No. 22-_____

In The
Supreme Court of the United States

DOUGLAS TYRONE ARMSTRONG,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an incarcerated inmate's trial counsel provided constitutionally deficient representation under the "prevailing norms" of the American Bar Association standards of professional competence, which prejudiced the inmate if all the evidence adduced at trial and in the habeas proceeding is considered, when that counsel openly admitted to failing to conduct an investigation into the inmate's innocence prior to the inmate's capital-murder trial.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b)(i), the caption includes all parties appearing here and before the Fifth Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner is an individual.

RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), the following proceedings in federal courts are directly related to this case: *Armstrong v. Lumpkin*, United States District Court for the Southern District of Texas, USDC No. 7:18-CV-356.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on July 21, 2022. (App. 1.) This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1254(1), so long as this petition is filed with the Clerk of this Court within 90 days after the July 21, 2022 entry of judgment. Sup. Ct. R. 13(1). Justice Alito granted Petitioner's application to extend this deadline, such that this petition is due to be filed by November 18, 2022.

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

"In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Petitioner Douglas Tyrone Armstrong is an innocent man, incarcerated for life in the Texas prison system based on a conviction that was the product of his trial counsel's constitutionally deficient performance. With nowhere left to turn, he comes to this Court for relief.

Rafael Castelan was murdered on the evening of April 21, 2006. (App. 3.) It is undisputed that Armstrong came into contact with Castelan while Castelan was dying. (App. 4.) Armstrong, who was walking home from a bar, came upon Castelan, who had already been mortally wounded. (*Id.*) At about that same time, two eyewitnesses happened to drive up to the scene, and thought they saw Armstrong attacking Castelan. (*Id.*) What they saw instead were Armstrong's efforts to help Castelan, who by that point had bled out to the point of not being able to walk under his own power.

It is also undisputed that, when Armstrong saw the headlights of the eyewitnesses' van, he panicked, dropped Castelan, and ran back to the bar. (App. 4.) This flight seemingly cemented the eyewitnesses' belief that it was Armstrong who had attacked Castelan.

Armstrong was arrested within minutes of the crime being reported. (App. 35-36.) He was interrogated three hours later, at 1:00 a.m. (App. 38.) During this interrogation, Armstrong consistently explained that he had come upon Castelan, that he tried to help Castelan, and that he panicked and fled when he saw a van approaching:

> I was going home, walking down the street. I was going down the street and I seen that man laying down and I looked over there, I walked over there and picked the man up. And the man was talking. I couldn't understand. I said man, just be quiet. And I had the man in my arm and I walked with the man right up there. And I seen a van or something pull up, pull out, and I got scared and I left the man and I took off running.

(App. 39-41.)

Armstrong was charged with capital murder the following day, Sunday, April 23, 2006. Because he was an indigent charged with capital murder, the District Court for Hidalgo County (the "trial court") appointed counsel to assist with Armstrong's trial, which was bifurcated into a guilt/innocence phase and a sentencing phase. (App. 32; *see also* App. 47 (describing Texas Court of Criminal Appeals' conclusion that counsel's deficient performance as to investigating mitigation evidence prejudiced Armstrong's sentencing).)

In the more than seven months leading up to trial in January 2007, the appointed counsel did little, if anything, to develop exculpatory evidence—despite Armstrong's repeated and consistent explanation to them and to police that he was innocent. In fact, Rogelio Garza, the lawyer with primary responsibility for the guilt/innocence phase of the trial, almost wholly relied on the police investigation into the crime. (*See* App. 65 n.17 (Garza believed he had "all the information" developed from "reviewing the police files,

meeting with [Armstrong], visiting the crime scene, reviewing [a private investigator's] investigative reports, assessing the credibility of the eyewitnesses (based on their statements to police and to [the private investigator], and consulting with co-counsel").) Further, trial counsel did not retain any forensic experts to investigate, analyze, and explain the significance of the blood spatter and pattern evidence at the crime scene. (App. 59.) Ultimately, in his testimony at the habeas proceeding, "Garza acknowledged understanding his obligation to conduct a thorough investigation that was independent of the police investigation, but stated: 'Did I do it? No.'" (App. 65.)

Following defense counsel's failure to investigate the existence of exculpatory evidence, trial counsel's defense strategy was to cross-examine prosecution witnesses[1] and to play for the jury Armstrong's videotaped statement to the police. (App. 37-38.) The jury heard no corroborating evidence to support Armstrong's statement, because defense counsel did not look for such corroborating evidence.

In January 2007, Armstrong was convicted of capital murder and sentenced to death. (App. 32.) His conviction and sentence were upheld on direct appeal. (App. 43-44.) Armstrong petitioned the trial court for state-law habeas corpus relief, arguing, inter alia, that

[1] To the extent that cross-examination of the prosecution's witnesses is a strategy, as opposed to the minimum expected of trial counsel, trial counsel's cross-examination was not informed by any independent factual investigation in support of Armstrong's defense.

his conviction and sentence were the result of constitutionally deficient assistance of counsel because Armstrong's trial counsel had not conducted an adequate, independent investigation into either exculpatory evidence to support his innocence or mitigating evidence to reduce his sentence. (App. 44-45.)

In support of his petition, Armstrong presented critical pieces of witness testimony and forensic evidence that were not discovered prior to trial due to his trial counsel's inadequate investigation. (App. 60-62.)

First, Faustino Barrera—who was Castelan's neighbor—apparently heard the murder from his home as it occurred. The night of the murder, Barrera heard Castelan cry out, "¿por qué yo?" ("why me?") from outside of his apartment. (App. 76-77.) Barrera did not go or look outside to see what was going on because he was scared and feared for his life. (App. 77.) Approximately twenty minutes later, Barrera heard a woman—likely one of the prosecution's eyewitnesses—scream out, and shortly thereafter, he heard the sirens of the police cars speeding to the scene. (App. 80.)

Second, Max Guerra (who was briefly interviewed by trial counsel's private investigator), saw Armstrong several blocks away from the murder about three minutes before Guerra heard police sirens, and stated that nothing about Armstrong suggested he had been in a fight, was in a rush, or was angry. (App. 82-83.)

Third, blood spatter and blood pattern evidence, as testified to by habeas counsel's expert witnesses, demonstrate that the physical evidence from the crime

scene simply does not match the eyewitnesses' version of events. (App. 143-44.) The prosecution's star witness supposedly saw Armstrong and Castelan fighting, and that Castelan was already covered in blood. (App. 146.) At the scene, there was a large pool of blood thirty feet from where Castelan's body was found by the eyewitnesses and the police then they arrived on the scene. (App. 159-60; *see also* App. 225 (photograph showing large pool of blood several feet from the body).) Habeas counsel's forensic expert testified that this pool of blood, in conjunction with a stab wound on Castelan's jugular, indicates that Castelan had lain in that location (and not where his body was found) for several minutes, and that he would not have had the power to rise to his feet and walk, unassisted, for thirty feet. (App. 159-60.) Further, habeas counsel also presented a forensic expert's opinion that the blood on Armstrong's clothes was "consistent with 'direct contact with the blood body or clothing of Castelan,' such as carrying or assisting Castelan." (App. 22.)

All of this evidence is consistent with Armstrong's account that he came upon an already-wounded Castelan. (App. 23.) But defense counsel, who had not investigated Armstrong's innocence and made no effort to retain forensic experts, had no knowledge of these facts and leads.[2]

The trial court considered all this evidence and recommended denial of the relief sought. (App. 45.)

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[2] At the habeas proceeding, Garza agreed "that some of the evidence developed by [Armstrong's] habeas counsel would have been helpful had it been available at trial. . . ." (App. 66-67 n.18.)

Upon review, however, the Texas Criminal Court of Appeals determined Armstrong's trial counsel had conducted a deficient investigation related to the sentencing phase of his trial and vacated his death sentence.[3] (App. 45-48.) The Texas Criminal Court of Appeals considered and denied all other relief. (App. 47-48 (noting that the Texas Criminal Court of Appeals "summarily denied the other claims in Petitioner's state habeas application, including his claims challenging his capital murder conviction (which he is now asserting in his federal petition)").) On remand for resentencing, the trial court sentenced Armstrong to life without parole. (App. 48.)

Following the exhaustion of his state court remedies, on November 14, 2018, Armstrong petitioned the United States District Court for the Southern District of Texas (the "district court") for federal habeas corpus relief, arguing that, like his death sentence, his conviction was tainted by constitutionally deficient assistance of counsel. (App. 30.) The petition was submitted under the authority of 28 U.S.C. § 2241, 28 U.S.C. § 2254, and Fed. R. Civ. P. 81(a)(4). The parties brought cross-motions for summary judgment. (App. 30.) By consent, the cross-motions were considered by the

[3] Armstrong also presented significant evidence in support of his state-court habeas petition regarding his childhood and personal circumstances that tended to mitigate against the death penalty. The mitigation evidence is not germane to this petition beyond the fact that the same counsel who, as determined by the Texas Court of Criminal Appeals, failed to conduct a constitutionally adequate investigation of mitigation evidence, were *also* in charge of investigating his innocence.

Honorable Peter E. Ormsby (the "magistrate judge"). The magistrate judge recommended that summary judgment be granted against Armstrong and that habeas relief be denied. (App. 30-31.) Over Armstrong's objection, the district court adopted the magistrate judge's report and recommendation, granted Appellee's motion for summary judgment and dismissed the action. (App. 26-28.) In doing so, however, the district court granted Armstrong a certificate of appealability as to the ineffective-assistance-of-counsel claim based upon his trial counsel's failure to investigate. (App. 27-28.)

Armstrong timely appealed to the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"), pursuant to 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(1)(A). The Fifth Circuit affirmed the district court's judgment, denied Armstrong's petition for writ of habeas corpus, and remanded the matter to the district court for further proceedings in accordance with the Fifth Circuit's opinion. In an unpublished opinion, the Fifth Circuit concluded that, despite Armstrong's trial counsel's admission that he failed to investigate Armstrong's innocence, trial counsel had made "strategic decisions" to not perform this investigation.

REASONS THE PETITION SHOULD BE GRANTED

1. Certiorari should be granted because the Fifth Circuit has decided an important question of federal law that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

This Court may grant review on a writ of certiorari when a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). As set forth below, the Fifth Circuit's decision in this case conflicts with this Court's ineffective assistance of counsel jurisprudence, as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

a. The Fifth Circuit's decision conflicts with this Court's standard for finding deficient performance of counsel in *Strickland* and its progeny, which incorporate the American Bar Association's standards.

Under *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. At the habeas proceeding, Armstrong's trial counsel in charge of the guilt/innocence phase of trial "acknowledged understanding his obligation to conduct a thorough investigation that

was independent of the police investigation, but stated: 'Did I do it? No.'" (App. 65.)

This Court has adopted the American Bar Association's ("ABA") "[p]revailing norms of practice," which are to guide a court's inquiry into whether an attorney's capital defense work was constitutionally adequate. *Strickland*, 466 U.S. at 688; *see also Wiggins v. Smith*, 539 U.S. 510, 511 (2003); *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (ABA "standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions"); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (applying ABA standards). The United States Courts of Appeal, including the Fifth Circuit in other cases, have followed this precedent. *See Sanders v. Davis*, 23 F.4th 966, 984 (9th Cir. 2022) ("Both the Supreme Court and our court have long referenced the American Bar Association . . . Standards for Criminal Justice as indicia of the obligations of criminal defense attorneys.") (internal quotation removed); *see also Hooks v. Workman*, 689 F.3d 1148, 1201 (10th Cir. 2012) (applying ABA standards to find counsel's performance during sentencing "woefully inadequate"); *Richards v. Quarterman*, 566 F.3d 553, 564-68 (5th Cir. 2009) (applying ABA standards to find counsel's failure to interview witnesses prior to trial "fell below an objective standard of reasonableness and was constitutionally inadequate").

Under the ABA's "prevailing norms," defense counsel in a capital case has an absolute duty to

conduct a "thorough and independent investigation" of their client's guilt or innocence. AM. BAR ASS'N, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (the "ABA GUIDELINES"), Guideline 10.7(a)(1) (2003). The duty attaches "regardless of . . . overwhelming evidence of guilt" and regardless of "any statement by the client that evidence bearing upon guilt is not to be collected. . . ." *Id.*; *see also* AM. BAR ASS'N, *Criminal Justice Standards for the Defense Function*, Standard 4-4.1(c) ("Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation."), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited Oct. 18, 2022). The State Bar of Texas adopted these standards in April 2006. BD. OF DIRS. OF STATE BAR OF TEX., *Guidelines and Standards for Texas Capital Counsel*, TEX. BAR J., Nov. 2006, at 967 (explaining that the "guidelines and standards articulate the statewide standard of practice for the defense of capital cases") & 971 (Guideline 11.1(A)(1) explains that "[t]he investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented."), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/Standards/State/texas-bar-association-adopted-version-of-aba-guidelines.pdf (last

visited Oct. 18, 2022). Therefore, these "prevailing norms" were clearly articulated by the time Armstrong's defense counsel were appointed.

In a capital case, there can be no constitutionally adequate "assistance" when counsel has admittedly failed to meet this duty, regardless of whatever strategy the counsel chooses to employ after that fatal failure. Put a different way, strategic decisions must be informed by investigation, and the failure to investigate cannot be a strategic decision in and of itself.

The Fifth Circuit inappropriately credited trial counsel's proffered explanation that they did not investigate guilt because it was too "risky," and investigation may have revealed evidence that might have inculpated Armstrong. (*See* App. 19 (decision to not investigate forensic evidence was reasonable due to hypothetical risk that forensic evidence "might reveal Armstrong *did* touch" an item belonging to Castelan) (emphasis in original).) But this contradicts the ABA standards, which require nothing short of a full investigation in a death-penalty case, "regardless of . . . overwhelming evidence of guilt" and regardless of "any statement by the client that evidence bearing upon guilt is not to be collected. . . ." ABA GUIDELINES, Guideline 10.7(a)(1) (2003). The reason for this is obvious: the stakes cannot be higher than when an accused faces a death sentence.

Further, the possibility that inculpatory evidence may be discovered in trial counsel's investigation is not a risk to the defendant. "Generally, the State has no

right of discovery against the Defendant in a criminal case." *Morrison v. State*, 575 S.W.3d 1, 13 (Tex. App. 2019). While there are some exceptions to that rule, none would have applied to an investigation into witnesses and physical evidence related to an already-committed murder. *See id.* at 13 n.8 (describing exceptions). Thus, without any justification for their lack of investigation, trial counsel's admitted failure to investigate innocence is an "error . . . so serious as to deprive [Armstrong] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The Fifth Circuit was far too forgiving of trial counsel's testimony that

> he thought emphasizing the inconsistency of the blood spatter with [an eyewitness's] testimony would not have helped because [the eyewitnesses] were both adamant about what they saw. In his view, he thought the better avenue of investigation and trial strategy was to discredit the eyewitness testimony.

(App. 22.) There is no internal logic to these two sentences. It cannot be sound strategy to "discredit the eyewitness testimony," while also not pursuing investigation that would reveal facts inconsistent with their testimony. Showing the jury evidence that contradicts a witness's testimony is a standard means of discrediting a witness. And trial counsel's conclusion that the eyewitnesses were "adamant" only underscores the need for trial counsel to conduct an investigation that would uncover contradictory evidence.

At the end of the analysis, trial counsel simply failed to investigate Armstrong's innocence. There was no justification or rationalization for that failure. Under *Strickland* and its application of the ABA's "prevailing norms," such investigation is an absolute duty. The Fifth Circuit erred by failing to recognize that absolute duty.

b. The Fifth Circuit's decision conflicts with this Court's standard for prejudice under *Strickland*.

This Court has held that a petitioner has been prejudiced by ineffective assistance of counsel when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id*. It is not enough to show that the errors had "some conceivable effect on the outcome." *Id.* at 693. A reasonable probability need not be proof by a preponderance that the result would have been different, but it must be a showing sufficient to "undermine confidence in the outcome." *Id.* at 694.

This Court has been clear that, when determining whether a petitioner was prejudiced, "a court hearing an ineffectiveness claim must consider the *totality of the evidence before the judge or jury*." *Id.* at 696. Following *Strickland*, the Court has clarified that courts are to make the "prejudice determination" based on the "totality of the available mitigation evidence—both

that adduced at trial, and the evidence adduced in the habeas proceeding." *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)); *see also Wiggins*, 539 U.S. at 538 (relying on evidence that may have not been admissible at state court proceeding, because the court considers "the totality of the evidence—'both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*'" (quoting *Williams*, 529 U.S. at 398 (emphasis and alteration in original); *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (finding Florida Supreme Court unreasonably applied *Strickland* because it "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"). While *Williams* was decided on questions of whether counsel's deficiency was prejudicial as to mitigation evidence,[4] there is nothing in the opinion that necessarily limits its application only to mitigation evidence. The Sixth Amendment, and *Strickland*, apply to both the conviction and punishment phases of trial. *Cf. Williams*, 529 U.S. at 399 (citing *Strickland*, 466 U.S. 668). Instead, the Court's central holding in *Williams* is that a court reviewing a habeas petition must consider "the entire postconviction record" and weigh all the newly discovered evidence *together* against the evidence presented at trial. *Id*.

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[4] There was no question in *Williams* related to the conviction; the lower courts had determined that trial counsel in that case "competently handled the guilt phase of the trial. . . ." *Williams*, 529 U.S. at 395.

This standard—reviewing the *totality* of evidence under a prejudice analysis—is consistently applied in the United States Courts of Appeal. *See*, *e.g.*, *Henry v. Poole*, 409 F.3d 48, 66-67 (2d Cir. 2005) (weighing prejudicial effect of defense counsel's incorrect alibi evidence against "lack of any evidence to connect [petitioner] to the crime other than his selection from an arguably suggestive lineup"); *Grant v. Lockett*, 709 F.3d 224, 236-37 (3d Cir. 2013) (weighing prejudicial effect of impeachment evidence not presented at trial against supposed inculpatory evidence at trial); *Andrews v. Davis*, 944 F.3d 1092, 1117 (9th Cir. 2019) (weighing prejudicial effect of failure to present "background of severe abuse, neglect, and disadvantage" suffered by petitioner against evidence presented to jury at sentencing).

Here, the Fifth Circuit departed from this standard by *separately* analyzing and then discrediting each piece of newly proffered evidence without regard or reference to the *other* pieces of evidence uncovered by habeas counsel.

For example, the Fifth Circuit found that the failure to find Barrera—despite the fact that he lived immediately next door to the crime scene—was not prejudicial because Barerra's testimony, which was that he heard Castelan cry out 20 minutes before he heard the police sirens, "does not necessarily mean that [what Barrera heard] was when the attack occurred." (App. 14.) The Fifth Circuit also concluded that Barrera's testimony "does not eliminate Armstrong as the one perpetrating the attack at that time."

(*Id.*) The Fifth Circuit went on to dismiss Barerra's testimony as "inconsistent with evidence presented at trial." (App. 15.) But this is where the Fifth Circuit's error lays—its conclusions are undermined by *other* pieces of evidence habeas counsel presented.

Barrera's testimony must be considered along with Guerra's testimony. Together, those two witnesses place Armstrong several blocks away from the crime scene when Castelan was attacked. Barrera's testimony indicated that a terrifying assault occurred about 20 minutes before police sirens sounded; Guerra's testimony places Armstrong walking leisurely home from the bar toward the crime scene a few minutes before police sirens began to sound. That evidence together does "eliminate Armstrong as the one perpetrating the attack. . . ." (App. 14.) Guerra's testimony supports Armstrong's statement that he was not at the scene at the time Barrera heard the attack—when Barrera heard Castelan scream "¿por qué yo?", Armstrong was blocks away.

More egregiously, the Fifth Circuit did not consider how the forensic evidence submitted at the habeas proceeding supported Barrera's and Guerra's testimony. The Fifth Circuit concedes that the large

> pool of blood being consistent with Castelan being cut in the jugular vein and laying by the sidewalk for several minutes is objective evidence corroborating Armstrong's statement that he found Castelan laying on the ground near the sidewalk. It also tends to discredit [the eyewitness's] claim that she saw

> Armstrong stab and slash Castelan by the van in the alley [30 feet away from the pool of blood].

(App. 23.) The Fifth Circuit, however, does not acknowledge how this evidence supports Barrera's and Guerra's testimony. For instance, a man attacked so viciously that he suffered multiple wounds and had his jugular severed could be expected to cry out "¿por qué yo?" in a manner that left Barrera himself terrified. Further, the large pool of blood caused by the attack—a pool that could have only resulted from the victim bleeding out on the ground for a significant period of time prior to the eyewitnesses' arrival at the scene—makes Geurra's testimony indicating that Armstrong was not covered in blood just a few minutes before the police sirens were heard all the more significant.

This evidence corroborates Armstrong's version of events and, together with the evidence that Armstrong's DNA and fingerprints were not on the murder weapon, demonstrates that *someone else* committed the crime.

And that is the ultimate point. The totality of the evidence, "both that adduced at trial, and the evidence adduced in the habeas proceeding" creates a likelihood that someone other than Armstrong killed Castelan. Armstrong was therefore prejudiced by his trial counsel's failure to investigate his innocence.

CONCLUSION

For more than fifteen years, Armstrong has been incarcerated because of his trial counsel's failures to investigate his innocence, and the evidence adduced by habeas counsel demonstrates that Armstrong was prejudiced by that failure. This Court should issue a writ of certiorari to the Fifth Circuit for its failure to follow this Court's jurisprudence under *Strickland*, which is a crucially important line of cases animating the Sixth Amendment's promise that all accused shall receive the effective assistance of counsel.

Respectfully submitted,

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