No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

MARK WATKINS,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish that trial counsel was ineffective due to a single error, must the defendant establish that the error satisfies *Strickland v. Washington*'s deficient-performance and reasonable-probability-prejudice standards, 466 U.S. 668 (1984), or must he also satisfy a heightened standard that governs single-error cases?

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The New York Court of Appeals decision affirming the judgment is pending publication and is attached at Pet. App. 1a. The opinion of the Appellate Division, Supreme Court of New York, First Judicial Department is reported at 206 A.D.3d 452 (N.Y. App. Ct. 2022) and is attached at Pet. App. 49. The relevant trial proceedings are unpublished.

JURISDICTION

The New York Court of Appeals' judgment was entered on May 23, 2024. Justice Sotomayor granted Petitioner's request for an extension of time to file a petition for a writ of certiorari to Friday, September 20, 2024. Application Order 24A171. This Court has jurisdiction over the federal question presented under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment declares that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

1. ***Overview.*** This petition provides this Court with the opportunity to clarify the standards governing the frequently litigated question of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* held that, in assessing an ineffective-assistance claim, a court must determine whether the "identified" error was: (1) objectively unreasonable and (2) prejudicial, that is, there is a reasonable probability that, but for the error, there would have been a different outcome. *Id.* at 686-94. This Court has never adopted a distinct standard for so-called "single error" cases and has instead

confirmed that a single error constitutes ineffective assistance if it satisfies *Strickland*'s clearly established two-pronged standard. *E.g.*, *Rompilla v. Beard*, 545 U.S. 374, 383-93 (2005); *Williams v. Taylor*, 529 U.S. 362 (2000).

Nevertheless, a split has emerged regarding the standards governing so-called single-error cases. The New York Court of Appeals has held, and held below, that in single-error cases, the error must have been "clear cut and dispositive" to constitute ineffective assistance. Pet. App. 6a-8a. The Seventh Circuit has similarly held that the single error must have been a "whopper of an error that nullifies all of the good things that counsel did." *Coleman v. Neal*, 990 F.3d 1054, 1056 (7th Cir. 2021).

On the other hand, the Second Circuit has held that requiring that the defendant make a heightened showing in single-error cases would be "absurd." *Rosario v. Ercole*, 601 F.3d 118, 125-26 (2d Cir. 2010). Instead, a single error requires relief if it satisfies *Strickland*'s two-pronged standards. *Id.*

This Court should grant this petition to resolve the split and put an end to arbitrary "clear-cut-and-dispositive" and "whopper" standards in so-called single-error cases. The choice is between subjective tests finding no support in this Court's precedents, or the clearly established two-pronged *Strickland* standard. That choice is not close at all. The *Strickland* standard should prevail.

2. ***Trial.*** The State indicted Petitioner Mark Watkins in New York County Supreme Court for felony assault charges stemming from a 2016 incident. The case proceeded to trial in 2017. At the trial, the State presented just one piece of evidence: the victim's identification of Petitioner as his assailant. Petitioner was a stranger to the victim.

The trial testimony established that on October 7, 2016 at approximately 1 p.m., a man quickly approached Mr. Pena, the victim—who was smoking on a work break—and hit him in the eye socket with a hard object. Trial Transcript 6-7 ("T"). While the victim testified that the suspect was holding a piece of cement, he previously reported a brick. T. 48-49, 213-14. Startled and dizzy, the victim ran inside his office to grab a piece of wood to protect himself. T. 8. After he came back out, the suspect was standing about 15 to 20 feet away. T. 96. The victim asked why the man had hit him. The suspect left. T. 8.

Pena did not call 911 that day but reported the incident two days later. T. 8, 21. The victim initially told the police that his assailant was as Black male who was "a little taller, hoodie, sneakers, brown pants." T. 22-23. At trial though, the victim amplified the description, describing a Black man with a shaven head and a slight beard, who was a little taller than 5' 10." T. 12-13.

Pena gave shifting accounts of whether he had previously seen the man who assaulted him. When asked whether he had seen the suspect before the assault, he testified "no, no." T. 19. But when "ask[ed] again" if the victim had "ever seen him before in the neighborhood," the victim responded that "he passed by one day before the incident." T. 19. When asked later on cross whether he had told the police that he had seen the assailant before, Pena answered, "I had never seen him." T. 122.

Five days after the incident, Pena initially identified someone else as the assailant by calling the police and claiming he thought he saw the assailant. T. 25, 100. Responding to the report, two police officers detained an individual in the vicinity matching the broad

description provided by the victim. T. 182-83. When the officers conducted a show-up procedure, the victim's identification was negative. T. 188, 189.

The following day, six days after the incident, Pena called the police again, claiming that he saw his attacker in the same general area where the assault had occurred. T. 29, 194. On that day, Pena's eye-socket injury had escalated to the point of causing dizziness, headaches, and facial swelling. T. 105. At that time, he was "forgetting things" and "had hallucinations." T. 105. When the officers arrived, Pena pointed to Petitioner, who was wearing a hat and standing across the street. T. 12, 29-30. The police arrested him. T. 195.

The next day, Pena went to the hospital for symptoms he had been experiencing for a week since the incident. T. 38, 105. The doctors diagnosed him with a fractured orbital (eye socket) bone. T. 39-40.

The victim eventually identified Mr. Watkins in court. T. 195. That identification was cross-racial: Pena is Hispanic and he identified his attacker's race as Black. T. 12, 23, 217; *see also* Pet. App. 16a (Troutman, J., concurring) (noting the State's concession that the identification here was cross-racial).

No evidence corroborated the victim's account. Although the prosecution introduced video surveillance of the attack, the footage was too blurry to depict the assailant's face. T. 281. The State presented no forensic or statement evidence. Its whole case rested on Pena's identification testimony.

At the charge conference, defense counsel did not request the New York pattern jury instruction on cross-racial identifications, which would have instructed the jury that individuals have difficulty accurately identifying people of a different race. CJI 2d (NY)

Identification (One Witness) (as rev. 2011) ("You may consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, whether that difference affected the accuracy of the witness's identification. Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. With respect to this issue, you may consider the nature and extent of the witness's contacts with members of the defendant's race and whether such contacts, or lack thereof, affected the accuracy of the witness's identification.").

The jury convicted Petitioner of the assault and related counts and the court sentenced him to 13 years in prison.

3. ***Appeal.*** On appeal to the Appellate Division First Department, Petitioner pressed that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), in failing to request the pattern jury instruction on cross-racial identifications.

The Appellate Division found that Petitioner "received effective assistance under the state and federal standards." 206 A.D.3d 452 (N.Y. App. Ct. 2022). According to the Appellate Division, Petitioner had "not shown that it was objectively unreasonable for counsel to refrain from requesting a jury charge on cross-racial identification." *Id.* Further, Petitioner was not prejudiced by the omission because he had not shown that a request for the charge would have been granted or that the omission "affected the outcome of the case." *Id.*

4. ***New York Court of Appeals***. A Judge of the New York Court of Appeals granted Petitioner leave to appeal to that court. There, Petitioner renewed his ineffective-assistance

claim. Citing *Strickland* and *Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986), Petitioner pressed that a "single prejudicial error may constitute ineffective assistance" if it is unreasonable and prejudicial under *Strickland*. Pet. N.Y. COA Br. 17-19 (citing *Strickland*, 466 U.S. at 688-91 (an unreasonable error inconsistent with prevailing professional norms constitutes deficient performance) and *id.* at 693-94 (an unreasonable error is prejudicial where it raises a reasonable probability of a different outcome; "[a] reasonable probability is [one] sufficient to undermine confidence in the outcome.")). Petitioner argued that if "the identified error constituted deficient performance and prejudiced the defense, counsel's otherwise competent performance at other stages of the proceeding is irrelevant. An attorney's otherwise adequate advocacy cannot offset a single error that would have alone created a 'reasonable probability' that the outcome would have been different." *Id.* at 19 (citing *Kimmelman*, 477 U.S. at 385-86 and *Rosario v. Ercole*, 601 F.3d 118, 125-26 (2d Cir. 2010)); *accord* Pet. N.Y. COA Reply Br. 9 ("[W]here a reasonable lawyer would have requested an instruction, and the omission of the instruction was prejudicial, counsel was ineffective. That standard is met here.") (citing *Strickland*, 466 U.S. at 688-91).

The State answered that Petitioner could only secure relief if he could show that the "single error" was "clear cut and dispositive." State's COA Br. 4 ("When a defendant challenges his counsel's performance as ineffective based on a single alleged error, the error must be so egregious, clear-cut, and completely dispositive in light of the record that no reasonable attorney would have made it."); *id.* at 27 (referring to the single-error standard as "well-established" in the New York Court of Appeals' precedents); *id.* at 25-35.

The Court of Appeals affirmed in a split opinion. The majority explained that this "appeal presents an ineffective assistance of counsel claim based on a single alleged error. 'A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial.'" Pet. App. 6a (citing *People v. Caban*, 5 N.Y.3d 143, 152 (2005) and *People v. Turner*, 5 N.Y.3d 476, 480 (2005) ("the single failing in an otherwise competent performance (was) so egregious and prejudicial as to deprive a defendant of [effective assistance]"). Citing its precedents, the majority held that a single error does not justify relief unless it is "clear cut and completely dispositive." *Id.* at 6a (citing *Turner*, 5 N.Y.3d at 480, *People v. McGee*, 20 N.Y.3d 513, 518 (2013), and *People v. Harris*, 26 N.Y.3d 321, 327 (2015)). That standard is not met, the Court explained, where counsel fails to object to an improper jury instruction if "the omitted argument was 'not so compelling that a failure to make it amounted to ineffective assistance of counsel.'" Pet. App. 7a (citation omitted). Similarly, the failure to argue for an available instruction is not ineffective unless the omitted argument was "'so obvious and unmitigated by the balance of the representational effort as singly to support a claim for ineffective assistance.'" *Id.* at 6a-7a (quoting *People v. Blake*, 24 N.Y.3d 78, 82 (2014)).

On the other hand, in the "rare" case where the Court had found a single error constituted ineffective assistance, "counsel failed to raise an argument that would have conclusively entitled the defendant to a specific action by the trial court," such as dismissal of the charges due to the insufficiency of the evidence. Pet. App. 6a-7a.

The Court then found that the clear-cut and dispositive test was not met here because counsel's single error—the failure to request the cross-racial identification—implicated a "discretionary" jury instruction as opposed to a mandatory one. *Id.* at 8a-13a. "Given the state of the law at the time, the decision to forgo a request for the cross-racial identification charge was not the kind of 'egregious' single error that rises to the level of ineffective assistance." *Id.* at 12a (citing *Caban*, 5 N.Y.3d at 152). Petitioner's "single-error ineffective assistance of counsel claim" therefore failed. *Id.* at 2a, 6a-13a; *see also id.* at 12a n.4 ("our rejection of defendant's single-error ineffective assistance claim rests on application of our precedent").

Chief Judge Wilson concurred in the result but observed that "New York's system of indigent defense is not set up to provide high-quality representation. For decades we have been walking a due process tightrope, providing such minimal support for indigent defense that the question is not whether defense counsel has put on the best possible case for a client, but whether the representation was so deficient as to require the trial to be redone." *Id.* at 15a-16a. After detailing the history of New York's structural problems with legal representation in criminal cases, the Chief Judge questioned: "Putting aside constitutional sufficiency, is it right for someone facing decades in prison to be represented by a grossly underpaid attorney with a crushing caseload?" *Id.* at 23a.

Judges Troutman and Rivera dissented in separate opinions. Judge Troutman found that no reasonable lawyer would have failed to request the cross-racial instruction, and that, had the law been followed by the trial court, the instruction would have likely been

granted. *Id.* at 32a. Judge Troutman then found that the failure was prejudicial because the cross-racial-identification issue was crucial to the defense:

> Even the majority must acknowledge 'the cross racial identification charge as a powerful tool for assisting juries in determining whether there has been a mistaken identification, thereby reducing the risk of wrongful convictions caused by the cross-race effect.' Here, the sole evidence . . . was the victim's cross-racial identification; the sole defense theory was honest-but-mistaken identification; and the identification testimony came exclusively from [the victim], who had no prior familiarity with the assailant, was of a different race than the assailant, and had only a few seconds under the stress of a violent assault to observe the assailant. Furthermore, the cross-racial identification charge may well have been the dispositive factor providing the jury with a reasonable doubt that [the victim] accurately identified Watkins as the assailant, given the various other factors undercutting [the] identification[.]

Id. at 36a-37a (citations omitted); *see also id.* at 47a (Rivera, J., dissenting).

This timely petition follows.

REASONS FOR GRANTING THE PETITION

"The rule of law" is "a law of rules." Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). But when it comes to ineffective-assistance litigation in New York and several other jurisdictions ("the single-error camp"), the rules have broken down in cases involving a single but prejudicial blunder. Instead, arbitrary standards control. *See Watkins*: Pet. App. 6a-8a (error must be "clear cut and dispositive"); *Coleman v. Neal*, 990 F.3d 1054, 1056 (7th Cir. 2021) (single error must be a "whopper" that offsets all the "good things" counsel did); *Gordon v. United States*, 518 F.3d 1291,

1298 (11th Cir. 2008) (the "single error must be so substantial as to stamp counsel's overall performance with a mark of ineffectiveness") (cleaned up).

The single-error camp requires a reviewing court to determine whether, given the totality of counsel's representation—that is, by tallying up everything counsel did or failed to do—counsel's representation was sufficiently adequate and the trial seemingly "fair." *See* Pet. App. 6a-9a; *Turner*, 5 N.Y.3d at 480-81. Applying that vague framework, the New York Court of Appeals has repeatedly held, and held here, that a "single error" can only constitute ineffective assistance if it was "clear cut and completely dispositive" (*Turner*, 5 N.Y.3d at 480-81), another vague standard the Court struggled to define below. Pet. App. 6a-8a. The theory underlying this quantity-based approach is that if counsel did most things competently but made just one harmful blunder, the trial was, on balance, "fair" unless that error is "egregious." *Turner*, 5 N.Y.3d at 481; Pet. App. 7a; *Rosario v. Ercole*, 617 F.3d 683, 686 (2d Cir. 2010) (Jacobs, C.J., dissenting from denial of rehearing en banc). As the Seventh Circuit has similarly found, counsel's single error must be a "whopper of an error that nullifies all of the good things that counsel did." *Coleman*, 990 F.3d at 1056.

It would be one thing if, in crafting its quantity-based approach, the single-error camp were writing on a blank Sixth Amendment slate. But it is not. *Strickland* and its progeny confirm that the "clearly established" two-pronged standard governs the ineffectiveness inquiry. *E.g.*, *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000). Under that governing standard, a reviewing court must determine whether the "identified" error was objectively unreasonable (deficient performance) and undermines confidence in the trial's outcome (prejudice). *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *Strickland*, 466 U.S.

at 690-91. This Court has also held, on deferential habeas review no less, that a reviewing court *cannot*, as the New York Court of Appeals has done for decades, consider whether, on balance, counsel's error(s) rendered the trial unfair—an impossibly subjective "balancing test in which unweighted factors mysteriously are weighed." *June Med. Servs. L.L.C. v. Russo*, 591 U.S. 299, 348 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted). As we should expect with subjective inquiries, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired." *Id.* (quoting Scalia, *above*, at 1182).

This Court should put an end to this single-error approach. By granting this petition, this Court can confirm that defendants alleging ineffective assistance are entitled to review under the clearly established, two-pronged, *Strickland* standard—not flimsy tests that call upon courts to summon their sense of fairness while searching for "whoppers." *Coleman v. Neal*, 990 F.3d 1054, 1056 (7th Cir. 2021). Arising out of a state high court overseeing one of our nation's largest criminal justice systems, this petition should be granted to bring the lower courts into compliance with *Strickland* and ensure clarity and consistency in a frequently litigated area of law.

A. New York's free-standing fair-trial approach produces a "clear cut and dispositive" standard.

The New York Court of Appeals has long held that ineffective-assistance analysis requires an assessment of counsel's "overall performance." *E.g.*, *Turner*, 5 N.Y.3d at 480-81. The touchstone of this vague analysis is whether counsel's overall performance rendered the trial unfair. *People v. Benevento*, 91 N.Y.2d 708, 714 (1998) ("While the

inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case."). Under this "well-settled" New York approach, *id.*, a court considers everything counsel did (or did not do) and then assesses, on balance, whether counsel's performance seemed adequate enough. *Benevento*, 91 N.Y.2d at 714; *People v. Henry*, 95 N.Y.2d 563, 566 (2000); *People v. Flores*, 84 N.Y.2d 184, 188-89 (1994). Good performance can thus outweigh deficient performance if the "balance of the representational effort" suggests fairness and "meaningful representation." Pet. App. 7a (citing *Blake*, 24 N.Y.3d at 82). This focus on "overall performance" (*Turner*, 5 N.Y.3d at 480-81) essentially "averages out the lawyer's performance": a prejudicial error can be offset by competent performance elsewhere. *Rosario*, 617 F.3d at 686 (Jacobs, C.J., dissenting from denial of rehearing en banc).

Building from the foundation that overall performance and fairness are the touchstones, the New York Court of Appeals has adopted a single-error standard. Pet. App. 2a, 6a-8a. Under that framework, a single error only constitutes ineffective assistance if the error was "clear cut" and "dispositive." Pet. App. 6a-8a; *e.g.*, *People v. Jennings*, 37 N.Y.3d 1078, 1079 (2021); *People v. Flowers*, 28 N.Y.3d 536, 541 (2016); *People v. Santiago*, 22 N.Y.3d 740, 751 (2014). If counsel just did one thing wrong but did a whole lot right, the theory goes, the trial was essentially "fair" unless the error was "clear cut and dispositive." *Turner*, 5 N.Y.3d at 480-83.

Since announcing its single-error approach in 2005, the New York Court of Appeals has only twice found the clear-cut-and-dispositive standard satisfied. *Harris*, 26 N.Y.3d at

327; *Turner*, 5 N.Y.3d at 483-84. And both of those cases involved the omission of arguments that would have resulted in dismissal (statute-of-limitations defenses). The Court of Appeals has therefore meant what it has said: the single error must be *dispositive*, that is, it must dispose of the charges. On the other hand, if the error does not necessarily dispose of the case but instead would merely require a new trial, the clear-cut-and-dispositive standard is not satisfied.

Perhaps recognizing that explicitly limiting relief in single-error cases to dismissal errors would be difficult to justify, the Court of Appeals majority below attempted to recast that standard as requiring a showing that the defendant was "conclusively entitled . . . to a specific action by the trial court." *Watkins*: Pet. App. 7a-8a. Under that formulation, single errors that do not implicate court "action" to which the defendant is "conclusively entitled"—including any "action" that could be styled "discretionary"—do not constitute ineffective assistance. *Id.*

B. The single-error approach violates *Strickland*.

1. As explained above, New York's single-error approach finds its roots in the theory that ineffective-assistance analysis does not focus on the unreasonableness and prejudicial impact of the identified errors. *Strickland*, 466 U.S. at 686-94. Instead, the analysis considers counsel's performance in its totality in order to discern whether the representation rendered the trial unfair. That foundational theory violates *Strickland*.

Strickland does not permit a court to analyze counsel's every move and then grade counsel's performance in its totality to assess overall "fairness." Instead, *Strickland* analysis is error specific: "[A defendant alleging] ineffective assistance must *identify the*

acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, *the identified acts or omissions* were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (emphasis added). In turn, a court must assess whether these identified errors prejudiced the defense under the reasonable-probability standard. *Id.* at 693-94. Thus, *Strickland* does not call upon a court to engage in the subjective exercise of tallying up everything counsel did to determine whether it rendered the trial unfair. *See Weaver v. Massachusetts*, 582 U.S. 286, 307 (2017) (Alito, J., concurring).

United States v. Cronic, 466 U.S. 648, 657 n.20 (1984) (decided the same day as *Strickland*), explicitly rejected an overall-representation touchstone: "The Court of Appeals focused on counsel's overall representation of respondent, as opposed to any specific error or omission counsel may have made. Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—specific errors and omissions may be the focus of a claim of ineffective assistance as well." (citing *Strickland*, 466 U.S. at 693-96).

Kimmelman v. Morrison, 477 U.S. 365 (1986), is to the same effect. There, the State argued that counsel's failure to file a suppression motion was not ineffective because counsel did other things well, such as cross-examine witnesses at trial. *Id.* at 385-86. *Kimmelman* rejected that approach, holding that "[o]verall performance" may "generally" be relevant to "determine whether the 'identified acts, or omissions'" were objectively unreasonable because conduct beyond the identified error may indicate the strategic *reason*

for the challenged omission. *Id.* at 386. But, where counsel makes a prejudicial blunder at one stage, good performance at another cannot, as the government argued in *Kimmelman*, "lift counsel's performance back into the realm of professional acceptability." *Id.* at 385-86. And because counsel's overall performance at trial provided "no better explanation" and "shed[ ] no light" on the reasonableness of counsel's pretrial-suppression blunder, it had no relevance. *Id.* at 386-87.

This Court has even, on deferential habeas review (28 U.S.C. § 2254(d)(1)), held that a state court violates the clearly established *Strickland* standard by bypassing the deficient-performance and reasonable-probability tests and instead focusing on fundamental fairness. In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court reviewed a Virginia Supreme Court decision which, in assessing sentencing counsel's failure to present mitigating evidence, refused to apply *Strickland*'s reasonable-probability-prejudice standard. 529 U.S. at 394 (quoting Virginia Supreme Court decision); *Strickland*, 466 U.S. at 694. Instead, the Virginia high court read *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as modifying *Strickland*'s reasonable-probability rule to instead require a free-standing assessment of whether counsel's blunders rendered the trial "fundamentally unfair." *Williams*, 529 U.S. at 373, 390-92. The Virginia trial court, on the other hand, had assessed whether there was a reasonable probability that the "unprofessional errors" affected the result, defining a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* at 394-95 (Stevens, J., for a majority); *id.* at 413-15 (O'Connor, J.). *Williams* held that the Virginia trial court "analyzed the ineffective-

assistance claim under the correct standard; the Virginia Supreme Court did not." *Id.* at 395. Overall fairness is not the governing standard. *Id.* at 393-95.

2. The origins of the *Strickland* test also confirm that a reviewing court must focus on the unreasonableness and prejudicial impact of the *identified error*, not overall fairness. *Strickland* held that the test for prejudice "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution [the *Brady* materiality] test . . . The defendant must show . . . 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." *Id.* at 694 (citing *United States v. Agurs*, 427 U.S. 97 (1976)).

No one would argue in the *Brady* context that a prosecutor's diligent disclosures should be weighed against the suppressed evidence to determine whether, on balance, the prosecutor's overall-disclosure record rendered the trial unfair. The same is true for *Strickland* claims. Good performance in *other* contexts beyond the identified error cannot offset unreasonable performance elsewhere.

To be sure, it may be *harder* to show that a single attorney or *Brady* error satisfies the governing prejudice tests. But it does not follow that the governing standards substantively change based on the purported number of errors in the case.

3. This Court's cases confirm that *Strickland*'s two-pronged standard—not a heightened requirement—governs single-error ineffective-assistance claims.

Hinton v. Alabama, 571 U.S. 263 (2014) (per curiam), involved a single error: counsel failed to retain a more-qualified ballistics expert than the expert he presented at

trial because he mistakenly believed Alabama law capped state-expert funding at $1,000. *Id.* at 273. *Hinton* held that the appeal involved a "straightforward application" of *Strickland*'s deficient-performance and prejudice test. *Id.* at 272 (citing *Strickland*, 466 U.S. at 685-87 and *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). And "[h]aving established deficient performance" due to counsel's "mistake of law," the Court held that Hinton "must also 'show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 272 (citing *Strickland*, 466 U.S. at 685-87 and *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). *Hinton* did not subject counsel's error to a single-error test.

Rompilla v. Beard, 545 U.S. 374, 383-93 (2005), and *Buck v. Davis*, 580 U.S. 100 (2017), further doom any requirement that the defendant make a heightened showing in single-error cases. In *Rompilla*, the Petitioner had argued that counsel in a death-penalty case was ineffective for several reasons, including the failure to investigate school records, juvenile-incarceration records, and evidence of alcohol dependence. 545 U.S. at 382. This Court, however, found "no need" to address such claims because counsel was "deficient" due to a single error: "failing to examine the court file on Rompilla's prior conviction." *Id.* at 383. In granting relief due to that single error, this Court did not suggest that counsel's error had to be "clear cut and dispositive" (and had Rompilla been litigating his case in New York, he would have most certainly lost under that test).

Buck similarly highlights the flaws with a quantity-based formalism. There, this Court considered whether sentencing counsel's introduction—against his own client—of a psychologist's conclusion that "Buck's race disproportionately predisposed him to violent

conduct" was ineffective. 580 U.S. at 119. This Court found deficient performance because "no competent defense attorney would introduce such evidence about his own client." *Id.* In turn, this Court granted relief because there was a "reasonable probability that, without [the impermissible] testimony on race, at least one juror would have harbored a reasonable doubt about whether Buck was likely to be violent in the future." *Id.* at 119-20. Again, this Court did not consider whether counsel's challenged conduct involved a single or a multiplicitous error.

But under the single-error approach, *Buck*'s analysis would have turned on an arbitrary numbers game. If counsel's error were deemed to include a single act—that is, he introduced the damaging report against his own client—a heightened standard would govern. But if the error were recast as three errors that ultimately amounted to the same thing as that single error—that is, counsel "(1) called [the psychologist] to the stand; (2) specifically elicited testimony about the connection between Buck's race and the likelihood of future violence; and (3) put into evidence [the psychologist's] expert report [codifying that testimonial conclusion]"[1]—*Strickland*'s more-favorable two-pronged standard would govern. The right to ineffective assistance of counsel should not, as this Court recently reminded us, turn on such "strange" and "unsound" rules. *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024).

Only an "undiscerning reader would" (*Whren v. United States*, 517 U.S. 806, 811 (1996)), as the single-error camp has done, read *Murray v. Carrier*, 477 U.S. 478, 496

[1] 580 U.S. at 119.

(1986), to support a heightened requirement in single-error cases. *See Turner*, 5 N.Y.3d at 480 ("But our decisions, and the United States Supreme Court's, have recognized that there may be cases in which a single failing in an otherwise competent performance is so 'egregious and prejudicial' as to deprive a defendant of his constitutional right.") (citing *Murray*, 477 U.S. at 496)). *Murray* stated in passing dictum that *Strickland* can be satisfied "by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." 477 U.S. at 496 (citing *Cronic* 466 U.S. at 657 n.20 and *Strickland* 466 U.S. at 693-96). The *Murray* dictum merely confirms the common sense that it is *difficult* to show relief from a single error, not that the deficient-performance and prejudice standards substantively change in single-error cases.

Smith v. Murray, 477 U.S. 527 (1986), bolsters that reading of *Murray v. Carrier*. There, the Court clarified that "sufficiently egregious" means "of such magnitude that it rendered counsel's performance constitutionally deficient under [*Strickland*]." *Id.* at 535. Thus, "sufficiently egregious" is just another way of saying "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88.

C. The question presented has divided our nation's courts.

Our nation's appellate courts are split on whether a heightened standard governs single-error-ineffectiveness claims.

1. The Second Circuit has led the charge against such quantity-based formalism. In *Rosario v. Ercole*, Judge Wesley (for the panel majority) explained that the "New York standard is not without its problems" and "creates a danger" that courts might "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general

competency throughout the trial. That would produce an absurd result inconsistent with . . . the mandates of *Strickland*." 601 F.3d 118, 125-26 (2d Cir. 2010); *Rosario*, 601 F.3d at 138 (Straub, J., dissenting) ("It is axiomatic that, even if defense counsel had performed superbly throughout the bulk of the proceedings, they would still be found ineffective under the Sixth Amendment if deficient in a material way, albeit only for a moment and not deliberately, and that deficiency prejudiced the defendant."). The Second Circuit made the same point in *Henry v. Poole* five years earlier: "[The New York Court of Appeals'] reliance on 'counsel's competency in all other respects' failed to apply the *Strickland* standard at all." 409 F.3d 48, 72 (2d Cir. 2005) (quoting *Henry*, 95 N.Y.2d at 566).

In *Rosario*, the Second Circuit denied rehearing *en banc* and issued four separate opinions. 617 F.3d 683 (2d Cir. 2010). In each opinion, the Second Circuit's Judges recommended that New York courts explicitly analyze ineffective-assistance claims under *Strickland*'s traditional deficient-performance/prejudice standard to ensure that winning *Strickland* claims are not ignored under an overall-representation standard. *Id.* at 685 (Wesley, J.) ("New York state courts would be wise to engage in separate assessments of counsel's performance under both the federal and the state standards. Such an exercise would ensure that the prejudicial effect of each error is evaluated with regard to outcome and would guarantee that defendants get the quality of overall representation guaranteed under New York state law."). As Chief Judge Jacobs added, the analytical "shift" from counsel's "specific mistake" to counsel's "broader performance . . . concerns me and should concern the entire Court." *Id.* at 687 (Jacobs, C.J., dissenting from the rehearing denial). And as Judge Pooler's separate dissenting opinion explained, "[t]he state standard

can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation." *Id.* at 688.

2. Like the Second Circuit, the Texas appellate courts have recognized the folly of a single-error theory: "Courts have frequently found counsel ineffective because of a single error affecting only the punishment assessed. To ignore a grievous error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, would be contrary to the reasons that caused the creation of the doctrine of ineffective assistance of counsel." *Cooper v. State*, 769 S.W.2d 301, 305 (Tex. App. 1989); *Valencia v. State*, 966 S.W.2d 188, 190 (Tex. App. 1998); *see also Jackson v. State*, 766 S.W.2d 504, 511 n.6 (Tex. 1985) ("Fortunately, history shows that single errors of such magnitude are rare. However, to ignore such a single error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, seems contrary to the very reasons that caused the creation of the doctrine of effective assistance of counsel."), *cert. granted and decision vacated on different grounds*, 106 S.Ct. 1627 (1986).

3. On the other hand, several Circuit Courts have, like the New York Court of Appeals, Pet. App. 6a-8a, embraced a single-error approach.

In the Seventh Circuit's view, good performance can offset a prejudicial blunder unless that error is a "whopper of an error that nullifies all of the good things that counsel did." *Coleman v. Neal*, 990 F.3d 1054, 1056 (7th Cir. 2021) (citing *Williams v. Lemmon*, 557 F.3d 534, 538 (7th Cir. 2009) ("Our first question is whether single oversights by counsel violate the sixth amendment. The answer is no. The Supreme Court insists that

judges must not examine a lawyer's error (of omission or commission) in isolation (citing *Strickland*, 466 U.S. at 690-96). It is essential to evaluate the entire course of the defense . . . [A] single error may suffice 'if that error is sufficiently egregious and prejudicial.' (quoting *Murray*, 477 U.S. at 496). Lest this exception swallow the rule, however, we must take the Justices at their word and search for an 'egregious' error—an omission of something obviously better (in light of what was known at the time) than the line of defense that counsel pursued. But Williams does not contend that the state court acted unreasonably in evaluating whether the error was 'egregious' when compared with what Inman did for his client. . . . Counsel did enough to give Williams a reasonable shot at an acquittal."). Accordingly, in the Seventh Circuit, appellate counsel claiming ineffective assistance has committed a "big omission" if appellate counsel fails to detail every single thing trial counsel did. *Williams*, 557 F.3d at 538 ("Williams maintains that he received ineffective assistance because his lawyer did not interview [a witness]. Although Williams chastises his lawyer for this omission, he does not tell us what his lawyer did do in his defense, and this is a big omission.").

The Eleventh Circuit has joined the single-error camp: "To ground a claim of ineffective assistance, a single error must be so substantial as to stamp counsel's overall performance with a mark of ineffectiveness." *Gordon v. United States*, 518 F.3d 1291, 1298 (11th Cir. 2008) (cleaned up).

4. This split is clear and pronounced, with one side demanding "clear cut and dispositive" "whoppers" (App. 6a-8a; *Coleman*, 990 F.3d at 1056) and another side calling that approach "absurd" (*Rosario*, 601 F.3d at 125-26). Only this Court can resolve

whether, under *Strickland*, a heightened showing, beyond the two-pronged *Strickland* test, is required in single-error cases.

D. The question presented is important to the administration of justice in our nation's courts.

1. Resolving the constitutional question presented and reaffirming *Strickland*'s standard is essential for safeguarding the "bedrock" right to effective assistance of counsel and the many rights that basic right secures. *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). Every year in this nation's state and federal courts, ineffective assistance of counsel is litigated thousands of times. *E.g.*, Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. Rev. 425, 446 (2011) ("ineffective assistance of counsel allegations now dominate habeas corpus litigation"). And a significant number of those cases involve "single errors." Clear and workable standards that comply with this Court's cases are therefore essential.

2. A free-standing fair-trial approach that subjects single errors to insurmountable and poorly defined standards produces arbitrary results that rest on a reviewing court's subjective discretion. This Court's two-pronged *Strickland* test provides a rule that is exceedingly more workable and objective than the vague alternatives invented by the single-error camp.

3. The appellate bar and the taxpayers who often fund their salary also deserve better. Litigating under ill-defined standards is difficult and wasteful. Appellate attorneys cannot predict with any meaningful certainty what the outcome will be, nor can they hit the moving "clear cut and dispositive" (New York) or "whopper" (Seventh Circuit) target as it morphs in the court system.

4. This petition implicates the integrity of this Court's decisions. This Court has never adopted a single-error standard and its cases don't support it. And this Court in *Williams* squarely rejected the theory that the ineffectiveness standard should turn on whether a trial seems fair—precisely the doctrine that animates the decisions of the courts in the single-error camp.

E. This appeal is a solid vehicle for resolving the question presented.

1. This case is an excellent vehicle for resolving the question presented. Over Petitioner's express argument that the single-error approach violates *Strickland*, the New York Court of Appeals applied its single-error standard here, finding that Petitioner could not show a clear-cut-and-dispositive blunder. Pet. App. 2a, 6a-12a. In turn, the Court of Appeals did not apply *Strickland*'s two-pronged standard. *Id.* Thus, the constitutionality of applying a unique single-error test is squarely presented and preserved here.

2. Because the question presented involves the standard governing ineffective-assistance claims, this Court need not engage in the often fact-intensive and record-specific analysis of whether counsel was, in fact, ineffective. Instead, as this Court is a court of "final review not first view," it need only correct the New York Court of Appeals' standard and remand to that court to apply *Strickland*'s two-pronged test. *McLane Co. v. E.E.O.C.*, 581 U.S. 72, 85 (2017) ("The United States also argues that the judgment below can be affirmed because it is clear that the District Court abused its discretion. But 'we are a court of review, not of first view,' and the Court of Appeals has not had the chance to [apply] the appropriate standard. That task is for the Court of Appeals in the first instance.") (quoting

Cutter v. Wilkinson, 544 U.S. 709, 718, n. 7 (2005)); *Holland v. Florida*, 560 U.S. 631, 654 (2010).

3. This appeal puts the question presented in stark relief. Mr. Watkins has a solid argument for relief under *Strickland*'s two-pronged standard since a reasonable lawyer would have requested the pattern—and thus readily available—cross-racial- identification instruction, a point the Court of Appeals majority never denied because it did not apply *Strickland*. Pet. App. 32a (Troutman, J., dissenting) (finding that no reasonable lawyer would have declined to request the instruction). And there is a reasonable probability, given the glaring deficiencies in the State's single-witness case, that, had the instruction been provided, a different result would have ensued. *Strickland*, 466 U.S. at 693-94; Pet. App. 36a-37a (Troutman, J., dissenting). That, too, is uncontested in the majority opinion. On the other hand, Petitioner cannot satisfy the single-error camp's standards because the error here cannot be fairly characterized as "dispositive" or a "whopper."

In the end though, the question is not whether Petitioner prevails under the two-pronged *Strickland* standard as New York's highest court did not even apply that governing standard here. Petitioner is entitled to review of his ineffective assistance claim under the standard that this Court established in *Strickland*. Only this Court can ensure that Petitioner, and other defendants within the jurisdiction of the single-error camp, obtain review of their ineffective-assistance claim under this Court's governing law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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