No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Marcus Jackson, Petitioner

v.

Vance Laughlin, Warden, Wheeler Correctional Facility,
Timothy C. Ward, Commissioner, Georgia Department of Corrections, Respondents

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On Petition for Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

STEPHEN R. SCARBOROUGH
100 Peachtree Street NW, Suite 1600
Atlanta, GA 30303
(404) 825-2275
srsdefender@gmail.com
Counsel of Record

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QUESTION PRESENTED

After Petitioner was convicted of murder in a Georgia Superior Court, his first appellate counsel sought reversal of the conviction in that same court, alleging that the verdict was "decidedly and strongly against the weight of the evidence" and "contrary to the law and principles of justice and equity." These contentions invoked two statutes that permit a Georgia trial judge broad discretion to reverse a conviction if she deems the verdict to be unfair or unreliable, a power that Georgia courts call the judge's sitting as a "thirteenth juror." When Petitioner's Motion for New Trial came to be heard, however, new appellate counsel withdrew all asserted grounds for relief except for a claim that the evidence of Petitioner's guilt was insufficient as a matter of law – a much more difficult test for a convicted Defendant to meet. The trial judge granted the Motion for New Trial, but the Georgia Supreme Court found the evidence sufficient to convict, and reversed. When appellate counsel countered, finally seeking thirteenth juror review in the Superior Court, the trial judge granted that motion as well, but the state supreme court again reversed, holding that Petitioner had impermissibly engaged in a piecemeal appeal.

Petitioner's state habeas corpus petition alleged ineffective assistance of appellate counsel for having withdrawn her argument for thirteenth juror review. At a hearing on the Petition, counsel testified she had erroneously believed that the trial judge's post-verdict ruling, holding the evidence of guilt legally insufficient, was not appealable by the prosecution. She had proceeded on that sole ground because she believed that prevailing thereon would conclusively end the case in Petitioner's favor, whereas a thirteenth-juror reversal would subject him to retrial. The state habeas court endorsed counsel's strategy as reasonable. It declined to address the question of prejudice, holding only that counsel had not performed deficiently. The Supreme Court of Georgia refused to review the denial of relief.

The question presented is:

> Did the Georgia courts err by refusing to remedy appellate counsel's professionally deficient, and prejudicial, waiver of a claim for discretionary relief from Petitioner's conviction and life sentence, where the decision to waive rested on both an error of law and an irrational strategy?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marcus Jackson respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Wheeler County, Georgia, denying his Petition for a Writ of Habeas Corpus.

OPINIONS BELOW

The order of the Supreme Court of Georgia denying Petitioner's application for a certificate of probable cause to appeal from the denial of habeas relief is unreported and is attached as Appendix A. The order of the Superior Court of Wheeler County, Georgia, denying habeas relief is unreported and is attached as Appendix B. The first, second, and third Motions for New Trial filed after Petitioner's conviction and sentencing are attached collectively as Appendix C. The two opinions of the Supreme Court of Georgia that reversed trial court orders granting Petitioner relief from his convictions are reported at *State v. Jackson*, 748 S.E.2d 902 (Ga. 2013) and *State v. Jackson*, 764 S.E.2d 395 (Ga. 2014), and are attached as Appendices D and E, respectively.

JURISDICTION

The Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal the denial of habeas relief on April 29, 2019. Justice Thomas granted Petitioner's Motion for Extension of Time to File this Petition for Writ of Certiorari, permitting filing up to and including August 28, 2019. No.

19A98. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]

The Official Code of Georgia Annotated provides in relevant part:

> § 5-5-20.
> In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury.

> § 5-5-21.
> The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding.

STATEMENT OF THE CASE

On April 16, 2009, after a jury trial, a judge of the Superior Court of Fulton County, Georgia sentenced Petitioner to life in prison for the murder of Brandon Horton. Attorneys filed and amended a Motion for New Trial shortly thereafter,

raising several claims of error (B.1-2).[1] A new attorney, Assistant Public Defender Alixe Steinmetz, assumed responsibility for the case and filed a Second Amended Motion for New Trial on September 14, 2012. Steinmetz withdrew all the grounds for reversal that were listed in previous motions but one: a claim that the evidence of Petitioner's guilt was insufficient as a matter of law. *See Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (C. 5). The same judge who presided at Petitioner's trial granted Steinmetz's motion, but the State appealed and the Supreme Court of Georgia reversed. It disagreed with the trial judge's conclusion that "there was no evidence that [Petitioner] directly committed or intentionally helped in the commission of the crimes charged." *State v. Jackson*, 748 S.E.2d 902, 904 (Ga. 2013) (D. 2-3).

When Steinmetz moved for reconsideration, she sought a remand for the trial court to exercise what Georgia courts call "thirteenth juror" review of Petitioner's conviction. She invoked state statutes that grant trial courts the power to reverse a conviction when a jury verdict "is found contrary to evidence and the principles of justice and equity," O.C.G.A. § 5-5-20, or is "decidedly and strongly against the weight of the evidence," § 5-5-21. The discretion these statutes grant is broad. *State v. Cash*, 779 S.E.2d 603, 607 (Ga. 2015) (citations omitted). The appellate courts of Georgia lack this remedial power, but when a Defendant asks a trial judge to exercise it, there is a duty at least to consider granting relief. *See Gomillion v. State*,

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[1]Citations in parentheses refer to the lettered Appendices to this Petition, and to the page numbers therein as specified.

769 S.E.2d 914, 916-917 (Ga. 2015).

The Motion for Reconsideration failed in the state supreme court, and when jurisdiction returned to the trial court, Steinmetz sought "thirteenth juror"relief there. Once again she succeeded, and once again her victory was short-lived. The Superior Court ordered a new trial, but in a second appeal by the prosecution, the Georgia Supreme Court held that Petitioner's choice, through counsel, to forego all claims of error except for a *Jackson v. Virginia* claim had waived his right to "justice and equity" relief. "It was too late, post-remittitur," said that court, "for [Petitioner] to secure a new trial on grounds that were not preserved in the motion that was the subject of the earlier appeal." *State v. Jackson*, 764 S.E.2d 395, 397 (Ga. 2014) (E. 2).

Petitioner timely filed a Petition for Writ of Habeas Corpus raising a single claim: that Ms. Steimetz's handing of his appeal, specifically her failure properly to invoke the Superior Court's "thirteenth juror" function as it reviewed his conviction on Motion for New Trial, was ineffective assistance of counsel under, *inter alia*, the Sixth and Fourteenth Amendments to the Constitution of the United States (B. 3).

Steinmetz was the sole witness at the evidentiary hearing. She testified that she was assigned to handle Petitioner's appeal when she worked at the Atlanta Circuit Public Defender's Office. She acknowledged that there is a difference between a court's undertaking the narrow question of whether the evidence underlying a conviction is legally sufficient, and the broader and more discretionary review that trial courts must perform when a party invokes OCGA §§ 5-5-20 and

5-5-21. She affirmed that, when she argued Petitioner's Motion for New Trial, she withdrew every argument for reversal that had been made in prior filings, except for the claim that the evidence of guilt was legally insufficient under *Jackson v. Virginia*. She conceded that this recourse to *Jackson's* strict standard, whereby "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," 443 U.S. at 319, was a "significant narrowing" of Petitioner's argument for reversal.

Steinmetz believed, from her review of the trial transcript, that the trial judge had doubts about the prosecution's case at trial and would be amenable to an insufficient evidence claim. Asked why she pressed only that claim, and no other, she testified that she then believed that the State could not appeal a favorable ruling under *Jackson v. Virginia*. A single-issue Motion for New Trial, she thought, carried the greatest promise for a final, favorable conclusion of Petitioner's appeal. Keeping a thirteenth-juror argument in play, on the other hand, raised the risk of a further appeal by the State (B. 4-6).

Steinmetz took the erroneous position that the State could not appeal the trial court's post-conviction finding of insufficient evidence as the Appellee in the first state supreme court appeal. After she lost that appeal, she "was trying to figure what I could do, personally, to correct the mistake I had made in Mr. Jackson's case," and so she filed the initially successful, but quickly reversed, post-remittitur motion for thirteenth-juror relief in the Superior Court. Had she

realized from the start that the prosecution could appeal an insufficient-evidence holding on Motion for New Trial,

> I would not have proceeded as I did. I would have definitely included the 13th juror argument. I was just under a misunderstanding. I was wrong on the law, and because I was wrong on the law, I had decided not to pursue 13th juror. But, if I had correctly understood the law at the time, I would have certainly proceeded on the 13th juror grounds.

In its order denying relief, the habeas Court credited Steinmetz's testimony that she misunderstood the appealability of the postverdict *Jackson v. Virginia* ruling, and that the error led her to drop the thirteenth juror claim from Petitioner's Motion for New Trial (B. 4). "[A]ppellate counsel testified that she raised the single issue that she believed had the greatest likelihood of resulting in the reversal of Petitioner's conviction." *Id.* The court then disposed of Petitioner's claim solely by reference to the deficient performance prong of *Strickland v. Washington*, 466 U.S. 668 (1984). It noted that the test for deficiency is whether a reasonably competent attorney would have taken the challenged action (B. 5). "Rather than pursue multiple grounds which, while potentially successful, would have subjected Petitioner to a retrial," said the court, "appellate counsel chose to advance the sole issue which, if affirmed on appeal, would have been a final determination of the case." This, the court found, was an "objectively reasonable strategy" (B. 6). Central to the habeas court's analysis was its belief that the Georgia Supreme Court had validated counsel's strategy in its second opinion. That court had stated:

> It is apparent that Jackson made a strategic choice to waive all other grounds for new trial in favor of advancing only an assertion of legal sufficiency of the *828 evidence because, if that gamble was ultimately successful, his conviction would be reversed and he would not be subject to retrial.

Jackson, 764 S.E.2d at 397-398 (E. 2-3, quoted at B. 6).

Petitioner timely sought a Certificate of Probable Cause to Appeal the denial of habeas corpus relief in the Supreme Court of Georgia. That court denied review on April 29, 2019 (App. A). In accord with their usual practice, *see, e.g., Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1193 (2018), the state Justices did not explain their reasoning.

REASONS FOR GRANTING THE WRIT

> Both the Supreme Court of Georgia and Petitioner's Habeas Court Endorsed an Appellate Strategy That Was Inconsistent with Appellate Counsel's Sixth Amendment Obligations; That Strategy, and Counsel's Related Misunderstanding of the Law, Violated Petitioner's Right to the Effective Assistance of Counsel

Petitioner's appellate attorney argued his Motion for New Trial under a legal standard that defers mightily to the verdict of the jury. Previously pleaded, but then affirmatively waived by counsel, was an alternative argument, for a less stringent form of review whose exercise would neither have undercut nor confused the court's inquiry into the sufficiency of the evidence. The trial court thought so little of the prosecution's evidence that it granted the Motion for New Trial under the first standard. When its ruling was reversed, its attempt to grant relief under

the less exacting standard of review was thwarted by the lateness of counsel's request for it.

It is undisputed that counsel chose to raise only one argument because she misunderstood what could happen if she prevailed on it. It is apparent, moreover, that the strategy she pursued flouted both reason and the proper aim of counsel's advocacy. Along the way to clarifying the nature and scope of appellate counsel's duties under the Sixth Amendment, a grant of certiorari in this case may bring about the relief that this life-sentenced Petitioner's trial judge, who heard all the evidence, repeatedly tried to afford him.

When a trial court grants a motion for a directed verdict of acquittal during trial, no appeal may be taken from that verdict. *See Smith v. Massachusetts*, 543 U.S. 462, 467 (2005). But it was also established, when Ms. Steinmetz was litigating Petitioner's Motion for New Trial, that a different rule applies when a jury has rendered a verdict of guilty and the defendant persuades a reviewing court to set the verdict aside. *See Smith*, 543 U.S. at 467. "Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions," this Court has said. "We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." *United States v. Wilson*, 420 U.S. 332, 352-353 (1975). *See also Evans v. Michigan*, 568 U.S. 313, 330 n. 9 (2013) (decided after Ms. Steinmetz waived thirteenth-juror review at

Motion for New Trial stage) ("If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial"). As Ms. Steinmetz realized by the end of the first state supreme court decision, then, she pared down Petitioner's arguments on Motion for New Trial for no reason. The State could appeal a reversal of his conviction whether that reversal came under *Jackson v. Virginia*, 443 U.S. 307 (1979), or by way of thirteenth juror review. The benefit she sought when she hung Petitioner's case on a single, thin reed was nonexistent.

Strickland v. Washington, 466 U.S. 668 (1984) has long instructed courts that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances," *id.* at 688, and knowing the law of appellate remedies is doubtless a highly relevant circumstance when a court evaluates the competence of appellate counsel in a serious felony case. The choice to narrow her claims down to one was not, moreover, an instance of "winnowing out weaker arguments on appeal and focusing on those more likely to prevail," *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal quotation marks omitted)). Culling weak claims and highlighting stronger ones is a core task of appellate practice, but it is hard to imagine a case with a colorable insufficient-evidence claim in which counsel would not also seek the more broadly available thirteenth juror or "justice and equity" relief before a court that is empowered to grant it.

There was a further deficiency in Steinmetz's representation as well: her

strategy made no sense in light of her function as defense counsel. Granted, she believed that thirteenth-juror relief would subject Petitioner to further proceedings (true) while a post-verdict finding of insufficient evidence would not (false). The record is clear that she acted on the basis of these beliefs. But upon "eliminat[ing] the distorting effects of hindsight," as courts must, *Strickland*, 466 U.S. at 689, counsel's waiver of all arguments but one appears completely irrational.

Maintaining Petitioner's thirteenth juror argument would not have undercut his insufficient evidence argument in any way. On the other hand, and critically, counsel bore an obligation to overturn Petitioner's murder conviction if she possibly could, on whatever legal or discretionary grounds might prevail. There is no scenario in which a man who is convicted of murder helps himself by staking everything on a risky claim that the evidence is insufficient as a matter of law, while forsaking a credible chance of winning the formidable, and also rare, prize of a fresh chance at trial. While the habeas court was accurate in saying, "Counsel affirmed that she strategically chose to advance Petitioner's strongest claim that would not subject Petitioner to retrial," (B. 6), that choice does not jibe with her obligation under the Sixth Amendment. To act on such a strategy -- even if counsel had been correct about the finality of a *Jackson v. Virginia* reversal, which she was not -- is itself deficient performance.

It is not merely the judgment of a single South Georgia habeas judge, but also the reasoning of the State's highest court, that calls for certiorari review here, and perhaps calls for summary reversal as well. The habeas judge, quoting the state

supreme court's second opinion in this case, believed that that court had already endorsed Steinmetz's strategy for conclusively ending Petitioner's litigation. It had written, after all, that "if [counsel's] gamble was ultimately successful, [Petitioner's] conviction would be reversed and he would not be subject to retrial" (E. 2-3). This reasoning by the unanimous state Justices continues the very error that Petitioner's counsel fell into. The same Justices' later denial of a chance to argue for habeas relief enshrines a misunderstanding about what post-verdict reversals for evidentiary insufficiency entail. This Court should dispel that misunderstanding.

CONCLUSION

For the reasons stated herein, Petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

STEPHEN R. SCARBOROUGH
100 Peachtree Street NW, Suite 1600
Atlanta, GA 30303
(404) 825-2275
srsdefender@gmail.com
Counsel of Record