No. 19-6918

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL NANCE,
Petitioner,

-v-

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

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INTRODUCTION

The first critical issue this petition presents is a persistent circuit split regarding how lower courts should decide ineffective assistance of counsel claims. When evaluating *Strickland*'s performance prong, the Eleventh Circuit determines whether counsel's actions or omissions were strategic and reasonable by asking "not what actually motivated counsel, but what reasonably could have." *See Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008). This framework, which looks beyond the given record in a case and to the hypothetical justifications of a hypothetical lawyer, is erroneous and is rejected by the majority of lower courts.

Respondent argues certiorari should be denied because there is no true circuit split and that instead circuits are consistent in their "approaches to deciding what qualifies as a reasonable strategic decision." BIO 13. But the only support Respondent offers for that argument is his assertion that the cases cited by Mr. Nance "reflect only specific applications of *Strickland*'s guidance about identifying strategic decisions to different sets of facts based on different records." *Id.* at 13. This does not at all address Mr. Nance's point that the majority of lower courts, when looking at "different sets of facts," *id.*, are applying an analysis that is significantly distinct from that of the Eleventh Circuit. That analysis looks only to the record in order to "identify[]strategic decisions," *id.*, and does not, as the state court and the Eleventh Circuit do, *imagine* strategic justifications where the record supplies none. Respondent fails to address the stark distinction between the courts, offering no real contention to the fact of the circuit split here.

Respondent's other arguments—that the decision below was correct and that there exists an independent basis for the Eleventh Circuit's decision—are similarly misguided. For the first contention, Respondent parrots conclusory statements regarding counsel's reasonableness without acknowledging that the lower courts' determination of counsel's reasonableness was dependent on their aberrant "hypothetical lawyer" framework. And for the second contention, that there exists an independent basis for the Eleventh Circuit's decision, Respondent argues that the prejudice prong is dispositive of Mr. Nance's *Strickland* claim and that Mr. Nance did not challenge it. But, as Mr. Nance pointed out in his petition, the Eleventh Circuit never engaged in a prejudice analysis, refraining from evaluating prejudice after finding trial counsel's performance to be strategic and reasonable. *See* Pet. 13 n.7.

The second critical issue presented in the petition is the Eleventh Circuit's distorted interpretation of "clearly established Federal law" and how that interpretation led the court to avoid reviewing the constitutionality of the State needlessly strapping a 50,000-volt stun belt to Mr. Nance during his capital trial. The Eleventh Circuit found that because "[t]he Supreme Court has never addressed whether and under what circumstances a trial court may require a defendant to wear a stun belt," no clearly established law exists for AEDPA purposes. Pet. App. 11. That finding ignores this Court's long-established general principle that state-sponsored courtroom practices that prejudice a criminal defendant must be justified by an essential state interest. Refusing to acknowledge this principle as clearly established

law and instead requiring a duplication of facts is at odds with this Court's precedent and with the majority of the lower courts.

Respondent reframes the question presented as one about the reasonableness of the trial court's decision to allow the stun belt, and not about the Eleventh Circuit's failure to acknowledge this Court's principles as clearly established law. *See* BIO "Questions Presented." Respondent acknowledges the existence of "this Court's rule that prejudicial courtroom practices must be justified by an essential state interest," *id.* at 18, but argues that certiorari should not be granted because there is no "genuine outcome-dispositive" circuit split; the issue "is of limited import"; and "this case is a poor vehicle" because it "would require this Court to engage in its own findings of fact[.]" *Id.* at 18-19.

First, there is a "genuine outcome-dispositive" split: Most circuits—but not the Eleventh—apply this Court's general principles as clearly established law, and many have done so in the stun-belt context. Second, the issue is not "of limited import": It involves a fundamental disagreement between the circuits about how to construe AEDPA and addresses the critical issue of restraining the Government's ability to infringe on the life and liberty of capital defendants. And third, this case would not require this Court's own fact-finding: The Court would resolve this issue by looking to the facts, as established by the record, and determining whether the Eleventh Circuit erred in finding no clearly established law here.

Respondent's arguments for denying Mr. Nance's petition miss the mark; the Court should grant certiorari.

I. Question 1: Ineffective Assistance of Counsel

A. There Is a Significant Circuit Split Regarding the Evaluation of Ineffectiveness Claims, and the Eleventh Circuit Is in the Minority.

Respondent incorrectly reframes the question presented as one of error correction when, in fact, the issue presented is a significant circuit split. Despite Respondent's arguments to the contrary, there is a genuine conflict between the lower courts regarding how to assess counsel's performance when evaluating an ineffective assistance of counsel claim. In determining whether counsel's challenged actions should be deemed strategic and reasonable, the Georgia Supreme Court, Eleventh Circuit, and First Circuit look outside of the record and ask simply whether some hypothetical lawyer could have taken similar action for some reasonable and strategic purpose. If the answer is yes, then counsel's actions or omissions—even if, in actuality, the product of sheer neglect (or illness, or intoxication)—are accepted as reasonable, strategic, and constitutionally effective. The Second, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits, on the other hand, refuse to imagine justifications for counsel's deficiencies where none actually exist—instead asking only whether the *actual* counsel in a case acted strategically and reasonably in the circumstances, and looking only to the record evidence in making that determination.

Respondent claims that any appearance of conflict between the circuits instead just reflects "specific applications of *Strickland*'s guidance about identifying strategic decisions to different sets of facts based on different records." BIO 13. But the different facts at issue in the cited cases are not the point; instead, it is how different courts believe that those facts should be assessed under the *Strickland* standard. The

cases cited by Mr. Nance demonstrate that the majority of circuit courts look only to the record in determining whether the facts of a case establish the ineffective assistance of counsel, and that the Eleventh Circuit instead looks outside of the record and to the hypothetical justifications of a hypothetical lawyer. This is a significant difference in approach, and one that has a deep and widespread impact on habeas petitioners throughout the country.

Respondent closes his argument that there exists no circuit split with this: "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." BIO 14. Respondent's argument misses a critical component of Mr. Nance's argument. Not only did the lower court misapply *Strickland* by inventing strategy and reasonableness where the record supplied none, it misapplied it in a way that has devastating impacts on habeas petitioners and in a way that the majority of circuits do not—reflecting a long-standing and significant split amongst the lower courts. That *is* a ground for certiorari review, S. Ct. R. 10, and such review is warranted here.

B. The Decision Below Was Incorrect and Dependent on the Georgia Supreme Court and Eleventh Circuit's "Hypothetical Lawyer" Standard.

As part of his effort to recast Mr. Nance's first question as one of mere error correction, Respondent presents a series of misleading arguments to show why, in his view, the state court and the Eleventh Circuit decided the merits of Mr. Nance's ineffective assistance of counsel claim correctly. He argues, for instance, that

"[c]ounsel'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[.]" BIO 15 (emphasis added). Maybe that is true, but that has never been Mr. Nance's argument. Instead, it was counsel's failure to present *any* expert evidence of brain damage, when brain damage continued to be part of their stated strategy, that was unreasonable. Respondent also asserts that trial counsel's failure to present certain mitigation evidence was justified because "counsel adjusted their mitigation defense at the resentencing trial to include a prison adaptability component[.]" *See* BIO 16. But their *inclusion* of additional mitigation does not explain the *exclusion* of existing critical mitigation. Trial counsel continued to believe that evidence of brain damage and the impacts of the tear-gas explosion were critical mitigation, and there is no evidence to support the speculation that the decision to include prison adaptability was intended to be at the expense of the other mitigation.

Most significantly, Respondent argues that "[i]t 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*. But the issue here is that counsel never concluded those things. Instead, the Georgia Supreme Court, and then the Eleventh Circuit when it sanctioned the state court opinion, found "that *a reasonable lawyer* under the circumstances *could have* strategically chosen not to present such evidence," Pet. App. 73 (emphasis added). In other words, the lower courts justified Mr. Nance's counsel's omissions on

the basis of the imagined strategy of a hypothetical lawyer. Had the lower courts instead limited themselves to the record evidence, they would have seen that Mr. Nance's trial counsel believed brain damage evidence continued to be critical at the second trial and entirely consistent with their mitigation strategy, that they wanted the jury to hear that evidence, and that they had no reasonable or strategic purpose for failing to present it.

The lower courts refused to give weight to the evidence demonstrating counsel's neglect, instead opting to excuse all failures because some imagined lawyer could have made the same omissions for strategic reasons. Their refusal is consistent with the Eleventh Circuit's long-standing and self-adopted framework of analysis for counsel's performance—asking "not what actually motivated counsel, but what reasonably could have." *See Gordon*, 518 F.3d at 1301. The majority of circuit courts reject this framework and would have refused to employ it in Mr. Nance's case. *See* Pet. 20-23. Respondent is therefore incorrect when he claims that "[t]he other circuits would have looked to the same state court record that the Eleventh Circuit reviewed and reached the same reasonable conclusion[.]" BIO 16.

C. This Case Is an Ideal Vehicle.

Respondent does not contest any of the reasons Mr. Nance presented for why this case is an ideal vehicle for resolving the question presented. He does not contest that this is a case in which "the record shows that trial counsel acted directly against their stated strategy [and y]et the Eleventh Circuit's aberrant framework still enabled the court to find no deficiency[.]" Pet. 28. Nor does Respondent contest that

this case is the right vehicle because "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." *Id.* at 29.

Instead, Respondent argues that this case is a poor vehicle to resolve the question presented because "an independent and unchallenged basis for the Eleventh Circuit's decision exists[.]" BIO 17. Respondent's argument is that "the Eleventh Circuit [found] that the Georgia Supreme Court reasonably determined that [Mr. Nance] failed to show prejudice[,]" and that Mr. Nance does not challenge that finding. *Id.* Mr. Nance did not focus on the Eleventh Circuit's prejudice determination because the Eleventh Circuit did not make a prejudice determination. As Mr. Nance made clear in his petition, the Eleventh Circuit engaged in no prejudice analysis, nor did it even explicitly endorse the state court's analysis. Pet. 13 n.7. Instead, finding the state court's deficiency analysis to be reasonable, the Eleventh Circuit merely acknowledged that "[the state court opinion] also explains why, even if counsel's performance was somehow deficient, it did not prejudice Nance." Pet. App. 10. The Eleventh Circuit left it at that, seeing no reason to evaluate *Strickland*'s prejudice prong after finding that trial counsel's omissions were reasonable and strategic.[1]

[1] A petition for certiorari currently pending before this Court, *Andrus v. Texas*, No. 18-9674 (filed June 12, 2019), highlights that the reverse problem exists as well—courts fail to meaningfully evaluate counsel's performance upon engaging in a truncated prejudice analysis. The *Andrus* petition summarizes its presented issues as follows:

> This Court should grant this petition to mend the plague of inadequate IAC analyses in death-penalty cases by revisiting *Strickland* and reinvigorating the Sixth Amendment. Although this Court tried to rectify some of the problem in

Because the Eleventh Circuit engaged in no analysis of the prejudice prong, that prong is not "an independent and unchallenged basis for the Eleventh Circuit's decision[.]" BIO 18. This case remains an ideal case for resolving the significant and long-standing circuit split.

II. Question #2: The Stun Belt

A. Courts Are Split Regarding How to Interpret 2254's "Clearly Established" Criteria.

Respondent does not contest Mr. Nance's core assertion that this Court has clearly established the principle "that prejudicial courtroom practices must be justified by an essential state interest." BIO 18. Instead, Respondent claims the question of that principle's applicability to this case is not worthy of certiorari review because "Nance does not allege a genuine outcome-dispositive conflict." BIO 19. Respondent is incorrect.

Respondent dismisses the cases Mr. Nance cites as illustrative of the circuit split as simply "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." *Id.* But what Respondent misses is that when those courts engage in that weighing, they do it under the rubric of the general principles clearly

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> *Williams*/*Wiggins*/*Rompilla*, courts plainly need more specific guidance about their obligation to conduct a nuanced, case-specific, comparative analysis that accounts for the new evidence adduced in the habeas proceeding, examines the deficient performance cumulatively in light of professional norms at the time of trial, resists facile shortcuts, and assesses the fundamental fairness of the trial holistically.

Id. at 38.

established by this Court—accepting those principles as the law that must guide their decision-making. *See* Pet. 36-38. Unlike the Eleventh Circuit, those courts accept that clearly established law includes general principles announced by this Court; that clearly established law extends beyond the four corners of the cases the Court has reviewed; and that this Court has announced principles of law that clearly apply to non-visible stun belts. *See id*.

The Eleventh Circuit is in the minority when it refuses to consider a general principle as clearly established law for AEDPA purposes and instead requires a duplication of facts.[2] In Mr. Nance's case, it held that because this Court has not reviewed a case specifically involving a stun belt, there exists no clearly established law to apply. The Eleventh Circuit's exact-facts requirement misconstrues this Court's precedent, *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); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time

[2] A petition for certiorari currently pending before this Court, *Bush v. Sharp*, No. 19-7455 (filed Jan. 24, 2020), relates closely to Mr. Nance's case and deals with the issue of the circuit split regarding how to interpret AEDPA's "clearly established Federal law" provision. The question presented there is as follows:

> Whether the "clearly established Federal law" provision of the Antiterrorism and Effective Death Penalty Act renders state court decisions categorically exempt from habeas review for unreasonableness where this Court has articulated general constitutional standards applicable to the petitioner's claim but has not previously decided a case where the facts were closely related or similar to the facts underlying the petitioner's claim.

the state court renders its decision.'") (internal citation omitted), and is at odds with the majority of circuits. Most circuits consider the general principles determined by this Court to supply clearly established law under AEDPA,[3] and many have applied those principles directly to cases involving non-visible security devices. *See* Pet. App. 35-37. Respondent is incorrect when he argues there is no genuine conflict here.

B. This Issue Is Significant.

Respondent argues that this case is "of limited import" because "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." BIO 20-21. But the issue is not whether those courts have addressed that question, but instead whether they have followed this Court's clearly established

[3] *See, e.g.*, *Owens v. Duncan*, 781 F.3d 360, 365 (7th Cir. 2015) (extrapolating from factually dissimilar Supreme Court cases the broad constitutional principle of "the right to have one's guilt or innocence adjudicated on the basis of evidence introduced at trial" and applying it as clearly established law); *Barnes v. Joyner*, 751 F.3d 229, 246 (4th Cir. 2014) ("There is no requirement under AEDPA that a habeas petitioner present facts identical to those previously considered by the Supreme Court to be entitled to relief. . . . Thus, as illustrated, this clearly established legal principle can apply to myriad factual circumstances . . . ."); *Varghese v. Uribe*, 736 F.3d 817, 823 (9th Cir. 2013) (highlighting that § 2254(d)(1)'s "unreasonable application" clause includes the "fail[ure] to extend a clearly established legal principle to a new context in a way that is unreasonable"); *Blackmon v. Booker*, 696 F.3d 536, 552 (6th Cir. 2012) (identifying "fundamental fairness" as the legal principle applicable to petitioner's claims for AEDPA purposes); *Harris v. Alexander*, 548 F.3d 200, 205 (2d Cir. 2008) (applying the Court's broad principle of whether an error "so infected the entire trial that the resulting conviction violates due process" as clearly established law to a factually dissimilar case); *Jamison v. Klem*, 544 F.3d 266, 273 (3d. Cir. 2008) ("[W]e have never interpreted the standard of review in § 2254 to suggest that Congress intended habeas review to turn on whether the Supreme Court had previously decided an issue in a case involving a fact pattern that is identical to the facts underlying a habeas petitioner's claim for federal relief."); *RaShad v. Walsh*, 300 F.3d 27, 35 (1st Cir. 2002) (highlighting there are scenarios in which "the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns").

federal law in doing so. They have not. The import here is that, without this Court's intervention, courts will continue to permit state-sponsored courtroom practices that prejudice the fair-trial rights of criminal defendants without the close judicial scrutiny of an essential state interest that is required.

The Georgia Supreme Court substituted their own standards where this Court's should apply, and the Eleventh Circuit unreasonably let the state court's decision stand, finding that this Court had not supplied clearly established law on the issue. Instead of requiring an essential state interest to justify the imposition of a 50,000-volt stun belt on a capital defendant, the Georgia Supreme Court sanctioned such an imposition where the trial court did not even consider Mr. Nance to be a threat and instead decided to simply defer to the wishes of law enforcement. *See* D. Ct. Doc. 15-7 at 14 ("Anyway, whether he really is a threat, I'm going to really leave that up to the sheriff's department to make that decision."). The Eleventh Circuit itself acknowledged that, under a more stringent standard than the one the state court applied, relief here may have been warranted. Pet. App. 17 ("If Nance were a federal prisoner, § 2254(d)(1) would not apply and *Durham* might require us to vacate his sentence.").

C. This Case Is the Ideal Vehicle.

Respondent argues that this case is not "an appropriate vehicle" because "[e]ven 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." BIO 21. Respondent does not explain how he

comes to that conclusion, and it is not self-evident. The standard applied by the Georgia Supreme Court did not require close judicial scrutiny or an essential state interest, *see* Pet. App. 152; had the appropriate constitutional standard been applied, the outcome would have been different. The trial judge allowed the State to strap a 50,000-volt, remote-controlled stun belt to Mr. Nance, equipped to deliver intensive electric shocks directly to his body, despite the fact that it prejudiced his ability to confer with counsel and follow the proceedings, and despite the fact that the judge did not consider Mr. Nance to be a security threat and instead decided to defer to the sheriff's department on the issue. *See* D. Ct. Doc. 15-7 at 14. Under the constitutional standards announced by this Court, such a decision would not stand. As mentioned above, even the Eleventh Circuit itself acknowledged that a stricter standard applied here might mandate relief. *See* Pet. App. 17.

Respondent continues his argument that this case is not an appropriate vehicle by claiming that "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." BIO 22. Respondent is mistaken; the Court's resolution of this issue would not require fact-finding by this Court. The question before the Court 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?[4] If the Court decides the answer to that question is yes, it will then decide

[4] It is worth noting that Respondent seems to acknowledge that the Court has established this rule. *See* BIO 18 ("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.")

whether relief is warranted by determining whether the facts of the case, as established by the record, meet this constitutional standard. Or, it will remand for the Eleventh Circuit to make that determination. Either way, this Court will not need "to engage in a complete upheaval of the lower courts' findings of fact on this issue[.]" BIO 22. Respondent is therefore incorrect in stating that this case is a poor vehicle for certiorari review.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare that on February 26, 2020, pursuant to Supreme Court Rule 29, I served the Reply Brief in Support of Petition for a Writ of Certiorari on Respondent's counsel by filing a copy of the documents with this Court's electronic filing system and by directing that the documents be placed in an envelope and deposited with the United States Postal Service for delivery to:

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Respectfully submitted,

/s/ Vanessa J. Carroll
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