No. 19-6918

In the
Supreme Court of the United States

Michael Wade Nance,
Petitioner,

v.

Benjamin Ford, Warden,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Georgia Supreme Court reasonably determined that trial counsel did not render constitutionally ineffective assistance when, after doing "as thorough an investigation into mitigating circumstances" as the court of appeals panel "[had] ever seen," counsel made the reasonably strategic decision to present no fewer than 23 mitigation witnesses at his resentencing trial, which included a psychologist and expert in the field of prison adaptability and numerous family members, who portrayed Nance as someone who had a difficult childhood, long-term cognitive difficulties, a low IQ, and early exposure to drugs and alcohol, but who also had adapted positively to incarcerated life and would not be a danger to others if allowed to spend the rest of his life in prison.

2. Whether the Georgia Supreme Court reasonably determined that the trial court had not erred in deciding that Nance was not entitled to a second evidentiary hearing to address the State's request that he wear an electronic security device underneath his clothing at his resentencing trial when, during the first evidentiary hearing, Nance testified on how the device adversely affected his comfort and concentration, and the State offered evidence on how the device worked and that there were no feasible alternatives to mitigate the security risks posed by Nance based on his threat to bite off the prosecuting attorney's nose.

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The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of § 2254 habeas corpus relief is published at *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298 (11th Cir. 2019). Pet. App. A.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law….

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

> In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury….

The Eighth Amendment of the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment, Section I, of the United States

Constitution provides in relevant part:

> No State . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Factual Background

On December 18, 1993, Nance stole a car and drove to a bank in Gwinnett County, Georgia, with plans to rob it. Pet. App. at 60, 75-76. Nance entered the bank at approximately 11:00 a.m. *Id.* After observing the bank's interior, Nance pulled a ski mask over his face, brandished a loaded .22 caliber revolver, and ordered the tellers to place the money in two pillowcases he had brought with him. *Id.* at 60, 75-76. Nance threatened the tellers not to place any dye packs with the money, telling one that she would be the first to die if there was any apparent attempt to contact law enforcement. *Id.* at 60, 76. Nevertheless, the tellers placed two dye packs, along with money, into the pillowcases. *Id.*

Nance exited the bank with the pillowcase and got into the vehicle he had previously stolen. *Id.* at 60. The dye packs discharged, emitting red dye and tear gas. *Id.* Nance exited the vehicle but grabbed a black trash bag containing the same .22 caliber revolver he had used to rob the bank. *Id.* Nance walked across the street to a liquor store parking lot where he encountered Gabor Balogh, who was backing his car out of a parking space. *Id.* Nance yanked open the driver's side door to Balogh's vehicle and thrust his right arm, which held the plastic bag containing the revolver, into the car. *Id.* Balogh pleaded with Nance, saying "no, no, no," as he leaned away from

Nance and raised his left arm to shield himself. *Id*. Nance shot and killed Balogh. *Id*.

Nance then turned towards another individual, Dan McNeal, who was standing in the same liquor store parking lot. *Id*. Nance pointed his firearm at McNeal and demanded that McNeal give him his car keys. *Id*. McNeal refused and ran around the side of the liquor store. *Id*. Nance fired his weapon again but no one was hit. *Id*. Nance ran around the store and confronted McNeal again, pointing the gun at him. *Id*.

Nance ran to a nearby gas station, where he was encountered by the police. *Id*. A stand-off with law enforcement ensued, and Nance told the police, "If anyone rushes me, there's going to be war." *Id*. After more than an hour, police successfully persuaded Nance to surrender. *Id*.

Three months prior to these crimes, Nance had committed another bank robbery in Gwinnett County, where he had similarly threatened the bank tellers. *Id*. at 60, 78.

B. Proceedings Below

1. The Original Trial

Nance was originally represented by attorneys, Donald Hudson and Edwin Wilson, on his charges stemming from the December 1993 bank robbery, which included the murder of Balogh. *Id*. at 61. Before he was tried for murder in Gwinnett County, Nance pled guilty in federal court to both bank robberies and to possession of a firearm by a convicted felon and received a life without parole sentence. *Id*. at 61-62. After he was sentenced in federal court, attorney Johnny Moore was substituted as counsel for

Hudson. *Id*. at 61. Nance's attorneys were highly experienced in death penalty cases. *Id*. at 61-62.

Nance had been represented by the federal public defender on his bank robbery charges, and Moore and Wilson ("counsel") were able to obtain the file from that office. *Id*. at 61. Counsel thoroughly investigated the facts surrounding Nance's crimes as well as possible avenues for mitigation at a sentencing trial. *Id*. at 62. They utilized mitigation specialists and investigators, obtained numerous records, examined discovery, met with the District Attorney to try and negotiate a plea bargain to life without parole, inspected the physical evidence, visited the crime scene, viewed the videotapes of the bank robbery and standoff with police, interviewed the State's expert witnesses, and traveled to Nance's home state of Kansas to interview potential mitigation witnesses. *Id*. In furtherance of the investigation into mitigating evidence, counsel also obtained prison records, marriage and divorce records, birth and death certificates, medical records, school records, probation records, and other documents. *Id*. at 5-6. The Eleventh Circuit panel below noted that counsel's investigation was "as thorough an investigation into mitigating circumstances as we have ever seen." *Id*. at 6.

Trial counsel wanted to try and show the jury that the effects of the dye packs' detonation caused Nance to become confused and disoriented. *Id*. They realized this would not disprove criminal intent but hoped such evidence would be mitigating. *Id*. In furtherance of this theory, counsel obtained funds to hire an expert in this field, spoke with at least four experts on dye packs, subpoenaed information from the dye packs' manufacturer, retained an expert toxicologist, spoke with the State's medical examiner

about the effects of tear gas, and interviewed another expert from the State's crime lab. *Id*.

Counsel also investigated potential mental health defenses and the use of such evidence in mitigation. *Id*. They reviewed reports from two different psychologists who had evaluated Nance. *Id*. Counsel ultimately decided to hire Dr. Robert Shaffer, who had previously evaluated Nance, to conduct further testing of Nance and to look for anything that might be mitigating, regardless of whether it was an actual legal defense. *Id*.

Despite counsel's best efforts, the jury found Nance guilty on all counts, including malice and felony murder. *Id*. at 64. Following the sentencing trial, the jury also recommended the death sentence, finding that the State had proven beyond a reasonable doubt that Nance had a prior conviction for a capital felony and that Nance had committed the murder while he was engaged in the commission of another capital felony (the armed robbery of Balogh's vehicle). *Id*. at 66.

2. The Resentencing Trial

Following his 1997 trial, the Georgia Supreme Court affirmed Nance's convictions but reversed his death sentence and remanded for resentencing. *Id*. The same attorneys represented Nance at his 2002 resentencing trial, and those attorneys again conducted additional investigation prior to that resentencing trial. *Id*.

Counsel reviewed their performance from the first trial, including the witnesses they had called. *Id*. at 6, 66-67. Counsel switched roles and decided to broaden their mitigation strategy and do things slightly differently at the resentencing trial because what they had presented at the first trial had not

persuaded that jury to spare Nance's life. *Id*. at 66-67. The mitigation theory at the resentencing trial would still involve evidence of Nance's mental impairments, childhood abuse and neglect, and substance abuse; however, a different expert witness would also testify about Nance's favorable prison adaptability. *Id*. at 66. In support of the prison adaptability component of their mitigation defense, counsel also called several deputies who testified about Nance's good behavior while incarcerated. *Id*. at 66-68. Counsel were also more successful at the resentencing trial in getting Nance's family to help present mitigation evidence. *Id*. at 67-68. Counsel continued to argue the adverse effects that the dye packs' detonation had on Nance. *Id*. Counsel ultimately called 23 witnesses at the resentencing trial. *Id*.

During their closing arguments to the jury, counsel acknowledged that Nance was responsible for Balogh's death and should be punished, but argued that a life sentence without the possibility of parole was harsh enough punishment. *Id*. at 68. Counsel asked the jury to remember the evidence that showed Nance's childhood contained "some verbal abuse," an "episodic alcoholic father in the home," and that Nance was an affectionate child, but a slow learner, neither parent's favorite, and unable to please his father. *Id*. Counsel also pointed to the testimony about Nance's developmental delays and difficulties at school, his father's labeling him as "stupid," his mother's devotion to her work and church at the expense of being at home with Nance, his introduction to drugs and alcohol at an early age, and his problems keeping work. *Id*. at 68-69. Counsel also reminded the jury that Nance never intended to harm anyone, and that he was startled, scared, teary-eyed, and a little bit dazed from that confusion when he ran across the street and encountered Balogh. *Id*. at 69. Counsel argued that the gun was still in a

black trash bag when it went off and that Nance did not mean to shoot Balogh. Finally, counsel argued to the jury that Nance was not the type of person for whom the death penalty was designed, especially considering his positive adjustment to being incarcerated, his commitment to Bible study, and his remorse for the crimes. *Id*.

Again, despite counsel's best efforts, the resentencing jury found the State had proven the existence of the same two statutory aggravating circumstances as found in 1997 and recommended a sentence of death. *Id*. The Georgia Supreme Court affirmed Nance's death sentence on direct appeal on December 1, 2005. *Id*. at 150-55.

3. The Electronic Security Device Nance Wore At Both Trials

On direct appeal of his death sentence, Nance argued that the trial court erred in refusing his request to conduct a second hearing on whether he should be required to wear an electronic security device underneath his closing at his 2002 resentencing trial. *Id*. at 152. Nance had been required to wear such a device at his 1997 trial because the trial judge had determined, after conducting a hearing, that Nance had threatened to bite off the nose of the prosecuting attorney during his trial. *Id*. At that same pretrial hearing, evidence was offered about the mechanics of the device and its advantages and the lack of feasible alternatives. *Id*. Nance also testified at that same hearing on the device's alleged impact on his comfort and ability to concentrate at trial. *Id*. After the 1997 hearing, the trial court determined that requiring Nance to wear the device was warranted by the threat and would not interfere with Nance's ability to receive a fair trial. *Id*.

The same trial judge presided at both of Nance's trials and at the pretrial hearing on the security device. *Id.* Prior to the resentencing trial, counsel asked the trial court to conduct another hearing to address whether Nance would have to wear the device at his resentencing trial. *Id.* The trial court denied Nance's request for another hearing, as the trial court recalled the evidence from the 1997 hearing and said that Nance's threat to bite off the prosecutor's nose, even after the passage of several years, could not be ignored. *Id.* Nance was required to wear the device at his 2002 resentencing trial as well. *Id.*

4. The State Habeas Corpus Proceedings

In 2007, Nance, through new counsel, filed a state habeas corpus petition, which he amended on January 17, 2008. *Id.* at 60. After an evidentiary hearing, the state habeas court denied relief with respect to Nance's convictions but granted relief on the death sentence, finding that counsel had been prejudicially deficient in presenting mitigating evidence at the resentencing trial. *Id.* The warden appealed, and the Georgia Supreme Court, in a decision entered on June 17, 2013, reversed the state habeas court and reinstated the death sentence. *Id.*

5. The Federal Habeas Corpus Proceedings

At the end of 2013, Nance filed a federal habeas corpus petition under 28 U.S.C. § 2254. *Id.* at 3. The district court denied relief in 2017 but granted a certificate of appealability on two issues: (1) his claims concerning trial counsel's effectiveness in presenting his mitigation case; and (2) his claim that the trial court erred in requiring him to wear a security device under his clothing during his resentencing trial. *Id.*

On April 30, 2019, the Eleventh Circuit Court of Appeals affirmed the district court's denial of § 2254 relief. *Id*. at 1-19. The Eleventh Circuit recognized just how difficult it is for a petitioner to succeed on an ineffectiveness claim questioning the strategic decisions of trial counsel who were informed of the available evidence, and how it is even more difficult to obtain federal habeas relief on a strategy-questioning ineffectiveness claim under § 2254(d) review. *Id*. at 9. The Eleventh Circuit correctly determined that the Georgia Supreme Court had reasonably determined that Nance's attorneys at his resentencing trial did not perform unreasonably, as they called 23 mitigation witnesses in support of their defense, including numerous family members, a psychologist who was an expert in the field of prison adaptability, and numerous sheriff's deputies who testified about Nance's positive behavior while incarcerated, while not abandoning focus on Nance's intellectual impairments and the effects the dye packs' detonation had on him. *Id*. at 9-11.

The Eleventh Circuit also affirmed the district court's denial of relief because Nance had not shown that the Georgia Supreme Court's decision, which affirmed the trial court's denial of Nance's request for a second hearing on the security device issue, was in violation of clearly established federal law as required under 28 U.S.C. § 2254(d). Pet. App. at 11-19. The Eleventh Circuit correctly held that Nance was not entitled to a second evidentiary hearing to address the State's request that he wear an electronic security device underneath his clothing at his resentencing trial. During the first evidentiary hearing, Nance testified on how the device adversely affected his comfort and concentration, and the State offered evidence on how the device worked, and that there were no feasible alternatives to mitigate the security

risks posed by Nance based on his threat to bite off the prosecuting attorney's nose. *Id*.

REASONS FOR DENYING THE PETITION

In his first question, Nance asks this Court to review the Eleventh Circuit's decision because it allegedly failed to properly review the state court record and disregarded the testimony of his former attorneys when adjudicating his ineffectiveness claims. Nance argues that the Eleventh Circuit's decision conflicts with the manner in which other circuit courts of appeals evaluate the performance prong of the Sixth Amendment test of *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court should deny the petition on this question because: (1) there is no circuit split on the question of how to determine whether counsel's actions were reasonable when evaluating an ineffective assistance of counsel claim; (2) the lower court's decision was correct; and (3) this case is not an appropriate vehicle to decide this question because an independent and unchallenged basis for the judgment exists: Nance failed to show that he was prejudiced by counsel's conduct.

In his second question, Nance, without alleging a genuine conflict among the circuit or state high courts, asks this Court the general question of whether it has clearly established a principle that courtroom practices, such as requiring a capital defendant who has threatened to bite off the prosecutor's nose to wear a security device underneath his clothing at trial, must be justified by an essential state interest. However, the Eleventh Circuit correctly held that the state court's decision concerning the security belt, which Nance has never shown was visible to the jury, did not run afoul

of this Court's precedents because this Court has never established constitutional parameters for requiring a defendant to wear such a security device. Not only does this question fail to allege a genuine conflict, but it also presents an issue of limited importance. The lower courts already apply a constitutional standard a trial court must consider before a defendant is required to wear such a device. Finally, this case is not the proper vehicle to address this question, as this Court would have to engage in its own fact-finding mission and reject facts as already found by the state courts to rule in Nance's favor.

I. Nance's *Strickland* claim does not warrant certiorari review.

To succeed on an ineffective assistance of counsel claim, a petitioner must show two things: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688. Nance focuses solely on the first prong of the *Strickland* test in his first question presented: he asks this Court to review the Eleventh Circuit's approach to evaluating whether trial counsel's challenged decisions were strategic choices, which are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. Pet. at 18-29. This question does not warrant review. First, there is no genuine conflict among the circuits about how to judge whether counsel's decisions were strategic choices. Second, the Eleventh Circuit's conclusion that counsel's decisions in this case were reasonable strategic choices was correct. And third, this case is not a suitable vehicle for addressing Nance's question anyway, because the state courts also denied relief based on the

prejudice prong of *Strickland*, which is an independent and unchallenged basis for denying habeas relief in this case.

A. The circuit courts are not divided on the question of how to determine whether counsel's actions were reasonable strategic choices.

Nance asserts that the Eleventh Circuit employs a "hypothetical lawyer" standard—looking not to what trial counsel actually did in a specific case but to what some reasonable lawyer could have done. Pet. at 18-29. But in fact, the Eleventh Circuit follows this Court's clear guidance in applying *Strickland's* performance prong: it looks to the entire state court record, including the testimony of former counsel, in deciding whether counsel's conduct fell outside the wide range of professionally competent assistance. And its application of the performance prong of *Strickland* here is not in conflict with the other circuits.

The Court's guidance on how to assess counsel's strategic decisions under *Strickland's* performance prong is quite clear. "Strategic choices made," as here, "after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689. In assessing whether a defendant has met that burden, courts look to the entire state court record, which typically includes the testimony of former counsel in a post-conviction proceeding. *See Strickland*, 466 U.S. at 699; *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 105

(2011). *See also* Pet. App. 5-11, 61-69. But that testimony is by no means dispositive: courts are required "to affirmatively entertain the range of possible 'reasons…counsel may have had for proceeding as they did," and this "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Pinholster*, 563 U.S. at 196 (citing *Harrington*, 562 U.S. at 110). At bottom, the question is whether counsel's actions fall within "the wide range of reasonable professional assistance" given the facts of the particular case, viewed as of the time of counsel's conduct." *Harrington*, 562 U.S. at 104; *Strickland*, 466 U.S. at 689-90. The Eleventh Circuit correctly applied just that approach when it determined that the Georgia Supreme Court had reasonably applied the *Strickland* standard. Pet. App. 8-11.

This approach is not in conflict with the other circuits as Nance suggests. None of the cases Nance cites indicate that circuits take conflicting approaches to deciding what qualifies as a reasonable strategic decision. Instead, they reflect only specific applications of *Strickland*'s guidance about identifying strategic decisions to different sets of facts based on different records. *See, e.g., Bell v. Miller*, 500 F.3d 149, 157 (2d Cir. 2007) (fact-specific analysis of performance prong under *Strickland* in determining that counsel failed to even consider a medical expert concerning an eyewitness' memory and had no tactical reason for the course they undertook); *Pavel v. Hollins*, 261 F.3d 210, 218 (2d Cir. 2001) (counsel's decision as to which witnesses to call was not a reasonable trial strategy); *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009) (simply calling an action strategic does not pass muster under *Strickland,* as counsel's decisions must pass the objective reasonableness test); *Moore v. Johnson*, 194 F.3d 586, 610 (5th Cir. 1999) (an

attorney's decision to exclude exculpatory portions of his client's confession was not professionally reasonable); *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016) (an attorney's decision not to present a material exculpatory witness was not reasonable, despite labeling it as "strategic"); *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (an attorney's decision not to put up any witnesses in support of a viable defense theory was outside the realm of professionally competent assistance); *Gabaree v. Steele*, 792 F.3d 991, 999 (8th Cir. 2015) (review of state court record shows that counsel bolstered an adverse expert witness' testimony through cross-examination, which was not in line with the defense strategy); *Marcrum v. Luebbers*, 509 F.3d 489, 502 (8th Cir. 2007) (the test applied for deficiency of performance under *Strickland* is an objective standard of reasonableness, and a review of the record to show why counsel acted as he did at the time of trial is relevant); *Alcala v. Woodford*, 334 F.3d 862, 871-72 (9th Cir. 2003) (counsel undertook to establish an alibi for the defendant but failed to present available evidence in support of that alibi, and failed to offer a strategic reason for such failure); *Chatmon v. United States*, 801 A.2d 92, 108 (D.C. Ct. App. 2002) (trial counsel's questioning of a detective led to introduction of identification from a suggestive photo array and to admission of defendant's damaging statement, which amounted to deficient performance under *Strickland*). In short, a closer look at these cases reveals the true nature of Nance's argument: the lower court misapplied *Strickland* in his case. This is not a ground for certiorari review. S. Ct. R. 10.

B. The decision below is correct.

The Eleventh Circuit properly adjudicated Nance's ineffectiveness claim under a doubly deferential standard of review. Pet. App. 9 (citing *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.)) (internal citations and quotation marks omitted). The Eleventh Circuit determined that the Georgia Supreme Court's adjudication of Nance's claim was not an objectively unreasonable application of the deferential *Strickland* standard. Upon complete examination of the Georgia Supreme Court's detailed decision and the state court record supporting it, the Eleventh Circuit correctly determined that trial counsel simply recalibrated their mitigation defense for the resentencing trial, a decision that was deliberately made by counsel after careful analysis of the portion of their presentation that had not been persuasive from the first sentencing trial. (Pet. App. 5-11). Counsel's decision not to present the same mental health expert they had presented at the first trial to talk about Nance's alleged brain damage was reasonable when evaluated in the complete context of the state court record, which included not only the testimony of counsel in the state post-conviction proceeding but also included an examination of all the mitigating evidence presented at both sentencing trials and its consistency with the mitigation defense. *Id*. It was reasonable for counsel to have concluded that the brain damage portion of their defense from the first trial was severely discredited, would have been further discredited if presented again, and would have conflicted with the recalibrated mitigation strategy at the resentencing trial. *Id*. at 71-75.

Nance argues that the state court record shows that counsel acted directly against their strategy in neglecting to present a certain mental health expert at the resentencing trial. Pet. 28. Yet again, Nance focuses on the testimony of counsel at the post-conviction proceedings and ignores the complete record from the resentencing trial, which shows that counsel adjusted their mitigation defense at the resentencing trial to include a prison adaptability component that showed Nance was able to control certain aspects of his behavior. Pet. App. at 5-7.[1]

Nance has not shown that any other circuit court would have ruled differently from the Eleventh Circuit if presented with the same ineffectiveness claim in the same § 2254(d) context. The other circuits would have looked to the same state court record that the Eleventh Circuit reviewed and reached the same reasonable conclusion—Nance's trial attorneys performed reasonably after conducting one of the most thorough investigations the Eleventh Circuit has ever seen in a capital case. Pet. App. at 6 n.1.

C. This is a poor vehicle to address a question about ineffectiveness because Nance's failure to prove prejudice is an unchallenged and independent ground for denying habeas relief.

To prevail on an ineffectiveness claim under *Strickland*, a petitioner must not only show that counsel performed unreasonably, but he must also show actual prejudice, i.e., a reasonable probability exists that, but for

[1] Counsel called seven Gwinnett County sheriff's deputies at the resentencing trial who testified about Nance's good behavior during the approximately year and a half he was incarcerated in Gwinnett County before his resentencing trial. Pet. App. at 68.

counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 688. Nance makes no attempt to challenge the Eleventh Circuit's finding that the Georgia Supreme Court reasonably determined that he failed to show prejudice. Thus, an independent and unchallenged basis for the Eleventh Circuit's decision exists, making this case a poor vehicle for answering this question presented.

The Eleventh Circuit correctly determined that even if counsel's performance had somehow been deficient, the Georgia Supreme Court has reasonably applied the prejudice prong of the *Strickland* test and determined that Nance had not shown prejudice finding:

> …even if counsel had referred to Nance's low average intelligence as 'borderline intellectual functioning' and 'borderline mental retardation' and had presented evidence of Nance's organic brain damage and the testimony of Dr. Hutchinson in mitigation during Nance's resentencing trial, we conclude that there is no reasonable probability that the outcome would have been different.

Pet. App. 78-79.

Counsel presented evidence of Nance's borderline IQ and level of intellect through the testimony of a psychologist, Dr. Daniel Grant, and through numerous other witnesses with knowledge of Nance's past. *Id*. at 68. Counsel also presented evidence concerning the potential physical effects the dye packs' detonation could have had on Nance. *Id*. at 67-68. Nance cannot show prejudice where the evidence he argues should have been presented would have been cumulative of that presented at trial. *See Herring v. Secretary, Dept. of Corrections*, 397 F.3d 1338, 1351 (11th Cir. 2005) (petitioner failed to show prejudice where counsel did not introduce two mental health reports concerning a petitioner's mental impairments, as such

evidence would have been cumulative of petitioner's mother's testimony that he suffered from a low IQ).

Because an independent and unchallenged basis for the Eleventh Circuit's decision exists, Nance's first question is an inappropriate vehicle for granting certiorari.

II. The Eleventh Circuit's deferential analysis of Nance's fact-specific claim regarding the use of an unseen security device on which there is no clearly established federal law provides no issue warranting review.

This Court already denied Nance's certiorari petition following the Georgia Supreme Court's affirmance of his death sentence, in which Nance explicitly asked this Court if the trial court could waive his right to a second hearing concerning the implementation of such a security device at his resentencing trial. *Nance v. Georgia*, 549 U.S. 868 (2006). *See also* Resp. App. A.

Nance asks this Court to grant certiorari to answer the general question of whether this Court has clearly established a principle that state-imposed courtroom practices that prejudice a capital defendant's constitutional rights must be justified by a state interest. Pet. at i, 29-40. Nance asks for this Court's intervention to ensure that the Eleventh Circuit adheres to this Court's rule that prejudicial courtroom practices must be justified by an essential state interest. Pet. at 34. While this Court has addressed the use of visible security devices at trial, such as cuffs or shackles, it has not addressed the use of security devices hidden underneath a defendant's clothing, such as the one Nance wore at trial. However, Nance has not shown that certiorari should be granted here for the following reasons: (1) there is no allegation of a genuine outcome-dispositive conflict among the circuit courts or state high

courts; (2) this issue, in the context in which it was addressed below, is of limited import because the lower courts already apply the principle Nance asks this Court to adopt; and (3) this case is a poor vehicle for resolving the question, as it would require this Court to engage in its own findings of fact in defiance of fact findings already made by the lower courts.

A. There is no genuine conflict of authority.

Certiorari should not be granted because Nance does not allege a genuine outcome-dispositive conflict. Instead, Nance argues this Court "should grant certiorari to correct the misunderstanding of a minority of circuits." Pet. at 35. That is not a valid basis upon which this Court should grant certiorari review. *See* S. Ct. R. 10. A closer inspection of the "misunderstanding" Nance alleges is not an outcome-dispositive conflict, i.e., he has not shown that other circuits have ruled in a way that conflicts with the Eleventh Circuit when addressing the same issue. Instead, he shows only examples of lower courts weighing viable security risks against the concerns of a defendant in upholding the use of similar security devices to the one worn by Nance. *See, e.g., United States v. Moore*, 651 F.3d 30, 45 (D.C. Cir. 2011) (district court made appropriate findings before requiring defendant to wear a security device underneath his clothing at trial); *Earhart v. Konteh*, 589 F.3d 337, 349 (6th Cir. 2009) (if the security device was not visible to the jury, then there is not a violation of clearly established Federal law); *Gonzalez v. Pliler*, 341 F.3d 897, 903-04 (9th Cir. 2003) (remanded to district court to conduct an evidentiary hearing concerning whether a defendant has to wear a security device underneath his cloths at trial).

Nance presents the same unpersuasive arguments in his certiorari petition that he presented to the Eleventh Circuit. He argues that this Court has clearly established constitutional parameters that must be followed by the lower courts before a defendant is required to wear a security device like the one Nance wore at trial. *See Deck v. Missouri*, 544 U.S. 622, 630-33 (2005) (defendant wore visible shackles during the sentencing phase of his trial); *Riggins v. Nevada*, 504 U.S. 127 (1992) (state trial court could force a mentally ill inmate to take prescribed antipsychotic medications during trial if there was an overriding justification—issue of security restraints not addressed); *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986) (increased presence of security personnel at trial); *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (defendant required to stand trial in prison garb). However, all of those cases involved security devices visible to the jury, which is a materially distinguishable fact that separates those cases from clearly establishing federal law in the context of the concealed security device Nance wore at trial. The Eleventh Circuit properly held that only this Court's decisions can clearly establish federal law for purposes of review under § 2254(d) and that this Court had not established any constitutional parameters for an invisible security device worn under a defendant's clothing. Pet. App. at 18-19.

B. This issue is of limited import.

Nance also fails to present a question of sufficient import because the decision below was made in the limited context of whether this Court has clearly established federal law under § 2254(d) in the context of security devices that are not visible to jurors. Pet. App. at 11-19. The lower courts, most notably the Georgia Supreme Court and Eleventh Circuit, have

addressed what consideration must be followed before a defendant can be made to wear a security device like the one Nance wore. *See United States v. Durham*, 287 F.3d 1297 (11th Cir. 2002) (district court erred in requiring defendant to wear a security device underneath his clothing at trial because there was no consideration of the necessity and effect of such a device or a consideration of potentially less restrictive alternatives); *Weldon v. State*, 297 Ga. 537 (2015) (defendant failed to show that he suffered any harm by having to wear a security device, which was not apparent to the jury). *See also* Pet. App. at 152.

The lower courts, applying those standards, correctly determined that Nance was not entitled to a second evidentiary hearing to address the State's request that he wear an electronic security device underneath his clothing at his resentencing trial. Pet. App at 152. During the first evidentiary hearing, Nance testified on how the device adversely affected his comfort and concentration, and the State offered evidence on how the device worked, and that there were no feasible alternatives to mitigate the security risks posed by Nance based on his threat to bite off the prosecuting attorney's nose. *Id.*

C. This case is a poor vehicle to address the question presented.

Nance's second question is one of no consequence for him and, thus, does not present an appropriate vehicle for this Court to answer his question. Even if this Court were to grant certiorari and adopt the standard Nance suggests for such security devices, the outcome of his case would not change and his death sentence would remain undisturbed. The trial court conducted an evidentiary hearing, heard evidence from both sides, and weighed the interest of courtroom safety and security in light of the concerns Nance

presented. Pet. App. at 152. The trial court ultimately found that Nance's threat to bite off the prosecutor's nose could not be discounted. *Id*. In order for Nance to obtain relief, this Court would have to undo all of those fact findings by the trial court and adopt an alternative set of facts. This Court has typically avoided engaging in its own fact-finding missions, especially when that would require directly refuting fact findings already made by the lower courts.

Because this case was reviewed by the lower court under AEDPA's demanding standard, the fact findings of the state courts are presumed correct absent a rebuttal of that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Consalvo v. Sec'y for the Dep't of Corr.*, 664 F.3d 842 (11th Cir. 2011). Nance has shown no basis for this Court to engage in a complete upheaval of the lower courts' findings of fact on this issue, which is what would be required if this Court were to grant certiorari on this question.

CONCLUSION

This Court should deny the petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2020, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email and United States Postal Service, addressed as follows:

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