No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

DEONTE LEWIS,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITON FOR WRIT OF CERTIORARI

Deonte Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth District Court of Appeals rejecting his Sixth Amendment ineffective assistance of counsel claim, which, in doing so, applied an irrebuttable presumption that trial counsel's performance was competent.

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QUESTION PRESENTED

This matter asks this Court: Whether the presumption of reasonable trial strategy that this Court articulated in *Strickland* created an irrebuttable bar to performance competency challenges in the ineffective assistance of counsel context? If the answer to that question is no, then the presumption of competence in assessing counsel's trial tactics must be overcome when the record demonstrates that counsel's strategy was predicated upon a misunderstanding of the law surrounding the defendant's case.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The decision of the Eighth District Court of Appeals affirming petitioner's conviction and sentence was decided on November 12, 2020, and published as *State v. Lewis,* 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265 (Pet. App. 1-30). The Ohio Supreme Court's order declining jurisdiction over the matter was issued on February 8, 2022 and published under *State v. Lewis*, 165 Ohio St. 3d 1532, 2022-Ohio-364. The Court's April 12, 2022, denial of Lewis's motion for reconsideration is published under *State v. Lewis*, 166 Ohio St. 3d 1469, 2022-Ohio-1163, 2022 Ohio LEXIS 733, 185 N.E.3d 114.

JURISDICTION

Petitioner seeks review from the November 12, 2020 decision of the Eighth District Court of Appeals affirming his conviction and sentence. *State v. Lewis,* 8th Dist. Cuyahoga No. 108463, 2020-Ohio-5265. On June 27, 2022, Justice Kavanaugh extended the time within which to file a petition for writ of certiorari to and including September 9, 2022. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the 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.

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> 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.

INTRODUCTION

On trial for purposeful aggravated murder in connection with the death of his girlfriend's daughter, Deonte Lewis watched his attorneys ask the trial court for an instruction on negligent homicide, which requires the use of a firearm or other deadly weapon, even though no such implement was involved in this case. The child died from blunt force trauma and neglect. Under Ohio law, the available lesser included offense instruction was reckless homicide, an offense fitting the prosecution's theory of the case – that Deonte should have known the child was dying and did nothing. That instruction was never requested.

Deonte Lewis listened with the jury as the prosecution presented evidence that the child's mother, his codefendant, committed acts of physical violence against the child well before Deonte started dating her. Those previous violent acts made it more likely that the jury would conclude that the child was purposely killed. Deonte's attorneys understood in advance of trial that this was damaging evidence (they filed a motion to sever Deonte's trial from that of his girlfriend, but it was

denied). Yet counsel uttered no objection to the evidence and made no request for a limiting instruction to separate Deonte from his girlfriend's prior acts.

Deonte Lewis watched helplessly as the prosecutors commented on the fact that no one had testified that Deonte lived with his parents and not his girlfriend. Deonte – the logical source of such information – had not testified to this fact. But that is because Deonte did not testify at all, as was his Fifth Amendment right. If Deonte's silence was deafening, so too was the silence of attorneys who failed to object to this impermissible prosecutorial argument. In those closing remarks prosecutors also told the jury to think of Deonte and his codefendant interchangeably, repeatedly conflating evidence they had introduced relevant only to the girlfriend, but then encouraged the jury to weigh it while determining Lewis's guilt, again with no objection from Deonte's lawyers.

When Lewis sought a reversal and new trial based on ineffective assistance of counsel, the Eighth District Court of Appeals rejected the challenge. According to the state court, his counsels' work on the case was fine, and characterized the acts and omissions noted above as reasonable "all or nothing" trial strategy. That decision hides, or at least utterly avoids, that counsel did not undertake an "all or nothing" strategy.

To the contrary, counsel requested a lesser included offense instruction, thus hoping to give the jury an intermediate option. The problem there, was that counsel requested the wrong instruction, reflecting that they did not know the law applicable to their client's case. Further, having recognized that a joint trial was

going to be prejudicial, counsel then failed to request an instruction limiting the jury's consideration of irrelevant but damaging evidence. Counsel also failed to object to improper arguments by trial prosecutors that left the jury with the impression that Petitioner should have testified and that he acted in concert with the child's mother to bring about her death, among other things.

It is true that "[s]trategic choices made *after thorough investigation of law* and facts relevant to plausible options" may well be unchallengeable. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added). While we do presume that counsel acts competently, it should go without saying that such a presumption does not create unfettered deference. A requirement, indeed, a Constitutional right, to competent legal representation against criminal charges must mean something. This Court should grant this Petition for Certiorari to provide all courts, and especially Ohio's, with a baseline understanding of what constitutes trial strategy worthy of deference. Because the state court's decision in this case illustrates that many reviewing courts have transformed the presumption of competence into something incapable of being rebutted.

This case is not an outlier. With alarming consistency, Ohio reviewing courts casually reject performance prong challenges to trial counsel's work as "reasonable trial strategy." See, e.g. *State v. Lloyd*, 8th Dist. Cuyahoga No.108463; *State v. Clayton*, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980); *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278; *State v. Vogt*, 4th Dist. Washington No.

17CA17, 2018-Ohio-4457; *State v. Viers*, 7th Dist. Jefferson No. 01JE19, 2003-Ohio-3483.

Yet, if a trial attorney can actively get the law wrong, and be found to have acted reasonably, then the presumption is irrebuttable, and counsel will always be deemed effective regardless of what the record shows. That is not what the Sixth Amendment guarantees.

Legal Context

Nearly 40 years ago, this Court made clear that "'the right to counsel is the right to the *effective assistance* of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674, quoting *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970). It had further deemed that right to be of a "fundamental character." *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Accordingly, in *Strickland* this Court resolved that a litigant demonstrates ineffective assistance of counsel upon a showing that counsel's performance was objectively unreasonable, and that the deficient performance prejudiced the client.

The question then becomes, what is reasonable trial strategy? In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), this Court found that, whatever strategy counsel employed, it needed to be informed by a complete investigation into the defendant's background. Specifically, this Court observed,

> We base our conclusion on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *Id.,* at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.' *Id.,* at 691, 80 L

Ed 2d 674, 104 S Ct 2052.

Wiggins at 514.

True, *Wiggins* was a death penalty case and the ineffective performance claimed there involved an inadequate mitigation investigation. But the analysis should reflect similarly on the predicament Petitioner faced. At Petitioner's trial, his counsel consistently failed to object to patently objectionable evidence and arguments, failed to request limiting instructions, and, when they did actually request an instruction for a lesser included offense, they picked the wrong one.

Counsel's strategic choices in this case, to the extent there were any, were based on a misapprehension of, or unfamiliarity with, the law. When a legal professional makes legal decisions on behalf of their client that are uninformed, those decisions are not reasonable. Under such a circumstance, the presumption of competence should be overcome.[1] Deonte Lewis is asking this Court to grant certiorari, consider the question presented above, and reach the following conclusion:

> Where the record demonstrates that trial counsel's decision-making was not informed by an accurate understanding of the applicable law and the case's facts, the reviewing court will not presume that counsel's performance was competent.

[1] A "presumption" has been defined as "a rule of law, statutory or judicial, by which [a] finding of a basic fact gives rise to existence of presumed fact, until [the] presumption is rebutted." *United States v. Chase*, 18 F.3d 1166, 1172 n. 7 (4th Cir. 1994) (quoting Black's Law Dictionary 1185 (6th ed. 1990)).

STATEMENT OF THE CASE

On March 11, 2018, a Cuyahoga County grand jury issued an indictment charging Petitioner Deonte Lewis and his girlfriend jointly with aggravated murder, murder, felonious assault, permitting child abuse, three counts of child endangering, and tampering with evidence. The charges followed the death of Petitioner's girlfriend's daughter, a four-year-old child. Petitioner pleaded not guilty and asked the trial court to sever his case from the child's mother. Petitioner argued that a joint trial would compromise his right to a fair trial and his ability to confront and cross examine witnesses. The trial court denied the motion, and the two cases were tried jointly to a jury.

At trial, the County Medical Examiner testified that the child's death resulted from a cerebral infarction, i.e. a stroke – or series of strokes, caused by a subdural hematoma, which occurred following blunt trauma to the left side of her head. The Medical Examiner also opined that the child's death was a homicide. The doctor noted that the child had suffered a black eye about two days before her death and that she was severely malnourished. Nevertheless, the doctor acknowledged that, as poor as her condition was, it might have been difficult, when the child was fully clothed, for someone who did not see the child regularly to recognize how bad off she actually was.

Petitioner and child's mother were questioned and arrested shortly after Petitioner contacted 911 to report that she was unresponsive. The prosecution called 36 other witnesses: Some described the child's condition on the day of her

death; others testified about the law enforcement investigation; some described their respective observations about Petitioner's relationship with the child's mother; still others described a history of suspected abuse against the child by her mother, Petitioner's codefendant. That conduct largely predated Petitioner's involvement with the mother.

Petitioner's attorneys introduced no evidence but did request a lesser offense instruction on the aggravated murder count – specifically for negligent homicide – an offense whose elements did not apply. The trial court denied that request. The jury found Petitioner guilty on all counts. At sentencing, Petitioner denied harming the child. The trial court sentenced him to a term of life with parole eligibility at 20 years.[2]

REASON FOR GRANTING THE PETITION

There is no coherence in how State and Federal Courts determine what constitutes reasonable trial strategy in the IAC context.

A) State Courts

The Ohio reviewing courts' wholesale willingness to characterize mistakes, even egregious ones, by trial counsel, as reasonable strategic decision-making has not been universally embraced by other State Court jurisdictions. The Delaware Supreme Court, for example, recently rejected the idea that trial counsel's failure to request a lesser-included offense was viable strategy, finding that doing so created a

[2] The child's mother was also found guilty and received a sentence of life without the possibility of parole.

substantial risk to the accused and reflected counsel misunderstood the law. *Baynum v. State*, 211 A.3d 1075, 1083–85 (Del. 2019).

In Montana, the state's high court remanded the case for a new trial where counsel failed to object to a misstatement of the law. *State v. Resh*, 397 Mont. 254, 2019 MT 220, 448 P.3d 1100. Likewise in Tennessee, the court found counsel's work was deficient because they failed to request a jury instruction on second degree murder. *Wiley v. State*, 183 S.W.3d 317 (Tenn.2006). Faced with similar facts alleging ineffective assistance of counsel, the Vermont Supreme Court reached a nearly identical finding. *In re Sharrow*, 205 Vt. 309, 2017 VT 69, 175 A.3d 1236. In Iowa, as well, the State Supreme Court has adopted an analogue of the rule Petitioner asks this Court to consider. See, *State v. Davis*, 951 N.W.2d 8 (Iowa 2020). There, the Court looked at counsel's failure to object to an erroneous jury instruction on the issue of sanity in an NGRI case. The Supreme Court rejected a lower finding that this was a viable strategic decision, opining that no strategic purpose was served by getting the law wrong. *Id.*

In Petitioner's case one must ask – Where was the strategy in requesting an instruction on the wrong lesser included offense, when an otherwise proper lesser offense instruction was available? These decisions illustrate that, but for geography, Petitioner would have received a new trial. That scenario is arbitrary and unfair and this Court can and should correct it.

B) Federal Split

Moreover, several federal courts have also considered the issue this case presents and handled it differently than have Ohio courts. The Third Circuit, for instance, found that trial counsel was ineffective when he refused an instruction on voluntary manslaughter, even after the trial court informed counsel of the law. *Massey v. Superintendent Coal Twp. SCI*, No. 19-2808, 2021 WL 2910930 (3d Cir. July 12, 2021). The Pennsylvania State Supreme Court had denied relief because it found counsel's decision to have been "strategic" and, like the Eighth District found in the instant case, an attempt at a complete acquittal, i.e., an "all-or-nothing" strategy. The Third Circuit disagreed finding that the record showed counsel was aware of the correct law and had simply pursued a legally flawed strategy instead. The Ninth Circuit likewise found that ignorance of a critical point of law is a quintessential example of deficient performance under *Strickland.* In *Duarte,* counsel failed to object to an unlawful jury instruction – that could not have been a viable "all-or-nothing" strategy where actual knowledge of the law would have necessitated an objection. *Duarte v. Williams*, No. 19-17207, 2021 WL 4130075 (9th Cir. Sept. 10, 2021).

The Fourth Circuit, as well, has repeatedly noted that ignorance of the law cannot amount to viable strategy. *See Dodson v. Ballard*, 800 F. App'x 171 (4th Cir. 2020) (finding that counsel was deficient for offering advice to his client that was based on a misunderstanding of the elements of a lesser-included felony); *United States v. Carthorne*, 878 F.3d 458 (4th Cir. 2017) (finding IAC when counsel failed

to grasp relevant legal standards and appropriately object to sentencing enhancements); and *United States v. Freeman*, 24 F.4th 320 (4th Cir. 2022) (finding IAC when counsel failed to raise meritorious objections at sentencing because he believed none of them were relevant).

These three circuits have found that counsel's misunderstanding or ignorance of the law, where the record illustrates it, cannot be "reasonable strategy" even when couched as an attempt at complete exoneration. There is no such thing as an "all-or-nothing" trial strategy when it is grounded on a mistake.

Accepting and considering this case will create consistency, promote fairness, and encourage litigators to more effectively represent their clients. In *Strickland*, this Court established a high bar for those seeking relief based on challenges to their attorney's performance. But that bar was not intended to be insurmountable. In reality, on the ground level, that is exactly what the test has become. Surely, this Court did not intend, when deciding Strickland, to render the Sixth Amendment right to effective assistance of counsel – a right this Court has characterized as "fundamental" – illusory.

CONCLUSION

Granting Certiorari to consider this case will allow this Court to make clear that getting the law wrong is deficient performance. The irrebuttable presumption of competence that Ohio courts have establish is inconsistent with *Strickland* and undermines the promise the Sixth Amendment us supposed to guarantee into an empty one.

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

Respectfully submitted,

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