No. 19-

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL NANCE,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

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QUESTIONS PRESENTED

1. The state habeas testimony of Michael Nance's trial counsel established that they inexplicably omitted highly mitigating evidence from Mr. Nance's capital sentencing trial that they themselves regarded as pivotal to their chosen mitigation strategy.

   The question presented is:

   > Are courts permitted to deem trial counsel's omissions strategic and reasonable without consideration of the record, as the Eleventh Circuit did here, or must a court instead look to the record evidence in determining the reasonableness of trial counsel's actions, as the Second, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits have all held?

2. The State used a 50,000-volt, remote-activated stun belt to restrain Mr. Nance throughout his entire capital trial, though no particularized security risk justified its use. Mr. Nance made clear to the court that the belt interfered with his ability to confer with counsel and participate in his trial. The court nonetheless permitted the State to use the stun belt—not because the judge found a particularized need for it, but instead because he decided "to really leave that up to the sheriff's department to make that decision."

   The question presented is:

   > Has this Court clearly established a general principle that state-imposed courtroom practices that prejudice a capital defendant's constitutional trial rights must be justified by an essential state interest?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of this petition. Petitioner in this Court, Petitioner-Appellant below, is Michael Nance. Respondent in this Court, Respondent-Appellee below, is Benjamin Ford, in his official capacity as Warden of the Georgia Diagnostic and Classification State Prison.

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INTRODUCTION

Michael Nance is a man with frontal lobe brain damage and borderline intellectual functioning—impairments that were exacerbated by a tear-gas explosion immediately before he frantically shot and killed Gabor Balogh. But the jury who sentenced Mr. Nance to death never heard any of this evidence, despite his trial attorneys' admitted intention to present it and the fact that it was readily available to them.

The State first tried Mr. Nance in 1997. He then faced a resentencing trial in 2002, after the Georgia Supreme Court vacated his death sentence due to the trial court's improper qualification of a juror. In the course of state post-conviction proceedings following the 2002 resentencing, trial counsel testified that evidence of Mr. Nance's impairments and the impact of the tear gas on him at the time of the crime was pivotal to their strategy in both 1997 and 2002; that they had no strategic reason for omitting the evidence; and that they did not know why they ultimately failed to present it. The state habeas court found that trial counsel were ineffective for failing to present evidence of Mr. Nance's impairments, the impact of the tear-gas explosion on his functioning, and how those factors directly linked to Mr. Balogh's tragic, and unintended, death. The state habeas court granted sentencing-phase relief and vacated Mr. Nance's death sentence.

The Georgia Supreme Court reversed, evaluating trial counsel's omissions under a hypothetical lawyer framework—specifically, that *some* reasonable lawyer *could have* omitted the evidence for strategic reasons. In federal habeas proceedings, both the district court and the Eleventh Circuit affirmed the Georgia

Supreme Court's denial of relief, thereby sanctioning the state court's hypothetical lawyer framework. Unsurprisingly, as that framework is also the adopted law of the Eleventh Circuit.

This case thus presents the Court with the opportunity to resolve a significant dispute regarding the meaning of *Strickland*'s reasonableness standard. The majority of lower courts, consistent with this Court's precedent, hold that *Strickland*'s deficiency prong requires courts to presume reasonableness but then look at the record evidence to determine whether trial counsel's challenged actions were, in fact, strategic and reasonable. But in the Eleventh Circuit, as well as in the First Circuit, the court considers actions to be strategic and reasonable even in the face of record evidence that demonstrates they were the very opposite.

The Second, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits use a different framework. Those courts refuse to impute strategy and reasonableness to trial counsel's actions when the record belies those labels. In Mr. Nance's case, those courts would have looked to the record and seen that trial counsel's critical omissions were, in fact, in opposition to their stated strategy and likewise unreasonable.

This circuit split has persisted for years and it has significant and frequent impact on habeas cases. Ineffective assistance of counsel is the most commonly raised claim in habeas petitions. But the Eleventh Circuit's framework renders those claims all but meaningless, allowing the court to invent reasonableness where the record does not supply it. This Court must step in to align the circuit with its peer courts.

This petition also raises a separate critical issue: that the trial court permitted the State to restrain Mr. Nance with a 50,000-volt stun belt throughout his trial even though Mr. Nance did not present a security risk and protested repeatedly that the belt prevented him from engaging in the proceedings and conferring with counsel. The Eleventh Circuit denied Mr. Nance relief, finding that no clearly established federal law pertains specifically to stun belts. This case presents the Court with the opportunity to confirm that its cases clearly establish that state-sponsored courtroom practices that prejudice a defendant's fair trial rights must be justified by an essential state interest. Without this Court's confirmation of that general principle, the Government will continue to trample on the fair-trial rights of criminal defendants with the unnecessary imposition of prejudicial courtroom practices.

This is an issue of fundamental importance. The Eleventh Circuit has erroneously watered down the import of this Court's clear directives, endangering critical protections for people facing the deprivation of their liberty or, as here, their very life. This Court should grant Mr. Nance's petition to confirm its long-held restrictions on government overreach in proceedings in which individuals' liberty—and sometimes very life—is at stake.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, entered April 30, 2019, denying Mr. Nance's appeal from the denial of habeas corpus relief, is reported as *Nance v. Warden*, 922 F.3d 1298 (11th Cir. 2019). It is attached to this petition as Appendix A. The unpublished order of the federal district court denying habeas

relief is attached as Appendix B. The opinion of the Georgia Supreme Court, reported as *Humphrey v. Nance*, 293 Ga. 189 (2013), reversing the state habeas court's grant of sentencing relief is attached as Appendix C. The unpublished order of the Superior Court of Butts County, Georgia, granting Mr. Nance habeas relief as to sentencing is attached as Appendix D. The direct appeal opinion of the Georgia Supreme Court, reported as 280 Ga. 125 (2005), is attached as Appendix E. The Eleventh Circuit order denying rehearing is attached as Appendix F.

RELATED PROCEEDINGS

Nance v. State, No. S05P1438 (Ga. Dec. 1, 2005) (direct appeal opinion)

Nance v. Humphrey, No. 2007-V-250 (Butts Co. Superior Ct. Sept. 6, 2012) (state habeas court opinion granting sentencing relief)

Humphrey v. Nance, No. S13A0201 (Ga. June 17, 2013) (reversal of state habeas court relief)

Nance v. Warden, No. 1:13-CV-4279 (N.D. Ga. Aug. 7, 2017)

Nance v. Warden, No. 17-15361 (11th Cir. April 30, 2019)

JURISDICTION

The Eleventh Circuit entered judgment on April 30, 2019. App. 1. On September 25, 2019, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 8, 2019, which extended to December 9, 2019, pursuant to Supreme Court Rule 30. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property without due process of law . . . ." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflict." U.S. Const. amend. VIII. "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. Facts Relevant to Question Number One—the Eleventh Circuit's Aberrant Method of *Strickland* Analysis.

A. Trial Counsel's Ineffectiveness and the State Habeas Court's Grant of Sentencing Relief.

On the morning of December 18, 1993, Mr. Nance woke up, found a gun in the house he was renting, and then made, in the words of the prosecutor, "a spur-of-the-moment decision" to rob a bank. D. Ct. Doc. 16-1 at 12. Mr. Nance entered the bank with the gun in hand, demanded money be put into pillowcases, and then, after receiving the cash, ran outside into his car parked in front of the bank. Seconds later, two dye packs, which tellers had placed in the pillowcases, exploded in the car, releasing clouds of tear gas and red dye. Mr. Nance, confused and disoriented, left the car and ran across a busy four-lane street, landing in the

parking lot of a liquor store. It was there that he shot Gabor Balogh, an innocent bystander, during a frantic attempt to take Mr. Balogh's car. At the time of the shooting, the gun was in a black plastic bag. The single bullet, which entered through Mr. Balogh's elbow and lodged in his liver, was fatal.

After the shooting, Mr. Nance abandoned the effort to take Mr. Balogh's car and took off on foot. A standoff with the police followed, during which a panicked Mr. Nance intermittently cried; inquired about Mr. Balogh's condition; claimed there would be "war" if the police rushed him; begged the police officers to shoot him; and threatened to take his own life. Eventually, in exchange for a phone call to his wife, a sobbing Mr. Nance laid down his gun and was taken into custody.

Mr. Nance was represented by the same defense counsel at both his 1997 and 2002 proceedings. During the 2002 resentencing, trial counsel wanted to show that the crime was impulsive, uncontrolled, and undeserving of the death penalty, and that it was directly linked to Mr. Nance's frontal lobe damage and borderline intellectual functioning, which were exacerbated by his exposure to tear gas right before the shooting. As the state habeas court found, trial counsel's strategy was to demonstrate a connection between Mr. Nance's impairments and his actions on the day of the crime.

But trial counsel failed to follow their own strategy, presenting no evidence of Mr. Nance's brain damage, borderline intellectual functioning, or the interaction of the tear gas with his existing impairments—let alone how all of those factors impacted the crime. The State used this critical gap in evidence to argue that Mr. Nance was a "smart" and calculated criminal, who "wants you to believe [] that he

has a learning disability," and who "absolutely underst[ood] what he was doing that day." App. 142, 146. The jury sentenced Mr. Nance to death.

During state habeas proceedings, trial counsel testified that they considered the missing mitigation critical and that their strategy depended on presenting that evidence to the jury. Yet when asked, they could not provide an explanation for their omissions. They were clear, though, that the omissions ran contrary to their intended strategy. They considered the impact of the dye-pack explosion, for example, important evidence to show the jury, explaining in state habeas that, "given [Mr. Nance's] mental limitations and the tear gas, we felt like that may have done—had a lot to do with what happened." App. 106.[1] Trial counsel further explained that they wanted to highlight:

> that [Mr. Nance] was shocked by the concussion and the tear gas; ran across the street . . . and in his confrontation with the man, trying to get his car, the gun went off, but the gun went off inside the plastic bag. . . . [I]t seemed as though it was close upon an accidental shooting. . . . He [was] obviously shocked.

App. 99, 135. But, inexplicably, trial counsel presented no evidence of the tear-gas explosion's interaction with Mr. Nance's mental impairments or how that impacted his behavior at the time of the crime.

Trial counsel also presented no evidence of Mr. Nance's frontal lobe brain damage or borderline intellectual functioning, even though that evidence was also critical to their mitigation strategy. Trial counsel had presented that evidence at

[1] Trial counsel Edwin Wilson knew firsthand how disorienting chemical gas could be from his own military experience. As he testified in habeas proceedings, he considered the tear gas issue to be significant because he had "experienced chlorine gas during my military days, and I know that can be kind of debilitating . . . . It can disorient one. It can mess you up." D. Ct. Doc. 18-3 at 45.

Mr. Nance's 1997 trial, and their testimony in state habeas proceedings "made clear that the defense's mental health strategy remained unchanged from the first trial to the re-sentencing." App. 130. The only modification was to "do it better," and supplement it with evidence of Mr. Nance's prison adaptability. *Id.* But that never happened. Instead, "no witness testified to [Mr. Nance's] neurological deficits and borderline mental retardation." *Id.* at 130-31. The only explanation trial counsel offered at state habeas for why the evidence did not come in was, "I don't know." D. Ct. Doc. 18-3 at 44.

Trial counsel's failure was all the more inexcusable because the omitted evidence was readily available. Trial counsel had confirmation of Mr. Nance's limited intellectual functioning and frontal lobe damage dating back to his first trial: two mental health experts, a psychiatrist and psychologist, had evaluated Mr. Nance and came to similar conclusions regarding Mr. Nance's significant mental impairments. The psychologist, Dr. Robert Shaffer, had testified in Mr. Nance's 1997 trial to his frontal lobe damage and limited intellectual functioning.[2]

Trial counsel had also investigated the contents of the dye pack and had retained a chemical weapons expert, Dr. Leslie Hutchinson, to testify to the impact of the dye-pack explosion and how the tear gas exacerbated Mr. Nance's existing

[2] Trial counsel testified in state habeas proceedings that they did not use Dr. Shaffer in 2002 because their deficient preparation led to the prosecutor successfully discrediting Dr. Shaffer during the 1997 trial: "I failed to properly prepare him for some of the background information. And the district attorney was able to attack not him on his credentials, but the fact he didn't know a lot of things about the case." D. Ct. Doc. 18-2 at 37. This maybe explained why counsel did not use Dr. Shaffer specifically, but provided no explanation for why they failed to present evidence of brain damage through a different expert, properly prepped this time for cross-examination.

impairments, resulting in his frantic attempt to flee the scene of the bank robbery, which ultimately led to the tragic shooting of Mr. Balogh. When asked why they did not call Dr. Hutchinson, lead counsel testified, "I'm not sure why we didn't call [him]."[3] App. 136. He added that the State's witnesses had provided some information about tear gas. *See id*. But the State's witnesses who mentioned the tear gas—a forensic pathologist, microanalyst, police officer, and bank teller—were obviously no substitute for Dr. Hutchinson,[4] a physician and chemical weapons expert who was "uniquely qualified" to explain the impact of the tear-gas explosion on Mr. Nance and its connection to the crime. App. 112-13, 136. As a result, the jury was given zero explanation of how the tear-gas explosion impacted Mr. Nance and directly connected to the shooting.

There is no strategic explanation for trial counsel's omission of this mitigation evidence.[5] What the record shows without question is: 1) trial counsel

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[3] Co-counsel recalled this omission differently, though his memory was totally wrong. He testified that "we were not able to find an expert who could testify to [the tear gas] information." D. Ct. Doc. 18-2 at 60. In fact, a defense investigator "interviewed numerous experts to gain an understanding of the effects of a dye bomb and how exposure to the gas impacts a person," and one of those experts referred trial counsel to Dr. Hutchinson, who was "uniquely qualified to testify to the issues" and who trial counsel retained and added to their witness list. App. 112-13.

[4] First, the State's witnesses, by their very selection as witnesses for the prosecution, were there to testify in its favor and accordingly minimized the impact of the tear gas. Second, they did not—and were wholly unqualified to—speak to the neuropsychological effects of tear gas generally, let alone the particular effect on Mr. Nance given his specific mental impairments.

[5] Trial counsel's closing argument suggests, perhaps, some reasons for the gross omissions. Lead counsel told the jury that he: 1) gets easily distracted ("Please forgive me. I get distracted easily sometimes."); 2) may not have chosen witnesses wisely ("And at times it probably got a little weird and you thought why in the world did they present somebody? Okay."); and 3) has struggled with substance abuse ("I've had my day is [sic] an alcoholic. Lord help me set that down a while back, thank goodness."). D. Ct. Doc. 16-10 at 37, 43.

had compelling evidence of Mr. Nance's brain damage, limited intellectual functioning, and the impact of the tear gas on his mental faculties; 2) they deemed the evidence critical and directly in line with their chosen strategy; and 3) they never put the evidence before the jury.

The state habeas court found these facts salient. In its order granting relief, it highlighted that "the jury heard nothing about the mental health implications of Petitioner's life history, nor about the nexus between Petitioner's mitigating brain impairments and the crime itself." App. 137. The court also explicitly found that trial counsel's omissions were not the product of strategy: "Trial counsel did not abandon their strategy of presenting the relationship of Petitioner's brain damage and borderline mental retardation to his actions during the offense; however counsel failed to present *any* evidence in support of that theory." App. 124 (emphasis added).

Trial counsel instead presented a series of lay witnesses who testified to Mr. Nance's academic troubles and drug use, and who gave inconsistent accounts of his adoptive father's abuse. They also presented an expert to opine on Mr. Nance's prison adaptability.[6] But no expert testified to his frontal lobe brain damage, his borderline intellectual functioning, or the impact of the dye-pack explosion—and how all of those factors together directly linked to the circumstances of the crime.

[6] This expert cited Mr. Nance's IQ score for the jury in passing, but did so "solely in the context of his prison adaptability." App. 142. The expert offered no explanation of what that score meant in terms of Mr. Nance's intellectual functioning and decision-making abilities, or the relevance of his IQ to his actions on the day of the crime.

The jury sentenced Mr. Nance to death without ever knowing this highly mitigating information that trial counsel themselves had deemed pivotal.

The state habeas court saw trial counsel's omissions for what they were: the ineffective assistance of counsel. Had trial counsel presented the testimony of Dr. Hutchinson, the court found, they would have been able to argue that the unintentional nature of the shooting was "a professional medical opinion corroborated by scientific evidence regarding tear gas and its effects on a brain that already has damage to its frontal lobes." App. 148. The court further found that, had trial counsel presented the omitted evidence as they intended to, "the jury could not have been persuaded that [Mr. Nance] was a 'smart' criminal." *Id.* The court concluded: "[H]ad the jury understood . . . the extent of [Mr. Nance]'s diminished moral culpability, there is a reasonable probability that he would not have been sentenced to death." *Id.*

B. The Georgia Supreme Court and Eleventh Circuit Sanctioned Trial Counsel's Ineffectiveness with the Justifications of a Hypothetical Lawyer.

The Georgia Supreme Court reversed the state habeas court, asking not whether trial counsel's omissions were, in fact, strategic and reasonable, but instead whether "*some* reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." App. 61 (emphasis added). In other words, the Georgia Supreme Court justified trial counsel's unreasonable omissions, which ran contrary to their admitted strategy, by deciding "that a reasonable lawyer under the circumstances *could have* strategically chosen not to

present such evidence." App. 71 (emphasis added); *see also id.* at 72, 73, 74, 75, 78 n.7.

This framework enabled the Georgia Supreme Court to deem trial counsel's conduct reasonable irrespective of the record. For instance, the court found counsel's omission of brain damage evidence strategic, despite their testimony showing it was not, because a hypothetical reasonable lawyer "could have" made the strategic decision to omit such evidence. *See* App. 71. It also justified trial counsel's omissions on a finding that "[a] reasonable lawyer could have believed" that brain damage evidence was aggravating in light of the prison adaptability evidence, even though the record offered no support that trial counsel had any such belief. *See* App. 75. The entire ineffectiveness claim was evaluated under the rubric of whether some hypothetical lawyer could have acted as trial counsel did. *See* App. 61.

The Eleventh Circuit found the Georgia Supreme Court's decision to be reasonable, endorsing the state court's imputation of strategy based on the justifications of a hypothetical lawyer. The endorsement was expected, as this framework is also the adopted law of the Eleventh Circuit. *See, e.g.*, *Jenkins v. Comm'r*, 936 F.3d 1252, 1271 (11th Cir. 2019) ("We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial.") (citing *White v. Singletary*, 972 F.2d 1218, 1220-21 (11th Cir. 1992)).

Finding no deficiency in trial counsel's performance, the extent of the Eleventh Circuit's prejudice finding was as follows: "[The state court opinion] also

explains why, even if counsel's performance was somehow deficient, it did not prejudice Nance." App. 10.[7]

II. Facts Relevant to Question Number Two—the Stun Belt.

During Mr. Nance's trial proceedings in both 1997 and 2002, the State strapped a 50,000-volt, remote-activated stun belt to his body, hovering over his kidneys and other vital organs. Through a remote control, a courtroom deputy could activate the belt at any moment, sending waves of electric shocks through Mr. Nance. *See* D. Ct. Doc. 11-17 at 75. Once activated, the shock would last for eight seconds,. *Id*. The 50,000 volts would be powerful enough to cause immediate immobilization and possible defecation and urination. *See id.* at 73-74, 76; *accord People v. Mar*, 28 Cal. 4th 1201, 1215 (2002) ("The wearer is generally knocked to the ground by the shock and shakes uncontrollably. Activation may also cause immediate and uncontrolled defecation and urination, and the belt's metal prongs may leave welts on the wearer's skin requiring as long as six months to heal.").

Prior to the 1997 trial, counsel filed a motion to preclude the stun belt's use. At a hearing on the motion, Mr. Nance took the stand and told the court how the belt impaired his constitutional trial rights. He testified that "[t]he majority of the

[7] In finding that Mr. Nance did not suffer prejudice, the Georgia Supreme Court relied on a rote recitation of the facts of the crime and the same unreasonable factual determinations that undergirded its deficiency analysis. *See, e.g.*, App. 75-79. The Eleventh Circuit, for its part, engaged in no prejudice analysis, stating merely that the state court opinion "explains why, even if counsel's performance was somehow deficient, it did not prejudice Nance." App. 10. The Eleventh Circuit's endorsement of trial counsel's omissions as strategic and reasonable led it to refrain from evaluating the prejudice prong. The Eleventh Circuit's statement about prejudice is not dispositive of Mr. Nance's *Strickland* claim.

time" the belt made it "impossible for [him] to concentrate on what's going on in the courtroom." D. Ct. Doc. 11-17 at 82. He further explained how the belt interfered with his ability to concentrate: "I'm steadily asking [trial counsel] questions, what did they say or what does that mean? And [trial counsel] can testify to that. I just—I have a hard time with this belt on me. It's a lot of—it's a lot." *Id.* He explained the physical discomfort: "Very uncomfortable. . . . It's a motorcycle battery basically fit to your back." *Id*. When asked if it interfered with his ability to think and talk with counsel, he explained: "Sure. It puts my mind to my kidneys . . . 50,000 volts is a lot of amperage, a lot of volts." *Id.* at 82. Mr. Nance testified later that he had not been able to understand what had happened in court that day and that the stun belt was the primary reason for his lack of understanding. *Id.* at 83.

The prosecutor put on testimony regarding the State's desire for the belt, which included mention by a sheriff's major of an unspecified rumor "that Mr. Nance intended at some point during the proceedings to bite the nose off of the prosecuting attorney."[8] *Id.* at 66-67. When questioned during cross-examination, the sheriff's major admitted that Mr. Nance had never even attempted to escape, and that he had never presented any problem on his many journeys to and from the jail and courthouse. *Id.* at 70-71. The court denied the motion.

More than five years later, during the 2002 resentencing proceedings, the trial court refused to revisit the stun belt issue, though years of demonstrated good

[8] The State never indicated who provided such information or who received it.

behavior in court and while incarcerated had passed.[9] Given these new circumstances, as well as their ongoing concern about the belt's prejudice to Mr. Nance, trial counsel filed another motion to preclude the stun belt's use. The motion set forth the ways in which the belt harmed Mr. Nance:

> [T]he stun belt torture device impinges upon Defendant's Sixth Amendment right to confer with counsel and his due process right to be present at trial. Wearing of this device inhibits Defendant's ability to follow the proceedings and take an active interest in the case. Much of the Defendant's focus and attention will be concentrated upon doing everything he can to insure [sic] that the belt does not get activated . . . . The belt will interfere with Defendant's ability to direct his own defense.

D. Ct. Doc. 14-14 at 20. Counsel urged the court to "give weight to Defendant's past conduct in this very courtroom, and th[e] fact that he has never presented any problem whatsoever to court security personnel, during all of the nine and a half years that Defendant has been appearing before this court." *Id.*

During a pretrial hearing on the motion, counsel reiterated the ways the belt prejudiced Mr. Nance:

> The stun belt has a number of ramifications on my client. It interferes with his ability to be present in the courtroom. It interferes with his ability to sit comfortably. During the course of a day's proceeding it wears him down and tires him out. It impinges on his rights to a fair trial, and it impinges on his right to be present in the courtroom. It impinges on his Sixth Amendment right to confer with counsel and to assist in his defense.

D. Ct. Doc. 14-27 at 37. Counsel then again emphasized why there was no need for the belt: "Mr. Nance has never been any problem in the courtroom. He's been

[9] In fact, Mr. Nance's behavior while incarcerated was so impressive that four jail guards testified during the 2002 resentencing to his good conduct and the special privileges he had earned as a result. *See* D. Ct. Doc. 16-7 at 79-91. These same jail guards could have testified at a hearing on the stun belt.

coming to court in Gwinnett County for a number of years. He went all the way through a three-week trial with Your Honor." *Id.* at 38.

The trial judge's response was brief. He recalled having a hearing on the stun belt before the 1997 trial and "do not wish to have another one"; he "just feel[s] like [the belt]'s still necessary." D. Ct. Doc. 14-27 at 48-49. The judge conceded that "Mr. Nance has been a perfect gentleman when he's in the courtroom[,]" but decided "at present I think it's gone okay so I'm just——I'm going to deny that motion." *Id.* The trial court then moved on to other matters.

During jury selection, the belt's ongoing harm to Mr. Nance compelled trial counsel to once again object. Counsel interrupted the proceedings to tell the judge that the belt was "impact[ing] [Mr. Nance's] ability to participate meaningfully in his defense. . . . He needs to participate meaningfully and assist us in his defense, Your Honor. He needs to help us with voir dire. He needs to help us throughout this trial. He can't do so with this belt." D. Ct. Doc. 15-7 at 12. The judge replied: "I ruled on that a couple of times before. I'm going to deny that motion in that regard." *Id.* at 12-13. Trial counsel continued to protest, explaining that there had not been a hearing on the issue in over five years, and asking that they be permitted an opportunity to present evidence. *See id.* at 13. The judge denied the request, saying he remembered the earlier hearing and that he could not disregard "the threats that were made by Mr. Nance." *Id.*

The judge, though, quickly qualified that he actually did not perceive any security risk: "Although, I really don't think that he would be a threat to the court

reporter at this point[.]" *Id.* at 13.[10] Without requiring a showing of need for the belt, the judge closed the discussion by explaining that he would simply defer to the sheriff: "Anyway, whether he really is a threat, I'm going to really leave that up to the sheriff's department to make that decision. I'm not going to have it removed at this point." *Id.* at 14.

The trial proceeded, and the stun belt remained strapped to Mr. Nance for the remainder of the 2002 resentencing, as it had for the entire 1997 trial.

At the motion for new trial hearing, counsel raised the stun belt issue again: "[B]ack in 1997 you held a little hearing about that issue prior to the first trial in the matter. But this time [in 2002] you never gave us a hearing on that issue and it [sic] eventually just seemed to defer to whatever the sheriff thought was appropriate." D. Ct. Doc. 16-16 at 5. Trial counsel then requested for Mr. Nance to testify to the belt's impact during trial, but the trial court denied the request upon the State's objection. Trial counsel then proffered this:

> I would think, Your Honor, if Mr. Nance were to testify that he would tell you that the belt is extremely uncomfortable, downright painful at times; that throughout the trial he was——it made him hot, it made him tired, it kept him from sitting comfortably. . . .
>
> I think Mr. Nance would tell you that the fact he was wearing that belt has a—not just a direct physical evidence but it wears on him emotionally, that he's afraid to move sometimes, afraid he might get zapped.

[10] This statement demonstrated two things. First, that the trial judge did not remember the 1997 hearing as well as he thought he did, given that the supposed nose-biting threat had involved the prosecutor and not the court reporter. And second, that the judge ordered the continued use of the stun belt despite believing Mr. Nance to present no security risk.

> I think he would tell you that in addition to that, Your Honor, he—that was probably the factor in why he didn't want to testify, in his decision not to testify, that he'd be fidgeting and looking weird and uncomfortable in front of the jurors if he took the witness stand and testified.
>
> [. . .]
>
> Additionally, Your Honor, he would tell you that at times the belt contributed to overheating and made him nauseous during the trial.

Id. at 7-8.

The stun belt was strapped to Mr. Nance from pretrial hearings all the way through the jury's imposition of death, prejudicing his fundamental trial rights at every stage of the proceedings. The record also demonstrates that the trial court's decision to impose its use was made merely in acquiescence to the wishes of the State, not because it served any need.

The Georgia Supreme Court denied relief on direct appeal, finding that "the use of extraordinary security measures . . . is within the discretion of the trial court" and that the trial court did not abuse its discretion in permitting the belt's use in 2002. App. 152.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Eleventh Circuit's Framework for Evaluating Ineffective Assistance of Counsel Claims Conflicts with Its Peer Courts and with this Court's Precedent and Denies Habeas Petitioners Meaningful Review.

The Eleventh Circuit's opinion in Mr. Nance's case highlights the court's departure from this Court's directives and from the majority of its peer courts' practices. *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny instruct courts reviewing ineffective assistance of counsel claims to look at counsel's

thoughts and actions at the time of trial. *See, e.g.*, *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made . . . to *reconstruct the circumstances* of counsel's challenged conduct, and to evaluate the conduct *from counsel's perspective at the time*.") (emphasis added). The Eleventh Circuit, though, ignores "counsel's perspective at the time" and instead finds trial counsel's conduct to be strategic and reasonable irrespective of record evidence that demonstrates the opposite.

The Eleventh Circuit's aberrant framework, also implemented by the First Circuit, means that *Strickland* claims in these circuits are reviewed under a different standard than those brought in the majority of circuits around the country. This Court should grant certiorari to resolve this well-entrenched circuit split that has critical consequences for habeas petitioners.

A. The Eleventh Circuit Departs from the Majority of the Circuits When It Imputes Strategy and Reasonableness to Trial Counsel's Actions Irrespective of the Record Evidence.

The Eleventh Circuit characterized Mr. Nance's *Strickland* claim as a "strategy-questioning" one and highlighted that it is "rarer still for merit to be found in a claim that challenges a strategic decision of counsel." App. 9. But Mr. Nance never questioned trial counsel's strategy; he instead claimed and continues to claim that trial counsel's failure to present evidence of Mr. Nance's brain damage, borderline intellectual functioning, and the tear-gas explosion's impact was not a strategic decision at all. In fact, it was in direct contrast to trial counsel's stated strategy. The Eleventh Circuit deemed counsel's omissions "strategic" and "virtually

unchallengable" in the face of a record that showed they were actually the product of inattention and neglect.

In this regard, the Eleventh Circuit is an outlier. *Strickland* makes clear that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[,]" 466 U.S. at 690, but in interpreting *Strickland* other circuits look to the record to determine whether actions presumed to be the product of reasonable strategy were actually so. The Eleventh Circuit, though, imputes strategy in disregard of the record evidence, imposing an unrebuttable presumption of reasonableness as long as the challenged actions were taken in the wake of a reasonable investigation.

The Eleventh Circuit's application of strategy to trial counsel's actions irrespective of the record is consistent with the circuit's "hypothetical lawyer" standard—looking not to what the actual trial counsel did in a specific case but to what some reasonable lawyer could have done. Justifying trial counsel's actions with the judgment of a hypothetical lawyer is the adopted law of the circuit. *See, e.g.*, *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) ("[I]t matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight. The relevant question is not what actually motivated counsel, but what reasonably could have."); *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000) ("We look at the acts or omissions of counsel that the petitioner alleges are unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner."). The same is also the adopted law in

Georgia, and was the framework applied by the Georgia Supreme Court in Mr. Nance's case.

In its opinion overturning the state habeas court's grant of relief, the Georgia Supreme Court repeatedly cited to its hypothetical lawyer standard for assessing *Strickland* claims. "In reviewing trial counsel's performance," the court stated, "we ask only whether *some reasonable lawyer* at the trial could have acted, in the circumstances, as defense counsel acted at trial." App. 61 (internal quotation marks and citation omitted) (emphasis added). The court relied on this framework throughout the opinion, repeatedly justifying trial counsel's failures upon a conclusion that "a reasonable attorney could have" acted similarly. *See id.* at 71, 72, 73, 74, 75, 78 n.7. The Eleventh Circuit sanctioned the state court's reasoning when it denied Mr. Nance habeas relief, lauding the court's "thorough[] and convincing[]" explanation of why trial counsel's actions were strategic and reasonable. *See* App. 10.

The vast majority of circuit courts understand that it is contrary to *Strickland* to impute strategy and reasonableness where the record does not support such a finding. The Second Circuit refuses to imagine a hypothetical strategic justification for trial counsel's decisions. *See Bell v. Miller*, 500 F.3d 149, 157 (2nd Cir. 2007) (granting relief upon finding that "the record reveals no 'tactical justification for the course' trial counsel chose" and the excluded expert testimony would have promoted counsel's stated trial strategy); *Pavel v. Hollins*, 261 F.3d 210, 218 (2nd Cir. 2001) ("[Trial counsel]'s decision not to call any witnesses other than Pavel was thus 'strategic' in the sense that it related to a question of trial

strategy—which witnesses to call. . . . [but] it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb.").

The Fifth Circuit employs the same standard—requiring record evidence to support a determination that trial counsel's actions were strategic. *See, e.g.*, *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009) (finding "there does not appear to be any legitimate strategic reason for [trial counsel]'s failure to present [certain] evidence" even in light of trial counsel's testimony that it was strategic, and finding that "'[t]he Court . . . is not required to condone unreasonable decisions parading under the umbrella of strategy'") (internal citation omitted); *Moore v. Johnson*, 194 F.3d 586, 610 (5th Cir. 1999) (finding decision cannot be "strategic" when record shows counsel does not know why they did or did not do something).

The Seventh Circuit similarly recognizes that, although "'*Strickland* establishes a deferential presumption that strategic judgments made by defense counsel are reasonable[,] . . . the presumption applies only if the lawyer actually exercised judgment.' *A court adjudicating a* Strickland *claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny*." *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016) (internal citation omitted) (emphasis added); *accord Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer.").

The Eighth Circuit follows suit, refusing to impute strategy even in a case in which counsel testified in state habeas that they did not recall why they did not object at trial and gave possible reasons for their decision. The court has said clearly: "We cannot impute to counsel a trial strategy that the record reveals she did not follow. . . . Though we apply a strong presumption that counsel acted reasonably, the state court record belies that presumption and reveals no reasonable strategic reason not to object to either doctor's testimony." *Gabaree v. Steele*, 792 F.3d 991, 999 (8th Cir. 2015).

The Ninth Circuit has taken the same approach. In a case dealing with trial counsel's failure to put on a helpful witness, the court "recognize[d] that 'few decisions a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial,'" but would not impute strategy where "trial counsel [] offered no strategic reason for [their] failing[.]" *Alcala v. Woodford*, 334 F.3d 862, 871-72 (9th Cir. 2003). The court further stated that it "will not assume facts not in the record in order to manufacture a reasonable strategic decision for [] trial counsel." *Id.* at 872.

Finally, the D.C. Circuit agrees—"just as we do not burden counsel's actual tactical choices with the benefit of tactics as disclosed by hindsight, neither do we salvage them on that basis. Analysis under *Strickland* is highly fact bound and the presumption created by *Strickland* . . . can be overcome by the facts in a particular case." *Chatmon v. United States*, 801 A.2d 92, 108 (D.C. Cir. 2002).

It is only the First Circuit that joins the Eleventh Circuit, "judging whether counsel was ineffective by asking whether objectively reasonable counsel could have

made a strategic choice to do as actual counsel did." *Vargas-De Jesús v. United States*, 813 F.3d 414, 418 (1st Cir. 2016) (internal quotation marks and citation omitted).

B. The Eleventh Circuit's Ineffective Assistance of Counsel Framework Conflicts with this Court's Precedent.

The Georgia Supreme Court and the Eleventh Circuit err by imputing strategy and reasonableness where the record demonstrates trial counsel's omissions were the product of neither. In *Strickland*, this Court emphasized the need for courts to look to the actual basis for counsel's conduct in analyzing ineffective assistance claims. *See* 466 U.S. at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."), 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."), 690 ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."). This Court's cases following *Strickland* emphasize the same need for determining trial counsel's performance based on whether the record establishes that the challenged conduct was in fact the product of strategy. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 395 (2005) (O'Connor, J., concurring) (explaining that trial counsel's failure to obtain a critical file "would not necessarily have been deficient if it had resulted from the lawyers' careful exercise of judgment about how best to marshal their time" but that,

because it resulted from "inattention, not reasoned strategic judgment," the omission was deficient) (internal quotation marks and citation omitted); *accord Marcrum v. Luebbers*, 509 F.3d 489, 502 (8th Cir. 2007) ("The Supreme Court has held in several cases that the habeas court's commission is not to invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened; when a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy[.]").

By imputing strategy to trial counsel where the record demonstrates there was none, and using any possible justification a hypothetical lawyer could have had for engaging in the same conduct, courts deny habeas petitioners meaningful review of the reasonableness of their counsel's conduct. As long as the court can imagine some strategic reason why some lawyer would have taken the challenged action, the court can and will deny relief. Under this framework, the question of relief depends on the limits of the court's imagination, not on the actual reasonableness of trial counsel's conduct. *See, e.g.*, *Gordon*, 518 F.3d at 1302 ("When we can conceive of a reasonable motivation for counsel's actions, we will deny a claim of ineffective assistance without an evidentiary hearing.").

C. It Is Critical for The Court to Resolve This Circuit Split Given the Frequency of Ineffective Assistance of Counsel Claims in Federal Habeas Petitions and Their Role in Presenting Constitutional Violations for Review.

The dispute at the center of this circuit split comes up frequently, and it has dire consequences for federal habeas petitioners. Ineffective assistance of counsel

claims are raised more frequently than any other claim in habeas proceedings. *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. Rev. 425, 433, 438 (2011). This is partially because it is often the only available vehicle by which a federal habeas petitioner can challenge a constitutional violation. *See, e.g.*, Anne M. Voigts, *Note: Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1118 (1999).

The Eleventh Circuit regularly denies habeas petitioners relief on the basis of its aberrant ineffective assistance of counsel framework. *See, e.g.*, *Barriner v. Sec'y, Dep't of Corr.*, 604 Fed. Appx. 801, 807 (11th Cir. 2015) ("[C]ounsel reasonably could have interpreted the question in a way that would have made a 'no' answer the best one for his client. It matters not whether Barriner's trial counsel actually did."); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1299 (11th Cir. 2014) *("*Can we imagine that there is 'some reasonable lawyer' out there, somewhere, who would survey this situation and decide, as [trial counsel] did, to stay seated? We say, with gusto, that we can.") (internal citation omitted); *Hammond v. Hall*, 586 F.3d 1289, 1332 (11th Cir. 2009) ("Under the law of this circuit the question is not why Hammond's counsel failed to move for a mistrial because of the parole remark but whether a competent attorney reasonably could have decided not to move for one. . . . [I]t does not matter if the actual reason trial counsel did not move for a mistrial was inattention, misguided tactics, or unawareness of the code section."); *Gordon*, 518 F.3d at 1302 ("We can conceive of strategic reasons that Gordon's counsel could have decided not to object[.]").

In *Bates*, for example, trial counsel failed to object, during a capital trial, to a prayer delivered to the jury venire by a minister of the church where the victim's funeral service took place. 768 F.3d at 1283-84. In determining whether the failure was deficient, the Eleventh Circuit concocted a "hypothetical" trial counsel and asked whether they could have had some strategic reason for failing to object—all the while acknowledging that "[i]n real life, of course, it never even occurred to [trial counsel] to object." *Id.* at 1295-96. Finding that "some reasonable lawyer out there, somewhere" could have acted for strategic reasons, the Eleventh Circuit denied relief. *Id.* at 1299-1300. This is the same analysis that the Georgia Supreme Court followed in Mr. Nance's case and which the Eleventh Circuit, in accordance with the law of the circuit, sanctioned.

The circuit split here has dire—often life-or-death—consequences. In the Second, Fifth, Seventh, Eighth, Ninth, or D.C. Circuit, a habeas petitioner who claims their trial counsel omitted highly mitigating evidence critical to counsel's strategy would have the benefit of the court looking to the record to determine whether or not trial counsel's omission was strategic and reasonable. In the Eleventh Circuit—and the First Circuit, and the Georgia Supreme Court—on the other hand, that same petitioner would face no chance of relief as long as the court could concoct, irrespective of the record, some reason why a hypothetical lawyer could have had a strategic reason for acting similarly. This framework deprives habeas petitioners a meaningful review of their constitutional claims.

Without the Court's resolution of this split, Mr. Nance will likely be executed, even though trial counsel's inattention and neglect—not strategy and reason—

meant that his sentencing jury never knew about his brain damage, borderline intellectual functioning, and the impacts of the tear-gas explosion right before the shooting. This Court's intervention is necessary to ensure that *Strickland* claims receive meaningful review in all lower courts.

D. This Case Is the Right Vehicle for Resolving the Circuit Split.

A similar question to the one presented here came before this Court in *Garner v. Colorado*, which asked the Court to resolve this question: "When the actual basis for counsel's acts or omissions was unreasonable, may a court nevertheless hold, based on an invented rationale, that defense counsel's performance was reasonable?" Petition for Writ of Certiorari, *Garner v. Colorado*, No. 16-857 (2017). But in that case, trial counsel testified that she took the challenged action (not requesting an intoxication defense instruction) because it ran *contrary to* her chosen strategy (to deny the charges and argue her client's innocence). *See id.* at 12-13. The record therefore demonstrated that trial counsel's action was strategic and reasonable.

In Mr. Nance's case, though, the record shows that trial counsel acted *directly against* their stated strategy. Yet the Eleventh Circuit's aberrant framework still enabled the court to find no deficiency and deny Mr. Nance relief. Mr. Nance's case illustrates the deep impact of the Georgia Supreme Court and Eleventh Circuit's erroneous ineffective assistance of counsel analysis. It allows those courts to evade meaningful review of trial counsel's conduct even in the face of a record that proves trial counsel did not act strategically or reasonably. Had Mr. Nance's case been reviewed in the Second, Fifth, Seventh, Eighth, Ninth, or D.C. Circuit, the court

would have been required to look to the record evidence establishing that trial counsel's omissions were in direct opposition to their chosen strategy—and therefore not strategic or reasonable.

Furthermore, resolving the question presented in an AEDPA-bound case will ensure that lower courts will approach ineffective assistance of counsel claims in the correct way, even—and especially, because the stakes are usually very high—in cases in which AEDPA deference applies.

II. The Stun Belt

A. This Court's Precedent Clearly Establishes That a State-Sponsored Courtroom Practice That Prejudices a Criminal Defendant's Constitutional Trial Rights Must Be Justified by an Essential State Interest.

This Court has clearly established that state-sponsored courtroom practices that prejudice a criminal defendant's fair-trial rights must be justified by an essential state interest specific to the circumstances. *See Deck v. Missouri*, 544 U.S. 622 (2005); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Holbrook v. Flynn*, 475 U.S. 560 (1986); *Estelle v. Williams*, 425 U.S. 501 (1976); *Illinois v. Allen*, 397 U.S. 337 (1970); *accord Carey v. Musladin*, 549 U.S. 70, 76 (2006) (highlighting that the Court in *Estelle* and *Holbrook* established the test for evaluating prejudicial "state-sponsored courtroom practices," which "ask[s] whether the practices furthered an essential state interest").

In reviewing Mr. Nance's stun belt claim, the Eleventh Circuit found there to be no clearly established federal law on point and denied Mr. Nance relief on that basis. *See* App. 14-17 (acknowledging that if § 2254(d)(1) did not apply, the court's

precedent "might require us to vacate [Mr. Nance's] sentence"). The court deemed this Court's cases inapplicable because they do not specifically address "whether and under what circumstances a trial court may require a defendant to wear a stun belt." App. 11. The Eleventh Circuit's reading of this Court's precedent is narrow and incorrect, and casts aside this Court's clearly established principles regarding the State's prejudicial intrusion into the constitutional rights of criminal defendants.

1. This Court's Cases Announce a Simple Principle Regarding the State's Intrusion on a Defendant's Constitutional Trial Rights.

This Court's decisions have addressed an array of different courtroom practices: shackles (*Deck*), jail garb (*Estelle*), increased police presence (*Holbrook*), forced medication (*Riggins*), and the defendant's removal from the courtroom (*Allen*). At the core of each of these decisions is a consistent principle: when a state-sponsored courtroom practice prejudices a criminal defendant's fair-trial rights, it must be justified by an essential state interest.

In *Estelle*, a case that addressed whether a defendant was prejudiced wearing jail garb in front of the jury, this Court cited to its earlier cases in arriving at the conclusion that "this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny. Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." 425 U.S. at 504 (citing *Estes v. Texas*, 381 U.S. 532 (1965) and *In re Murchison*, 349 U.S. 133 (1955)). In *Illinois v. Allen*, the Court trumpeted the same concerns regarding a defendant's fundamental

trial rights in coming to the conclusion that removal from the courtroom or total physical restraint is permissible when the particular circumstances demand such extreme action. *See* 397 U.S. 337, 344-46 (1970).

In *Holbrook*, this Court examined whether security personnel in the courtroom "is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." 475 U.S. at 568-569. The *Holbrook* Court looked to *Estelle* and *Allen* in identifying the principle at issue as the need to limit prejudicial trial practices to situations of specific need. Citing *Estelle*, the Court highlighted its previous "recogni[tion] that certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" *Holbrook*, 475 U.S. at 568 (citing *Estelle*, 425 U.S. at 503-504); *accord Carey*, 549 U.S. at 72 ("This Court has recognized that certain courtroom practices are so inherently prejudicial that they deprive the defendant of a fair trial."); *Deck*, 544 U.S. at 654 (Thomas, J., dissenting) ("I certainly agree that shackles would be impermissible if they were to seriously impair a defendant's ability to assist in his defense.") (citing *Riggins*, 504 U.S. at 154, n.4).

In *Deck*, the Court held that using visible shackles during the penalty phase is constitutionally impermissible unless "justified by an essential state interest." 544 U.S. at 624 (citing *Holbrook*, 475 U.S. at 568-569, and *Allen*, 397 U.S. at 343-344). The Court identified the three fundamental concerns posed by shackling: 1) the restraints' visibility can impact the jury's impression of the defendant; 2) the restraints can interfere with a defendant's ability to communicate with counsel; and

3) the restraints can harm the dignity of the judicial process. *Id.* at 630-632. In granting relief, the Court found that the trial court had violated Mr. Deck's due process rights by ordering him to wear shackles during the penalty phase of his trial without first finding an essential state interest. *Id.* at 634-635 (citing *Holbrook* and *Allen*). The Court also held that "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635.[11]

This Court applied the same principle in *Riggins* as it did in *Deck*, *Holbrook*, *Estelle*, and *Allen*. In *Riggins*, this Court granted relief to a criminal defendant whom the State had medicated with antipsychotics against his will. 504 U.S. at 127. The Court discussed the possibility that the forced medication's "side effects had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." *Id.* at 137. The Court's decision to grant relief to Mr. Riggins was not premised on a conclusion that a trial court can never curtail a criminal defendant's constitutional trial rights. *See id.* at 135-138. Instead, the Court made its decision based on the principle that an extraordinary measure that prejudices a defendant's trial rights is constitutionally sound only

[11] The holding in *Deck*, focused on visibility, does nothing to limit the Court's clearly established principle that state-sponsored courtroom practices that prejudice fair-trial rights must be justified by an essential state interest. *Deck* simply clarifies that visible shackles are inherently prejudicial even during the penalty phase, and thus that specific prejudice need not be demonstrated.

when "justified by an essential state interest." *Id*. at 138 (citing *Holbrook*, 475 U.S. at 568-569, and *Allen*, 397 U.S. at 344).

This Court's cases have long established a general principle that applies with equal force to a stun belt: the State may not impose a courtroom practice that prejudices a criminal defendant's constitutional trial rights absent an essential state interest. The Eleventh Circuit disregarded this core principle when it found *Riggins* "irrelevant to Nance's case," App. 16, and *Deck*, *Holbrook*, and *Allen* "not applicable to security devices or measures that are not visible."[12] *Id*. at 16. In making those findings, the Eleventh Circuit looked only to the specific facts of the Court's cases and ignored their central holding: that "trial prejudice [must be] justified by an essential state interest." *Riggins*, 504 U.S. at 138; *accord Holbrook*, 475 U.S. at 568 ("[C]ertain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'") (internal citation omitted); *Estelle*, 425 U.S. at 504 ("[T]his Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny.").

This principle is even more critical in a capital case. *See, e.g.*, *Monge v. Cal.*, 524 U.S. 721, 732 (1998) ("Because the death penalty is unique 'in both its severity

[12] While the record in Mr. Nance's case does not establish that the stun belt was definitively visible to the jury, the record establishes that there was the possibility of visibility. The record shows that the belt protruded "about two inches" from Mr. Nance's back. D. Ct. Doc. 11-17 at 76; *see United States v. Durham*, 287 F.3d 1297, 1305 (11th Cir. 2002) ("[I]f the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury."). The record also shows that the belt's psychological impacts affected Mr. Nance's demeanor during trial, which could also have been visible to the jury. Therefore, the Eleventh Circuit's reasoning was also flawed because it was based on its conclusive determination that the stun belt was invisible.

and its finality,' we have recognized an acute need for reliability in capital sentencing proceedings.") (internal citation omitted).

2. "Clearly Established" Requires an Identifiable Principle, Not a Duplication of Facts.

The Eleventh Circuit wedded itself to a requirement that, under AEDPA, relevant Supreme Court cases must deal with a duplication of facts in order for their principles to be clearly established. That is not the law. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("AEDPA does not require state and federal courts to wait for some nearly identical fact pattern before a legal rule must be applied.") (internal citation omitted). Instead, what is "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'" *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (internal citation omitted); *see also Williams v. Taylor*, 529 U.S. 362, 379-381 (2000); *accord Hope v. Pelzer*, 536 U.S. 730, 740-741 (2002) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful[.]'") (internal citations omitted).

Here, the Eleventh Circuit ignored this Court's clearly established principle concerning prejudicial courtroom practices, and instead based its decision on the particular technology deployed in Mr. Nance's case. This Court's intervention is necessary to ensure that the Eleventh Circuit adheres to this Court's rule that prejudicial courtroom practices must be justified by an essential state interest.

B. The Majority of Circuits That Have Reviewed the Issue Have Found This Court's Relevant Cases to Stand for a Clearly Established Principle Directly Applicable to Stun Belts.

The clearly established law set by this Court, and its direct applicability to stun belts, has been recognized by multiple lower courts. Though circuit court decisions do not clearly establish federal law under § 2254(d)(1), they are relevant "to the extent that the decisions demonstrate that the Supreme Court's pre-existing, clearly established law compelled the circuit courts . . . to decide in a definite way the case before them." *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003). The lower courts that identify this Court's existing law as clearly establishing a principle directly applicable to stun belts correctly adhere to this Court's jurisprudence. The Court should grant certiorari to correct the misunderstanding of a minority of circuits.

In a direct appeal case reviewing the constitutionality of a stun belt's use at trial, the D.C. Circuit identified *Deck*, *Holbrook*, and *Estelle* as the relevant cases and found them establishing a clear rule:

> [T]he Supreme Court has stated that certain government practices during criminal trials prejudice defendants because they offend three "fundamental legal principles," *Deck v. Missouri*: (1) that "the criminal process presumes that the defendant is innocent until proved guilty," *id.*; (2) that "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel," *id.* at 631; and (3) that "judges must seek to maintain a judicial process that is a dignified process," *id. When a government practice is prejudicial because it either inherently or in a particular defendant's case offends these principles, the Court has forbidden district courts from utilizing the practice unless it is justified by an essential state interest, such as courtroom security or escape prevention, specific to the defendant on trial. See, e.g., Deck*; *Holbrook*; *Estelle.*

United States v. Moore, 651 F.3d 30, 45 (D.C. Cir. 2011) (emphasis added) (internal citations omitted). The D.C. Circuit relied on this Court's cases to find that "if the use of stun belts to restrain criminal defendants at trial either is inherently prejudicial or in this case was actually prejudicial to the defendants, the district court had the obligation to determine whether the belts were justified by an essential governmental interest specific to the defendants on trial." *Id.* The court's determination did not depend on whether or not the stun belt was visible to the jury. *See id.* at 47.

The Seventh Circuit has also found this Court's law clearly established as it relates to stun belts. Looking to *Allen*, *Estelle*, and *Holbrook*, the Seventh Circuit, in an AEDPA-bound case in which the court evaluated trial counsel's ineffectiveness for failing to object to the use of a stun belt, found it "well established that a trial court could not restrain a criminal defendant absent a particularized justification." *Wrinkles v. Buss*, 537 F.3d 804, 814 (7th Cir. 2008). The *Wrinkles* court's determination that the stun belt at issue was not visible did not impact its application of this Court's clearly established law. *See id.* at 813-14. The court ultimately denied relief because the petitioner did not demonstrate any prejudice caused by trial counsel's failure to object to the stun belt. *Id.* at 823. ("Without evidence that the jurors saw the stun belt, or that he was otherwise affected by the stun belt throughout trial, Wrinkles cannot demonstrate prejudice.").

The Ninth Circuit has similarly found, also in a federal habeas case, that the constitutional limits this Court has long imposed on physical restraints do, without a doubt, apply to stun belts and that visibility is *not* dispositive. *See Gonzalez v.*

Pliler, 341 F.3d 897 (9th Cir. 2003). In *Gonzalez*, the record did not establish the stun belt's prejudice to the petitioner and the court therefore granted an evidentiary hearing on that issue. *Id.* at 903-04. In highlighting that it was not applying a new rule which would bar the petitioner from relief under *Teague v. Lane*, 489 U.S. 288 (1989), the court explained:

> [T]he Supreme Court has long imposed constitutional limits on the use of physical restraints at trial. *See Allen*, 397 U.S. at 344. . . . If we were to adopt the Warden's theory, a new rule of criminal procedure would obtain every time there was a technological advance in the design of prisoner restraints. The form of the physical restraint, however, is irrelevant to the application of the constitutional standards. *It matters not whether the restraint takes the form of handcuffs, gags, leg shackles, ropes, straight jackets, stun belts, or force fields. The relevant constitutional questions are identical and dictated by a long line of case law.*

Id. at 904 (emphasis added).

The Tenth Circuit also agrees that there is clearly established Supreme Court law on point. In *Ochoa v. Workman*, the state court decision had looked to *Deck* in finding that the trial court erred in requiring the petitioner to wear a shock sleeve during an intellectual disability proceeding, but that the error was harmless because the sleeve was not visible to the jury and because Mr. Ochoa claimed no harm beyond visibility. 669 F.3d 1130, 1145 (10th Cir. 2012); *Ochoa v. State*, 136 P.3d 661, 666-670 (Okla. Crim. App. 2006). Under AEDPA review, the Tenth Circuit agreed that *Deck* applied and found the state court's decision to be consistent with that precedent. *See Ochoa*, 669 F.3d at 1145-46.

The Sixth Circuit, on the other hand, has limited the applicability of this Court's precedent when reviewing the use of a stun belt at trial, but it looked to only

Deck in doing so. In *Earhart v. Konteh*, the Sixth Circuit identified *Deck* alone as this Court's relevant precedent and determined that *Deck's* applicability depends on visibility. *See* 589 F.3d 337 (6th Cir. 2009). In deciding whether *Deck* clearly established a requirement for "an individualized finding of necessity" before a stun belt's use, the Sixth Circuit found that *Deck*'s applicability "rises or falls on the question of whether the stun belt was visible to the jury." *Id.* at 349. In making that determination, the Sixth Circuit acknowledged it was choosing a "narrow interpretation of *Deck*." *Id.*[13]

Disregarding the general principle of law that this Court has repeatedly established is erroneous. This Court's cases together make clear that the Court's chief concern is with restricting the Government's ability to prejudicially intrude on a criminal defendant's trial rights, and not on the specific method of the intrusion. In the circuits where courts have looked at this Court's related cases as a whole, they have identified a clear principle: a state-sponsored courtroom practice that prejudices a criminal defendant's fair-trial rights must be justified by an essential state interest. This is the correct approach, and the approach that should be confirmed by this Court.

[13] But the Sixth Circuit has also found, in a non-AEDPA case, that *Deck* stands for the principle that "[t]he use of physical restraints, *such as a stun belt*, during trial and the sentencing phase implicates a defendant's right to due process. . . . [and] the trial court must make a 'determination, in the exercise of its discretion, that [restraints] are justified by a state interest specific to a particular trial.'" *United States v. Miller*, 531 F.3d 340, 344-345 (6th Cir. 2008) (citing *Deck*). The Sixth Circuit on one hand, in *Earhart*, finds that under a narrow reading, *Deck* only clearly establishes law in regards to visible restraints. On the other hand, in *Miller*, the court finds *Deck* to have established a principle which expands to non-visible restraints, and explicitly to stun belts.

This Court alone has the authority to determine what is clearly established under § 2254(d)(1). That the Eleventh and Sixth Circuits have misconstrued this Court's jurisprudence as limited to specific mechanisms of restraint does not undermine the fact that this Court has, repeatedly, clearly expressed a general principle applicable to Mr. Nance's case. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. at 410 ("[T]he mere existence of conflicting authority does not necessarily mean a rule is new.") (O'Connor, J., concurring) (citation and quotation marks omitted); *Hall v. Zenk*, 692 F.3d 793, 802 (7th Cir. 2012) (finding a principle to be clearly established despite contrary decisions of sister courts where those decisions "constitute an unreasonable interpretation of Supreme Court law"). This Court has clearly established that a state-sponsored courtroom practice that prejudices a defendant's fair-trial rights must be justified by an essential state interest. The Court should grant certiorari to confirm the applicability of this general principle to stun belts.

C. Stun Belts Present a Grave Threat to the Constitutional Rights of Criminal Defendants and Require the Court's Confirmation That They May Not Be Needlessly Imposed.

The significant prejudice caused by stun belts to a criminal defendant's constitutional trial rights has been agreed upon by many courts, including the Eleventh Circuit. As the Eleventh Circuit detailed in *United States v. Durham*:

> A stun belt seemingly poses a far more substantial risk of interfering with a defendant's Sixth Amendment right to confer with counsel than do leg shackles. The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely chills a defendant's inclination to make any movements during trial—including those movements necessary for effective communication with counsel.

> Another problem with this device is the adverse impact it can have on a defendant's Sixth Amendment and due process rights to be present at trial and to participate in his defense. . . . It is reasonable to assume that much of a defendant's focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. . . . A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.
>
> Finally, stun belts have the potential to be highly detrimental to the dignified administration of criminal justice. . . . Shackles are a minor threat to the dignity of the courtroom when compared with the discharge of a stun belt, which could cause the defendant to lose control of his limbs, collapse to the floor, and defecate on himself.

287 F.3d 1297, 1305-1306 (11th Cir. 2002). The Indiana Supreme Court has banned the use of stun belts in all of Indiana's state courts, finding that "[a] pain infliction device that has the potential to compromise an individual's ability to participate in his or her own defense does not belong in a court of law." *Wrinkles v. State*, 749 N.E.2d 1179, 1194 (2001).

This Court should grant certiorari to confirm that its clearly established law subjects stun belts to the same level of judicial scrutiny as other prejudicial courtroom practices. Without that confirmation, some states will continue to use stun belts unchecked, intruding on a defendant's fair-trial rights with a practice that is, in many ways, *more* prejudicial than the practices directly at issue in this Court's prior cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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