No. 22-A1028

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TIMOTHY SUMPTER,
Petitioner,

v.

STATE OF KANSAS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under clearly established law, in most ineffective assistance of trial counsel cases, prejudice is shown by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Based on this framework, the Supreme Court has held that a state court decision would be "contrary" to *Strickland* if it required a prisoner to meet a higher evidentiary burden than "reasonable probability." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

To ensure state courts have "a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary," a habeas petitioner must "fairly present[]" his claims to the state court. *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986).

1. Is it contrary to the clearly established *Strickland* standard to assess the prejudice from trial counsel's ineffective assistance of counsel for her failure to investigate and deploy the strongest defense to the most serious charged count measured by only examining whether there was sufficient evidence to support the jury's verdict?

2. Does the "fairly presented" exhaustion standard limit a petitioner to claims that were "centered" in a "clear fram[ing]" or can the necessary facts and legal bases set out in the state post-conviction relief petition and in briefing to the state appellate courts be considered in federal court?

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PETITION FOR A WRIT OF CERTIORARI

Timothy Sumpter respectfully petitions for a writ of *certiorari* to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (App. 1) is reported at 61 F.4th 729. The opinion of the district court (App. 54) is reported at 485 F. Supp. 3d 1286. The opinion of the Kansas Court of Appeals (App. 90) is unreported but can be found at 433 P.3d 201.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its judgment on December 28, 2022. App. 52. A petition for panel rehearing was granted in part on March 3, 2023. App. 1. A petition for rehearing *en banc* was denied on March 3, 2023. *Id.* This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

"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."

Fifth Amendment to the United States Constitution

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(b)(1)(A)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."

INTRODUCTION

Habeas actions, like this one, "are of fundamental importance . . . in our constitutional scheme" to ensure the direct protection of "our most valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (internal quotation omitted).

This case is—and has always been—a case about a trial attorney who failed to investigate, deploy, and counsel on the necessary elements of the most serious charge at every stage of the case. The failure to understand the elements of aggravated kidnapping (and the associated jurisprudence under *State v. Buggs*, 219 Kan. 203 (1976)) meant trial counsel did not correctly explain the elements to the jury lessening the State's burden, develop evidence to support the argument including through developing direct and cross examinations on the point, request the necessary jury instruction, challenge prosecutorial misstatements of the law and facts, or make arguments to the judge or jury on the best defense to a charge that added over 15 years to Sumpter's sentence. Due to trial counsel's failures, Timothy Sumpter did not have counsel who subjected the State's evidence and argument on the most serious count to the crucible of adversarial testing.

The Kansas Court of Appeals ("KCOA") determined Sumpter was not prejudiced by these deficiencies by trial counsel because "the trial evidence was sufficient for the jury's verdict." App. 99. Such an approach is "contrary to" clearly established federal law because it required Sumpter to meet a higher evidentiary burden than "reasonable probability" as recognized in *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000), and would inappropriately limit ineffective assistance claims to petitioners capable of proving actual innocence, *Kimmelman v. Morrison*, 477 U.S.

365, 385 (1986) (the Court has "never intimated that the right to counsel is conditioned upon actual innocence"). Despite this binding precedent, the Tenth Circuit not only found the KCOA's application of *Strickland* in line with clearly established law; it also used this same sufficiency finding on *de novo* review to independently determine that Sumpter was not prejudiced.

To avoid evaluating the reasonable probability of a different result in front of the jury under *Strickland*, the Tenth Circuit improperly narrowed Sumpter's claim to only involve trial counsel's failure to lodge a sufficiency-of-the-evidence legal challenge. The Tenth Circuit relied on a justification raised *sua sponte* at oral argument: exhaustion. But the Tenth Circuit's rationale—that the full challenge was not part of Sumpter's clear framing—is contrary to Supreme Court precedent and widens a split in the circuits on how to apply this Court's exhaustion guidance.

STATEMENT OF THE CASE

I. The Constitutional Right is Clearly Established under *Strickland*.

Criminal defendants are entitled to a fair trial under the Due Process Clauses in the Constitution. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The basic elements of a fair trial include "the Assistance of Counsel for his defence." *Id.* "Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984). The right to counsel is only meaningful and more than a sham if it entails "the right to the effective assistance of counsel." *Id.* (internal quotation omitted).

The right to counsel is thus "the right of the accused to require the

prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. A "fair trial" requires counsel subject the state's evidence "to adversarial testing" and deploy "counsel's skill and knowledge" "to meet the case of the prosecution." *Strickland*, 466 U.S. at 684-85 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). If counsel does not put the State's evidence through the crucible of adversarial testing, "the constitutional guarantee is violated." *Cronic*, 466 U.S. at 657.

It is "clearly established Federal law" that a petitioner must show "two components" on an ineffective assistance of counsel claim: (1) his attorney's performance was "deficient" by falling "below an objective standard of reasonableness," and (2) the defendant was "prejudiced" by his attorney's actions or omission assessed in terms of whether "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 687-88, 694.

On the first prong, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. A "quintessential example of unreasonable performance under *Strickland*" is counsel's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *accord Kimmelman*, 477 U.S. at 385 (counsel's failure to file a timely motion, when based on mistake of law amounts to constitutionally deficient assistance); *Williams*, 529 U.S. at 395–96 (failure to

conduct investigation due to lawyer's mistake of law was constitutionally ineffective).

On the second prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Supreme Court did not pick an "outcome-determinative standard" such as whether the "deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. That is because the Court concluded it could not assume that "all of the essential elements of a presumptively accurate and fair proceeding were present" when effective assistance of counsel—"one of the crucial assurances that the results of the proceeding is reliable"—is absent. *Id.* at 694. Notably, this Court never required a petitioner show "actual innocence"; "[t]he constitutional rights of criminal defendants are granted to the innocent and guilty alike." *Kimmelman*, 477 U.S. at 380.

II. The Charged Crime

While this was a consolidated trial with multiple charged crimes, only one count is relevant to this petition: aggravated kidnapping of victim J.B.

The incident in question began after Sumpter and the victim (J.B.) had spent the evening in a bar district. At trial, J.B. testified that she had voluntarily walked to her car with Sumpter even though she was wary of him. When she went to get into her car, she testified that Sumpter shoved his way in as well. A violent fight ensued between the two of them in the vehicle. J.B. testified that after Sumpter temporarily gained control of her with his knee, he started to touch her sexually. During his advances, J.B. testified she continued to fight him by punching and pushing. At some point, J.B. stated she had tried to use the mace on her key ring, but Sumpter grabbed the keys from her to prevent her from macing him. J.B. did not testify that the keys

had been thrown out of the car. J.B. testified that she was able to use her self-defense training to kick Sumpter out of the car. After she saw Sumpter outside the car with her keys, J.B. decided to stay in the car because she felt "safe" there "away from him." J.B. testified that she asked Sumpter to drop the keys through a crack in the door. Instead, Sumpter tried to force his way back in to put his body against her. Again, J.B. fought back and was able to kick him out and flag down an approaching vehicle. As Sumpter was distracted by the approaching vehicle, J.B. drove away.

Sumpter also took the stand to give his version of the events. Sumpter testified that J.B. started punching him with something and his instinct was to get the object out of her hands even though he didn't realize the object was her keys at the time. He testified that he was trying to protect himself.

In explaining the aggravated kidnapping count, the prosecutor explained that the confinement by force being presented to the jury happened as J.B. "starts to sit down in the driver's seat and then you can see as he grabs her and starts pulling and pushing and shoving and there's a terrible struggle as he fights her. . . . Is there any question, based on the testimony, that she was confined at a forcible time by force?" The prosecutor never mentioned the keys—either inside the car when Sumpter had them outside the car.

The jury found Sumpter guilty on the aggravated kidnapping count. This count added over 15 years to his sentence.

III. Kansas Kidnapping Law

When Sumpter was charged, Kansas kidnapping law was well developed and provided ample instruction on what burden the State should be held to and what

types of evidence could be developed—and questioned—to mount a successful defense. Under the operative Kansas statute at the time of the incident, kidnapping is "the taking or ***confining*** of any person, accomplished ***by force***, threat or deception, with the intent to hold such person . . . to facilitate . . . the commission of any crime . . . ." K.S.A. 21-3420 (emphasis added).[1] Aggravated kidnapping "is kidnapping . . . when bodily harm is inflicted upon the person kidnapped." K.S.A. 21-3421.

The Kansas statute does not criminalize merely any taking or confinement; rather, it must also be done with the requisite specific intent—"to ***facilitate*** either flight or commission of a crime." *Messer v. Roberts*, 74 F.3d 1009, 1014 (10th Cir. 1996). Given the broad statutory provision, the Kansas Supreme Court construed this "facilitation" intent element in the oft-cited *State v. Buggs* decision as the "key word" to avoid having the statute "convert every robbery and every rape into the more serious offense of kidnapping." 219 Kan. at 209, 214-216. That framework requires the State to show confinement by force that: (1) "[m]ust not be slight, inconsequential and merely incidental to the other crime"; (2) "[m]ust not be of the kind inherent in the nature of the other crime"; and (3) "[m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Id.* at 216. This has been the key to successful challenges to kidnapping convictions. *See, e.g., State v. Crane*, 260 Kan. 208, 230-34 (1996); *State v. Fisher*, 257 Kan. 65, 74-78 (1995); *State v. Hays*, 256 Kan.

[1] The jury was only instructed on confinement "by force . . . to facilitate the commission of the crime of Rape."

48, 63 (1994); *State v. Patterson*, 755 P.2d 551 (Kan. 1988); *State v. Ransom*, 239 Kan. 594, 600-03 (1986); *State v. Cabral*, 228 Kan. 741, 744-45 (1980); *State v. Quintero*, 183 P.3d 860, 2008 WL 2186070, at *5 (Kan. App. 2008); *State v. Miller*, 2004 WL 1191017 at *3 (Kan. App. 2004); *Messer*, 74 F.3d at 1014 (applying Kansas law).[2]

Notably, the Kansas Supreme Court has overturned kidnapping convictions where, as here, the confinement amounts to forcible, violent rape in a vehicle because any confinement is incidental to and inherent in that underlying crime: "When forcible rape occurs in an automobile, of necessity, some confinement of the woman is necessary part of the force required in the commission of the rape. Such a confinement is of a kind inherent in the nature of forcible rape and incidental to the commission of the rape." *Cabral*, 228 Kan. at 744-45; *cf. Buggs*, 219 Kan. at 215 (stating that "the ordinary rape require[s] as a necessary incident some 'confinement' of the victim-they are nevertheless not kidnappings solely for that reason").

As trial counsel developed legal and factual strategies to challenge the most serious charge Sumpter faced, it was critical that she understand *Buggs* and its progeny cases and explain them to the jury and court.

IV. Trial Counsel's Failure to Understand Kansas Kidnapping Law and The Impact of that Failure on His Trial

Despite the importance of the *Buggs* framework, the record reveals that trial counsel did not understand or investigate such a defense. Not only did she fail to affirmatively deploy any type of defense on the intent element, she incorrectly

[2] Kansas courts continue to use *Buggs* to reverse kidnapping convictions. *See State v. Olsman*, 473 P.3d 937, 944-48 (Kan. App. 2020).

explained the claim to the jury and court—decreasing the burden on the State, did not strategically develop the necessary evidence to mount such a challenge, nor request jury instructions on this confusing element suggested for these circumstances by Kansas appellate courts.

A. Misstatements of the law and failure to challenge the State's misstatements.

Trial counsel demonstrated her failure to understand or investigate Kansas kidnapping law while describing the State's burden on the count to the jury. She explained that to show intent for aggravated kidnapping, "the State has to prove to you, again, beyond a reasonable doubt, that why he was doing that is he intended to rape her . . . [i]f they can't prove that his intent was sexual intercourse, they have not proven aggravated kidnapping." The prosecutor similarly explained that all he had to prove was that Sumpter "confined [J.B] by force" and that "he intended to commit the crime of rape."

But these explanations incorrectly lowered the State's burden by conflating the intent element of the underlying crime—attempted rape—with the intent element of the separate kidnapping count. The State had to show more; it had to show "the intent to hold such person . . . to facilitate the commission of" the crime. K.S.A. 21-3420. This facilitation element required showing the confinement (1) was "not be slight, inconsequential and merely incidental to the other crime"; (2) was not "the kind inherent in the nature of the other crime"; ***and*** (3) had "some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." *Buggs*, 219 Kan. at 216.

Counsel failed to both explain the State's burden and object to the prosecutor's incorrect statement.

Trial counsel compounded this error by telling the jury that the bruising happened as "part of the confinement" and could not be used to support the "bodily harm" proof to establish an aggravated offense. Such an argument conceded to the jury that the State had met its burden to show a confinement and that the only real argument was what evidence could be used to establish bodily harm.

B. Evidentiary failures.

Trial counsel also did nothing to develop the evidence to support a defense under *Buggs* and subject the State's case to the crucible of adversarial testing. She did not cross examine J.B. to clarify what happened with Sumpter at or in the vehicle that would amount to confinement beyond what was inherent or incidental to the commission of the attempted rape or that had significant independent of the attempted rape at the preliminary hearing or at trial.[3] Such questioning could have involved J.B.'s motivations, what happened with her keys, and how long different interactions occurred. Nor did trial counsel cross-examine J.B about what happened when she got into her car or once she forced Sumpter out of the car with either her contradictory preliminary hearing testimony or the surveillance video of the incident.

Most of Sumpter's testimony centered on his belief that the women consented or he lacked the requisite intent. But his attorney did not counsel or prepare Sumpter to testify about the facilitation element of the aggravated kidnapping count. She did

[3] Interrogation at the preliminary hearing stage creates "a vital impeachment tool for use in cross-examination." *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

not elicit any testimony from Sumpter about what happened with J.B. at or in the vehicle to show that these interactions were inherent or incidental to the commission of the attempted rape including his motivations, how long different interactions occurred, or what happened with the keys.

C. Jury instructions.

During the charge conference, trial counsel did not request an instruction clarifying the facilitation element and the standard expressed in *Buggs*. This failure was especially egregious given that the KCOA has recognized that a jury instruction explaining the *Buggs*-standard is "advisable" "where the question of whether the restraint or movement facilitated the crime is at issue." *State v. Little*, 994 P.2d 645, 649-50 (Kan. App. 1999).

D. Procedural maneuvers and legal motions

Trial counsel could have also deployed other procedural manuevers to either eliminate the charge or better understand the State's case. Notably, at the preliminary hearing, J.B. offered no testimony to support the contention that Sumpter withheld her keys while she stayed in her vehicle—the act now relied on by the State and Kansas courts as the *actus reas*. Yet Sumpter's trial counsel did not ask for the charge to be dismissed. Trial counsel also did not request a bill of particulars to determine what act the State was relying on for the aggravated kidnapping count or make any inquiry into the State's theory of the *actus* or *mens rea* for the kidnapping charge so she could effectively prepare for trial.

Trial counsel did move for a judgment of acquittal at the end of the State's case but made no mention of the *Buggs*-test or any specific evidentiary deficiency related

to the facilitation element. Contrary to J.B.'s testimony that she had voluntarily gotten into her car, the prosecutor stated in his opposition to trial counsel's motion that the aggravated kidnapping count with respect to J.B. was based on a "confinement" and that the act was "holding her down, placing her into the car and placing her in a position where ultimately she was, choked . . . ." The trial court relied on the prosecutor's argument on the facts to deny the motion. Trial counsel did not challenge misstatements of the evidence by the prosecutor on the facilitation element or base her directed verdict or motion for retrial on the *Buggs* standard. Similarly, after the jury had rendered its verdict, trial counsel did not mention *Buggs* or argue that the State did not meet its burden to show confinement to facilitate sufficient to support its aggravated kidnapping charge in her motion for acquittal. These failures are particularly notable given that neither the KCOA nor the Tenth Circuit have concluded that the acts argued to the judge or jury at trial could be sufficient to show confinement-by-force kidnapping under Kansas law.

V. State Post-Conviction Relief Proceedings

A. State Court Petition

The claim considered in federal court was presented in state court. In his state petition, Sumpter included an ineffective assistance of trial counsel claim for "[h]er [f]ailure to [u]nderstand and [a]rgue the [e]lements of [a]ggravated kidnapping" "at all stages of the case." App. 364. Sumpter not only noted counsel's failure to attack sufficiency through motions at the preliminary hearing, trial, and post-trial, he also contended counsel's failure to investigate meant "she missed crucial opportunities to challenge the State's claims and testimonial evidence," App. 367, and enumerated

examples from trial argument and evidentiary presentation, App. 366-69:

- She did not object to the prosecutor's misstatements on what evidence could support the count and what the evidence showed;
- She did not cross-examine J.B. with prior inconsistent statements or clarify what happened at or in the vehicle beyond the underlying crimes;
- Rather than explain what *Buggs* required, trial counsel incorrectly explained this element to the jury, incorrectly conflated the intent element with the intent element for rape, and implied that "confinement" had occurred.

The effect that competent trial counsel would have had was made abundantly apparent during the state habeas proceedings. During argument and briefing on the state habeas petition, the State had to ***withdraw*** the *actus rea* argued at trial to the judge and jury because these acts could not support a verdict under the jury instructions as a matter of law. App. 63.

In its order, the state habeas court summarized its understanding of the claim: trial counsel "did not understand and argue the elements of aggravated kidnapping . . . at preliminary hearing, as well as at various stages of the trial, including cross examination of the victim, motion for judgment of acquittal, and closing argument." App. 125. The trial court denied relief because it looked at acts never argued to the jury and found "sufficient evidence to support the aggravated kidnapping conviction"; "[t]herefore, petitioner is not prejudiced." App. 127. The trial court did not consider whether there was a reasonable probability of a different verdict if counsel had

investigated, understood, and deployed a defense under *Buggs*.

B. KCOA Appeal and Opinion

Sumpter appealed to the KCOA. On the ineffectiveness claim, Sumpter again outlined how trial counsel "missed crucial opportunities to challenge the State's claims and testimonial evidence" because she "did not have a proper understanding of what the State had to show at trial on the aggravated kidnapping count." App. 412. He demonstrated deficiency by setting out "decisions that made no strategic sense if counsel had actually understood the importance of the facilitation element of the aggravated kidnapping count" including failing to: (1) challenge the prosecutor's misstatement on the evidence; (2) cross-examine J.B. on changing testimony or what happened in or around the vehicle that would meet the elements; (3) direct examine Sumpter as to what happened related to the elements; (4) object to or contradict the prosecutor's improper interpretation of contested evidence; (4) explain to the jury what the State must prove to satisfy the elements; (5) argue to the jury that the State had not met its burden under *Buggs*; (6) object to the incorrect statement of the intent element given by the prosecutor; (7) make any *Buggs* argument in the motions for acquittal and JNOV; (8) propose the jury instruction on facilitation recommended by Kansas courts. App. 412-13. Sumpter also highlighted counsel's closing argument errors conceding "confinement" and relaying the incorrect intent requirement by equating it with an intent to rape. App. 414.

As to prejudice, Sumpter emphasized that "the habeas inquiry into whether counsel's failure to understand the law is not a sufficiency review." App. 418. He then argued against using the inadequate trial record to assess prejudice:

> The district court—at the State's urging—proposes a Herculean feat to prove prejudice: negate all possible acts that could form the basis for aggravated kidnapping even when those acts were not identified to the jury nor challenged through the normal adversarial process. Indeed, the heart of Sumpter's ineffectiveness claim is that his trial counsel's ignorance of Kansas kidnapping law meant that she failed to properly challenge the State's testimonial evidence through cross-examination or admission of alternative evidence and she failed to highlight the weaknesses under the *Buggs* standard to either the judge or jury. To allow the State to now rely on acts that have neither been subjected to the adversarial process nor argued to the jury for a determination on their sufficiency would make a mockery of Sumpter's claim.

App. 415-16. Sumpter then noted that both Kansas and federal courts had concluded that a failure to investigate the legal underpinnings of a count and potential defenses could be *per se* prejudicial because the failure affects every strategic choice on evidence and argument. App. 416-17 (citing *State v. Davis*, 277 Kan. 309, 327-29 (2004); *Cronic*, 466 U.S. at 659; *Kimmelman*, 477 U.S. at 385)).

The KCOA affirmed the denial of relief. App. 90-119. The KCOA recognized the ineffectiveness claim relied on trial counsel's failure to understand and deploy the law appropriately: "Sumpter faults his trial lawyer for misunderstanding the fit between the elements of aggravated kidnapping and the evidence against him and fumbling the issue in the district court." App. 93. While the KCOA cited the *Strickland* test for ineffective assistance, it did not apply the "reasonable probability" standard in evaluating whether counsels' constitutionally deficient performance prejudiced Sumpter. Instead, the KCOA analyzed Sumpter's claim under the "sufficiency of the evidence" standard, asking whether there was *sufficient evidence* to legally support the jury's verdict:

> But the quality of the lawyers' representation becomes irrelevant if Sumpter cannot also show prejudice. If the trial evidence legally

> supports the jury's verdict and, thus, the conviction, his argument founders on that part of the *Strickland* test. We engage that analysis and conclude the State presented sufficient evidence to prove the aggravated kidnapping charge. To assess sufficiency we review the evidence in a light most favorable to the State as the prevailing party and ask whether reasonable jurors could return a guilty verdict based on that evidence.

App. 95. The KCOA did not cite any cases on how to determine whether a defendant is prejudiced by counsel's failure to investigate and understand the law prior to trial and ignored the multiple pages of briefing on the proper assessment of prejudice for this claim. Rather, the KCOA cited two Kansas cases on sufficiency of the evidence on direct appeal. App. 95. The KCOA conclusion on prejudice was also explicitly linked to a sufficiency determination: "Because the trial evidence was sufficient for the jury's verdict, Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and during the trial or on direct appeal in this court." App. 99.

C. Kansas Supreme Court Petition for Review

The Kansas Supreme Court declined to hear Sumpter's petition for review. App. 210. Sumpter had argued the KCOA "erred by applying a sufficiency of the evidence review to determine whether Sumpter was affected by his counsel's failure to understand Kansas kidnapping jurisprudence, including ignorance of the foundational opinion in *State v. Buggs*, 219 Kan. 203 (1976)." App. 213; *accord* App. 217 (statement of issues); App. 220 (arguing the KCOA "treating the prejudice prong as simply a sufficiency challenge, ignoring Sumpter's arguments on how trial counsel would have proceeded differently if she understood the well-developed *Buggs* jurisprudence"). He then explained how this failure to investigate and develop an

appropriate strategy manifested in her failure to seek dismissal at the preliminary hearing, develop appropriate direct or cross examinations, request a clarifying jury instruction as suggested by Kansas courts, challenge prosecutorial misstatements of the law and facts, appropriately relay the elements to the jury, or present a sufficiency challenge. App. 222-23.

VI. Federal § 2254 Proceedings

A. District Court

After exhausting his state court habeas options, Sumpter filed a petition for a writ of habeas corpus in federal court. As in state court, his ineffective assistance of trial counsel claim hinged on her failure to research, investigate, counsel, or deploy the *Buggs* standard at any stage of his case. Sumpter argued the KCOA ruling was "contrary to, or an unreasonable application of, clearly established Federal law" because the KCOA evaluated the prejudice of trial counsel's failure to investigate, understand, counsel, or deploy the *Buggs* standard at any stage of his case by evaluating the sufficiency of the evidence. Sumpter contended that because the conviction was—at best—weakly supported by the evidence, as the KCOA recognized, there was a reasonable probability of a different outcome had competent trial counsel raised *Buggs* during pre-trial proceedings, developed a record under the *Buggs* standard during trial, or explained Kansas kidnapping law to the jury through closing arguments or jury instructions.

While acknowledging the seriousness of the underlying crimes—and the denial of relief related to those convictions—Judge Lungstrum agreed that trial counsel had provided ineffective assistance related to the kidnapping count. App. 72. Judge

Lungstrum concluded he could review the ineffective assistance claim *de novo* because the KCOA "applied the wrong standard" when it used sufficiency to decide prejudice. App. 65. As he noted, "the issue is not whether the evidence was legally sufficient; the issue is whether there is a reasonable probability of a different outcome." *Id.* He determined that this ruling "deviated from the controlling federal standard and was contrary to clearly established federal law." *Id.*

Upon conducting a *de novo* review, Judge Lungstrum concluded: "Petitioner argues – and the record reveals – that trial counsel failed to assert that defense at any stage, including at the preliminary hearing, in examining the witnesses, in arguing for a directed verdict, in proposing and arguing jury instructions, and in closing argument." App. 61. Judge Lungstrum determined that trial counsel's performance was also "constitutionally deficient":

> Based on the strength of that defense, there is little doubt that counsel's failure to raise that defense, based on settled case law, before or during or after trial, was objectively unreasonable. *Buggs* is the seminal and oft-cited standard for the key facilitation element of the offense, and in light of the facts here, the Court can divine no possible strategic reason for failing to hold the State to that standard in its proof. That failure to appreciate and assert this defense was especially inexcusable considering that this conviction proved the most serious for purposes of petitioner's sentencing.

App. 71-72.

Judge Lungstrum went on to conclude that Sumpter had demonstrated prejudice as well: "The strength of this defense under Kansas law creates a probability of a different outcome sufficient to undermine confidence in the kidnapping conviction." App. 72. Crucial to the district court's analysis was how the jury would have analyzed the evidence if properly informed of the dictates of *Buggs*

and *Cabral*. *Id.* With effective counsel fully holding the State to its burden and informing the jury, Judge Lungstrum determined "there is also a significant likelihood that a jury . . . would have found that petitioner did not confine (not merely take) J.B. for force (not by threat or deception), based on the charge submitted to it." *Id.* Judge Lungstrum vacated the aggravated kidnapping conviction and sentence and ordered that Sumpter was entitled to a new trial on that count. App. 72-73.

B. Tenth Circuit

The State appealed the partial grant of habeas relief. The Tenth Circuit reversed the grant of habeas relief because, it concluded the KCOA "was reasonable in determining that any ineffective assistance of counsel was not prejudicial because the evidence was sufficient to support the aggravated kidnapping conviction." App. 4.

The Tenth Circuit began by examining whether the KCOA decision was contrary to or an unreasonable application of *Strickland*. App. 19-35. It noted that the KCOA had several times in its analysis correctly stated a petitioner's burden under *Strickland*. App. 22-24. In contrast to the district court, the Tenth Circuit concluded that the KCOA reasoning was not contrary to *Strickland*. App. 24. In coming to that conclusion, the Tenth Circuit noted that in relation to a different ineffectiveness claim (dealing with the consolidation of multiple criminal cases), the KCOA had properly stated the prejudice standard while setting out its holding on that claim. *Id.* Based on these correct statements of the *Strickland* standard and the holding on a different claim, the Tenth Circuit agreed with the State "that the KCOA's decision was not 'contrary to' clearly established federal law, and the district court erred in concluding otherwise." App. 25.

In assessing the KCOA's application of *Strickland*, the Tenth Circuit began by narrowing Sumpter's claim due its conclusion that the full claim was not fairly presented.[4] To avoid considering the crux of Sumpter's ineffectiveness challenge, the Tenth Circuit construed Sumpter's ineffective assistance of counsel claim as merely "failing to challenge the sufficiency of the evidence to support his aggravated kidnapping conviction." App. 27. It concluded that any broader challenge to his trial counsel's failure to investigate, understand, develop, and deploy a *Buggs*-defense at every stage of the case was not "fairly presented" to the state courts and, therefore, Sumpter "failed to exhaust any such claims." App. 27-28 n.2. To reach this conclusion, the Tenth Circuit found that Sumpter "clearly famed the issue in a way that centered on counsel's failure to raise the sufficiency of the evidence issue." *Id.* As support, the Tenth Circuit pointed to one section heading in his state trial court petition and one sentence in his opening brief to the KCOA. *Id.* The Tenth Circuit did not consider any factors—including what legal or factual support was given in Sumpter's state filings—beyond its assessment of Sumpter's "framing" in these two sentences.

Based on this characterization of Sumpter's ineffective assistance of counsel claim, the Tenth Circuit concluded it was entirely reasonable to assess whether there was sufficient evidence because that would be the core of whether there was a reasonable probability that such a motion challenging the sufficiency of the evidence would succeed. App. 29-30. To support the propriety of this assessment, the Tenth

[4] This exhaustion argument had never been raised by the State in federal court or briefed by the parties.

Circuit pointed to circuit precedent evaluating the failure of appellate counsel to challenge the sufficiency of the evidence on appeal. App. 29-30 (citing and explaining *Upchurch v. Bruce*, 333 F.3d 1158, 1165 (10th Cir. 2003)). The Tenth Circuit explained that, under this framework, the KCOA decision to look only at the merits of a sufficiency of the evidence challenge was reasonable. App. 30-35. The Tenth Circuit went on to conclude that the KCOA reasonably applied *Strickland* because any challenge to the sufficiency of the State's evidence would have been "meritless" because "the evidence was sufficient to support [Sumpter's] aggravated kidnapping conviction." App. 25.

Finally, the Tenth Circuit determined that even under *de novo* review, the KCOA decision should be upheld for two reasons. *First*, the Tenth Circuit concluded that Sumpter had not shown clear and convincing evidence to rebut two statements of fact in the KCOA opinion: (1) Sumpter retrieved J.B.'s keys that he had earlier thrown out of the car window, (2) Sumpter displayed the keys in an effort to get J.B. to open the door. App. 36. *Second*, the Tenth Circuit concluded that it would be inappropriate to second guess the KCOA's legal determination that legally sufficient evidence existed in Sumpter's case based on Kansas kidnapping law. App. 37-40. The Tenth Circuit applied the AEDPA's deference to cut off any review of Kansas kidnapping law beyond the KCOA sufficiency determination on these facts because there is "no room" for an "analysis" by a federal court to "presume to know better than state courts how to interpret their own state's law." App. 39. By combining the presumption of correctness on the facts with deference to the state court on whether

these facts were legally sufficient to support the conviction, the Tenth Circuit concluded that there was "no grounds" to support an argument that Sumpter was prejudiced by his trial counsel's failure to make a challenge "on the basis of the sufficiency of the evidence." App. 40.

Sumpter filed a petition for rehearing and requested *en banc* consideration. On March 3, 2023, the motion for panel rehearing was granted in part, the December 28, 2022, opinion was withdrawn and replaced with a revised opinion effective *nunc pro tunc* to the date the original opinion was filed.

REASONS FOR GRANTING THE WRIT

I. Sufficiency Review

Under clearly established law, in most ineffective assistance cases, a petitioner shows prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Court has "never intimated that the right to counsel is conditioned upon actual innocence." *Kimmelman*, 477 U.S. at 380. The court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 694. Based on this framework, the Supreme Court has held that a state court decision would be "contrary" to *Strickland* if it required a prisoner to meet a higher evidentiary burden than "reasonable probability." *Williams*, 529 U.S. at 405-06. In *Williams*, Justice O'Connor noted that requiring a "preponderance of the evidence" would be one such "contrary requirement." *Id.*

The Tenth Circuit ignored this framework in both its analysis of the state court

decision for AEDPA purposes ***and*** in its *de novo* review of prejudice. For AEDPA purposes, the Tenth Circuit concluded that the KCOA ruling: (1) was not contrary to *Strickland* because it set out the proper standard; and (2) reasonably applied *Strickland* because any challenge to the sufficiency of the State's evidence would have been "meritless" because "the evidence was sufficient to support [Sumpter's] aggravated kidnapping conviction." App. 22-25. In its *de novo* review, the Tenth Circuit concluded Sumpter's claims of ineffective assistance "lacked merit" because "there was no ground to disturb the KCOA's conclusion that there was sufficient evidence to support Mr. Sumpter's aggravated kidnapping conviction." App. 40.

With the Tenth Circuit's decision, the circuit courts are now split on whether a state court's use of the sufficiency of the evidence amounts to a decision that is "contrary" to *Strickland*. The Tenth Circuit is also the first to determine there is no prejudice to a petitioner for trial counsel's ineffective assistance in its investigation and presentation of a meritorious defense to the judge and jury if there is sufficient evidence to support a verdict on *de novo* review.

A. Circuit Split: The Tenth Circuit Conflicts with the Third and Ninth Circuits.

The Court should grant certiorari because there is a circuit split on the question presented. As explained above, the **Tenth Circuit** determined that it was "an entirely reasonable application of *Strickland*—in particular, its prejudice standard," for the KCOA to determine that "because the trial evidence was sufficient for the jury's verdict, Sumpter could have suffered no prejudice from his lawyers' handling of the charge and conviction either in the district court leading up to and

during the trial." App. 30. But this doubling-down on the KCOA's error puts the Tenth Circuit in direct conflict with this Court and the other Circuit Courts who have considered similar state decisions.

On facts similar to Sumpter's, the Third and Ninth Circuits have held that it is an unreasonable application of clearly established law to assess whether there is prejudice from counsel's deficient performance by determining whether there was enough evidence to legally support a conviction. *Breakiron v. Horn*, 642 F.3d 126, 138-140 (3d Cir. 2011); *Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 599 (3d Cir. 2015); *Crace v. Herzog*, 798 F.3d 840, 849 (9th Cir. 2015).

The **Third Circuit** has confronted this issue twice and consistently held that a state court opinion that uses sufficiency of the evidence—and fails to weigh all of the evidence—is not entitled to deference under AEDPA. *Breakiron*, 642 F.3d at 138-140; *Saranchak*, 802 F.3d at 596-600.

The Third Circuit first examined this issue in *Breakiron*, 642 F.3d 126 (3d Cir. 2011). Mark Breakiron contended that his counsel rendered ineffective assistance by failing to request a jury charge on the lesser-included offense of theft. It was uncontested that Breakiron had killed a bartender and stole her purse and bags of money from the bar. *Id.* at 129. His attorney had argued that he was guilty of theft (a lesser crime), but not robbery, because he did not decide to steal the money until after the attack on the bartender was complete. *Id.* at 129-30, 136. But his attorney did not request a charge on the lesser-included offense of theft, and the trial court did not give one. *Id.* at 130, 136. The PCRA court denied Breakiron's petition under

Pennsylvania's Post Conviction Relief Act, including on this claim. *Id.* In affirming that decision, the Pennsylvania Supreme Court only examined the prejudice prong and determined that Breakiron could not show prejudice for two reasons:

(1) trial counsel had made this argument to the jury and because the jury still convicted Breakiron of robbery, it necessarily rejected trial counsel's argument that Breakiron committed theft alone, *id.* at 139; and

(2) "the evidence supported this verdict," in other words the evidence of robbery was sufficient, *id.*

While the federal district court denied habeas relief, the Third Circuit reversed on the robbery count. After concluding that Breakiron was entitled to the jury instruction and there was no strategic reason for the failure to request the lesser-included offense instruction, *id.* at 137-38, the Third Circuit concluded that the first rationale was an "unreasonable application" of *Strickland* and the second was "contrary to" *Strickland*, *id.* at 139. As relevant to this petition, the Third Circuit concluded that even "partial reliance on the sufficiency of the evidence . . . is nevertheless problematic." *Id.* at 140. The Third Circuit acknowledged that *weighing* the strength of the evidence is part of a prejudice analysis, but it emphasized that a sufficiency determination is not the same as weighing the strength of all of the evidence. *Id.* "Merely noting that the evidence was sufficient to convict" does not weigh "all the evidence of record," nor does it "determine whether there was a reasonable probability that the jury would have convicted" the petition on the count if counsel had not rendered ineffective assistance. *Id.* Because this failure by the

Pennsylvania Supreme Court was "contrary to" *Strickland*, the Third Circuit determined that it was not entitled to any deference under AEDPA. *Id.*

Five years later, the **Third Circuit** again confronted whether the Pennsylvania state courts had issued an opinion "contrary to" *Strickland* in *Saranchak*. The Third Circuit examined whether Daniel Saranchak was prejudiced by his trial counsel's failure to investigate and present his mental health history for the penalty phase of his death penalty case. *Saranchak*, 802 F.3d at 596-97. Saranchak's trial counsel decided not to investigate potential mental health evidence because a court-appointed expert had determined Saranchak was competent to stand trial. *Id.* at 596. The Third Circuit concluded that this was unreasonably deficient because counsel's knowledge of a previous psychiatric hospitalization, a suicide attempt, depression, and militaristic posture demanded some investigation through further medical evaluation and obtaining medical and school records. *Id.* Such an investigation would have allowed counsel to present evidence of Saranchak's mental health, his abusive upbringing, and his dysfunctional family. *Id.* Under Pennsylvania law, a sentence of death is mandatory if the jury unanimously find either (1) at least one aggravating circumstance and no mitigating circumstance, or (2) one or more aggravating circumstance which outweighs any mitigating circumstances. *Id.* at 597. Saranchak sought to prove several mitigating circumstances including a catchall category for "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." *Id* (quoting 42 Pa. Cons. Stat. Ann. § 9711(e)(8)). As both the Third Circuit and the Pennsylvania PCRA court

recognized, these penalty phase standards meant that Saranchak had to show:

> The reasonable probability that, absent trial counsel's failure to present mitigating evidence, he would have been able to prove at least one mitigating circumstance by a preponderance of the evidence and that at least one jury member would have concluded that the mitigating circumstance(s) outweighed the aggravating circumstance(s).

Id. (quoting *Saranchak-PCRA*, No. 889, 889A-1993 at 16)).

The Third Circuit noted that it must presume "that state courts know and follow the law" and apply a "highly deferential standard" in evaluating state court decisions. *Saranchak*, 802 F.3d at 599 (internal quotation omitted). The Third Circuit acknowledged that the PCRA court had twice correctly described the *Strickland* prejudice enquiry. *Id.* at 597-98. But the Third Circuit concluded that despite these statements, the PCRA court "misapprehended *Strickland*'s prejudice prong" because it also included "repeated misstatements of the law." *Id.* at 599. The most important of these misstatements was when it applied the standard using "a sufficiency of the evidence test to demonstrate that the outcome would not have been different." *Id.* The Third Circuit noted that this determination was buttressed by the fact that the PCRA court did not "evaluate the totality of the available mitigation evidence" as would be required under a *Strickland* analysis. *Id.* at 600. For these reasons, the Third Circuit concluded that even though the correct legal standard had been set out, the Pennsylvania PCRA court had "at the very least" unreasonably applied clearly established law and thus was not entitled to deference under 28 U.S.C. § 2254(d)(1).

Similarly, in *Crace*, the **Ninth Circuit** held that the Washington Supreme Court applied *Strickland* in a "patently unreasonable" manner when the Washington Supreme Court concluded it could not hold there was a "reasonable probability" that

counsel's errors contributed to the conviction because "there was sufficient evidence to support the jury's verdict" combined with the presumption that the jury had followed the instructions. 798 F.3d at 845, 847. As the Ninth Circuit determined, it was wrong to assume that just "because there was sufficient evidence to support the original verdict, the jury *necessarily* would have reached the same verdict even if instructed on an additional lesser included offense." *Id.* at 847-48.

Crace had been charged with first-degree criminal trespass, second-degree malicious mischief, and second-degree assault. 798 F.3d at 844. The jury was instructed on the charged offenses and on a lesser included offense for second-degree assault: attempted second-degree assault. *Id.* The jury deadlocked on the second-degree assault conviction but convicted Crace on the attempted second-degree assault (a felony). *Id.* In his post-conviction proceeding, Crace faulted his trial counsel for failing to request a jury instruction on "unlawful display of a weapon," another lesser-included offense of second-degree assault. *Id.* A conviction on this count would have only been a misdemeanor and Crace would have avoided sentencing with a third strike under Washington's three-strikes law. *Id.* at 844-45.

The Washington Court of Appeals granted Crace's post-conviction personal restraint petition after finding both deficient performance and prejudice. *Id.* at 845. The State of Washington appealed, and the Washington Supreme Court reversed. The court only considered the prejudice prong. It explained that it had to "assume that the jury would not have convicted" Crace on the attempted second-degree assault "unless the State had met its burden of proof" and that "the availability of" an

additional lesser-included compromise offense "would not have changed the outcome of the trial." *Id.* (quoting *In re Crace*, 280 P.3d 1102, 1109 (Wash. 2012)). Based on these presumptions along with "the fact that there was sufficient evidence to support the jury's verdict," the Washington Supreme Court determined that it could not "'say in all reasonable probability that counsel's error . . . contributed to Crace's conviction on attempted second degree assault.'" *Id.*

After the federal district court granted habeas relief, the Ninth Circuit affirmed. In determining whether the Washington Supreme Court decision was entitled to AEDPA deference, the Ninth Circuit looked at both the legal standard cited as well as the application. Similar to the opinion of the KCOA here, the Washington Supreme Court had set out the correct *Strickland* prejudice standard. But as the Ninth Circuit noted, "recitation of the legal standard" on its own is not enough, the state court's application of the law must also be reasonable. *Crace*, 798 F.3d at 850 n.5.

The Ninth Circuit concluded that the method that the Washington courts used to determine prejudice was a "patently unreasonable application of *Strickland*." *Id.* at 847. As it noted, the Washington Supreme Court was "wrong to assume that, because there was sufficient evidence to support the original verdict, the jury *necessarily* would have reached the same verdict even if instructed on an additional lesser included offense." *Id.* at 847-48. The Ninth Circuit went on to explain that additional information—like another lesser-included-offense instruction—"can affect a jury's *perception* of reasonable doubt: the same scrupulous and conscientious jury

that convicts on a greater offense when that offense is the only one available could decide to convict on a lesser included offense if given more choices." *Id.* at 848.

As the Ninth Circuit went on to emphasize, *Strickland* requires courts to "assess the likelihood that the defendant's jury would have convicted only on the lesser included offense." *Crace*, 798 F.3d at 849. In contrast, the Ninth Circuit concluded that the Washington Supreme Court was "not merely wrong, but 'objectively unreasonable' under AEDPA" because it made a determination as a matter of law that "sufficient evidence" eliminated any chance of prejudice:

> [b]y pronouncing as a matter of law that, as long as there is sufficient evidence to support the jury's verdict, no prejudice results from a defense attorney's failure to request a lesser-included-offense instruction, the Washington Supreme Court has licensed Washington courts to avoid analyzing prejudice in the way that *Strickland* requires.

Crace, 798 F.3d at 849-50.

B. The Tenth Circuit's Sufficiency Approach is Wrong.

The Supreme Court has been emphatic on two fundamental principles for assessing prejudice since *Strickland*. ***First***, courts "must consider the totality of the evidence before the judge or jury" because "a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. ***Second***, the prejudice standard is not an "outcome-determinative" standard; "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 694. In subsequent decisions, this Court further emphasized that it has "never intimated that the right to counsel is conditioned upon actual innocence. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike." *Kimmelman*,

477 U.S. at 380. Given these clear statements a state court decision is "contrary" to *Strickland* if a prisoner must meet a higher evidentiary burden than "reasonable probability." *Williams*, 529 U.S. at 405-06.

The Tenth Circuit concluded that to assess counsel's failure to investigate and present the most viable defense, using sufficiency of the evidence to determine prejudice was both: (1) not contrary to nor an unreasonable application of *Strickland*; and (2) outcome dispositive of prejudice on *de novo* review. The Tenth Circuit's approach violates the fundamental principles of a *Strickland* prejudice analysis.

As to the first fundamental principle—considering the totality of the evidence—the KCOA sufficiency review relied on by the Tenth Circuit is necessarily at odds with this Court's command to consider all of the evidence. Kansas sufficiency review (like the federal standard) requires appellate courts to only view the evidence in the light most favorable to the State and "not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations." *State v. Brown*, 387 P.3d 835, 848 (Kan. 2017). The Third Circuit recognized in *Saranchak* that the sufficiency review conducted by the Pennsylvania PCRA court did not consider the evidence and argument that could have been made with effective assistance of counsel. *Saranchak*, 802 F.3d at 600. Similarly, the Tenth Circuit and KCOA in this case did not consider and weigh the totality of the evidence, make credibility determinations, or draw inferences—despite, the federal district court conclusion that there was competing evidence on what occurred and different inferences that could be drawn by the jury. App. 70-71. The Tenth Circuit also did not consider that the trial record would be

unreliable because his trial counsel did not present prior inconsistent statements, cross-examine J.B. on the act the KCOA assessed, or elicited direct testimony from Sumpter on the same. Because the KCOA and Tenth did not consider the totality of the evidence in the record—let alone the record that would have been develop by competent trial counsel—its assessment ran contrary to the first fundamental principle of *Strickland* prejudice analysis.

Using sufficiency of the evidence as a proxy for prejudice also violates the second fundamental principle because it imposes an impermissibly "heightened" and "outcome determinative" standard as recognized by the Third Circuit. *Saranchak*, 802 F.3d at 598. The Supreme Court has held that a state court decision would be "contrary" to *Strickland* if it required a prisoner to meet a higher evidentiary burden than "reasonable probability." *Williams*, 529 U.S. at 405-06. The Tenth Circuit—and KCOA—approach requires a petitioner to show that the verdict was not legally or factually supported as a matter of law; rather than simply "undermin[ing] confidence in the outcome" by showing a "reasonable probability" of a different outcome, *Strickland*, 466 U.S. at 694. Such a standard would result in virtually eliminating any entitlement to a fair trial for all but those who could prove innocence.

The Tenth Circuit's outcome-determinative approach would also make ineffective assistance claims duplicative of innocence claims under *Jackson v. Virginia*, 443 U.S. 307 (1979). In *Jackson*, this Court concluded that a petitioner is entitled to relief under Section 2254 if she can show that "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have

found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. As the Ninth Circuit explained, if a defendant can show innocence, the appropriate claim for relief would be under *Jackson*:

> If a defendant can only show *Strickland* prejudice when the evidence is insufficient to support the jury's verdict—a circumstance in which the defendant does not need to rely on *Strickland* at all because *Jackson* already provides a basis for habeas relief. . . . And conversely, if the evidence is sufficient to support the verdict, there is *categorically* no *Strickland* error, according to the [state court's] logic. By reducing the question to sufficiency of the evidence, the [state court] has focused on the wrong question here—one that has nothing to do with *Strickland*.

Crace, 798 F.3d at 849.

Here, there are serious questions that undermine confidence in the trial outcome. The State abandoned the acts of purported "confinement by force" identified at trial to the judge and jury as being legally insufficient. App 63. It is reasonable to assume the jury rested its decision on arguments made to it including trial counsel's and the prosecutor's misstatement of the elements and the evidence that could support it. Due to trial counsel's failures and egregious misstatements, there was no jury instruction on facilitation, evidentiary development or challenges, or argument to clarify what was actually required under Kansas law. This is enough to undermine confidence in Sumpter's conviction.

II. Exhaustion

A habeas petitioner in state custody must "exhaust[] the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A), by "fairly present[ing]" the federal claims in state court, *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986) (quoting *Picard v. Connor*, 404 U.S. 270, 276 (1971)). The rule ensures state courts have "a meaningful

opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez*, 474 U.S. at 257.

This Court has provided some guidance on the fair presentation requirement. Notably, a petitioner "must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-163 (1996). As to the legal basis, a petitioner must "alert[]" the state court to the "claims under the United States Constitution." *Duncan v. Henry*, 513 U.S. 364, 366 (1995) (per curiam). A state petitioner can alert the state courts by citing "the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling a claim 'federal'" in conjunction with his claim. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004). But asserting a similar (but not virtually identical) state-specific claim does not apprise the state court of the federal nature of an issue. *Duncan*, 513 U.S. at 366. Factually, a petitioner must simply present "the substance of his claims to the state court." *Vasquez*, 474 U.S. at 260. In federal Section 2254 proceedings, a petitioner can provide additional facts and supplemental evidence if those facts do not "fundamentally alter the legal claim already considered by the state court." *Id.*

But these high-level guideposts have not provided the clarity to prevent confusion in the lower courts. There are at least three different approaches with varying tests to the fair presentation requirement. Six circuits deploy multi-factor tests, which assess differing ways to provide notice of the federal claim. Two circuits apply a strict presentation requirement where petitioners must present the federal

claims face-up and squarely to the state's highest court. Finally, with its decision in this case, the Tenth Circuit has held that a petitioner only exhausts claims that are "centered" in his "fram[ing of] the issue" despite the legal and factual support for a broader claim. App. 27-28 n.2. The split is entrenched and widening, and there is no reason to think that the lower courts will resolve the split without additional guidance from this Court. As Judge Selya noted over three decades ago:

> We revisit today an enduring riddle, now codified: the requirement that a state prisoner who petitions for federal habeas relief must have given the state courts first crack at the claims which he raises. The relative ease with which the requirement can be stated belies the morass of interpretive difficulties which often engulfs individual petitions. . . . [A]s direct as the *Picard* mandate might appear, it has proven to be elusive in its application. The more simply the guidelines are stated, it seems, the more perplexing the ensuing complications.

Nadworny v. Fair, 872 F.2d 1093, 1095 (1st Cir. 1989). This unpredictability makes it difficult to determine the proper procedural course—especially for the often unrepresented state habeas petitioner. And it means that the disposition of a federal habeas petitioner's claim will depend on the jurisdiction in which the petition is filed.

A. The Circuit Split

1) Multi-Factor Indicia: First, Second, Third, Sixth, Seventh, Ninth Circuits

The **First Circuit** has identified at least five ways to satisfy the "fair presentation" requirement: (1) "reliance on a specific provision of the Constitution," (2) "substantive and conspicuous presentation of a federal constitutional claim," (3) "on-point citation to federal constitutional precedents," (4) "identification of a particular right specifically guaranteed by the Constitution," and (5) "assertion of a state-law claim that is functionally identical to a federal constitutional claim."

Coningford v. Rhode Island, 640 F.3d 478, 482 (1st Cir. 2011). But it has warned that a petitioner bears a "heavy" burden to show fair presentation and courts must adopt "a certain grudgingness in accepting conclusory allegations" to make "comity more than an empty gesture." *Nadworny*, 872 F.2d at 1098.

The **Second**, **Third**, **Sixth**, and **Seventh Circuits** assess whether a claim is exhausted by seeing if petitioner did one of four things: (1) relied on federal cases using the constitutional analysis; (2) relied on state cases using federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *Daye v. Attorney General*, 696 F.2d 186, 194 (2d Cir. 1982) (en banc); *Nara v. Frank*, 488 F.3d 187, 198 (3d Cir. 2007); *Nian v. Warden*, 994 F.3d 746, 751 (6th Cir. 2021); *Byers v. Basinger*, 610 F.3d 980, 985 (7th Cir. 2010).

The **Ninth Circuit** has yet to set a definitive list of factors to consider. But in an *en banc* decision, the Ninth Circuit considered two different means for a petitioner to meet the fair presentation requirement: (1) reference the specific provisions of the federal constitution, or (2) cite to federal or state cases involving the legal standard for a federal constitutional violation. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc); *accord Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). In subsequent decisions, that court also considered whether a federal claim not explicitly presented to the state courts was "sufficiently related" to and "intertwined" with the claims presented to the state court to meet the fair presentation

requirement. *Wooten v. Kirkland*, 540 F.3d 1019, 1025 (9th Cir. 2008); *Lounsbury v. Thompson*, 374 F.3d 785, 788 (9th Cir. 2004) (concluding that "exhausting the procedural (burden of proof) claim may also exhaust the substantive claim that the petitioner was tried while incompetent" because the two claims "are sufficiently related" and "intertwined"). "Claims are 'sufficiently related' or 'intertwined' for exhaustion purposes when, by raising one claim, the petition clearly implies another error." *Wooten*, 540 F.3d at 1025 (quoting *Lounsbury*, 374 F.3d at 788).

2) Strict Presentation: Fourth and Eleventh Circuits

In contrast to the multi-factor indicia of other circuits, the **Fourth Circuit** requires that petitioners present federal claims "face-up and squarely" by providing "both the operative facts and the controlling legal principles" to the state court; "[o]blique references which hint that a theory may be lurking in the woodwork will not suffice." *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000). In *Fullwood v. Lee*, the Fourth Circuit considered *sua sponte* how to approach a claim where the petitioner's "current emphasis [in federal court] seems to be slightly different than it was in state court." 290 F.3d 663,676 n.4 (4th Cir. 2002). The Fourth Circuit noted that the important consideration was whether the claim had "changed in any substantive way" rather than whether the argument was "articulate[d]" "in precisely the same fashion" in his state and federal briefs. *Id.*

While the Fourth Circuit still has not endorsed a multi-factor approach, it did consider many of the indicia noted by other Circuits when it assessed a double jeopardy claim. The Fourth Circuit held the claim was exhausted because petitioner cited a state case that dealt exclusively with federal double jeopardy law, "used clear

double jeopardy language," and presented a fact pattern that Virginia courts "regularly considered appropriate for double jeopardy analysis." *Jones v. Sussex I State Prison*, 591 F.3d 707, 713-14 (4th Cir. 2010). In a later unpublished case, the Fourth Circuit limited *Jones* to circumstances where all of these indicia exist. *Pinckney v. Clarke*, 697 F. App'x 768, 776 (4th Cir. 2017).

Similarly, the **Eleventh Circuit** requires petitioners present their claims "face-up and squarely" "to the state courts such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelley v. Sec'y for Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004). The "federal question must be plainly defined." *Id.* at 1345 (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). In *Kelley*, the Eleventh Circuit considered the extent to which general assertions of ineffective assistance of trial counsel could preserve federal claims. *Id.* at 1344. The Eleventh Circuit concluded that the general umbrella of ineffective assistance is necessary but not sufficient because a petitioner must also "transparently present the state courts with the specific acts or omissions of his lawyers that resulted in prejudice." *Id.* A petitioner had not fairly presented an ineffective assistance claim when the briefing on this argument did not mention the factual basis relied on in federal court. *Id.* at 1349-50.

3) Central Framing: Tenth Circuit

The **Tenth Circuit** had not previously adopted either of these approaches but had generally required that a petitioner "raise[] the 'substance' of the federal claim in state court." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). In this case, the Tenth Circuit raised the bar higher for petitioners attempting to fairly present

their federal claims in state court. App. 27-28 n.2. Instead of looking at the federal and state case law cited, the entirety of the factual allegations, or whether the claim was presented at all, the Tenth Circuit limited the exhausted claims to how it viewed Sumpter's "clear[] fram[ing of] the issue." *Id.* The Tenth Circuit then selected what it presumably believed was one thesis sentence in Sumpter's KCOA appellate brief as well as one heading in the state court post-conviction petition. *Id.* It did not consider what specific acts and omissions had been articulated by Sumpter to explain the deficient performance of his attorney; nor did it consider the cited federal and state cases which articulated the federal right being presented to the Kansas state courts.

B. The Tenth Circuit's Framing Approach is Wrong.

Perhaps because the exhaustion issue was brought up *sua sponte* by the panel and not briefed by either party, the Tenth Circuit approach to "fair presentment" stands in stark contrast to the approach of all other Circuits as well as Supreme Court precedent. This Court has simply required that a petitioner include: (1) "reference to a specific federal constitutional guarantee," and (2) "a statement of the facts that entitle the petitioner to relief." *Gray*, 518 U.S. at 162-163. The specific federal constitutional guarantee can be set out through citation to "a case deciding such a claim on federal grounds." *Baldwin*, 541 U.S. at 32.

But the Tenth Circuit did not consider all of the facts set out in the state court briefing or the cases cited by Sumpter in coming to its conclusion on how he "clearly framed the issue" for fair presentation purposes. App. 27-28 n.2. If it had, it would have been forced to acknowledge that Sumpter consistently argued that his trial counsel failed to investigate and understand Kansas kidnapping law under *Buggs*

and consequently "missed crucial opportunities to challenge the State's claims and testimonial evidence" including failing to: (1) challenge the prosecutor's misstatement on the evidence; (2) cross-examine J.B. on changing testimony or what happened in or around the vehicle that would meet the elements; (3) direct examine Sumpter as to what happened related to the elements; (4) object to or contradict the prosecutor's improper interpretation of contested evidence; (4) explain to the jury what the State must prove to satisfy the elements; (5) argue to the jury that the State had not met its burden under *Buggs*; (6) object to the incorrect statement of the intent element given by the prosecutor; (7) make any *Buggs* argument in the motions for acquittal and JNOV; (8) propose the jury instruction on facilitation recommended by Kansas courts. App. 412-13. The Tenth Circuit could only justify using a sufficiency-of-the-evidence standard by ignoring all of the ways Sumpter cited on how counsel's ineffective assistance manifested at trial. Because each of these examples of her deficient performance were presented in the state court briefing, Sumpter appropriately notified the state court of both the particular constitutional right he sought relief for as well as the factual underpinning for that claim as required by this Court in *Picard* and its progeny. *See Gray*, 518 U.S. at 162-163. The Tenth Circuit's requirement that the federal claim must be "clearly framed" has no basis in even the strictest interpretation of this Court's precedent.

While claims like ineffective assistance of trial counsel are undoubtedly broad, other Circuits have taken the guidance of this Court and looked to see whether the deficient behavior was mentioned in the state claim in relation to the federal

constitutional right. *Kelley*, 377 F.3d at 1344-50; *Sweeney v. Carter*, 361 F.3d 327, 332-33 (7th Cir. 2004). This approach does not rely on the subjective assessment of the central framing—as adopted by the Tenth Circuit—but instead relies on an objective determination of whether the deficient behavior was presented. Because fair presentment does not rely on a petitioner invoking a "talismanic phrase," *Duncan*, 513 U.S. at 365, the approach of the other Courts of Appeals to simply enquire into whether the constitutional right and its supporting factual material was presented in some fashion is more appropriate than expecting a habeas petitioner to "clearly frame[]" her federal claim in a way that "centered" it to the subjective assessment of a federal court, App. 27-28 n.2.

If the Tenth Circuit followed precedent on fair presentation, it would also have assessed the cases cited by Sumpter, which centered on ineffective assistance due to counsel's failure to investigate and deploy a valid defense. App. 416-17 (citing *Davis*, 277 Kan. at 327-29 (examining claim defendant "was deprived of effective assistance of counsel when [trial counsel] failed to show an understanding or present a solid defense of not guilty by reason of mental disease or defect"); *Kimmelman*, 477 U.S. at 385 (counsel's failure to file a timely motion, when based on mistake of law amounts to constitutionally deficient assistance)). Sumpter cited no ineffective assistance of counsel cases that were limited to a failure to file a motion to the legal sufficiency—the narrow claim the Tenth Circuit concluded was "fairly presented."

The Court should reverse the Tenth Circuit's misguided decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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