreasonable determination of the facts is not merely an incorrect determination, but one "sufficiently against the weight of the evidence that it is objectively unreasonable." *Winston*, 592 F.3d at 554; *see also Wright v. Angelone*, 151 F.3d 151, 157 (4th Cir. 1998) (a decision is reasonable when it "is at least minimally consistent with the facts and circumstances of the case"). Crockett has not met his burden. The state court's conclusion is consistent with the facts and circumstances of the case. As discussed above, even if the jury had heard and credited Dr. Pape's opinion, it would have been but one more circumstance for the jury to consider in determining the driver's identity.

II. **The district court did not abuse its discretion in denying Crockett's request for an evidentiary hearing.**

The district court had the entire state criminal and state habeas records before it. As argued above, the records demonstrated the robust evidence against Crockett and the full array of Crockett's proffered seatbelt mechanism evidence. Crockett has not proffered what other evidence a hearing would produce. Further development of the evidence would not have illuminated the reasonable probability of a different result at trial. *See Landrigan*, 550 U.S. at 474-75.

Ultimately, because the state court's prejudice determination was not based on an unreasonable finding of fact, in light of the evidence presented to it, including the proposed seatbelt mechanism evidence, the district court did not abuse its discretion in denying Crockett's motion for an evidentiary hearing.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

HAROLD W. CLARKE, DIRECTOR,
VIRGINIA DEPARTMENT OF
CORRECTIONS,

By: /s/
Victoria Johnson (VSB #68282)
Assistant Attorney General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219

(804) 786-7773 – Telephone
(804) 371-0200 – Facsimile
OagCriminalLitigation@oag.state.va.us
vjohnson@oag.state.va.us

Counsel for Respondent-Appellee

STATEMENT REGARDING ORAL ARGUMENT

In compliance with Federal Rule of Appellate Procedure 34(a)(1), the Director suggests oral argument in this case would aid the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7), because it contains 11,423 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/
Victoria Johnson

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

Victoria Johnson