No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

STEVEN BRYANT,

Petitioner,

-v-

SHAWN EMMONS, Warden,
Valdosta State Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

Where the state's only eyewitness and linchpin of its case, the co-defendant, struck a deal whereby she would plead to a lesser offense and testify against the defendant to avoid a severe sentencing outcome; where the co-defendant failed to mention the deal when asked why she pled guilty; where counsel failed to use available information about the deal to correct the false and misleading impression left with the jury that the state had no deal with its key witness,

> Was it error under *Strickland v. Washington*, 466 U.S. 668 (1984), for the Georgia Supreme Court to reject Petitioner's ineffective assistance claim on the basis of trial counsel's post-hoc rationale - that he did not want to "beat [the witness] up" about the plea deal - for his failure to present evidence of the co-defendant's deal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

Constitutional Provisions

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Petitioner, STEVEN BRYANT, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Georgia, entered in *Emmons, Warden, v. Bryant*, Case No. S21A0532, on October 5, 2021. *See* Appendix A. Reconsideration was denied on November 2, 2021. *See* Appendix B.

OPINIONS BELOW

The decision of the Supreme Court of Georgia entered October 5, 2021, reversing the lower court's grant of habeas corpus relief, is reported as *Emmons v. Bryant*, 864 S.E.2d 1 (Ga. 2021). A copy of the decision is attached hereto as Appendix A. The underlying state habeas court

decision in *Bryant v. Emmons, Warden*, Lowndes County Superior Court Case No. 2019-CV-1187, granting the writ is unreported and attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Georgia reversing the lower court's grant of habeas corpus was entered on October 5, 2021. *See* Appendix A. A timely-filed petition for reconsideration was denied on November 2, 2021. *See* Appendix B. On January 11, 2022, Justice Thomas granted Petitioner's timely-filed motion for extension of time within which to file this Petition until March 2, 2022. *See* Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property without due process of law...." U.S. Const. amend. V. "In all criminal prosecutions, the accused shall 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 . . . and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "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...." U.S. Const. amend. XIV §1.

PROCEEDINGS BELOW

A. Statement of Facts

On July 8, 2015, a jury convicted Petitioner, Steven Bryant, of aggravated sexual battery against Shirley Hudgins. HT 214.[1] The trial court sentenced him to life without the possibility of parole pursuant to O.C.G.A. § 17-10-7 on August 25, 2015. HT 211, 774.[2]

1. Co-defendant Kimberly Bridges cuts a very good deal with the prosecution.

The initial indictment charged both Mr. Bryant and a co-defendant, Kimberly Bridges, Mr. Bryant's girlfriend at the time, with aggravated sexual battery under O.C.G.A. § 16-6-22.2. HT 211. Bridges faced a possible sentence of 25 years to life if convicted, O.C.G.A. § 16-6-22.2(c), and lifelong placement on the statewide sex offender registry, O.C.G.A. § 42-1-12.

However, shortly after the alleged assault, Shirley Hudgins unexpectedly passed away. HT 707. The only alleged eyewitness to the assault at that point was Bridges.

On the day before Mr. Bryant's trial began, the prosecution negotiated a deal with Bridges whereby she agreed to plead guilty to the lesser charge of aggravated assault (O.C.G.A. § 16-5-21) in exchange for her testimony against Mr. Bryant. HT 1070. Pursuant to the agreement, Bridges was given a probated two-year sentence, to be served consecutively to three years

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[1] The trial transcript was incorporated into the state habeas record below. Thus, most record citations are notated as "HT," referencing the habeas transcript. Some references may be to pleadings and orders appearing in the habeas court record on appeal, which will be notated as "ROA."

[2] *State v. Bryant*, Floyd County Criminal Case No. 15-CR-00771B-JFL001.

imprisonment resulting from a probation revocation on an unrelated charge. *Id.*[3] Her conviction would not require her placement on the sex offender registry. HT 1070-71.

2. Bridges becomes the state's linchpin witness at trial.

At Mr. Bryant's July 2015 trial, which started the day after Bridges pled guilty, Mr. Bryant was represented by a public defender, James Wyatt.[4]

At trial, because Shirley Hudgins had died, "the State's case rested largely on the testimony of [Kimberly] Bridges." *Bryant,* 864 S.E.2d at 5. Bridges testified that on the night of February 7, 2015, Mr. Bryant and Bridges were staying in the master bedroom in Hudgins' mobile home. Hudgins was sleeping on the couch in her living room. Hudgins' boyfriend, Jimmy Ray Hunter, slept in a back bedroom. HT 599. Hudgins had had the flu for several days, was "in a lot of pain" from a prior wrist injury, was taking "a lot of medication at night, and she was sleeping very hard . . . ." HT 599, 665. That night, Hudgins had taken several medications, including Seroquil, a sleep aid; Xanax, an anti-anxiety medication; Soma, a muscle relaxant; and Norco, an opioid pain medication. HT 666-69.

Also that night, Kimberly Bridges, had gotten "high" and was "on drugs" after Hudgins had gone to bed. HT 600, 601. Bridges was "not in [her] right frame of mind. . . ." HT 601. At some point, she testified, she and Mr. Bryant discussed his intention to wake Hudgins up and ask

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[3] The maximum possible term under § 16-5-21 is 20 years.

[4] In 2008, the Georgia Supreme Court had found Wyatt prejudicially ineffective in his representation of the capital murder defendant in *Hall v. McPherson*, 284 Ga. 219 (2008), for conducting a lackadaisical and incomplete investigation which got his client sentenced to death. The court explicitly found Wyatt's failure to investigate his client's life history to be a product "not [of] a strategic decision but . . . from counsel's inattention," and that Wyatt had "failed to pursue . . . obvious sources of information" as a result of "neglect." *Id.* at 223-24.

her to engage in sexual activity with him and Bridges. HT 601-02, 613. Bryant then went to Hudgins in the living room. Bridges testified she followed and that, although the lights in the living room of the mobile home were off and it was only dimly lit by a light in the kitchen (HT 659), she witnessed Mr. Bryant inserting his fingers into Hudgins' vagina. HT 603. At that point, Hudgins woke up screaming. *Id.* Bridges tried to calm Hudgins, and at some point Bryant texted apologies to Hudgins. *Id.*

According to Hudgins' boyfriend, Jimmy Hunter, and daughter-in-law, Krista Barker, Hudgins reported the assault to them later that morning. After police arrived to investigate, Hudgins was examined by a sexual assault nurse, Tina Gentry. Gentry recounted Hudgins' story to the jury, along with her observation of a small abrasion, less than an inch in length, in Hudgins' vaginal area consistent with a fingernail scratch. HT 635-37, 643. The abrasion could have been caused by anything that could abrade the skin. HT 643.

After the prosecution rested, Mr. Bryant testified, denying that he had touched Hudgins and asserting that he had only wanted to procure a lighter from her. HT 726-27.

3. Neither the prosecution nor trial counsel correct Bridges' misleading testimony about her guilty plea, leaving the false impression that she had no arrangement with the prosecution.

During Bridges' testimony on direct, the prosecutor elicited incomplete facts about her guilty plea by omitting any mention of a quid-pro-quo or a deal, that her crucial testimony against Mr. Bryant was given in exchange for avoiding a possible multi-decade or life sentence along with permanent placement on the sex offender registry. Moreover, the prosecutor led the witness to state that she had pled guilty to aggravated sexual battery, not aggravated assault, giving the false impression that she had pled guilty to the original charges:

Q: - - and you were eventually charged with - - in sexual battery and - -

A: Party to a crime.

Q: - - party to the crime?

A: Yes, sir.

Q: And is your understanding it was because you were there and observed what went on?

A: Yes.

Q: And it was because you and Mr. Bryant had discussed what he was fixing to do?

A: Yes.

Q: And there's no secret at this point in time. You've already - - you've been to court. You've pled those charges?

A: Yes, I have.

Q: You are currently under sentence of those charges?

A: Yes, sir, I am.

Q: All right.

A: I am currently at Pulaski State Prison, here - - been waiting for court this whole time, so. Since May.

Mr. Goldin: At this time I will tender the witness.

HT 612-13.

On cross-examination, trial counsel repeatedly badgered Bridges about her guilty plea, but never asked her what benefit she had gotten as a result of her agreement with the prosecutor or to clarify that she had pled to a lesser offense:

Wyatt: Did you aid or abet any - - did you aid or abet anybody in doing a criminal act?

Bridges: Towards her?

Q: Yes.

A: Towards Shirley?

Q: Yes.

A: I felt - - I don't know. I don't know if I could, you know, refrain from that - - the answer to that question. It's - - it's - - it's kind of in between. I didn't try to like help him do anything.

Q: You didn't help him do anything?

A: I mean, I've already pled my guilty, okay?

Q: I understand. I'm asking why - -

A: I took my plea, sir

Q: *Why did you plead guilty?*

A: *I pled guilty because the truth needs to come out*, what happen, what - -

Q: Because what?

A: - - what really happened.

Q: Okay. How were you guilty?

A: I'm guilty for - - for allowing - - I don't know how to say it. It's really a crazy crime. I don't know - - I didn't touch her, - -

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Q: All right. Have you been in a writing relationship with Steve? . . . . Did you write that letter to Steve?

A: Yeah.

Q: And, in that letter, did you say that it didn't happen, nothing happened?

A: I said -- I said that in that letter. Yes, sir, I did.

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A: I didn't touch her, you know. I pled out to it so I could go back to prison.

Q: That's why you pled out?

A: I've pled -- no. I pled out so I can get back. I'm going to school. I've got a job. I've pled my guilty so I could go back.

Q: So you can go back to prison?

A: I have a son to get home to.

Q: Not because-

A: I pled because I was guilty, sir.

Q: Of what?

A: Of what?

Q: Yes.

A: Helping a sick man.

Q: You helped him?

A: (Nodding head in the affirmative.)

HT 663-64, 670, 671-72 (emphasis supplied).

Wyatt later testified that he knew Bridges' deal with the prosecution required her to testify (HT 77) and that as a result of her plea "had some probation revoked" for her alleged involvement

in the incident and "got some time for it . . . ."[5] HT 874–75. However, Wyatt failed -- even after her obviously evasive answer to the direct question "Why did you plead guilty?" -- to cross-examine her to clarify that she was required under the terms of her agreement to testify against Mr. Bryant, and that she had pled guilty to a lesser offense and thereby avoided the severe sentencing consequences of an aggravated sexual battery conviction. Nor did counsel tender a certified copy of the readily available plea colloquy (HT 1061-71), which clearly outlined the parameters of the deal. The jury heard nothing about it. Nevertheless, during a charge conference after the defense had rested, Wyatt indicated to the trial court his intention to cast doubt on her account by arguing to the jury that "just more or less the fear of prosecution . . . made [Bridges] plead in this case." HT 736.[6]

Following the presentation of evidence, Bryant's jury struggled for hours to come to a verdict and indicated to the trial court several times that it was unable to reach a verdict, even after the court gave an Allen charge. *See* HT 757-62. Jurors even requested a transcript of Bridges' and Bryant's testimony, which the court refused. HT 754-55.

Mr. Bryant was subsequently convicted of aggravated sexual battery and sentenced to life without possibility of parole.

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[5] It was not accurate that Bridges received prison time for the aggravated assault charge. As discussed above, she served no prison time on the charge, instead receiving a probated two year sentence.

[6] Inexplicably, closing arguments were not transcribed.

4. On appeal, appellate counsel failed to substantiate his claim that trial counsel unreasonably failed to adduce evidence of the actual parameters of Bridges' plea deal.

After James Wyatt withdrew as counsel, attorney Juwayn Haddad was appointed in response to Bryant's complaints about Wyatt's performance and requests that he be replaced as counsel. On motion for new trial, Haddad alleged the following claim:

> Trial counsel failed to properly impeach the co-defendant K. Bridges with any plea deals for testifying against the defendant. (T. 62-65, 92-123). "[The] exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."

HT 223.[7]

At the hearing on the motion, Haddad questioned Wyatt as to why he did not elicit any information at trial as to the plea deal Bridges had struck. Wyatt conceded he had the plea colloquy but did not want to enter it into evidence because he "was of the opinion she received quite a harsh sentence for her part in this case, and that's the reason [he] did not bring it into the evidence, the sentence that she received." HT 875. Haddad, clearly surprised, pointed out that she had received a 2-year probated sentence on a lesser offense when she could have faced a mandatory 25-year sentence at minimum on the aggravated sexual assault charge. HT 875-76. Wyatt maintained that he felt the sentence Bridges actually receieved was harsh and that was why he did not enter the plea into evidence. HT 876.

However, Haddad failed to enter the plea into evidence at the motion for new trial hearing. As a result, the Court of Appeals rejected the ineffectiveness claim:

> No evidence was presented at the hearing on the second motion for new trial establishing the sentence that Bridges received in connection with her guilty plea,

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[7] Haddad subsequently fleshed out this claim in his appeal brief

> or that she was required to testify at Bryant's trial as a condition of receiving a negotiated sentence. Bryant's trial counsel testified that he did not ask Bridges on cross-examination about her plea agreement because it was his opinion that she received "quite a harsh sentence for her part in this case." He further testified that he thought "she had some probation revoked and. . . got some time for it, and her involvement was fairly minor[.]"

HT 958 (*Bryant v. State*, Georgia Court of Appeals Case No. A18A0342 (unpublished opinion dated June 12, 2018)). The court credited trial counsel's reasoning, stating, "'[W]e cannot say that trial counsel's failure to cross-examine [Bridges] about [her] plea was patently unreasonable, particularly in light of the potential prejudice to [Bryant] that trial counsel was trying to avoid.'" *Id.* (quoting and paraphrasing *Bonner v. State*, 308 Ga. App. 827, 828-829 (1) (a) (2011)).

5. In habeas proceedings, trial counsel concedes he had Bridges' plea colloquy prior to trial but reveals a lack of apprehension, or even ignorance, of the actual scope of the plea deal; states he does not know why he failed to elicit the plea deal but may not have wanted to "beat up" on Bridges.

During an evidentiary hearing in state habeas court, where Mr. Bryant represented himself, the habeas court examined attorney Wyatt about his performance with respect to Bridges' plea deal. During the examination, Wyatt indicated that he knew that Bridges had struck a cooperation deal with the prosecution requiring her to testify against Mr. Bryant (HT 77), but when asked his knowledge of the scope of the deal, Wyatt failed to appreciate, and even seemed to show ignorance of, the scope of the benefit Bridges received:

> Q Do you know the extent of the plea offer or whether she received any benefit from her testimony in the Bryant prosecution?
>
> A She received probation in this case.
>
> *****
>
> Q Did she receive some benefit for testifying in the Bryant trial?

A She did. *She was in jail and she received probation, so she received a benefit, yes.*

Q Did you question her about that during the trial on cross examination?

A The previous habeas attorney called me. One of the allegations was that I did not go into the plea deal, the details of the plea deal.

Q Do you want to speak to that any further?

A *I don't know why I did not*. Mainly because I think the allegations of the main act she was just kind of, she saw it. The main act was against my client, and *I decided not to beat her up* on that point.

HT 78 (emphasis supplied).

6. The state habeas court grants the writ as to appellate counsel's deficient performance with respect to trial counsel's ineffectiveness as to Bridges' plea deal.

The state habeas court found trial and appellate counsel's failures to be patently unreasonable and to justify the grant of the writ under *Strickland v. Washington*, 466 U.S. 668 (1984):

Appellate counsel did ask Mr. Wyatt briefly about his cross-examination of Kimberly Bridges and her plea deal with the State, but he failed to specifically ask why trial counsel did not cross-examine her at trial about her requirement to testify against Bryant in exchange for probation, release from jail and avoid the consequence of an aggravated sexual battery conviction, a penalty range of imprisonment for life or split sentence of a term of imprisonment for not less than 25 years and not exceeding life, followed by probation for life and sex offender registration. O.C.G.A. § 16-6-22.2.

Bias and motive are always relevant. Mr. Haddad did raise this ineffective issue on appeal, but he failed to do so effectively and such work was not reasonable.

The Court of Appeals points out the deficiency: appellate counsel did not provide any evidence that establishes the actual sentence Bridges received in connection with her guilty plea agreement or any evidence showing that she was required to testify. *Bryant v. State*, A18A0342. This constitutes deficient performance, and such failure by trial and appellate counsel is not reasonable performance. This

performance is certainly not trial strategy, nor strategy at the appeals court, to raise an issue but fail to perfect the record for review.

The court finds it important to note that neither trial counsel nor appellate counsel shed light on the benefits that co-defendant Kimberly Bridges received when her sentence was lowered to aggravated assault: the new sentence removes her from sexual offender registration potentially for life, including residence restrictions, presence of minors, and work restrictions. Further, the record contained a transcript of Bridges' plea, within which it is made clear that she is required to testify in exchange for the plea. These items were easily obtainable or in Mr. Haddad or Mr. Wyatt's file, and there is no tactical reason for this failure.

Mr. Wyatt asserted he decided not to cross-examine Ms. Bridges about her guilty plea for tactical reasons. He reasons that, during his testimony in the second motion for new trial hearing, her sentence was too harsh. Mr. Haddad failed in his duty to reasonably pursue further questions of trial counsel about his decision.

The state called Ms. Bridges to testify in its case in chief. She gave harmful testimony against Bryant that they had a prior agreement that he would commit the act of aggravated sexual battery as she watched.

Motive and bias are always relevant and her plea deal and release from jail was material and probative. No reasonable attorney would not examine her about her plea deal and bring the issue of the requirement for her testimony before the jury. No other witnesses were more important for the state than the alleged eyewitness. Bridges.

Mr. Wyatt stated he did not ask Ms. Bridges about her plea agreement because it was his opinion that she received "quite a hard sentence for her part in this case." Further, he stated she was revoked and got some time and her involvement was minor. Mr. Wyatt did not explain how this sentence was harsh or how he viewed the decision as strategic or how her unchallenged testimony that [Bryant] committed the aggravated sexual battery benefited Petitioner.

The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. O.C.G.A. §24-6-611. The cross-examination by trial and appellate counsel failed to meet the standard and the 6th Amendment right to effectively confront all witnesses against him.

ROA 33-35 (Appendix C).

7. The Georgia Supreme Court defers to trial counsel's "strategic" reasoning, reverses the state habeas court.

On appeal, the Georgia Supreme Court reversed. Ignoring the court's previous finding that attorney Wyatt had rendered prejudicially deficient performance in a previous case where he showed "inattention" and "neglect" in failing to prepare for his client's trial,[8] the court now seized on Wyatt's post-hoc rationalization for failing to adduce evidence of Kimberly Bridges' plea deal, *i.e.*, counsel's purported desire not to "beat [Bridges] up" (HT 78), finding it to be a reasonable strategic decision entitled to deference. *Bryant*, 864 S.E.2d at 11. Although the Georgia Supreme Court made a point of emphasizing that "hindsight has no place in an assessment of the performance of trial counsel," *id*., the court ignored trial counsel's explicitly stated strategy *at the time of trial* of emphasizing that "the fear of prosecution . . . made [Bridges] plead in this case," HT 736, and instead praised counsel's "attempt[] to impeach Bridges' testimony in other ways," such as by pointing out Bridges' drug use. *Bryant*, 864 S.E.2d at 11. Having found trial counsel's performance to be reasonable, the court found that the ineffective assistance claim against appellate counsel Haddad failed. *Id.*

B. Procedural History

Mr. Bryant was convicted of aggravated sexual battery after a jury trial on July 8, 2015. He was sentenced to life without parole on August 25, 2015.

On June 12, 2018, the Georgia Court of Appeals affirmed Mr. Bryant's conviction in an unpublished decision. *See* HT 958 (opinion in *Bryant v. State*, Case No. A18A0342).

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[8] *See McPherson*, 284 Ga. at 223-24 and *supra* at n.4.

On June 18, 2019, Bryant filed a *pro se* habeas corpus petition in the Superior Court of Lowndes County, raising claims of ineffective assistance of trial and appellate counsel, including a claim regarding counsel's failure to adduce evidence of Bridges' deal at trial or on appeal.

On June 30, 2020, the habeas court entered an order granting relief on several grounds, including the claim regarding trial and appellate counsel's ineffectiveness as to Bridges' plea deal. *See* Appendix C.

Respondent appealed, and the Georgia Supreme Court reversed the lower court in an opinion entered October 5, 2021. *Emmons v. Bryant*, 864 S.E.2d 1 (Ga. 2021). *See* Appendix A.[9] Reconsideration was denied on November 2, 2021. Appendix B.

Justice Thomas granted Mr. Bryant an extension until March 2, 2022, to file his Petition for Writ of Certiorari. Appendix D.

STATEMENT OF THE CASE

The state habeas court correctly applied *Strickland v. Washington*, 466 U.S. 668 (1984), in finding that trial counsel unreasonably failed to cross-examine Bridges about the terms of her plea deal or otherwise adduce evidence of the deal in the form of the readily available plea colloquy, and that appellate counsel had similarly unreasonably failed to substantiate the claim of ineffective assistance of trial counsel with evidence of the actual plea deal,[10] and that had he done so there was a reasonable probability that Bryant would have stated a winning claim for reversal of his conviction based on trial counsel's ineffective performance.

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[9] Please be advised that the Southeast Reporter date for this opinion is inaccurate.

[10] *See, e.g., Cartwright v. Caldwell*, 305 Ga. 371, 381 (2019) (habeas petitioner must present evidence demonstrating witness was impeachable in order to succeed on claim that trial counsel unreasonably failed to impeach witness).

The Georgia Supreme Court, in turn, misapplied *Strickland* in disposing of the ineffective assistance claim on the basis of trial counsel's after-the-fact assertion that although he could not remember why he failed to bring up the plea deal at trial, he may have not wanted to "beat [Bridges] up." In seizing on attorney Wyatt's rationale, the court impermissibly engaged in post-hoc rationalization[11] of counsel's dismal performance while failing to assess the "totality of the circumstances" (*Strickland*, 466 U.S. at 689) of Wyatt's conduct. For example, the Georgia Supreme Court ignored evidence of counsel's prior experience malpracticing a capital case through "inattention" and "neglect."[12] The court also ignored counsel's conduct at Mr. Bryant's trial illustrating that Wyatt *did* "beat [Bridges] up" on cross-examination, repeatedly asking her why she had pled guilty. The court also ignored the fact that adducing evidence of the plea deal would have been consistent with Wyatt's stated strategy at the time -- to demonstrate that "the fear of prosecution . . . made [Bridges] plead in this case." HT 376. The Georgia Supreme Court also failed to meaningfully weigh the "potential for prejudice" from counsel's failure to adduce evidence of the plea deal and use it to undermine the credibility of the state's key witness. *Strickland*, 466 U.S. at 681.

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[11] *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (courts should "not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence . . . .").

[12] *McPherson*, 284 Ga. at 223-24.

ARGUMENT

I. The Georgia Supreme Court's Analysis Failed to Address the Totality of the Circumstances and Myopically Seized on Trial Counsel's Post-Hoc Justification for his Failure to Elicit or Present Evidence of Bridges' Plea Deal.

A. The Georgia Supreme Court improperly deferred to counsel's unreliable post-hoc explanations for his failure to elicit evidence of Bridges' plea deal.

Wyatt gave contradictory statements regarding his approach to Bridges' testimony. First, at trial, Wyatt indicated to the trial court that his strategy was to show that Bridges had accepted the plea out of fear of prosecution - a strategy which would have benefitted from disclosing the actual scope of the plea deal to the jury. *See* HT 736. Later, at the second motion for new trial hearing, when challenged about failure to elicit any testimony or evidence as to Bridges plea deal, Wyatt testified that he failed to adequately question Bridges because he believed "she received quite a harsh sentence" – an utterly inexplicable characterization in light of the facts described above. *See* HT 875.[13] Finally, at the habeas hearing, Wyatt testified that he "d[id not] know why" he failed to illustrate the benefits Bridges received for testifying against Bryant, but that he may have not wanted to "beat her up on" the issue of the plea deal. HT 78.

In light of Wyatt's contradictory and evolving rationales for his failure to cross Bridges and his factually inaccurate statements regarding the terms of Bridges' plea agreement, the habeas court correctly declined to credit[14] Wyatt's excuses for failing to illustrate Bridges' bias with

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[13] Trial counsel's stated rationale for failing to cross Bridges does not square with his stated strategy at trial, which was to argue that Bridges was biasing her testimony because she feared prosecution.

[14] It was the prerogative of the state habeas court to make credibility determinations. *Humphrey v. Walker*, 294 Ga. 855 (2014).

evidence. ROA 35. The habeas court further appropriately found that "no reasonable attorney" would have failed to question Bridges regarding her plea under the circumstances. *Id.* Where "actual [trial] proceedings" directly illustrate counsel's contemporaneous tactic or thinking, counterfactual "post-hoc rationalization of counsel's conduct" cannot substitute for record facts which suggest lack of preparation and neglect as the more accurate cause of counsel's omissions. *Wiggins v. Smith*, 539 U.S. 510, 526-27, 534 (2003).[15] Here, since counsel's stated strategy at the time of trial was to show that Bridges shaded the truth because she feared prosecution (HT 376) – not to coddle her -- counsel had "every reason to develop the most powerful . . . case possible" in support of that strategy. *Id.* at 526.

Furthermore, counsel's actual conduct in cross-examining Bridges evinced a confrontational and badgering approach which included directly questioning Bridges as to why she had pled guilty. *See, e.g.*, HT 663-64, 670-72. Counsel's approach directly contradicted his post-trial statements that he did not want to "beat [Bridges up" by bringing up the plea deal, and thus the failure to follow up on Bridges' evasive and misleading answers to direct questions like "Why did you plead guilty?" (HT 664) was patently unreasonable performance which deprived the jury of critical information bearing on Bridges' credibility. The Georgia Supreme Court erred in failing to compare trial counsel's post-trial statements about his performance, offered in the

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[15] *See also Richter*, 562 U.S. at 109 (courts should "not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence . . . ."); *Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011) ("[C]ourts should not conjure up tactical decisions an attorney could have made, but plainly did not.") (citation omitted); *Young v. United States*, 56 A.3d 1184, 1198 (D.C. 2012) ("A reviewing court must rely upon trial counsel's actual decisionmaking process, . . . rather than invent a post hoc rationalization . . . .") (citation omitted); *Kimmelman v. Morrison*, 477 U.S. 365, 386-87 (1986) (state improperly employed hindsight rationalization of trial counsel's performance in defending against allegations of ineffective assistance).

context of hearings on allegations of ineffective assistance, with his conduct and statements at the time of trial, per *Wiggins*, *Richter*, *Kimmelman*.

B. The Georgia Supreme Court improperly failed to factor its prior finding of deficient performance on the part of attorney Wyatt into its assessment of his performance in Mr. Bryant's case.

The Georgia Supreme Court failed to adhere to *Strickland* in refusing to factor evidence of Wyatt's constitutionally deficient representation in the *McPherson* case into its assessment of his performance in Mr. Bryant's case. *Strickland* instructs that courts assessing counsel's performance "must . . . determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. *Strickland* counsels that the "experience of the attorney" is "relevant to deciding whether particular strategic choices are reasonable." *Id.* at 681. It was thus unreasonable for the Georgia Supreme Court to ignore its finding as to this specific attorney's "inattention" and "neglect" in his handling of a prior case in the same judicial circuit as Mr. Bryant's. *See McPherson*, 284 Ga. at 223-24. The court's alarming characterization of Wyatt's conduct in *McPherson* should have caused it to question whether an assumption of reasonableness was appropriate in Mr. Bryant's case.[16]

The Georgia Supreme Court's failure to consider the prior finding of ineffectiveness unreasonably flouted *Strickland*'s holding that "[t]he proper measure of attorney performance

[16] *Cf. In re Vargas*, 83 Cal. App. 4th 1125, 1134 (Ca. App. 2000) (appellate court taking judicial notice of prior findings of ineffectiveness against trial counsel in *Strickland* analysis); *Sanders v. Ratelle*, 21 F.3d 1146, 1460 (9th Cir. 1994) (considering counsel's pattern of misconduct in *Strickland* analysis).

remains simply reasonableness under prevailing professional norms[17] . . . . considering *all the circumstances*," *Strickland*, 466 U.S. at 688 (emphasis added), including specifically counsel's prior experience, *id.* at 681. By ignoring the fact that trial counsel had engaged in malpractice in another case not long before his representation of Mr. Bryant, the Georgia Supreme Court "placed undue reliance on the assumed reasonableness of [trial] counsel's [decision-making]" in Mr. Bryant's case. *Sears v. Upton*, 561 U.S. 945, 953 (2010) (paraphrasing). The Georgia Supreme Court's contravention of *Strickland*, by failing to consider *all* relevant circumstances attending counsel's representation of Mr. Bryant, fatally compromised its overall analysis of trial counsel's performance in Mr. Bryant's case.

For example, a reviewing court mindful, per *Strickland*, of trial counsel's past history of neglectful and inattentive performance would have more carefully scrutinized, justifiably, counsel's rationale for his failure to adduce any information about Bridges' plea deal, including his counter-factual characterization of Bridges' probated sentence as "quite harsh" (HT 875). A reviewing court more skeptical of counsel's performance due to his history of malpractice would have given more scrutiny to the actual record of counsel's conduct at trial, where his badgering cross-examination of Bridges could easily be characterized as "beating up" on her, thus giving the lie to counsel's post-hoc rationale that he did not want to "beat up on" Bridges by revealing crucial information bearing on her motivation to shade the truth to Mr. Bryant's jury. Such a court would also have paid close attention, per *Wiggins* and *Richter*, *supra*, to counsel's articulation of his strategy *at the time of trial*, which would have shown that questioning Bridges about the scope of

[17] "The Sixth Amendment . . . . relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

the plea deal, or otherwise adducing evidence of the deal, would have been *consistent* with counsel's stated strategy of demonstrating that "the fear of prosecution . . . made [Bridges] plead in this case." HT 376.

C. The Georgia Supreme Court improperly failed to meaningfully factor into its assessment of counsel's performance the potential prejudice stemming from counsel's failure to adduce evidence of Bridges' plea deal at trial.

In our adversarial system of justice, a defendant's right to cross-examination is an essential safeguard of fact-finding accuracy. It is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The state habeas court properly gauged counsel's performance in light of what counsel knew about the state of the evidence at the time of trial and the significance of Kimberly Bridges' testimony within the state's case, concluding that "no reasonable attorney would not examine her about her plea deal and bring the issue of the requirement for her testimony before the jury." ROA 35. The habeas court correctly found that "[n]o other witnesses were more important for the state than the alleged eyewitness, Bridges." *Id*. Bridges' testimony was particularly important to the State's case because she attested "that they had a prior agreement that he would commit the act of aggravated sexual battery as she watched." *Id.* The other witnesses could offer only second-hand hearsay testimony. Even absent effective use of the plea information, the case was "close and hinged on witness credibility." *Cartwright*, 305 Ga. at 380 (finding counsel's failure to impeach key state witness prejudicially deficient).

It should have been obvious to competent counsel that failure to alert the jury to the scope of the plea deal would be potentially devastating. "Trial counsel's failure [would have] prevented the jury from hearing what motive" Bridges may have had in testifying against Bryant. *Taylor v. Metoyer*, 299 Ga. 345, 349 (2016). "[I]t [would] also [have] prevented the jury from learning that

the co-defendant[] and the State had been less than forthcoming about their agreement[]." *Id.* Without key facts about Bridges' plea agreement, the jury could not accurately weigh Bridges' credibility and would foreseeably have an extremely misleading impression as to why she pled guilty, *e.g.*, because the "truth had to come out."

If the State had not disclosed the terms of Bridges' plea agreement to the defense, it is difficult to believe that a reviewing court would not have found reversible *Brady*[18]/*Giglio*[19]/*Napue*[20] error. Bridges' false and misleading testimony about why she pled guilty (never corrected by the prosecution or the defense) deprived the jury of critical facts necessary to a reliable assessment of Bridges' credibility and resulted in a trial lacking in the "meaningful adversarial testing"[21] to which Bryant was constitutionally entitled.[22] Yet the Georgia Supreme Court ignored the misleading nature of Bridges' testimony in ratifying trial counsel's purported strategy of not "beat[ing] [Bridges] up" by sparing her any questions about the facts of her plea agreement. Impeaching a key witness who had just arguably lied about the true incentives

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[18] *Brady v. Maryland*, 373 U.S. 83 (1963).

[19] *Giglio v. U.S.*, 405 U.S. 150 (1972).

[20] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

[21] *U.S. v. Cronic*, 466 U.S. 648, 656 (1984).

[22] This is the thrust of *Giglio* -- to "ensure that the jury knows the facts which might motivate a witness in giving testimony." *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986). *See also, Napue*, 360 U.S. at 270: "Had the jury been apprised of the true facts, it might have concluded that [the witness] had fabricated testimony in order to curry the favor of the [prosecutor] . . ."

behind her testimony could have made the difference for Mr. Bryant.[23] Acknowledging the misleading quality of Bridges' testimony reveals that counsel's purported "strategy" was patently unreasonable. Here, "[a]s the only eyewitness to events . . ., [Bridges] was the key to the State's case; yet [counsel], who had the weapons to discredit [Bridges], allowed [Bridges]' testimony to go unchallenged." *Higgins v. Renico*, 470 F.3d 624, 634 (6th Cir. 2006).

Further, the Georgia Supreme Court's assessment that Wyatt's purported desire not to "beat [Bridges] up" was worthy of deference as a "strategic" decision, and that his performance was not "patently unreasonable" under the circumstances is wildly inconsistent with its own prior precedent[24] and the general consensus within the circuit courts that the failure to impeach the state's key witness with evidence strongly proving a motive to shade the truth is patently unreasonable attorney performance.

"Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel. . . . The reasonableness of the investigation depends, in part, upon the importance of the witness to the prosecution's case." *Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003) (citations omitted). *See, e.g., Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999) (finding trial counsel's failure to impeach ineffective, noting that although "our review of counsel's performance is highly

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[23] Where a "remunerative relationship" exists between a witness and the State, it can assist the defense on cross-examination by demonstrating the witness' bias and, even more importantly, by exposing the witness' testimony as to the lack of government inducements as lies. *Bagley v. Lumpkin*, 798 F.2d 1297, 1301-02 (9th Cir. 1986). Where evidence shows that critical State witnesses lied under oath, "it is contrary to reason that confidence in the outcome of the case would not be undermined." *Id.* at 1301. This is particularly true where "the lies relate to the reasons why they testified." *Id.*

[24] *See, e.g., Metoyer, Cartwright, supra*.

deferential, 'it borders on the inconceivable that a trial attorney would fail to inform a jury of the Sheriff['s] . . . dishonesty and win at all costs attitude.'"); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (finding deficient performance where counsel failed to confront the prosecution's star witness with inconsistent statements, thus "sacrific[ing] an opportunity to weaken the star witness's inculpatory testimony"); *Peoples v. Lafler*, 734 F.3d 503 (6th Cir. 2013) (trial counsel failed to impeach the credibility of key witnesses with known false testimony; new trial granted); *Reynoso v. Giurbino*, 462 F.3d 1099 (9th Cir. 2006) (trial counsel's failure to question the two eyewitnesses about their expectation of receiving a reward for their participation in the prosecution of the defendant was ineffective assistance of counsel that necessitated setting aside the conviction); *Smith v. Wainwright*, 799 F.2d 1442 (11th Cir. 1986) (counsel ineffective for failing to impeach with prior inconsistent statement); *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) (Trial counsel's failure in this capital case to investigate and present the inconsistent statements that were made by the only survivor of a robbery (three others were killed) – inconsistencies about identification that dramatically contradicted the defendant's own alleged confession – amounted to ineffective assistance of counsel which required setting aside the conviction); *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (finding ineffective assistance of counsel where, among other things, counsel's "failure to investigate prevented an effective challenge to the credibility of the prosecution's only eyewitness"); *Berryman v. Morton*, 100 F.3d 1089, 1099 (3d Cir. 1996) (finding deficient performance where counsel failed to raise the victim's prior inconsistent identification testimony, given that "[t]he reliability of this victim's uncorroborated identification of [the defendant] cut[] directly to the heart of the only evidence against [the defendant]"); *Tomlin v. Myers*, 30 F.3d 1235, 1238 (9th Cir.1994) (finding deficient performance where counsel failed to challenge an eyewitness's in-court identification in a case that "hinge[d] on an eyewitness's

testimony"); *Blackburn v. Foltz*, 828 F.2d 1177, 1183 (6th Cir.1987) (finding deficient performance where counsel failed to impeach an eyewitness with previous inconsistent identification testimony when "weakening [the witness's] testimony was the only plausible hope [the defendant] had for acquittal"); cf. *Guzman v. Sec'y Dep't of Corr.*, 663 F.3d 1336 (11th Cir. 2011) (granting habeas relief based on uncorrected false testimony that key witness received no benefit for her testimony); *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986) (court granted writ due to false testimony that witness did not receive benefit, noting that "[t]he jury . . . was entitled to know whether [the witness] was testifying under an agreement that might make it possible for him to avoid prosecution for the . . . murder, and, if he was, to consider this in measuring his credibility" and that "[e]ffect on the sentence is implicated because the [witness's] testimony . . . supplied evidence of rape as an aggravating circumstance"); *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005) ("Impeachment evidence is especially likely to be material when it impugns the testimony of a witness who is critical to the prosecution's case."); *Horton v. Mayles*, 408 F.3d 570, 580–81 (9th Cir. 2005) (holding that 'where a witness is central to the prosecution's case, the defendant's conviction demonstrates that the impeachment evidence presented at trial likely did not suffice to convince the jury that the witness lacked credibility' and that, therefore, any impeachment evidence not introduced at trial takes on greater significance).

Thus, in Mr. Bryant's case, given the importance of the star witness's testimony, it is clear that the outcome of the trial was "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466 U.S. at 696.

CONCLUSION

The Georgia Supreme Court's decision in Mr. Bryant's case flies in the face of *Strickland*'s demand that courts evaluate the totality of the circumstances surrounding trial counsel's conduct, to include an assessment of counsel's prior experience, as well as counsel's actual conduct and reasoning at the time of trial - not counsel's post-hoc reasoning offered in the setting of hearings on allegations of counsel's ineffective assistance.

Mr. Bryant is serving a sentence of life without parole on the basis of flimsy evidence and the testimony of a lone eyewitness who cut an extremely favorable deal with the prosecution and then lied about it on the stand. Trial counsel unreasonably let it happen.

This Court should grant the Petition for Writ of Certiorari in order to correct the Georgia Supreme Court's erroneous determinations of law and fact and to bring it in line with this Court's precedents.

Respectfully submitted,

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No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

STEVEN BRYANT,

Petitioner,

-v-

SHAWN EMMONS, Warden,
Valdosta State Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail or hand delivery, on counsel for Respondent at the following address:

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This 2nd day of March 2022.

Attorney