

No. _____

In The
Supreme Court of the United States

GRANT LLOYD GREENWOOD,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

**On Petition For A Writ Of Certiorari
To The Minnesota Court Of Appeals**

PETITION FOR A WRIT OF CERTIORARI

DAVID R. LUNDGREN
Counsel of Record
ADAM T. JOHNSON
LUNDGREN & JOHNSON, P.S.C.
121 South Eighth Street
Suite 893
Minneapolis, MN 55402
Tel. (612) 767-9643
Email: david@lundgrenjohnson.com
Email: adam@lundgrenjohnson.com

ANDREW M. IRLBECK
ANDREW IRLBECK, LAWYER,
CHARTERED
332 Minnesota Street
Suite W1610
St. Paul, MN 55101
Tel. (651) 986-3895
Email: andrew@irlbecklaw.com

Counsel for Petitioner

QUESTION PRESENTED

The question presented by this petition is whether a defendant's Sixth Amendment right to effective assistance of appellate counsel, and Fourteenth Amendment right to due process, are violated when:

1. A prosecutor requests a jury instruction that omits an essential element of the crime charged;
2. The prosecutor argues in summation for a conviction consistent with the omission of the essential element of the crime charged;
3. The trial court provides a jury instruction that omits the essential element of the crime charged;
4. The defendant's trial counsel fails to object to any of the foregoing;
5. The defendant is convicted of the crime charged; and
6. The defendant's appellate counsel on direct appeal fails to raise the issue as a basis for reversal on the defendant's behalf.

PARTIES TO THE PROCEEDINGS

Grant Lloyd Greenwood was the Appellant in the Minnesota Court of Appeals, and is the Petitioner herein. The State of Minnesota was the Respondent in the Minnesota Court of Appeals, and is the Respondent herein.

RELATED CASES

State of Minnesota v. Grant Lloyd Greenwood, Anoka County District Court, No. 02-CR-15-7596. Judgement entered July 18, 2016

State of Minnesota v. Grant Lloyd Greenwood, Minnesota Court of Appeals, No. A16-1651. Judgement entered November 22, 2017

Grant Lloyd Greenwood v. State of Minnesota, Minnesota Court of Appeals, No. A20-0363. Judgment entered May 5, 2021

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Related Cases	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
I. Trial and sentencing.....	3
A. Testimonial phase of trial	3
B. Jury instructions and closing arguments	5
C. Verdicts and sentencing	6
II. Petitioner's appeals and postconviction proceedings	6
A. Petitioner's direct appeal.....	6
B. Postconviction proceedings.....	7
C. Petitioner's appeal from the denial of postconviction relief	12
Reasons for Granting the Petition.....	16
I. The Court should grant review to decide the question presented	17
A. The Minnesota Court of Appeals' decision is in conflict with several federal courts of appeal	17
Conclusion.....	34

TABLE OF CONTENTS – Continued

	Page
APPENDIX	
Appendix A	
Minnesota Court of Appeals' Opinion in <i>Grant Lloyd Greenwood v. State of Minnesota</i> , dated February 1, 2021	App. 1
Appendix B	
Findings of Fact, Conclusions of Law, and Order Denying Post-Conviction Relief, by the Anoka County District Court, dated January 17, 2020	App. 15
Appendix C	
Minnesota Court of Appeals' Opinion in <i>State of Minnesota v. Grant Lloyd Greenwood</i> , dated September 5, 2017	App. 35
Appendix D	
Order of the Minnesota Supreme Court denying discretionary review, dated April 28, 2021	App. 45
Appendix E	
Judgment of the Minnesota Court of Appeals in <i>Grant Lloyd Greenwood v. State of Minnesota</i> , dated May 5, 2021	App. 46

TABLE OF AUTHORITIES

	Page
CASES	
<i>Bennett v. Superintendent Graterford SCI</i> , 886 F.3d 268 (3rd Cir. 2018).....	20
<i>Boyde v. California</i> , 494 U.S. 370 (1990).....	20
<i>Cupp v. Naughten</i> , 414 U.S. 141 (1973).....	19, 20
<i>Dickinson v. Shinn</i> , 2 F.4th 851 (9th Cir. 2021).....	21
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).....	19, 20, 29
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	17
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985).....	19
<i>Gray v. Lynn</i> , 6 F.3d 265 (5th Cir. 1993).....	20, 21, 22, 23
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	18
<i>In re Winship</i> , 397 U.S. 358 (1970).....	19
<i>Jones v. Barnes</i> , 463 U.S. 745 (1983).....	18
<i>Middleton v. McNeil</i> , 541 U.S. 433 (2004).....	19
<i>Smith v. Horn</i> , 120 F.3d 400 (3rd Cir. 1997)	30
<i>Smith v. Robbins</i> , 528 U.S. 259 (2000)	18, 19
<i>State v. Hill</i> , 801 N.W.2d 646 (Minn. 2011).....	9
<i>State v. Peltier</i> , 874 N.W.2d 792 (Minn. 2016).....	10, 14
<i>State v. Shamp</i> , 422 N.W.2d 520 (Minn. App. 1988), review denied (Minn. June 10, 1988).....	15, 24, 25
<i>State v. Washington</i> , 693 N.W.2d 195 (Minn. 2005)	9
<i>State v. Watkins</i> , 840 N.W.2d 21 (Minn. 2013).....	10, 12

TABLE OF AUTHORITIES – Continued

	Page
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	<i>passim</i>
<i>Tyson v. Superintendent Houtzdale SCI</i> , 976 F.3d 382 (3rd Cir. 2020)	26, 27, 28, 30, 31
<i>United States v. Alferahin</i> , 433 F.3d 1148 (9th Cir. 2006)	31, 32
<i>United States v. Lucero</i> , 989 F.3d 1088 (9th Cir. 2021)	32
<i>United States v. Murphy</i> , 824 F.3d 1197 (9th Cir. 2016)	33
<i>Waddington v. Sarausad</i> , 555 U.S. 179 (2009).....	20
<i>Zafiro v. United States</i> , 506 U.S. 534 (1993)	23
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. VI.....	<i>passim</i>
U.S. Const. amend. XIV	<i>passim</i>
STATUTES	
Minn. Stat. § 590, <i>et seq.</i>	7
Minn. Stat. § 609.342, subd. 1(a) (2010)	3
Minn. Stat. § 609.342, subd. 1(h)(iii) (2010)	3, 13, 15
Minn. Stat. § 609.343, subd. 1(h)(iii) (2010)	3, 14
18 U.S.C. § 1425(a).....	31
28 U.S.C. § 1257(a).....	1
28 U.S.C. § 2254(d)(1)	28

PETITION FOR A WRIT OF CERTIORARI

Grant Lloyd Greenwood petitions for a writ of certiorari to review the opinion and judgment of the Minnesota Court of Appeals that were rendered in his case.

OPINIONS BELOW

The Minnesota Court of Appeals' panel opinion affirming the denial of Petitioner's state court petition for postconviction relief (Pet. App. 1) is unpublished. The Minnesota state district court's order and memorandum denying postconviction relief (Pet. App. 15) is unpublished. The Minnesota Court of Appeals' panel opinion in Petitioner's direct appeal in state court (Pet. App. 35) is unpublished.

JURISDICTION

The Minnesota Court of Appeals entered judgment in Petitioner's case on May 5, 2021. By an order filed on April 28, 2021, the Minnesota Supreme Court denied discretionary review of Petitioner's case. Jurisdiction in this Court is vested pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section I of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law 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; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Trial and sentencing.

The criminal complaint against Petitioner contained three counts: (1) first-degree criminal sexual conduct, penetration or contact with a person under 13, in violation of Minn. Stat. § 609.342, subd. 1(a) (2010); (2) first-degree criminal sexual conduct, penetration of a victim under the age of 16 when there is a significant relationship and the sexual abuse involves multiple acts over time, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2010); and (3) second-degree criminal sexual conduct, sexual contact with a victim under the age of 16 when there is a significant relationship and the sexual abuse involves multiple acts over time, in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2010). (App. 2). A misdemeanor domestic assault count was joined for trial (count 4). (App. 16).

A. Testimonial phase of trial.

Petitioner's jury trial was held from May 9, 2016 to May 16, 2016. (App. 17). At trial, the facts revealed that in early 2009, Petitioner began a romantic relationship with R.M., and shortly thereafter moved in with R.M., her two sons, and her nine-year-old daughter, V.M. (App. 36). After moving in with the family, Petitioner felt that it was his responsibility to "assume a role of a father." (App. 36). For example, when R.M. frequently traveled for work, Petitioner supervised the children in her absence. (App. 36).

On November 17, 2015, an argument occurred between Petitioner and R.M.’s daughter, V.M. (App. 37). As a result of the argument, Petitioner grounded V.M. from attending soccer practice that night. (App. 37). This upset V.M., who then tried to leave, but was prevented from doing so by Petitioner. (App. 37). V.M. testified that Petitioner would “propel his body forward so his stomach was – would push [her] back.” (App. 37). V.M. told Petitioner that she was “going to call the police,” before leaving to go to her friend’s house next door. (App. 37). There, V.M. told her friend’s mother, H.H., that Petitioner “bumped” her with his body. (App. 37). V.M. was “hysterical,” and continued to state she “can’t do this anymore.” (App. 37). H.H., a police officer, asked V.M. if anything “sexual” happened, to which V.M. stated “[i]t happened in middle school.” (App. 37).

In response to this disclosure, H.H. contacted R.M., who then arrived at H.H.’s house. (App. 37). There, V.M. told her mother that she had been sexually abused by Petitioner. (App. 37). R.M. contacted the police, and V.M. later gave a videotaped interview to a detective. (App. 37). In the interview, V.M. told the detective that she had been sexually abused by Petitioner from shortly after Petitioner moved in until she was in middle school. (App. 37). Specifically, V.M. stated that after Petitioner moved in, he would rub V.M.’s feet against his crotch while they watched television. (App. 38). According to V.M., Petitioner “gradually” began “doing more stuff,” such as taking off her shirt and bra to “feel” and “lick” her breasts. (App. 38). V.M. stated

that the conduct progressed to the point of Petitioner digitally penetrating her vagina. (App. 38).

Petitioner testified at trial. Petitioner acknowledged the confrontation that occurred between he and V.M. on November 17, 2015. Petitioner denied pushing V.M. on that date, and denied having any sexual contact with V.M. at any time. (App. 39).

B. Jury instructions and closing arguments.

An erroneous jury instruction was requested by the State for count 2, was not objected to by Petitioner's trial counsel, and was ultimately provided to the jury. (App. 2-3). The jury instruction provided for count 2 omitted the essential element that would have required the jury to find that the State proved that "the sexual abuse involved multiple acts committed over an extended period of time." (App. 3, 18-19). In its post-conviction order, the trial court wrote that "[t]here is no dispute that this omission was an error." (App. 21).

In arguing during summation that the State met its burden of proof, the prosecutor misstated the law and told the jury, "[a]gain, two different forms of penetration; oral sex, digital penetration. You don't need to have both. You only need to have one. You would only need to have one act to be able to convict. If he digitally penetrated her only one time, that's enough." (App. 3). The prosecutor also failed to advise the jury of the omitted element in count 2. (App. 21). The term sexual abuse was not defined in the jury instructions.

C. Verdicts and sentencing.

On May 16, 2016, the jury notified the trial court that they had reached a verdict on three counts, but could not reach a verdict on one count. (App. 22). The jury returned hung with regard to count 1, reached verdicts of guilty on counts 2 and 3, and reached a verdict of not guilty on count 4. (App. 22-23). A mistrial was declared on count 1. On July 19, 2016, Petitioner was sentenced to 172 months imprisonment on count 2, the count for which the erroneous jury instruction was provided, as discussed *supra*. (App. 23).

II. Petitioner's appeals and postconviction proceedings.**A. Petitioner's direct appeal.**

In October 2016, Petitioner initiated a direct appeal of his convictions and sentence to the Minnesota Court of Appeals. (App. 3). Petitioner's appellate counsel argued in the direct appeal that the evidence was insufficient to sustain a conviction on count 2. (App. 36). Petitioner submitted a *pro se* supplemental brief citing concerns about deficiencies in the investigation by law enforcement, and alleged prosecutorial misconduct during the State's closing argument. (App. 36). In an unpublished opinion filed on September 5, 2017, the Minnesota Court of Appeals affirmed Petitioner's convictions.

B. Postconviction proceedings.

On May 21, 2019, Petitioner commenced a postconviction action in the Anoka County District Court pursuant to Minn. Stat. § 590, *et seq.*, by filing a petition for postconviction relief. (App. 24). In the petition, Petitioner claimed that he was denied the effective assistance of appellate counsel because: (1) appellate counsel failed to raise any claims related to the plainly erroneous jury instruction; (2) appellate counsel failed to raise any claims related to trial counsel's failure to object to the erroneous jury instruction; (3) appellate counsel failed to raise any claims regarding alleged prosecutorial misconduct in requesting an incorrect jury instruction and affirmatively misstating the law to the jury; and (4) appellate counsel failed to raise any claims regarding the cumulative effect of the alleged errors. (App. 24-25). All of the issues raised by Petitioner in postconviction proceedings related to the omitted element for count 2, namely, that "the sexual abuse included multiple acts over an extended period of time." (App. 25).

At a subsequent postconviction evidentiary hearing, Petitioner called his former appellate counsel as a witness. At the hearing, Petitioner's appellate counsel, Mr. Steven Russett, testified that he reviewed Petitioner's case in the same manner that he reviews all cases, by reviewing the trial court records and transcripts to identify issues for appeal. (App. 26). Mr. Russett testified that he identified the issue of the instructional error arising from the omitted element in the instruction for count 2. (App. 26). However, Mr.

Russett further testified that raising the issue in Petitioner's direct appeal would not have been successful because it would be reviewed under a plain error standard, and Petitioner would not be able to show that the error affected his substantial rights. (App. 26). In support of this conclusion, Mr. Russett testified that because the jury found Petitioner guilty of count 3, and because that count contained the element omitted from count 2 – that “the sexual abuse included multiple acts over an extended period of time” – there was “really no chance that the appellate court would grant any relief on that issue.” (App. 27).

In an order filed on January 17, 2020, the district court denied Petitioner's request for postconviction relief. (App. 15). In its order, the district court made the following findings of fact, as pertinent herein:

There is no dispute that the jury instruction read to, and provided in hard copy, to the jury for Count II did not include the element of “the sexual abuse involved multiple acts committed over an extended period of time” (“omitted element”). There is also no dispute that this omission was an error.

During her closing argument, the prosecutor argued to the jury that the convict Defendant of Count II, ‘you only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that's enough.’ The prosecutor also failed to advise the jury of the omitted element in Count II.

(App. 21).

In concluding that Petitioner’s postconviction claims failed, the district court wrote that Mr. Russett “legitimately and reasonably concluded that raising the [omitted element] issue in Petitioner’s case would be without merit.” (App. 29). Accordingly, the district court concluded that Petitioner failed to satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984) (requiring a showing that counsel’s performance fell below an objective standard of reasonableness).

The district court further concluded that even if it had found that Petitioner’s appellate counsel’s performance was unreasonable, Petitioner could still not meet the second prong of *Strickland*, namely, Petitioner could not show that but for counsel’s performance, the outcome of his appeal would have been different. (App. 29). On the second *Strickland* prong, the district court noted that a failure to properly instruct the jury on all elements of the offense charged constitutes plain error, and that plain error review requires reversal only if there was “(1) an error, (2) that is plain, and (3) that affects the petitioner’s substantial rights.” (App. 30) (citing *State v. Hill*, 801 N.W.2d 646, 654 (Minn. 2011)). The district court also correctly recognized that if all three requirements of the plain error test are met, a reviewing court can only grant relief when the error “seriously affects the fairness, integrity or public reputation of [the] judicial proceedings.” (App. 30) (citing *State v. Washington*, 693 N.W.2d 195, 204 (Minn. 2005)).

In holding that Petitioner’s claimed error failed the plain error test, the district court wrote, “[t]he

omission of an element of a crime in a jury instruction does not automatically require a new trial. Instead, the reviewing court must conduct a thorough examination of the record to determine whether the omission of an element of the charged offense from the jury instruction was sufficiently prejudicial in light of the standard of review.” (App. 30) (quoting *State v. Watkins*, 840 N.W.2d 21, 28 (Minn. 2013)). The district court went on to consider the issue under a multi-factor test established by the Minnesota Supreme Court. (App. 30-34). The factors included the following: (1) whether Petitioner contested the omitted element at trial and submitted evidence to support a contrary finding; (2) whether the state presented overwhelming evidence to prove the element; and (3) whether the jury’s verdict encompassed a finding on the element notwithstanding the omission from the jury instructions. (App. 31) (citing *State v. Peltier*, 874 N.W.2d 792, 801 (Minn. 2016)).

With regard to the first factor, the district court concluded as follows:

Petitioner testified that he did not sexually abuse the victim, whether by penetration or contact, and that he did not sexually abuse the victim multiple times over an extended period of time.

While petitioner argues that this factor weighs in his favor, it is clear from the jury’s verdict that they did not believe Petitioner’s testimony. Likewise, the Minnesota Court of

Appeals rejected Petitioner's sufficiency of the evidence argument.

(App. 31) (internal citations omitted).

With regard to the second factor, the district court concluded that Petitioner's argument was in essence a repetition of his sufficiency of the evidence argument, and found the second factor to weigh against him. (App. 32).

With regard to the third factor, the district court wrote as follows:

Petitioner argues that the jury's finding of 'multiple acts of abuse over an extended period of time' in Count III does not encompass the omitted element from Count II. Petitioner argues there is a 'substantial possibility that the facts found by the jury support a finding of that element for Count 3, but not Count 2.' In support, Petitioner states that there is no way to "conclude that the act of sexual penetration the jury found for Count 2 happened during the 'extended period of time' that it found sexual abuse was committed for Count 3." Petitioner's argument is confusing at best and is without merit.

Counts II and III allege the same time period for Petitioner's conduct – January, 2009 through December 31, 2013. Likewise, Count II required the jury to find only one act of penetration, not multiple acts of penetration during the 'extended period of time' of sexual abuse.

Based on this Court’s review of the *Watkins* factors, the omitted element from the jury instructions in Count III did not prejudice Petitioner and was not likely to affect the outcome of Petitioner’s appeal had appellate counsel raised the issue.

(App. 33) (internal citation omitted).¹

C. Petitioner’s appeal from the denial of postconviction relief.

Having been denied postconviction relief in the district court, Petitioner appealed to the Minnesota Court of Appeals. (App. 2). On appeal, Petitioner sought review of all four claims that he made in his postconviction petition, and which are set forth on page seven, *supra*.

In a nonprecedential opinion filed on February 1, 2021, the Minnesota Court of Appeals affirmed the district court. In so doing, the court of appeals recognized at the outset of its opinion that the “basis for each of [Petitioner’s] arguments on appeal relates to the erroneous jury instruction for count 2.” (App. 4). The court of appeals then laid out the specific nature of the omitted jury instruction from the record in Petitioner’s case:

¹ The district court also found that the prosecutor did not misstate the law in arguing to the jury that it only needed to find one act of penetration in order to convict Petitioner on count 2. (App. 34).

The relevant statute for count 2, criminal sexual conduct in the first degree, provides:

A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

. . .

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the act, and:

. . .

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat. § 609.342, subd. 1(h)(iii).

The element set forth in clause (iii) was erroneously omitted from the jury instruction for count 2. The relevant statute for count 3, criminal sexual conduct in the second degree, also contains the same element set forth in clause (iii) for count 2:

A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the second degree if any of the following circumstances exists:

. . .

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual contact, and:

....

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Minn. Stat § 609.343, subd. 1(h)(iii).

The element set forth in clause (iii) was included in the jury instruction for count 3.

(App. 4-5).

With regard to Petitioner's claim that his appellate counsel was ineffective by failing to raise claims arising from the omitted element for count 2, the court of appeals analyzed the error under the plain error standard. The court of appeals recognized that "[a] district court commits plain error if it fails to properly instruct the jury on all elements of the offense charged." (App. 9) (citing *Peltier*, 874 N.W.2d at 799-800). Ultimately, the court of appeals reasoned that Petitioner was not entitled to relief, because the omission of the element for count 2 did not affect Petitioner's substantial rights. (App. 9). The court went on to explain its rationale as follows:

Here, the district court included the identical element omitted from its instruction for count 2 in its instruction for count 3. The jury convicted [Petitioner] of count 3, a lesser-included offense of count 2, necessarily finding beyond

a reasonable doubt that [Petitioner] engaged in sexual abuse involving multiple acts committed over an extended period of time. The jury's verdict therefore encompassed a finding on the element at issue here and no prejudice to [Petitioner] occurred. In recognizing that the jury unanimously agreed that the state proved this element beyond a reasonable doubt, appellate counsel did not act below an objective standard of reasonableness in determining that raising the issue on appeal was not meritorious.

[Petitioner] argues his appellate counsel was ineffective because counsel erroneously interpreted *State v. Shamp*, 422 N.W.2d 520, 524-525 (Minn. App. 1988), *review denied* (Minn. June 10, 1988), to conclude that element (iii) was the same for both counts 2 and 3. [Petitioner] asserts that count 2 is a 'penetration based offense' but that count 3 is a 'contact based offense' and therefore the definition of sexual abuse involving multiple acts in element (iii) has a different meaning depending on the charge. But no authority supports that argument, and the omitted element does not require a specific finding of multiple acts of penetration. And we have previously held that a prior version of Minn. Stat. § 609.342, subd. 1(h)(iii), requires only multiple acts of sexual abuse and not multiple acts of penetration.

The statute in *Shamp*, which contains the same language as the version under which [Petitioner] was charged, required that '[t]he actor has a significant relationship to the

complainant, the complainant was under 16 years of age at the time of the sexual penetration, and: . . . (v) the sexual abuse involved multiple acts committed over an extended period of time.' Because the term 'sexual abuse' does not require penetration but instead more broadly includes 'sexual contact other than penetration,' the jury's finding in count 3 that 'the sexual abuse involved multiple acts committed over an extended period of time' is the same finding required for a conviction under count 2.

(App. 9-11) (internal citations omitted).

In concluding that Petitioner's appellate counsel was not ineffective for failing to raise the issues stemming from the omitted element – the provision of the instruction itself along with the prosecutorial misconduct resulting from the prosecutor's closing argument – the court of appeals failed to account for the fundamental deficiency in process. And while the court of appeals was correct to recognize that Petitioner's trial counsel's performance fell below an objective standard of reasonableness (App. 14), the court of appeals plainly erred when it concluded that the error did not affect the outcome of the proceedings with respect to count 2.



REASONS FOR GRANTING THE PETITION

Petitioner was convicted at a jury trial of a state criminal offense without having all of the elements

decided by a jury. This Court should grant this petition and review the decision of the Minnesota Court of Appeals. The Minnesota Court of Appeals has decided an important federal question in a way that conflicts with several United States courts of appeal. The important federal question presented in this case is one of broad applicability. This Court should grant review to clarify the precise nature of the Sixth Amendment right to effective assistance of appellate counsel, while simultaneously forging a clear statement on a defendant's right to accurate criminal jury instructions under the Due Process Clause of the Fourteenth Amendment.

I. The Court should grant review to decide the question presented.

A. The Minnesota Court of Appeals' decision is in conflict with several federal courts of appeal.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to assistance of counsel. U.S. Const. amend. VI. This Court has said "the right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citations omitted).² Generally, ineffective assistance claims are analyzed under a two-pronged test: the petitioner must show,

² This right attaches equally to the assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (Constitution guarantees a defendant an effective appellate counsel, just as it guarantees a defendant an effective trial counsel.).

first, that his or her counsel's performance was deficient; and second, that he or she was prejudiced by the deficiency. *Id.* at 687. "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 688).

A court considering a claim of ineffective assistance "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The test from *Strickland* is the same for claims related to the effectiveness of trial and appellate counsels. *See Smith v. Robbins*, 528 U.S. 259, 289 (2000).

As observed in *Smith*, this Court stated in *Jones v. Barnes* that "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 288 (citing *Jones v. Barnes*, 463 U.S. 745 (1983). "Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim." *Id.* As stated above, the *Strickland* test remains the same, viz. the relevant questions for assessing a party's claim of ineffective

assistance of appellate counsel are whether appellate counsel was objectively unreasonable in failing to raise the omitted claims on appeal and, if so, whether there is a reasonable probability that, but for his counsel's unreasonable failure to raise the claims, the party "would have prevailed on his appeal." *Smith*, 528 U.S. at 285-286 (citing *Strickland*, 466 U.S. at 687-691).

In the case *sub judice*, Petitioner's claim is that his appellate counsel failed to raise the issue arising from the erroneous jury instruction, and that but for his counsel's failure in this regard, the outcome of his appeal would have been different, namely, Petitioner's conviction for count 2 would have been vacated.

In a criminal prosecution, the Due Process Clause of the Fourteenth Amendment requires the government to prove each element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). "This bedrock, 'axiomatic and elementary' principle" prohibits a jury instruction that lessens the prosecution's burden of proof. *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *In re Winship*, 397 U.S. at 363, 90 S.Ct. 1068). Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). The question is "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

In *Cupp v. Naughten*, this Court stated that “a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” 414 U.S. 141, 146-147 (1973); *see also Boyde v. California*, 494 U.S. 370, 378 (1990). If the charge as a whole is ambiguous, the question is whether there is a “‘reasonable likelihood that the jury has applied the challenged instruction in a way’ that violates the Constitution.” *Estelle, supra*, at 72 (quoting *Boyde, supra*, at 380). If the instruction contains “some ‘ambiguity, inconsistency, or deficiency,’” such that it creates a “reasonable likelihood” the jury misapplied the law and relieved the government of its burden of proving each element beyond a reasonable doubt, the resulting criminal conviction violates the defendant’s Constitutional right to due process. *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 285 (3rd Cir. 2018) (citing *Waddington v. Sarausad*, 555 U.S. 179, 190-191 (2009) (internal citations omitted)).

The Minnesota Court of Appeals’ decision affirming the denial of postconviction relief in Petitioner’s case decided an important federal question, and is in conflict with several United States courts of appeals, namely, the courts of appeal in the Fifth, Third, and Ninth circuits.

1. Fifth Circuit.

In *Gray v. Lynn*, a jury found the defendant guilty of first-degree murder after hearing evidence that he had appeared at a couple’s door holding a gun, told the

man who answered the door that he was going to “blow [his] brains out,” and hit him on the side of the head with the gun. 6 F.3d 265, 267 (5th Cir. 1993). The defendant then entered their bedroom, struck the woman and the man with his gun, and got into a struggle with the man during which he fired three shots at the man at close range, all of which missed. *Id.* At trial, the jury was erroneously instructed that “[a]n essential element of the offense of attempted first degree murder is specific criminal intent to kill *or inflict great bodily harm.*” *Id.* at 269 (emphasis supplied). Gray’s attorney failed to object to this instruction, and on federal habeas review, the Fifth Circuit concluded that counsel’s failure constituted ineffective assistance. *Id.* at 269, 271-272.

In assessing *Strickland*’s prejudice prong, the Fifth Circuit “framed its inquiry as ‘whether there is a reasonable probability that the jury would have had a reasonable doubt respecting Gray’s guilt if the phrase “or inflict great bodily harm” had not been included in the charge.’” *Dickinson v. Shinn*, 2 F.4th 851, 868 (9th Cir. 2021) (quoting *Gray*, 6 F.3d at 269-270). The Fifth Circuit reasoned as follows:

The jury plausibly could have interpreted this evidence in at least two ways: (1) Gray *intended to kill* James by shooting him with the gun, but did not succeed; or (2) Gray *intended to inflict great bodily harm* on James by striking him and shooting him with the gun. Considering the circumstances, including the fact that Gray did not take advantage of several

golden opportunities to kill James if he had intended to do so, we think there is at least a reasonable probability that the jury could have had a reasonable doubt about Gray's intent to kill, and that it convicted him instead on the basis of the erroneous instruction, because it found that he had the intent to inflict great bodily harm.

Gray, 6 F.3d at 270.

Of particular additional import in *Gray* is the fact that during the trial, neither the prosecutor nor defense counsel emphasized the erroneous instruction, and both argued the law correctly to the jury, that is, both argued that in order to convict Gray for attempted first degree murder, the State had to prove intent to kill. The State in *Gray* argued that these facts rendered the erroneous instruction inconsequential. The Fifth Circuit was not so swayed, and stated:

Considering the evidence and the instructions as a whole, we cannot conclude that the prejudice resulting from counsel's failure to object to the erroneous instruction was cured simply by counsel stating the law correctly to the jury. Twice, the jury was instructed that it had a duty to follow the court's instructions regarding the law to be applied. . . .

It is more than well-settled that juries are presumed to follow their instructions. Here, we can find no valid basis for disregarding that established presumption. Accordingly, we cannot conclude that the jurors ignored the court's erroneous instructions and chose,

instead, to apply the law as stated correctly by counsel. Under the court's instructions, the jury could have convicted Gray for attempted first degree murder on the basis of a finding that he had the intent to inflict great bodily harm, even if it had a reasonable doubt that he had the specific intent to kill James. Therefore, Gray has demonstrated prejudice sufficient to undermine confidence in the outcome of his trial. No more is required.

Gray, 6 F.3d at 271 (internal citations and quotation omitted).

In Petitioner's case, an erroneous jury instruction was requested by the State for count 2, was not objected to by Petitioner's trial counsel, and was ultimately provided to the jury by the trial court, both orally and in writing. On top of that, the State vigorously argued in summation that it needed only to prove "one act" in order to convict Petitioner for count 2. The erroneous jury instruction relieved the State of proving that the sexual abuse by Petitioner involved multiple acts over an extended period of time on count 2. And as in *Gray*, the jury in Petitioner's case is presumed to have followed their instructions. *See Zafiro v. United States*, 506 U.S. 534 (1993).

The crux of the court of appeals' decision in Petitioner's case was that because the jury found Petitioner guilty on count 3 – a fundamentally different offense, but one that nonetheless contained a multiple-acts-over-time element – the jury's verdict "encompassed a

finding" on that element for count 2, and the conviction on count 2 should stand. (App. 9).

The Minnesota Court of Appeals treated its precedential opinion in *State v. Shamp* as dispositive as to all of Petitioner's postconviction claims. In *Shamp*, the court of appeals was tasked with construing the definition of a first-degree criminal sexual conduct offense involving penetration and multiple acts committed over an extended period of time. 422 N.W.2d 520, 524 (Minn. App. 1988). There, the trial court defined the phrase mandating that "the sexual abuse involved multiple acts" as requiring only one act of penetration in addition to multiple instances of sexual contact or touching. *Id.* Specifically, the trial court instructed the jury in *Shamp* as follows:

[I]t must have been proven that the sexual abuse involved multiple acts committed over an extended period of time.

Sexual abuse includes prohibited sexual penetration and prohibited sexual contact or touching as those prohibited acts are defined and will be throughout these instructions.

Id.

The appellant in *Shamp* contended that the trial court erroneously instructed the jury because the court's instructions required only that the jury find that Shamp sexually penetrated the victim one time. *Id.* In other words, Shamp argued that the offense required the jury to find multiple acts of *sexual penetration* over an extended period of time. *Id.*

In rejecting Shamp's claim, the court of appeals noted that while "sexual abuse" is not defined by statute, the relevant legislative history strongly suggested that the term "sexual abuse" includes sexual contact "other than penetration." *Id.* at 525. The court of appeals further found that the trial court "clearly explained the difference between sexual penetration and sexual contact, as well as the relation of these elements to the crime of first degree sexual conduct." *Id.*

In Petitioner's case, an erroneous jury instruction was requested by the State for count 2, was not objected to by Petitioner's counsel, and was ultimately provided to the jury by the trial court, both orally and in writing. Moreover, the State vigorously argued that it needed only to prove "one act" as is discussed above. The errors in the instructional phase and the State's arguments were compounded by the fact that – unlike in *Shamp* – the trial court in Petitioner's case provided no guidance on the definition or qualities of the term "sexual abuse." The jury was left to decide entirely for itself what was meant by those words, and was never instructed whether "sexual abuse" for count 3 was the same as "sexual abuse" for count 2, which involved disparate penetration and contact-based definitions, and arguably different periods of time.

Here, there is no question but that the erroneous jury instruction had a significant effect on the jury's verdict. This was a he-said/she-said case. There was not overwhelming evidence of guilt, and there was ambiguous and equivocal testimony with regard to the number of incidents of sexual misconduct and their

time period. Additionally, the jury rejected portions of V.M.'s testimony and accepted others, as is illustrated by their being hung as to count 1. Petitioner contested the omitted element of multiple acts of sexual abuse committed over an extended period of time, but the instructions nullified this issue for the most serious count that Petitioner was convicted of. As important, the State was relieved from having to prove the multiple acts element for count 2 because the jury was never instructed on that element. Had the jury been instructed, at a minimum, as to what is meant by "sexual abuse," then there might be some merit to the incorporation of findings on count 3 into the necessary findings embraced by count 2. But in the absence of any definitional instruction, the chasm is simply too wide for the inferential leap. The court of appeals' decision is in conflict with the well-settled law of the Fifth Circuit.

2. Third Circuit.

In *Tyson v. Superintendent Houtzdale SCI*, the defendant was convicted in Pennsylvania state court of first-degree murder as an accomplice. 976 F.3d 382 (3rd Cir. 2020). The trial court's instruction for accomplice liability "was general and not tied to either murder charge." *Id.* at 387. Instead, the trial court explained that Tyson "is an accomplice if with the intent to promote or facilitate the commission of a crime he encourages, requests or commands the other person to commit it or agrees or aids or agrees to aid or attempts to aid the other person in planning, organizing,

committing it.” *Id.* (emphasis supplied by the appellate court). The trial court finished its explanation with a “circular statement:” “You may find [Tyson] guilty on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed; that [Tyson] was an accomplice of the person who actually committed the crime.” *Id.* The trial court failed to instruct the jury that, under Pennsylvania law, an accomplice to first-degree murder must intend to promote or facilitate a killing. *Id.*

Following an unsuccessful state court direct appeal, Tyson timely filed a *pro se* petition and accompanying legal memorandum in the state trial court pursuant to Pennsylvania’s Post-Conviction Relief Act (PCRA). *Id.* In his petition, Tyson stated he was “deprived of his Constitutional Rights to Due Process and right to effective assistance of counsel.” *Id.* An attorney was appointed and filed an amended PCRA petition, which expanded upon Tyson’s claim that, based on federal law, trial counsel was ineffective for failing to object to the trial court’s instruction. *Id.* at 388.

A “PCRA hearing” was held before the trial court. *Id.* Tyson’s post-conviction counsel questioned trial counsel about his failure to object to the accomplice instruction; trial counsel responded that he did not remember the charge. In subsequent briefing, post-conviction counsel reiterated the ineffective assistance claim, arguing that trial counsel’s failure to request an instruction on the *mens rea* required for accomplice liability “is a tremendously important point” because the intent to kill “means the difference between

murder in the first degree and murder in the third degree.” *Id.*

Subsequently, the trial court denied Tyson’s PCRA petition finding that, *inter alia*, counsel was not ineffective for failing to object to the jury instruction because it provided a definition of accomplice liability and the elements of first-degree murder. *Id.* Citing portions of the instruction, the trial court concluded that, on the whole, it conveyed the Commonwealth’s burden to prove beyond a reasonable doubt that Tyson possessed “the shared specific intent to kill the [victims].” *Id.* The trial court bolstered the denial of the ineffectiveness claim by stating that the evidence presented to the jury “revealed that [Tyson’s] conduct was willful, deliberate and premeditated and that he actively participated in the murders by aiding the shooter.” *Id.*

Following the denial of post-conviction relief, Tyson appealed to the Pennsylvania Superior Court, which affirmed the findings of the trial court and denied post-conviction relief. Tyson then sought a writ of habeas corpus in the Middle District of Pennsylvania. *Id.* There, the federal district court applied the highly deferential standard of review of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1), and concluded that the Pennsylvania state court reasonably applied clearly established federal law in determining that Tyson’s trial counsel was not ineffective for failing to object to the accomplice liability instruction. *Id.*

Tyson appealed to this Third Circuit Court of Appeals, which granted a certificate of appealability limited to Tyson's "jury instructions claim under both the Fourteenth Amendment's Due Process Clause, *see Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), and the Sixth Amendment, *see Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." *Id.* at 388-389.

In reversing the federal district court, the Third Circuit found that Tyson satisfied both prongs of the test from *Strickland*. In reaching this conclusion, the Third Circuit wrote as follows:

Reading the instant instruction . . . we find a strong likelihood the jury convicted Tyson as an accomplice to first-degree murder without finding he possessed the specific intent to kill. Indeed, we could find no language in the instruction that would lead the jury to connect the requisite intent to kill to the role of an accomplice.

...

The court's instruction on accomplice liability only made it more likely that a reasonable juror would misapprehend the law. Rather than convey the crucial point that an accomplice must intend to kill to be guilty of first-degree murder, the court's explanation was general and defined an accomplice as one who intends to promote or facilitate 'a crime[.]'

...

This Court has previously held that, when a specific intent instruction is required, a general accomplice instruction lessens the state's burden of proof and is therefore violative of due process. As with the instruction in *Smith*,³ the trial court here did not identify the crime to which accomplice liability should attach; nothing in the charge tied the mental state of an accomplice to that of a murderer. The result was an implication that if Tyson was an accomplice to 'a' crime, he was an accomplice to any crime also committed, including first-degree murder.

...

In light of the instruction's profound impropriety, we conclude that trial counsel acted unreasonably in failing to object. The failure to object was particularly glaring given that the prosecutor's closing argument contained the same erroneous interpretation of Pennsylvania law. . . . Although the counsel's arguments carry less weight with the jury than the trial court's instructions, the Commonwealth's blatant misstatement of the law certainly increased the likelihood that the jury interpreted the charge so as to relieve the Commonwealth of its burden of proof.

Tyson, 976 F.3d at 392-394, 395-395 (internal citations and quotations omitted).

³ *Smith v. Horn*, 120 F.3d 400, 414 (3rd Cir. 1997) (instruction violative of due process because it was reasonably likely jurors convicted defendant of first-degree murder based on the finding that he was an accomplice to robbery).

Here, as in *Tyson*, there was nothing in the trial court’s charge to the jury that tied count 2 to the requirement that the State prove Petitioner’s commission of multiple acts of sexual abuse over time for that offense. Here, as in *Tyson*, the trial court did not identify the crime to which the multiple acts element should attach. And here, again as in *Tyson*, the prosecutor’s closing argument contained the same erroneous interpretation of Minnesota law – that the State had only to prove “one act” in order to convict Petitioner on count 2. Petitioner’s matter is on all fours with *Tyson*. In rendering its opinion, the Minnesota Court of Appeals decided an important federal question directly in conflict with the Third Circuit’s decision in *Tyson*.

3. Ninth Circuit.

In *United States v. Alferahin*, the defendant was charged with “knowingly procuring naturalization ‘contrary to law,’” in violation of 18 U.S.C. § 1425(a). 433 F.3d 1148, 1151 (9th Cir. 2006). During closing arguments, the prosecutor argued that the defendant had omitted material information from his immigration application, and the trial court raised the issue of whether it should instruct the jury on materiality. When asked if the instructions provided to the jury were complete and accurate about “what the government [had] to prove,” the defendant’s counsel stated that they were. However, because materiality is an element of the crime under the United States Code, both the trial court and defense counsel “were operating under a misapprehension of the applicable law.” *Id.* at

1153, 1154 n.2. On direct appeal, the Ninth Circuit found counsel's performance constitutionally deficient.

In reaching this conclusion, the court in *Alferahin* stated, “[w]e recognize . . . that the omission of an element from jury instructions does not always ‘affect’ a defendant’s substantial rights and that the failure to submit an element to the jury is not *per se* prejudicial.” *Id.* at 1157. However, the court was unpersuaded that the omitted element did not affect Alferahin’s substantial rights:

It is . . . clear from the record that Alferahin’s attorney did not intend strategically to forego the materiality instruction. Instead, he had no idea that such instruction was available to his client as a matter of right. . . . We have a hard time seeing what kind of strategy, save an ineffective one, would lead a lawyer to deliberately omit his client’s only defense, a defense that had a . . . likelihood of success, and a defense that he specifically stated he [would have] had every intention of presenting.

...

We hold that the submission of incomplete jury instructions was plain error in this case and that Alferahin’s attorney provided constitutionally deficient assistance when he declined an offer by the judge to instruct the jury on the element of materiality.

Id. at 1161-1162 (internal quotations omitted). Other cases in the Ninth Circuit accord. See *United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021) (district court

committed reversible error by failing to instruct jury that government had to prove that defendant knew that he was discharging material “into water.”); *United States v. Murphy*, 824 F.3d 1197 (9th Cir. 2016) (plain error reversal required where defendant was convicted of interfering with the administration of the tax laws, presenting fictitious financial instruments, and presenting false claims to the United States, but where the jury instructions omitted the element that the bonded promissory notes at issue were issued “under the authority of the United States.”).

In Petitioner’s case, it is clear from the record that his trial counsel did not strategically forego an instruction for count 2 that would involve the multiple acts over time element. And while Petitioner’s appellate counsel testified that he strategically determined to not raise the instructional issue on appeal, that decision was objectively unreasonable, as evidenced by the decisions discussed above. The Minnesota Court of Appeals failed to recognize the clear Sixth and Fourteenth Amendment errors in Petitioner’s case, stating merely that the omitted element for count 2 was “embraced” by a totally separate count upon which Petitioner was also convicted. In rendering its opinion, the Minnesota Court of Appeals decided an important federal question directly in conflict with the Ninth Circuit Court of Appeals.

CONCLUSION

Petitioner Grant Lloyd Greenwood is serving a 172-month state prison sentence following a jury trial at which he was convicted of first-degree criminal sexual conduct and second-degree criminal sexual conduct in a Minnesota state district court. The jury instruction for the first-degree offense omitted an essential element of the offense, namely, that the State was required to prove that Petitioner committed multiple acts of sexual abuse against the victim over an extended period of time. (App. 2-3). Additionally, the State explicitly argued in its closing argument that it did not have to prove this essential element, stating to the jury, “You would only need to have one act to be able to convict. Just one. If he digitally penetrated her only one time, that’s enough.” (App. 3). These compounded errors were left unaccounted for by Petitioner’s former trial and appellate counsels, and have not received the regard that is their due by any of the courts of the state of Minnesota. To clarify and harmonize important aspects of the Sixth and Fourteenth Amendments, and to ensure the fair administration of justice throughout the land, this Court should grant certiorari review in this case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. LUNDGREN	ANDREW M. IRLBECK
<i>Counsel of Record</i>	ANDREW IRLBECK, LAWYER,
ADAM T. JOHNSON	CHARTERED
LUNDGREN & JOHNSON, P.S.C.	332 Minnesota Street
121 South Eighth Street	Suite W1610
Suite 893	St. Paul, MN 55101
Minneapolis, MN 55402	Tel. (651) 986-3895
Tel. (612) 767-9643	Email: andrew@
Email: david@	irlbecklaw.com
lundgrenjohnson.com	
Email: adam@	
lundgrenjohnson.com	

Counsel for Petitioner

September 2021