No. 19-6429

In the United States Supreme Court

WILLIAM JOVIAN DAVIS,

Petitioner,

v.

CLARK E. DUCART, Warden,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY

AMY M. KARLIN
Interim Federal Public Defender
MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

REPLY

The Warden doesn't dispute that Davis adequately developed his *Strickland*[1] claim in state court (Pet. 12); or that if the claim is colorable, he is entitled to an evidentiary hearing under *Townsend*[2] (Pet. 13); or, indeed, that his remaining reasons for granting certiorari—doubts about the integrity of the proceedings below, and concerns about fundamental injustice (Pet. 25–26)—are sufficiently compelling.

Instead, the Warden argues only that Davis's underlying *Strickland* claim should fail on the merits. Of course even if the Warden were right about that, it would "not logically mean" that Davis failed to make his preliminary showing that the district court's denial of a hearing is at least "debatable." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017).

But the Warden is wrong—even on his own terms.

To begin with, the Warden's account of "the prosecutor's theory" (Opp. 2) is both misleading and unrealistic. Misleading, because what the Warden casts as "the" theory was nothing more than a fallback, appearing six pages of reporter's transcript after the prosecution cited its leading evidence of guilt: what jurors "heard from [Mason] himself." (App.[3] 2. *See generally* App. 3–9.) And unrealistic, because this half-hearted fallback—that the shot "could" have gone off in Davis's pocket "during the shooting" (App. 8)—would have required jurors not only to accept a far less plausible factual theory, but to take at face value

---

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Townsend v. Sain,* 372 U.S. 293 (1963).

[3] Appendix citations refer to the appendix attached to this reply.

whatever was left of Mason's testimony once they'd discounted the more dramatic parts he'd confabulated.

This erroneous and implausible conceit is, on its own, fatal to the Warden's analysis, since it underwrites just about every defensive argument he makes: that an absence of gunshot residue (or "GSR") in the car wouldn't have mattered (Opp. 7); that Davis didn't adequately explain why it would have mattered (*id.*);[4] that the absence of stippling "would be explained by the discharge … inside of Davis's pocket" (Opp. 11); and that trajectory analysis would have shown only that Mason was "mistaken" about a "detail" (*id.*).

And though the GSR testing was only an example (*see* App. 13 (alleging that "such" evidence would have supported his defense), the Warden would have the Court now limit Davis to that one particular "theor[y]" (Opp. 9)—as if an expert, once retained, would have done no more than parrot findings that an indigent, pro se inmate could think up. The assumption is unreasonable. *See Lee v. Kink*, 922 F.3d 772, 774 (7th Cir. 2019) (Easterbrook, J.) (holding that state court unreasonably denied hearing on assumption that proffered eyewitness affiants would merely "parrot[]" their affidavits).[5] Simply put, Davis

---

[4] The relevance of GSR testing to the prosecutor's *leading* theory was if anything unusually clear for a pro se petition. (*See* App. 13 (comparing Mason's testimony to what testing would have shown); App. 11 (citing *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992) in form petition's "Supporting cases" box). *See also* Pet. 15–16 (discussing *Sims*).)

[5] The Warden's reliance on *Wood v. Milyard*, 566 U.S. 463, 473 (2012), as if it held to the contrary, confuses "issues" (at Opp. 9 (quoting *Wood*)) with arguments. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010) ("[O]nce a federal claim is properly presented, a party can make any argument in support of [it].").

"did what he could and the absence of evidence about what the trial would have been like, had [an expert] testified, must be attributed to the state [court]'s failure to afford him a hearing." *Id.*

In asserting elsewhere that Davis "fails to grapple" with Mason's testimony (Opp. 7), the Warden himself ignores the page of argument that Davis dedicated to that very topic (Pet. 20–21)—and thus leaves those points unrebutted. Nor does Davis's initial dishonesty about his involvement (Opp. 7) have much probative value: He had an obvious reason to deny culpability for the shooting even if he was innocent of premeditation. *See*, *e.g.*, *People v. Freudenberg*, 121 Cal. App. 2d 564, 578 (1953) (affirming involuntary manslaughter conviction based on accidental discharge of cocked gun).

As for the idea that McKinney could reasonably rely on the prosecution expert's determination without consulting an expert of his own (Opp. 9), it ignores the reality McKinney faced. His job was to raise reasonable doubts about Mason's eyewitness account of a deliberate shot aimed at his head. No reasonable attorney would think that such doubts could be raised by the mere fact that a gun had once been fired inside Davis's jacket pocket—a point the prosecutor himself made in argument. (App. 8 ("[T]he firearms expert … cannot tell you when the gun was fired from within the pocket.").)

Worse, the record is clear that McKinney meant to rely on more than that finding alone, but failed to lay the groundwork—telling jurors in his opening statement that the prosecutor had an opportunity to test "the entire interior of the car" for GSR but failed to (RT 621),

yet never asking the state's expert to explain what such testing would have revealed. So what the Warden invokes as a "reasonable" decision is "more a *post hoc* rationalization" than it is an accurate description of McKinney's pretrial deliberation. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003).

Finally, the Warden offers no rebuttal whatever to Davis's arguments that his *Strickland* claim would be reviewed de novo. In fact, the Warden concedes that the state court denied relief on prejudice grounds (Opp. 8), and thus that the court did not "reach" prong one. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)). As for prong two, Davis's argument isn't that the state court's decision was "succinct" (*cf.* Opp. 8), but that it was unreasonable—and for a host of reasons the Warden leaves simply unanswered. (Pet. 22–23.) [6]

[6] As the Warden notes in his letter to the Court dated February 13, 2020, there is now no dispute that McKinney was disbarred. (*Cf.* Opp. 11 n.4.)

CONCLUSION

Even with the focus on the merits—where it doesn't belong, *Buck*, 137 S. Ct. at 773—the Warden's opposition fails. Because the Warden has provided no other reasons to deny review, the Court should grant it.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

February 20, 2020

MICHAEL T. DRAKE
Counsel of Record
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012
(213) 894-5355
michael_drake@fd.org

Counsel for Petitioner