

No. 23-6839

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IN THE SUPREME COURT OF THE UNITED STATES

March 15, 2024

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DONTE JOHNSON, *Petitioner*,

v.

THE STATE OF NEVADA, *Respondent*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF NEVADA

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RESPONDENT'S BRIEF IN OPPOSITION

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## **QUESTION PRESENTED**

### **CAPITAL CASE**

1. Whether the Nevada Supreme Court deprived petitioner of his Sixth Amendment right to effective counsel.

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**RESPONDENT'S BRIEF IN OPPOSITION**

**STATEMENT OF THE CASE**

On June 28, 2023, the Nevada Supreme Court issued an Order of Affirmance denying petitioner's third post-conviction petition for writ of habeas corpus (hereinafter "third petition"). Petitioner's third petition challenged the effectiveness of his post-conviction counsel, and that counsel's decision to omit claims related to his trial.

Among the claims that petitioner raised in his third petition were that his post-conviction counsel should have challenged trial counsel's decision not to call an expert witness about the voluntariness of witness statements that were made to the police, and that counsel's decision not to call an expert about police interrogation tactics.

In affirming the denial of his third petition, the Nevada Supreme Court remained consistent with established law that decision to call a witness at trial is within the trial counsel's discretion. The Nevada Supreme Court considered the claim of ineffectiveness of counsel against the other evidence that was presented at trial and determined that failure to call the expert was not objectively unreasonable.

Petitioner then filed the instant petition for certiorari with this Court.

## **ARGUMENT**

### **I. PETITIONER'S PETITION SHOULD NOT BE GRANTED BECAUSE IT DOES NOT RAISE A FEDERAL QUESTION.**

Petitioner's request for extraordinary relief does not present a conflict between inferior courts or an important federal question. Petitioner argues that the Nevada Supreme Court failed to analyze the reasonableness of trial counsel's decision not to call an expert witness. The reasonableness of a counsel's actions is an objective standard. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2065 (1984). In Strickland, this Court recognized "[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id., at 689, 104 S. Ct. at 689.

Despite this long-standing recognition that reasonable counsel may make different strategic decisions, petitioner now calls on this Court to intervene by eliminating the discretionary standard that has always applied to criminal defense.

Petitioner essentially argues that some decisions should not be discretionary, but that idea completely contradicts the foundations of Strickland and its progeny.

Petitioner further tries to argue that the decision to call an expert witness on the witness' statements to law enforcement should not be discretionary because the tactics used are susceptible to false confessions. However, the Nevada Supreme Court ruled that the statements of the witnesses were consistent and corroborated by the physical evidence in the case. Based on the Nevada Court's findings, an expert regarding the police techniques used would have merely gone to the weight and credibility of the witnesses and nothing more. As such, counsel was not as a matter of law ineffective for not calling an expert witness whose testimony would not have likely altered the outcome. The Nevada Supreme Court appropriately held that the effectiveness of such expert testimony was merely speculative.

Finally, Petitioner argues that the Nevada Supreme Court's decision conflicted with federal law. However, this argument again just tries to speculate about claims that could have been made, and the effectiveness of such claims. The Nevada Supreme Court's application of Strickland was consistent with federal law. It first assessed whether counsel's performance fell below the standard of care, and then it decided if there was any prejudice. There is nothing about the Nevada Supreme Court's actions that warrants this Court's review.

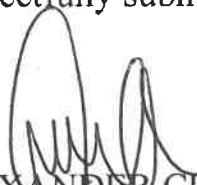
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## CONCLUSION

Petitioner fails to establish that the exercise of discretionary jurisdiction is warranted. There is no important federal issue or conflict in authority presented and as such, this Court should deny certiorari.

Dated this 15<sup>th</sup> day of March, 2024.

Respectfully submitted.



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