No. 18-185

In The
Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,
v.
MICHAEL SKAKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONER STATE OF CONNECTICUT

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The defense team in this case provided representation far above that afforded the overwhelming majority of criminal defendants. Nevertheless, the exceptional quality of their overall performance was completely ignored by the Connecticut Supreme Court in finding a Sixth Amendment violation. The court therefore failed to heed this Court's admonition in *Harrington v. Richter*, 562 U.S. 86 (2011), that "when counsel's overall performance indicates active and capable advocacy," an "isolated error" can "support an ineffective-assistance claim" only if it is "sufficiently egregious and prejudicial." *Id.* at 111 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (internal quotation marks omitted). Had the court done so, the only reasonable conclusion it could have reached is that the defense team's single omission in failing to present Denis Ossorio as a fourth, partial-alibi witness, even if error, simply was not "egregious error" sufficient, by itself, to find a Sixth Amendment violation and overturn the defendant's conviction.

Unfortunately, the state court's misapplication of *Strickland* in this regard is not uncommon among lower courts. Indeed, the defendant's own conflicting efforts to reconcile this Court's jurisprudence and that of other federal and state courts regarding the proper role of overall performance in evaluating claims of ineffectiveness under *Strickland v.*

Washington, 466 U.S. 668 (1984), confirm why it is critical that this Court grant certiorari to clarify and resolve this important Sixth Amendment issue.

I. OVERALL PERFORMANCE IS THE CENTRAL FOCUS OF THE FIRST *STRICKLAND* PRONG

As explained in the Petition at 15-22, this Court's decisions establish two relevant rules with respect to *Strickland*'s deficient-performance prong. First, courts must take into account defense counsel's overall performance. *Richter*, 562 U.S. at 111; *Kimmelman v. Morrison*, 477 U.S. 365, 396 (1986). Second, when counsel's overall performance is strong, an isolated error constitutes deficient performance only if the error was "egregious." *Richter*, 562 U.S. at 111; *Carrier*, 477 U.S. at 496. Only when those two conditions are met is a single error by otherwise effective counsel of such magnitude that it "undermined the proper functioning of the adversarial process." *Richter*, 562 U.S. at 110 (internal quotation marks omitted).

The defendant in his Brief in Opposition agrees that overall performance must be taken into account—except when he denies that very proposition. On the one hand, he says that consideration of overall performance is implicit in *Strickland*'s statement that a habeas petitioner must "show that, *considering all of the circumstances*, counsel's representation fell below an objective standard of reasonableness as measured by

prevailing professional norms." BIO 22 (quoting *Strickland*, 466 U.S. at 687-88) (emphasis added by BIO). He also acknowledges that *Kimmelman* and *Richter* stated that overall performance *is* essential to the *Strickland* analysis, even while expressing semantic disagreement with the state's assertion that it is the "central focus" of *Strickland*'s first prong. BIO 24-25.

On the other hand, the defendant quotes dicta in *United States v. Cronic*, 466 U.S. 648 (1984) as establishing that overall performance is *not* essential to the *Strickland* analysis, BIO 24, and insists that *Hinton v. Alabama*, 571 U.S. 263 (2014), and *Rompilla v. Beard*, 545 U.S. 374 (2005), implicitly show that overall performance is irrelevant to the *Strickland* analysis because those cases never address it. BIO 28.

If the Brief in Opposition leaves one thing clear it is that this Court's ineffective-assistance jurisprudence needs clarification. Should an isolated mistake by counsel whose "overall performance indicates active and capable advocacy" be treated the same as an isolated mistake by counsel whose overall performance does not? The defendant maintains that *Richter* and the cases upon which it relies—which answered that question no—should be taken neither literally nor seriously. The state, by contrast, does not believe this Court's statements should be so readily dismissed.

The defendant fares no better when he tries (BIO at 27-28) to read the word "egregious" out of this Court's decisions in *Carrier*, *Richter* and *Smith v. Murray*, 477 U.S. 527 (1986). Those decisions did not state that a single error by otherwise "active and capable" counsel satisfy *Strickland*'s first prong if the error simply (in *Strickland*'s words) "fell below an objective standard of reasonableness." 466 U.S. at 688. Rather, the decisions demanded that the single error be "egregious." No dictionary of which we are aware equates the terms egregious and unreasonable.

In *Strickland*, the Court explained that the first *Strickland* prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. That showing is necessarily difficult to make in a single-error case "when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111. In such cases, like the present one, only an egregiousness requirement ensures that that showing is truly made.

II. LOWER COURTS ARE DIVIDED OVER WHETHER COUNSEL'S OVERALL PERFORMANCE IS RELEVANT TO THE *STRICKLAND* ANALYSIS

The defendant's own shifting views reflect the confusion shared by our federal and state courts as to what, if any, role overall performance plays in

evaluating claims of ineffectiveness under *Strickland*. His suggestion that the lower courts agree on the proper role of overall performance, BIO 29, is flatly contradicted by the numerous conflicting cases discussed in the Petition, as well as those set forth in the Amicus Brief joined in by eleven other states. *See* Pet. 22-32; Amicus Br. 3-7.

Like the divide between the state and the defendant's position on the question presented here, the lower courts disagree on whether a court must take overall performance into account and whether the court must find a single error amidst otherwise capable advocacy to be egregious. Tellingly, the defendant omits any mention of the Seventh Circuit's decision in *Williams v. Lemmon*, 557 F.3d 534 (7th Cir. 2009). *See* Pet. 23. There, in an opinion by Judge Easterbook, the court ruled that "counsel's entire performance" must be assessed and that where it is "otherwise capable," only "an 'egregious' error" will constitute deficient performance. *Id*. at 538, 541 (quoting *Carrier*, 477 U.S. at 496). Numerous other courts have said the same. *See* Pet. 23-30; Amicus Br. 4-6.

In direct contrast, the Second Circuit and Wisconsin Supreme Court expressly *preclude* consideration of overall performance when evaluating counsel's effectiveness under *Strickland*. *See* Pet. 29-30. In *Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006), the Second Circuit granted habeas relief because the

state court's "reliance on 'counsel's competency in all other respects' . . . failed to apply the *Strickland* standard at all." *Id*. at 72. The defendant errs in asserting (BIO at 30-31) that the Second Circuit said this in the context of addressing prejudice. In issuing that holding, the Second Circuit in *Henry* specifically cited to the portion of the state court's decision addressing whether the defendant was afforded competent representation. *Henry*, 409 F.3d at 72 (citing *People v. Henry*, 744 N.E.2d 112, 114 (N.Y. 2000)).

Although the context of the Wisconsin Supreme Court's discussion of the issue in *State v. Thiel*, 264 Wis. 2d 571, 665 N.W.2d 305 (2003) was more muddled, the import of its directive could not have been clearer: "The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel *is not to assess the overall performance of counsel* but to ensure that the adversarial process functions fairly and reliably." *Thiel*, 264 Wis.2d at 607, 665 N.W.2d at 323 (emphasis added.) It is fanciful for the defendant to suggest that this directive "not to assess the overall *performance* of counsel" will impact only a court's assessment of the prejudice prong, and not the *performance* prong, of *Strickland*.

As discussed in the Petition at 30-31, there also is a third category of jurisdictions, including the Connecticut Supreme Court, which, while not directly articulating any view on the role of overall

performance, nevertheless lend implicit support to the views of the Second Circuit and Wisconsin Supreme Court by routinely ignoring overall performance when applying *Strickland*'s first prong.

It is readily apparent that the views regarding the role of overall performance expressed by the Seventh Circuit in *Williams* and shared by the numerous other jurisdictions set forth on pages 23-29 of the Petition and the views expressed by the Second Circuit, the Wisconsin Supreme Court and other jurisdictions that implicitly agree, are diametrically opposed to each other.

For these reasons, certiorari should be granted in this case to provide much-needed clarification of, and consistency as to, this issue.

III. THIS CASE PRESENTS AN IDEAL VEHICLE BY WHICH TO RESOLVE THE CONFLICT BECAUSE THE ISSUE WAS SQUARELY RAISED BELOW AND HAD THE CONNECTICUT SUPREME COURT CONSIDERED OVERALL PERFORMANCE AND EGREGIOUSNESS IT COULD NOT HAVE FOUND A SIXTH AMENDMENT VIOLATION

Contrary to the defendant's argument, this case presents an excellent vehicle by which to address the proper role of overall performance in the *Strickland* analysis and what does and does not constitute a single error sufficiently "egregious" to render

otherwise active and capable overall performance inadequate nevertheless.

The quality of the defense team's overall efforts in this case was exceptionally high, while the state court's sole justification for finding constitutional ineffectiveness—the defense team's failure to present a fourth potential, partial-alibi witness—did not constitute the type of "egregious" error sufficient to meet the standard explicated in *Kimmelman*, *Carrier*, *Smith*, and *Richter* for claims of ineffectiveness based on a single error. The disposition of the question presented is therefore outcome-determinative. The defendant's vehicle arguments are without merit.

First, he rightly concedes that the Connecticut Supreme Court's second decision did not alter the portions of its first decision rejecting any claims of ineffectiveness other than those relating to that fourth witness, Ossorio. *See* BIO 16 n.6 ("The Connecticut Supreme Court's May 2018 decision specified that it superseded the court's initial December 2016 decision only 'on the issue for which reconsideration en banc was granted' [i.e., the Ossorio issue]"); *id.* at 23. Notwithstanding this concession, however, many of the defendant's arguments are premised on a view of the record inconsistent with the Connecticut Supreme Court's unchallenged conclusion that the defense team was not ineffective in any respect other than in failing to uncover Ossorio.

For example, he discusses, at length, the state habeas trial court's contrary conclusions to suggest ineffectiveness in other respects, as well as to suggest his own innocence, contrary to the jury's guilty verdict. *See* BIO 13-14; *see also id.* at 34-35. But *all* of these other findings of ineffectiveness by the state habeas court were discredited and overruled by a solid majority of the state supreme court justices below. *See* Pet. App. A-362 to A-474.

Second, there is no merit to the defendant's argument that the state failed to fairly present this issue to the Connecticut Supreme Court. On the contrary, the state expressly argued that the defense team's able and effective overall efforts in this case precluded a finding of ineffectiveness under *Strickland*'s first prong. *See* State Conn. Sup. Ct. Br. 25-31. Although the defendant grudgingly concedes as much, he argues that the state failed to "argue for a categorical rule that 'overall performance' must be expressly analyzed in each case." BIO 33. Of course, in the state's view, *Kimmelman* and *Richter* already set forth a "categorical rule" that overall performance must be considered and, thus, there was no reason for the state to ask the state court to create one. No procedural rule provides that it is insufficient for a party to cite controlling authority to an appellate court unless the party also asks the court to "expressly analyze" that controlling authority when rendering its decision.

Even less meritorious is the defendant's argument that this Court should not decide whether the state supreme court erred in failing to consider counsel's overall performance in this case precisely *because* that court failed to consider overall performance in this case. BIO 32. The very nature of the question presented in the Petition requires a case in which the lower court did not properly consider overall performance. Indeed, if the lower court *did* consider overall performance, the question presented in this case would be academic. Consequently, the state supreme court's failure to consider this critical issue, which was squarely presented to it in the state's brief, does not preclude this Court's review of the correctness of that decision.[1]

Third, contrary to the defendant's claim, this case does not present that rare instance in which a single error by counsel could be deemed so "egregious" that it precluded counsel from providing reasonably competent assistance, regardless of his or her overall performance.[2]

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[1] The defendant also cites no authority for his argument that the state waived its right to pursue the issue of overall performance by failing to reiterate, in its response to the defendant's motion for reconsideration after the Connecticut Supreme Court's first decision, the argument already presented to that court in its brief. BIO 33.

[2] The defendant erroneously asserts that the state no longer disputes the Connecticut Supreme Court's conclusion (continued...)

It is difficult to characterize as egregious the defense team's omission in not seizing upon Georgeann Dowdle's fleeting reference in a grand jury transcript to another, unnamed person who, according to Dowdle's account, never left the far-off room at the Terrien house, Pet. App. A-59 to A-60, A-401 to A-403, and would not even have been in a position to provide any helpful information. *See* HT4/18/13: 187, HT 4/23/13: 49-50.

In addition, the account provided by *all* of the other alibi witnesses, *as well as the defendant himself*, gave the defense team every reason to believe that no one else, including any unnamed beau, could corroborate their alibi. Pet. App. A-399 to A-405, HT4/16/13: 233-34, HT4/18/13: 187. It cannot be overstated that, in his later habeas testimony, Ossorio did not merely claim that he surreptitiously observed the defendant and the others while he passed by them, unnoticed, at the Terrien house. Rather, Ossorio claimed that he *had*

(...continued)
that there is a reasonable likelihood that the jury would acquitted the defendant if the jury had been aware of Ossorio. BIO at 2. On the contrary, there are a host of problems with that court's misguided analysis that the state continues to dispute vehemently. The state simply has chosen to focus on the legal question particularly worthy of this Court's attention: the state court's failure to consider whether the defense team's single alleged-error in failing to pursue Ossorio was sufficiently egregious to justify the court's refusal to consider the team's overall performance.

a conversation with the boys, who were watching a Monty Python television show. App. at A-56 to A-57, HT4/18/13: 74-79. *See* HT4/18/13: 75 ("At that particular time I saw them, they were watching some television shows, *and we had a brief discussion*.") (emphasis added).

There is no way to reconcile Ossorio's account of this alleged conversation, forty years later at the habeas trial, with the far more immediate recollection of all of the other parties present that no such encounter with the unnamed beau, or anyone else, ever took place that evening. Thus, reasonably competent counsel would have had no reason to anticipate that this unnamed beau would provide an account so directly contrary to that provided by Dowdle, all of the other alibi witnesses, and even the defendant himself.

Indeed, while touting the potential benefit of Ossorio's testimony as the only unrelated partial-alibi witness, the defendant overlooks the fact that his testimony would have provided substantial fodder for the prosecution's further impeachment of the alibi defense. In addition to Ossorio's decades-long delay in providing this alibi testimony to anyone, despite the notoriety of this case, the fact that Ossorio's account conflicted with the defense's other alibi witnesses, none of whom could corroborate this alleged conversation with Ossorio, undoubtedly would have been seized upon by the prosecution to argue that the defendant's own

witnesses could not even give the same story. This downside to presenting Ossorio's account may well have offset, and even overshadowed, any benefit to the defense from the mere fact that Ossorio was not related to the defendant.

It is only with the benefit of the hindsight that *Strickland* expressly discourages, *Strickland*, 466 U.S. at 689—*i.e.*, it is only now knowing what Ossorio was willing to say forty years later at the habeas trial—that any likely benefit to be had from tracking down the unnamed beau has been magnified. Consequently, even assuming, *arguendo*, that the defense team's omission in not pursuing the unnamed beau is even properly characterized as an "error" that other reasonably competent attorneys would not have made under the same circumstances, it certainly falls short of the type of "*egregious* error" that, alone, rendered counsel's performance constitutionally incompetent and the defendant's trial fundamentally unfair.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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