No. _____

In the Supreme Court of the United States

MICHAEL MEYERS,

Petitioner,

v.

DAVID GOMEZ, WARDEN,
WARDEN, STATEVILLE CORRECTIONAL CENTER,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When faced with a Sixth Amendment claim for ineffective assistance of counsel, a court must determine whether counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In *Strickland*, this Court held that a "defendant must overcome [a] presumption that * * * the challenged action might be considered sound trial strategy." *Id.* at 689 (quotation marks omitted). But the Court emphasized that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.*

The federal courts disagree about how these principles apply when the record does not reveal the basis for an attorney's decision. In its decision below, the Seventh Circuit held that it was appropriate for an Illinois state court to retroactively *construct* a "strategic rationale" that "counsel himself ha[d] not articulated." The Fifth, Eighth, Tenth, and Eleventh Circuits have taken similar approaches. By contrast, the Second and Fourth Circuits have held that when an attorney has not articulated the rationale behind his or her decision, a court may not presume that it was based on strategy.

The question presented is: When evaluating a claim for ineffective assistance of counsel, may a court retroactively construct a strategic justification for a decision that the attorney has never articulated?

LIST OF PROCEEDINGS

Direct Habeas Proceedings Below

United States Court of Appeals for the Seventh Circuit

No. 20-2786

Michael Meyers *Petitioner-Appellant*, v.
David Gomez, *Respondent-Appellee*.

Date of Final Opinion: October 6, 2022

United States District Court
Northern District of Illinois

No. 17 C 5687

Michael Meyers, (N74364), *Petitioner*, v. Randy Pfister, Warden, Stateville Correctional Center, *Respondent*.

Date of Final Opinion and Order: August 13, 2019

Illinois State Court Post-Conviction Proceedings

Appellate Court of Illinois, First Judicial District

No. 1-14-2323

The People of the State of Illinois, *Respondent Appellee*, v. Michael Meyers, *Petitioner-Appellant*.

Date of Final Opinion: October 21, 2016

Circuit Court of Cook County

No. 89-CR-27587(3)

The People of the State of Illinois, *Respondent*, v. Michael Meyers, *Petitioner*.

Date of Final Opinion: June 24, 2014

Illinois State Court Original Trial Court Proceedings

Circuit Court of Cook County

No. 90-27587

The People of the State of Illinois v. Kevin Young, et. al

Date of Final Order: May 1, 1991

Appellate Court of Illinois, First Judicial District

Nos. 1-91-1519, 1-91-1522, 1-91-1778, 1-91-1848, 1-91-2087 and 1-92-0022

The People of the State of Illinois, *Plaintiff-Appellee*, v. Young, et. al, *Defendants-Appellants*.

Date of Final Order: March 31, 1994

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JURISDICTION

The Seventh Circuit issued its opinion on October 6, 2022. Petitioner initially filed on January 4, 2023 within the 90-day deadline. By letter of the clerk of court dated January 10, 2023, the Court gave Petitioner an additional 60 days to re-file a corrected petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

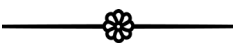
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI

The Sixth Amendment 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 defence.



PETITION FOR A WRIT OF CERTIORARI

In 1989, on the South Side of Chicago, a group of masked gunmen shot and killed two people. Petitioner Michael Meyers was one of seven men charged with murder in Illinois state court. Two witnesses claimed to have seen him at the time of the crime. The state's primary witness was Deanda Wilson, a 12-year-old member of a rival gang. He testified that Meyers was one of the shooters but later admitted that he had not seen Meyers at all. The other witness was Sherri Parker, who had no involvement in either of the two gangs. She claimed that she was with Meyers at the time of the shooting in an apartment 300 feet away. Parker, however, did not get the chance to tell her account until years later, because Meyers' lawyer never interviewed her or called her to testify. Meyers was convicted and sentenced to life imprisonment.

During his post-conviction proceedings in Illinois state court, Meyers argued that his trial counsel's performance "fell below an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), because counsel declined to interview or call Parker. The state courts rejected this claim. Although Meyers' lawyer had not offered any strategic reason for declining to interview or call Parker (and he had passed away before Meyers' evidentiary hearing), the state courts invented several reasons that *might*

have led counsel to make that decision, and held that these reasons would have been justifiable trial strategy.

Meyers brought a petition for writ of habeas corpus in the Northern District of Illinois under 28 U.S.C. § 2254. The district court rejected his ineffective assistance claim on the same grounds as the state courts. The Seventh Circuit affirmed. It recognized prior cases "indicating that it is improper to attribute a strategic rationale to counsel that counsel himself had not articulated." App.29a. But it found that "the risk that the defense would be taking by pursuing the alibi through Parker is obvious from the record," and therefore agreed with the state courts that trial counsel "had a legitimate strategic reason for keeping Parker off the witness stand." App.31a.

This holding exacerbates a split among federal courts that have considered this issue. When faced with a record that does not reveal the basis for an attorney's decision, the Fifth, Eighth, Tenth, and Eleventh Circuits have permitted courts to "reconstruct * * * strategic reasons why counsel may have made th[e] decision." *Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir. 1998); *see Hernandez v. Thaler*, 463 F. App'x 349, 356 (5th Cir. 2012); *Sallahdin v. Mullin*, 380 F.3d 1242, 1249 (10th Cir. 2004); *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999).

The Second and Fourth Circuits have rejected this approach. *Eze v. Senkowski*, 321 F.3d 110 (2d Cir. 2003); *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992). The Fourth Circuit, for example, has said that when there are no "tactical considerations" "suggested in the evidentiary record," attributing a strategy to counsel is an "exercise[] in retrospective sophistry." *Id.* at 1358. "[C]ourts should not conjure up tactical

decisions an attorney could have made": "Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another." *Id.* at 1358-59.

These courts are right. The core holding in *Strickland* is that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." 466 U.S. 668. This principle does not cut in only one direction, as the Seventh Circuit itself had previously recognized: "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986)). And that is particularly true where, as here, a trial lawyer does not even *investigate* the circumstances that would permit a reasoned strategic decision. Any other rule would lead to perverse results—it would mean that an attorney who is silent on his thinking would receive more deference than an attorney who explains the rationale for his decision.

The Court should grant Meyers' petition for writ of certiorari.

STATEMENT OF THE CASE

A. The November 1989 Shooting

At 6:00pm on November 7, 1989, a woman named A.W. left 3549 South Federal Street, part of the Stateway Gardens housing complex in Chicago. App.175a. Jerry Williams, a member of the Del-Vikings gang, approached A.W. on the street and struck her on the head with a gun. App.176a. Williams forced her to sit in a corner, and demanded that A.W. tell him where "Ace Dog" was—a reference to Kevin Young, who had a relationship with A.W. App.177a, App.189a. Williams then brought A.W. into an upstairs apartment, where he and two other Del-Vikings raped her. App.178a.

Two days after the assault, at about 10:00 pm, a group of masked men shot and killed Dan Williams at 3517-3519 South Federal Street, which was also part of the Stateway complex. App.211a-219a. Although Dan Williams was the target, the gunfire also killed Thomas Kaufman, a security guard in an Illinois Institute of Technology building nearby. App.200a-203a.

Meyers was one of seven men charged with murder in Illinois state court for the deaths of Williams and Kaufman. App.221a-223a. The others were Kevin Young ("Ace Dog"), James Young, James Bannister, Michael Johnson, Thomas Carter, and Eric Smith, all of whom were alleged to be members of the Gangster Disciples, a rival of the Del-Vikings. App.198a. The state's theory was that the defendants were seeking revenge for the rape of A.W,

and mistook Dan Williams for a Del-Viking. App.210a-211a.

B. Trial

Meyers was tried along with five codefendants beginning on March 26, 1991. The state's primary witness was Deanda Wilson, a 12-year-old member of the Del-Vikings. *See* App.167a-168a. Wilson initially identified Meyers as one of the shooters, but then admitted that he told both the police and the grand jury that he was unable to see Meyers' face; with the exception of Kevin Young, all of the men had pulled their caps completely over their faces. App.168a-169a.

The state's other witnesses never identified Meyers as one of the men at the crime scene. Several testified in detail about the shooting, but they acknowledged that the majority of the shooters had their faces covered. *See* App.211a-219a, App.194a-208a, App.170a-175a.

Other than Wilson, A.W. was the only trial witness who claimed to have seen Meyers on the night of the shooting. On direct, she said that about five hours before the shooting, she met with Kevin Young and Carter in a friend's apartment and identified the men who had assaulted her. App.179a-181a. A.W. testified that Young and Carter left the apartment and returned with Meyers, Johnson, and James Young. App.181a-183a. She said that the five men then departed at about 10:00pm, dressed in black and carrying guns. App.183a-184a. A.W. stayed behind and did not testify about where the men went. *Id.* They returned, according to A.W., about 20 minutes later, wearing face coverings, at which point Young

took the guns and placed them in a radiator. App.184a-186a.

On cross-examination, A.W. admitted that her testimony contradicted her initial statements to police, made three days after the shooting. A.W. told the police that she had spent the night of the shooting with her cousin and had not seen any of the defendants. App.187a-188a, App.190a-191a. At trial, she said that these statements had been lies. App.191a-192a.

The jury found each defendant guilty of two counts of first-degree murder. App.63a-64a. The court sentenced them to life imprisonment. App.160a-161a.

C. Wilson's Recantation

Shortly after the trial, Wilson admitted that he had lied under oath. In June 1992, during codefendant Eric Smith's post-trial proceedings, Wilson made a court-reported statement under oath that he was unable to identify all the shooters, including Meyers ("IceMike"). App.228a-231a.

Both Bannister and James Young filed post-conviction petitions based on Wilson's recantation. As part of James Young's proceedings, Wilson signed an affidavit swearing that on the night of the shooting, "[t]he only person whose face I saw was Kevin Young"; "I could not tell who any of the shooters were except for Kevin Young because they wore knit hats over their faces and coat collars up in front of their faces." App.233a. Wilson further explained: "I lied at trial because the cops and state's attorneys told me to." *Id.*

D. Sherri Parker's Alibi Testimony

One critical witness did not testify at trial: Sherri Parker. In an affidavit filed with Meyers' 2000 post-conviction petition (discussed below), Parker averred that Meyers was in her apartment building at the time of the shooting, 300 feet away, and that Meyers' lawyer—George Nichols—never spoke to her:

> I lived at 3549 South Federal apartment 102 until seven years ago. * * *
>
> On November 9, 1989, at about 9:30 p.m. Michael Meyers came to my apartment. He stayed in my apartment for about half an hour then he left.
>
> Almost immediately after Michael left my apartment, I heard several gun shots outside. The shooting lasted about ten seconds.
>
> As soon as the shooting stopped, I went outside to find my daughters who were out at the time. When I got near the building at 3517 South Federal, I saw Ace Dog [Kevin Young] running back with a gun in his hand. I did not see anyone else with a gun. I did not see Michael Meyers out there.
>
> I know Michael could not have made it to the outside of the 3549 building by the time the shooting started. The distance between the buildings at 3549 South Federal and 3517 South Federal is about 300 feet. He definitely would not have been able to make it to [the] 3517 building between the time he left my apartment and the time the shooting started.

> I never talked to the police about the night of the shooting.
>
> I do not know who George Nichols is and I have never talked to him or anyone else from the Public Defender's Office about the night of the shooting until now.
>
> I was subpoenaed to go to court for Michael Meyers. I went to court but was never called to testify.

App.235a-236a (paragraph numbers omitted).

The subpoena shows that Nichols compelled Parker to appear in court on the morning of March 26, 1991, then scheduled as the second day of trial. App.238a-239a. But he never called her as a witness.

E. First Post-Conviction Proceeding

In 1995, after an unsuccessful direct appeal, Meyers moved for post-conviction relief in Illinois Circuit Court under 725 ILCS 5/122-1. App.8a. Meyers argued that his "trial attorney was ineffective for failing to interview and present the testimony of [] Parker." App.226a. The Circuit Court declined to hold an evidentiary hearing and dismissed on Meyers' ineffective assistance claim. App.146a-147a, 89a.

Meyers appealed. The Illinois Appellate Court. held that the Circuit Court erred in failing to conduct an evidentiary hearing, and all but adopted Meyers' claim. App.94a-97a. The court explained that, if Parker's allegations were true, there did not appear to be a strategic justification for Nichols' decision not to interview or call her, and that Meyers was prejudiced:

> Accepting the assertions in Parker's affidavit as true, her exculpatory evidence would have directly contradicted the testimony of A.W., who stated that [Meyers] was one of the five armed men who were in [A.W.'s friend's] apartment just prior to the shootings. Parker's affidavit also indicated that [Meyers] could not have arrived at the location of the murders before the shooting began. If she had been called as a witness and testified consistent with her affidavit, Parker's testimony would have supported [Meyers'] theory that he was not present at the scene and was not involved in the shootings. * * *
>
> The State contends that counsel's decision not to call Parker as a witnesses was strategic because her testimony would have been speculative and because she would have been impeached based on her long-standing relationship with the defendant. This contention is without merit. It is established that strategic decisions may be made only after there has been a thorough investigation of law and facts relevant to plausible options. * * * In light of the assertions in Parker's affidavit, which we must accept as true, the defendant's trial counsel did not know the substance of her potential testimony, or the nature of her relationship with the defendant and could not have made a strategic decision not to call Parker.
>
> Therefore, the unrebutted allegations in the petition and Parker's affidavit indicate that defense counsel's representation failed to

> satisfy the objective standard of reasonableness required under the deficiency prong of the *Strickland* test.

94a-97a (quotation marks and citations omitted).[1]

F. Second Post-Conviction Proceeding

On remand, the Circuit Court held an evidentiary hearing on Meyers' ineffective assistance claim. App.14a-15a. Nichols did not testify; he had died by then. *Id.* The court heard testimony from Meyers, Parker, Edward Winstead (a detective), Timothy Leeming (an assistant public defender), and Daniel Brannigan (an investigator). App.130a-144a.

Meyers testified that he had no involvement in the 1989 shooting. App.117a. That night, he went to Parker's house at "about 8:30," and left after "about an hour, hour and a half." App.113a. "About ten, 15 seconds" after leaving, when he was still in the hallway outside Parker's apartment, Meyers heard gunshots. App.113a-114a. Parker then left to find her children and Meyers went home. *Id.*

Meyers testified that while speaking with Nichols in jail "a couple months after [Meyers'] arrest," he told Nichols that he "was with Sherry Parker at the time of the shooting." App.115a. Meyers provided Nichols with Parker's contact information, but Nichols said "he didn't feel safe going down there." *Id.* On the day of the trial, Nichols told Meyers that

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[1] On remand, the Circuit Court dismissed the petition again without a hearing, relying on an assertion by Meyers' subsequent counsel that is discussed below. The Appellate Court reversed, remanding again for an evidentiary hearing. App.67a-68a.

Parker was in the courtroom, but "he wasn't calling her"—a decision he did not explain. App.116a.

On cross-examination, the state questioned Meyers about a post-arrest interrogation by Detective Winstead. App.118a-123a. Meyers claimed that the only thing he told Winstead was that Meyers "didn't know anything about [the shooting]." App.119a. The state suggested that Meyers told Winstead he had gone to 3519 South Federal to buy marijuana on the night of the shooting, which Meyers denied. App.120a.

Parker testified that Meyers came to her apartment on the day of the shooting. App.128a. She did not recall the exact time, but said that it was before 10:00pm and that it was dark outside. App.123a, App.128a. Meyers stayed for "at least about a half hour." App.125a. He then began leaving, and just as he reached her door, Parker heard gunshots. App.124a. Parker noted that, due to the location of her apartment, it would take "about five minutes" just to get outdoors. *Id*.

Although Parker received a subpoena to appear in court, she did not meet with Nichols and did not believe she ever spoke to anyone working for him. App.126a-127a. Parker "came to the court building," "stood outside the door," and then went home. App.127a. Parker also recalled speaking to an investigator in 2009. App.129a. Years after the incident, Parker told the investigator that she could not remember the precise time of the shooting, but that she would "never forget" the shooting itself. App.129a-130a.

Detective Winstead interrogated Meyers after he was arrested. App.130a-131a. According to Winstead, Meyers said that on the day of the shooting, he went to 3519 South Federal to buy marijuana, but consistently denied any involvement in the shooting. App.132a-133a. Winstead also testified that Meyers claimed to have seen Dan Williams walking on the street and heard a group of men telling Williams to stop, followed by gunfire. App.133a.

Leeming testified that in 2009, he worked on Meyers' case, and found what looked like "one or two pages" of notes from an interview with Parker in 1990. App.134a. He had "no idea" who took the notes, and when he talked to Nichols in 2010, Nichols "did not know of" Parker. App.240a-241a, App.135a-136a. The notes from the 2010 interview confirm that Nichols "remembered" the case, but there were "no other possible witnesses/interviewed" and he "didn't talk to anybody else." App.240a-241a.

Brannigan testified that he interviewed Parker in 2009 (20 years after the shooting) and again in 2013 (24 years after). App.137a-138a, App.140a-141a. Both times, he said, she told him that she and Meyers had been in her apartment when she heard gunshots. App.143a-144a. He added that in 2009, Parker placed the interaction at around 3:00pm, but that in 2013, she placed it at around 7:00pm and admitted that she and Meyers were "probably getting high together" in her apartment. App.139a-142a.

The Circuit Court made no finding on whether Meyers was with Parker at the time of the shooting. Nor did it find that Nichols interviewed Parker. But the court rejected Meyers' ineffective assistance claim on the ground that Nichols *could* have made a

strategic decision not to call Parker, because Parker could have been impeached by the state with Meyers' alleged post-arrest statement that "he was not at the apartment at the time." App.110a. The court therefore denied Meyers' petition. App.111a.

Meyers appealed again. Even though the Appellate Court had previously found that Parker's affidavit, if true, would establish ineffective assistance of counsel (*see* pp. 9-11 *supra*), and even though the Circuit Court made no finding contrary to Parker's affidavit, the Appellate Court rejected Meyers' claim. App.75a-78a. It found that Nichols' failure to interview and call Parker could have been based on a reasonable trial strategy:

> We believe that the trial court's determination that Nichols' decision not to call Parker as a witness was a matter of trial strategy is adequately supported by the record even assuming, as the defendant contends, that Nichols never interviewed Parker.
>
> There is no question that Nichols was aware of Parker. The defendant testified that he told Nichols that he was with Parker in her apartment at the time of the shooting and that she was willing to testify to that effect. Nichols listed Parker as a potential witness in answer to discovery and issued a subpoena commanding her to appear at the defendant's trial. The evidence also established that, although he was aware that Parker was present in the courthouse on the day of the defendant's trial, Nichols decided not to call her as a witness. According to the defendant, Nichols told him on the day of trial that

> he did not plan to call Parker as a witness. Clearly, Nichols' decision in that regard was a matter of strategy. The question remains whether the strategy was reasonable under the circumstances.
>
> Had Parker testified that the defendant was with her at the time of the shooting, the State could have called Detective Winstead and ASA Marconi as rebuttal witnesses to testify to the defendant's postarrest statements placing himself at the scene of the shooting. Clearly, Nichols was aware that the State was able to introduce evidence of the defendant's postarrest statements as he not only filed a pretrial motion to suppress those statements, he also filed a pretrial motion *in limine* seeking to bar the State from using those portions of the defendant's statement relating to his use of marijuana. * * * We believe that declining to call an alibi witness whose testimony could be contradicted by the defendant's own postarrest statements as to his whereabouts falls within the realm of reasonable trial strategy, even if the known alibi witness had never been interviewed.

App.75a-77a.

The Illinois Supreme Court denied Meyers' petition for leave to appeal. *People v. Meyers*, 414 Ill. Dec. 272 (2017).

G. Habeas Petition

On July 19, 2017, Meyers filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254 in

the Northern District of Illinois. Dist. Dkt. 1. As relevant here, Meyers argued that his trial counsel was ineffective for failing to call Parker as an alibi witness. *Id.* at 5. The district court held that "the state appellate court's conclusion that trial counsel's performance did not fall below the objective standard of reasonableness was not an unreasonable application of *Strickland*." App.50a.[2]

H. Seventh Circuit Appeal

The Seventh Circuit granted Meyers a certificate of appealability, finding that "reasonable jurists could debate whether his trial counsel rendered ineffective assistance under *Strickland* * * * by failing to interview and call an available alibi witness." App.39a.

The Seventh Circuit then affirmed. App.2a. In relevant part, the court reasoned as follows:

> Given that Nichols was aware of the gist of Parker's alibi testimony through Meyers and he knew what risk her prospective testimony presented to the defense, the fact that he had not interviewed her is not dispositive of the ineffectiveness claim. Nichols knew enough to make a sound strategic assessment. Or, put in the terms of the AEDPA, it was not unreasonable for the Illinois Appellate Court to so conclude.
>
> Meyers contends, however, that it is inappropriate to credit Nichols with this strategic

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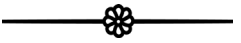
[2] Meyers also argued that he was entitled to relief because the state had knowingly used perjured testimony from Wilson; the district court held that this claim was procedurally barred. App.60a-61a.

judgment given that, by the time an evidentiary hearing was conducted as to the ineffectiveness claim, Nichols had died and therefore could not be examined as to why he did not present Parker as a witness. He has, once again, cited precedents from this court indicating that it is improper to attribute a strategic rationale to counsel that counsel himself has not articulated. But, of course, a court starts the *Strickland* analysis with the strong presumption that counsel was *not* ineffective, and when addressing the particular conduct for which his convicted client has faulted him, further presumes that, under the circumstances, the challenged action might be considered sound trial strategy. For us to presuppose, when counsel is unavailable to explain his decision-making, that he had no strategic rationale for the particular choice at issue—when a choice clearly was made—would turn these presumptions on their head. * * *

[A]lthough the state court did not have the benefit of Nichols' testimony, neither was it engaging in wholesale conjecture: Nichols' own actions reflect that, on the one hand, he affirmatively considered presenting Parker's testimony (and had her summoned to the courthouse in order to preserve the alibi option until the last moment), and on the other hand, that he was concerned about the potential impact of Meyers' contrary post-arrest statements, which he had taken steps to exclude from evidence at trial. We

> do not have Nichols' testimony linking the two, but the risk that the defense would be taking by pursuing the alibi through Parker is obvious from the record. It was not an unreasonable application of *Strickland* for the Illinois Appellate Court to conclude that Nichols had a legitimate strategic reason for keeping Parker off the witness stand.

App.29a-31a (quotation marks and citations omitted).



REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT ON WHETHER COURTS MAY CRAFT STRATEGIC RATIONALES FOR DECISIONS BY ALLEGEDLY INEFFECTIVE COUNSEL.

To establish a claim for ineffective assistance of counsel, a defendant must show that his lawyer's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In *Strickland*, this Court held that "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (quotation marks omitted). The Court made it equally clear, however, that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*

Federal appellate courts have struggled to find the line between these two principles: the presumption of reasonable professional assistance, and the need to avoid post hoc rationalizations. That analysis is especially difficult in cases where the record does not reveal the basis for a lawyer's decision. How can a strategy be deemed "reasonable" if no one knows what the strategy was? The Second and Fourth Circuits have held that in this situation, a court is not allowed to retroactively construct a rationale that the lawyer never articulated. Other courts—including the Seventh Circuit in its decision below—disagree.

A. The Second and Fourth Circuits Have Declined to Supply Counsel with Unarticulated Strategies.

In *Eze v. Senkowski*, 321 F.3d 110 (2d. Cir. 2003), a defendant convicted of child sexual abuse brought a Section 2254 petition arguing that his counsel was ineffective for failing to present several "pieces of evidence that would have cast doubt upon Eze's guilt." *Id.* at 112. Among other things, the defendant claimed that his counsel had insufficiently challenged the testimony of the prosecution's experts, including by failing to call an expert for the defense. *Id.* at 126-32. The district court "lack[ed] the benefit of an explanation of Eze's trial counsel's reasoning," because there had been no "evidentiary hearing at which Eze's trial counsel [was] allowed to explain her trial strategy." *Id.* at 113. But the court denied the petition without holding a hearing. *Id.* at 120.

The Second Circuit vacated that decision and remanded. *Id.* at 113. It explained:

> While it is fundamental that acts and omissions that could be considered sound trial strategy do not rise to the level of deficient performance under *Strickland,* we cannot presently conclude that Eze's counsel's actions were grounded in trial strategy. *This does not mean, however, that no trial strategy could have justified counsel's actions. Rather, it is that with the record before us, we are unable to assess with confidence whether strategic considerations accounted for Eze's counsel's decisions.*

Id. at 136 (emphasis added).

The court found itself particularly unequipped to evaluate counsel's failure to interview and call a medical expert. It explained that a "decision not to call a particular witness usually constitutes trial strategy that [courts] hesitate to second-guess." *Id.* at 132. But it was unable to tell "[f]rom the record * * * if the defense's failure to call an expert * * * reflected a sound trial strategy or perhaps some unjustifiable reason, such as a desire to avoid work." *Id.* at 132. The only way to make this assessment, the court held, would be to permit "trial counsel the opportunity to explain [her] acts and omissions." *Id.* at 136.

The Fourth Circuit reached a similar conclusion in *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992). There, like Meyers, the defendant brought a Section 2254 petition arguing that his counsel was ineffective for failing to interview alibi witnesses. *Id.* at 1356-57. The state court concluded that counsel's performance

was not deficient because the witnesses' testimony would not have "establish[ed] an alibi because it did not cover the period in question." *Id.* at 1358 (quotation marks and alterations omitted). It also found that "it may have been sound strategy not to call" one particular witness because there was a possibility that he was "an accomplice," which "could have hurt Griffin's case." *Id.* at 1358. The district court adopted this reasoning. *Id.* at 1357.

The Fourth Circuit reversed with instructions to grant the writ. *Id.* at 1360. It explained that "the 'cogent tactical considerations' that the state court bestowed on [counsel] for failing to present Griffin's alibi witnesses are exercises in retrospective sophistry" and "thoroughly disingenuous." *Id.* at 1358. Counsel "did not even talk to [the witnesses], let alone make some strategic decision not to call [them]." *Id.* This approach was deficient:

> *Strickland* and its progeny certainly teach indulgence of the on-the-spot decisions of defense attorneys. *On the other hand, courts should not conjure up tactical decisions an attorney could have made, but plainly did not.* The illogic of this "approach" is pellucidly depicted by this case, where the attorney's incompetent performance deprived him of the opportunity to even make a tactical decision about putting Staples on the stand. A court should "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. *Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another. Kimmelman*, 477 U.S. at 386-87 (hindsight cannot be used to

> supply a reasonable reason for decision of counsel).

Id. at 1358-59 (emphasis added) (citations shortened).

B. Other Courts Have Permitted Speculation About What Strategies Counsel Might Have Chosen.

We have found four federal appellate decisions that have taken the approach of the Seventh Circuit here, holding that it is permissible for a court to supply counsel with tactical decisions that he or she has not articulated. *See* pp. 16-18.

In *Hernandez v. Thaler*, 463 Fed. Appx. 349 (5th Cir. 2012), a lawyer failed to object to a prosecutor's inadmissible statement that the victim's family wanted the jury to impose the death penalty. *Id.* at 355. The Fifth Circuit held that the district "court was reasonable in believing that Hernandez's lawyer may have weighed the effect of making an objection" and decided against it. *Id.* at 356.

In *Fretwell v. Norris*, 133 F.3d 621 (8th Cir. 1998), the defendant argued that his trial counsel was ineffective for failing to introduce testimony from his family members. *Id.* at 627. Counsel testified at an evidentiary hearing, and he did not recall a strategic basis for this decision; he noted only that he "probably didn't see that there was anything to be gained by putting family members on." *Id.* The Eighth Circuit rejected the defendant's claim because it could "readily reconstruct at least two strategic reasons why counsel may have made this decision." *Id.*

In *Sallahdin v. Mullin*, 380 F.3d 1242 (10th Cir. 2004), a defendant's lawyer failed to call a leading

expert on one of the central issues in the case. *Id.* at 1244. When asked at an evidentiary hearing whether he made a strategic choice not to call the expert, he said that "it was important enough evidence to us that I can't imagine making any such decision." *Id.* at 1249. He "had no independent memory of what transpired." *Id.* But because the Tenth Circuit found no "basis for finding he was *neglectful*," it presumed that he acted with "reasonable professional judgment." *Id.* (emphasis added).

Finally, in *Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999), the Eleventh Circuit rejected a claim that the defendant's counsel was ineffective for failing to present mitigating evidence at his sentencing stage. *Id.* at 1225-26. The court explained that "where the record is incomplete or unclear about [an attorney's] actions, [it would] presume that he did what he should have done, and that he exercised reasonable professional judgment." *Id.* at 1228.

II. THE DECISION BELOW WAS ERROR.

This Court should grant certiorari and adopt the reasoning of the Second and Fourth Circuits. The decision below is incorrect. Meyers should be granted habeas relief because his trial counsel, Nichols, offered no justification—strategic or otherwise—for failing to interview or call Parker.

Under *Strickland*, courts must make "*every effort* * * * to eliminate the distorting effects of hindsight." 466 U.S. at 689 (emphasis added). This is true of efforts to *criticize* counsel's decisions, but it is equally true of efforts to "*lift* counsel's performance back into the realm of professional acceptability." *Kimmelman*, 477 U.S. at 386 (emphasis added). The Seventh

Circuit put it well in a case decided in 1990: "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) (citing *Kimmelman*, 477 U.S. at 386).

Notably, in its decision below, the Seventh Circuit did not attempt to distinguish *Harris*. After quoting its holding, the court simply offered a different reading of the *Strickland* presumptions: "For us to presuppose, when counsel is unable to explain his decision-making, that he had no strategic rationale for the particular choice at issue—*when a choice clearly was made*—would turn [the *Strickland*] presumptions on their head." App.30a (emphasis added). The problem, of course, is that we cannot tell from the record whether a "choice clearly was made" that calling Parker would be a bad strategy—Nichols never said anything of the sort. The most we know from the record that is that there are strategies that *could* have justified a decision not to call Parker. But Nichols could not have seriously evaluated those strategies without at least *interviewing* Parker.

It is true, as the Seventh Circuit explained, that the "Illinois Appellate Court did not fabricate from whole cloth the strategic rationale for rejecting Parker as a witness," because "Nichols was obviously aware of Parker" and he had moved to "keep[] Meyers' post-trial statements out of evidence." App.31a. But a state court will almost always be able to point to *something* in the record that could justify a decision by counsel. All witnesses are subject to potentially devastating cross-examination. All evidence can open

the door to damaging facts or simply detract from other evidence the party has presented. All attorney arguments can be disbelieved, damaging the credibility of the client.

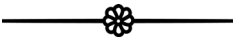
That is why, before evaluating an attorney decision, courts almost always given the attorney an opportunity "explain her actions." *Eze*, 321 F.3d at 136. That was impossible here, because Nichols was dead by the time of Meyers' evidentiary hearing. But that cannot fairly be held against Meyers. Nor did it permit the state courts to put words in Nichols' mouth.

The Seventh Circuit's approach will inevitably lead to perverse results. If an attorney *does* offer a strategic reason for a decision, a court will normally evaluate the reasonableness of that decision and decide whether meets the "objective standard of reasonableness." *Strickland*, 466 U.S. 668, 688 (1984). But if an attorney is silent on the rationale for a decision—or if, when asked he claims not to remember one—a court following the Seventh Circuit's rule would then need to scour the record in search of a rationale that *might* have justified the decision. This would mean that attorneys who fail to explain their decisions will receive *more* deference than those who do. That would not make sense.

III. THE ISSUE PRESENTED ARISES FREQUENTLY.

This case is far from an outlier. It is unusual for an attorney to pass away before he has a chance to explain the reasoning for a decision. But it is not unusual for courts to decide habeas petitions without holding an evidentiary hearing where an attorney can offer an explanation. *See, e.g.*, *Eze*, 321 F.3d at 120. And when such hearings are granted, it is not

uncommon for attorneys to claim an inability to remember their rationales. *See, e.g.*, *Fretwell*, 133 F.3d at 627; *Sallahdin*, 380 F.3d at 1249. This Court should grant certiorari to make clear that in these situations, courts may not construct strategic rationales that counsel has not offered.



CONCLUSION

The Court should grant this petition for writ of certiorari.

Respectfully submitted,

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