No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

LEONARD CONTRERAS SANDOVAL,

Petitioner,

v.

BRAD CAIN, Superintendent,
Snake River Correctional Institution,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Susan F. Wilk
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether a state court that applies a sufficiency of the evidence standard to determine a habeas petitioner was not prejudiced by his trial counsel's deficient performance acts contrary to or unreasonably applies the clearly established standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

2. Whether a state court that fails to consider the entire trial record before determining a habeas petitioner was not prejudiced by his trial counsel's deficient performance acts contrary to *Strickland* and its progeny, and unreasonably determines the facts under 28 U.S.C. § 2254(d)(2).

PARTIES TO THE PROCEEDINGS

The parties are named in the caption as the petitioner, Leonard Contreras Sandoval, an Oregon Department of Corrections prisoner housed at the Snake River Correctional Institution in Ontario, Oregon, and the warden as respondent.

RELATED PROCEEDINGS

Sandoval v. Cain, No. 23-35213 (United States Court of Appeals for the Ninth Circuit) (order affirming the district court's denial of habeas relief filed on June 18, 2024)

Sandoval v. Cain, 662 F. Supp. 3d 1155, 2:19-cv-01278-SI (United States District Court for the District of Oregon) (order denying habeas relief but granting a certificate of appealability filed on March 20, 2023)

Sandoval v. Nooth, 364 Or. 535, S066397 (Oregon Supreme Court) (order denying review of Court of Appeals decision decided March 7, 2019)

Sandoval v. Nooth, 294 Or. App. 511, A163008 (Court of Appeals for the State of Oregon) (order affirming without opinion the denial of post-conviction relief filed October 10, 2018)

Sandoval v. Nooth, No. 12109709P (Circuit Court of the State of Oregon for the County of Malheur) (order denying post-conviction relief on August 19, 2016)

State v. Sandoval, 351 Or. 649, S059939 (Oregon Supreme Court) (order denying review decided on March 8, 2012)

State v. Sandoval, 246 Or. App. 577, A141783 (Court of Appeals of the State of Oregon) (order affirming without opinion Sandoval's conviction at his second trial, filed November 2, 2011)

State v. Sandoval, 342 Or. 506, SC S53457 (Oregon Supreme Court) (order reversing and remanding Sandoval's original conviction filed March 29, 2007)

State v. Sandoval, 204 Or. App. 457, A119980 (Oregon Court of Appeals) (order affirming without opinion Sandoval's original conviction filed February 15, 2006)

State v. Sandoval, No. 01CR0641 (Circuit Court of the State of Oregon for Josephine County) (verdict of guilt filed October 10, 2002, second guilty verdict after new trial filed on March 9, 2009)

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Petitioner Leonard Contreras Sandoval respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. The Court affirmed the district court's denial of Mr. Sandoval's 28 U.S.C. § 2254 petition for a writ of habeas corpus seeking relief from his Oregon conviction for murder.

Opinions Below

The panel memorandum disposition affirming the district court's denial of habeas relief is unpublished but reprinted in App. A. The district court's decision denying habeas relief is also reprinted in App. B.

The state court decisions denying post-conviction relief are unpublished.

Jurisdictional Statement

The court of appeals issued its decision affirming the district court's denial of habeas relief on June 18, 2024. App. A. On September 17, 2024, Justice Kagan extended the time to file this petition until November 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Relevant Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

28 U.S.C. § 2254(d) states: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Supreme Court Rule 10(c) provides that a petition for a writ of certiorari may be granted if "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Introduction

This case presents critically important questions concerning how trial courts must evaluate whether a criminal defendant was prejudiced by the constitutionally deficient performance of trial counsel during the guilt phase of criminal proceedings under this Court's precedents.

In *Strickland v. Washington*, this Court defined prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694 (1984). In explaining the proper application of the standard, the Court made clear that the reviewing court "*must* consider the totality of the evidence before the judge or jury" to determine whether the defendant was prejudiced by his or her lawyer's deficiencies. *Id*. at 695 (emphasis added).

Since *Strickland*, this Court has explained the performance prong of ineffective assistance of counsel claims at length, but most of this Court's cases focusing on prejudice have addressed the penalty phase of capital cases. To assess prejudice from deficient performance during penalty-

phase proceedings, the Court directs reviewing courts to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *see Thornell v. Jones*, 144 S. Ct. 1302, 1305 (2024) (In the last term, the Court once again took up a capital ineffective assistance of counsel claim to remind the lower courts that they must "consider the totality of the evidence before the judge or jury." (quoting *Strickland*, 466 U.S. at 295)).

Few cases, however, have addressed in depth how to undertake the prejudice inquiry for the guilt phase of a criminal case since *Strickland*. As a result, although most state and circuit courts purport to use a "totality of the evidence" standard, the analysis being applied is less rigorous and focuses on the sufficiency of the evidence of guilt.

In the capital context, this Court has previously found that the failure to consider all the evidence results in an unreasonable decision under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) ("[T]he State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence"). The traditional deference to state-court decisions under the AEDPA does not apply when the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established federal law" or when the decision was based on "an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1) and (2); *see also Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

In this case, the state court found Mr. Sandoval's counsel performed deficiently in failing to investigate and present evidence necessary to support Mr. Sandoval's defense of self-defense, but nevertheless refused to set aside the conviction despite admitting it had not considered all the evidence. Instead, the court determined that there was enough evidence of Mr. Sandoval's guilt

for a jury to convict even if his trial counsel had presented the evidence he deficiently failed to investigate and offer. This inverted the *Strickland* standard, which requires reversal if there is a reasonable probability that, but for counsel's unprofessional omissions, the outcome would have been different. 466 U.S. at 694.

In so ruling, the state post-conviction court relied on *Green v. Franke*, 357 Or. 301, 311 (2015), an Oregon Supreme Court opinion purporting to parallel the Sixth Amendment analysis for whether a person has been denied the right to effective assistance of counsel. However, contrary to *Strickland*, the Oregon standard does not require lower courts to consider "the totality of the evidence." In habeas corpus proceedings, the district court and Ninth Circuit improperly deferred to the state post-conviction court's determination, although the Oregon courts' analysis was contrary to and unreasonably applied this Court's long-standing precedent.

A review of state court decisions on ineffective assistance of counsel confirms that courts widely use this sort of shortcut, eroding the federal standard and leading to lack of uniformity nationwide. Without this Court's intervention, states courts of last resort and federal courts evaluating § 2254 petitions will continue to uphold convictions in cases involving significant violations of criminal defendants' right to effective assistance where proper application of the standard would require reversal. Certiorari is therefore warranted under Supreme Court Rule 10(c).

Mr. Sandoval's case is an ideal vehicle for this issue because the performance prong under *Strickland* is not at issue, and the evidence that counsel deficiently failed to investigate and present called into question the central premise of the State's theory of guilt.

Statement of the Case

A. The fatal shooting of Mr. Whitcraft.

Mr. Sandoval and Jack Whitcraft, the decedent, had a mutually antagonistic relationship before Mr. Whitcraft's death at Mr. Sandoval's hands. Mr. Sandoval's ex-wife, Mary Sizemore, had entered a romantic relationship with Mr. Whitcraft after the deterioration of her marriage to Mr. Sandoval, and eventually moved in with him. App. F at 62. Mr. Sandoval frequently expressed "hate" and "distaste" for both Mr. Whitcraft and Ms. Sizemore. App. F at 63-65. For his part, Mr. Whitcraft told an acquaintance prior to his death that "he'd like to kill the Mexican," referring to Mr. Sandoval. App. F at 282-83. The acquaintance relayed Mr. Whitcraft's threat to Mr. Sandoval. App. F at 283.

Their mutual antagonism became physical on July 18, 2001, when Mr. Whitcraft violently assaulted Mr. Sandoval in the parking lot of a Lil Pantry in Grants Pass, Oregon. App. F at 401, 404-05. Mr. Sandoval was inside his vehicle when Mr. Whitcraft approached him, began beating him, then dragged him out of his vehicle and continued to beat him. *Id*. An employee at the Lil Pantry saw Mr. Whitcraft on top of Mr. Sandoval, punching him, screaming, and cursing as Mr. Sandoval lay in the fetal position, bleeding from his nose. App. F at 405-06. Mr. Whitcraft told the Lil Pantry employee that "he was going to beat [Mr. Sandoval] until he dies." App. F at 298.

Although Mr. Sandoval reported the assault to police, Mr. Whitcraft was neither arrested nor prosecuted. App. H at 22. In the assault's aftermath, Mr. Sandoval became agitated, angry, and nervous. App. F at 89. Mr. Whitcraft told Ms. Sizemore that he feared that Mr. Sandoval would retaliate because Mr. Whitcraft had "got the better" of him at the Lil Pantry. App. F at 65-66. Mr. Whitcraft began to carry a .44 caliber revolver. App. F at 72.

On September 13, 2001, Mr. Whitcraft was driving on Pickett Creek Road in Grants Pass. What happened next was disputed; however, it was clear that Mr. Sandoval's Ford Bronco had been behind Mr. Whitcraft's truck on the roadway, and that Mr. Whitcraft slammed on the brakes, put his truck in reverse, and crashed it into the front of the Bronco, immobilizing it. App. H at 20. Mr. Sandoval later told police that he saw Mr. Whitcraft open his car door and begin to exit while raising a gun at him. App. H at 33-36. Believing he was about to be killed, Mr. Sandoval opened the driver's side door and, using the door for cover, fired a single left-handed shot, striking the back of Mr. Whitcraft's head and killing him. App. H at 21, 34-35.

When Mr. Whitcraft's body was found, it was lying partly on the roadway. His feet were tangled in wires inside the truck cab, and a loaded .44 caliber revolver was underneath his head on the pavement. App. F at 151. The revolver was cocked and in the "ready to be fired position." *Id*.

During three different interviews with police, Mr. Sandoval maintained that he had not exited his vehicle to shoot Mr. Whitcraft. App. F at 189.

B. The prosecution's theory of guilt.

At trial, the prosecutor cast doubt on Mr. Sandoval's version of events, instead advancing the theory that the shooting was a "set up." App. F at 298. Relying on Oregon law restricting an initial aggressor from claiming self-defense, the State argued that Mr. Sandoval had initiated the encounter with Mr. Whitcraft to manufacture a self-defense claim and get away with murder. App. F at 298, 305. Recognizing that the angle of the shot meant that it was fired from outside the car door, the prosecutor argued that Mr. Sandoval's story was not plausible:

> Defendant said that he made some kind of acrobatic, heroic movement with his gun. This guy backed in to him or grabbed his gun, and we need to talk about that. But, he reached behind and grabbed this rifle, brang [sic] it through the cab, wrapped around in it while he was coming through the cab. Was able to maneuver it through out this door that he was opening at the same time. Placed it right by the A-pillar

> of the vehicle, fired because he was under such huge pressure and just happened to hit Mr. Whitcraft square in the back of the head, or right just a little bit off midline down in the back. You heard where the doctor said he was struck.
> What is the truth? Defendant sled [sic] the vehicle to the stop in an offset position. He popped the door open. He had the window down. He stepped out of the vehicle. He had the gun already where Mr. Whitcraft was showed that gun on another day. He stepped out of the vehicle and he shot from where John Amish [the State's criminalist] told you he shot and the evidence tells you he shot and we can see it in the photographs. You've already looked at them, but you'll have a chance to study them more.
>
> Why did he say he didn't get out of his vehicle when in fact he did? Well, if you did get out of your vehicle it shows you had a plan and it shows you had -- you were the aggressor and it shows you were provoking the event.

App. F at 300.

Although he was aware that Mr. Sandoval was a decorated Vietnam War veteran, Mr. Sandoval's trial counsel did not obtain Mr. Sandoval's military records or consult experts. A jury convicted Mr. Sandoval of murder, a crime carrying a mandatory life sentence under Oregon law. Or. Rev. Stat. § 163.115. This had been a retrial after the Oregon Supreme Court remanded Mr. Sandoval's case because the court at the previous trial wrongly instructed the jury that Mr. Sandoval had a duty to retreat and avoid conflict. This time, Mr. Sandoval's conviction was affirmed by the Oregon courts.

C. The state post-conviction court finds counsel performed deficiently in failing to present military records of Mr. Sandoval's service as a helicopter door gunner in Vietnam and expert testimony on military combat and self-defense.

In state post-conviction proceedings, counsel introduced Mr. Sandoval's military records, which showed that Mr. Sandoval was a helicopter door gunner in Vietnam, receiving numerous honors for his valorous service and extraordinary skill in active combat. App. J. Post-conviction counsel also presented declarations from experts in use of force and military combat, who would

have testified that Mr. Sandoval's story that the prosecutor claimed was implausible was in fact consistent with his unique combat training and skillset. App. H.

Use-of-force expert Roy Bedard declared that Mr. Sandoval's unique background gave him the capability to fire a lethal, left-handed shot while remaining seated in his vehicle, as he described. App. H at 24. Mr. Bedard explained that helicopter door gunners in Vietnam were "tasked with firing and maintaining manually directed armament to targets below from aboard a moving helicopter," and that they were required to use "a variety of shooting techniques," including leaning in and out of the helicopter and firing from either a right- or a left-shouldered position. *Id*. Mr. Bedard believed it "entirely reasonable" that, because of his military training and experience in active combat, Mr. Sandoval would have remained in the Bronco where there was partial cover rather than exiting the vehicle like an untrained person might have done. *Id*.

An expert in military training and combat, Timothy Charpenter, declared that Mr. Sandoval would have received "react to contact" training to defend against an ambush, since ambushes were a preferred tactic of enemy combatants during the Vietnam War. App. H at 8-9. Additionally, Mr. Sandoval's military records showed that as a helicopter door gunner in Vietnam, he engaged in intense combat and his unit suffered heavy casualties. App. H at 9. Mr. Charpenter would have told the jury that Mr. Sandoval's training and combat experience would have created in him a "conditioned response akin to muscle memory in the presence of an imminent threat" such as the one posed by Mr. Whitcraft. App. H at 6-9. Mr. Charpenter also would have told the jury that Mr. Sandoval would have perceived Mr. Whitcraft braking suddenly and then backing his truck into Mr. Sandoval's Bronco as an ambush, creating a kill zone in which Mr. Sandoval could be immobilized, targeted, and killed. App. H at 6. Mr. Charpenter believed that Mr. Sandoval's

account was "consistent with someone of similar training and experience reacting instinctively to an imminent threat." *Id*. Mr. Charpenter further believed that, consistent with his training, Mr. Sandoval remained behind cover and "engaged until he felt the threat was eliminated[.]" *Id*. Due to trial counsel's deficient performance, the jury never heard any of this testimony.

The state post-conviction court found that Mr. Sandoval's trial counsel performed deficiently in failing to obtain Mr. Sandoval's military records and call experts in use-of-force and military training, stating, "my goodness, you know he's a military veteran, I think you need to get the records. I think you need to at least consider and at least speak to a self-defense expert and a use-of-force expert." App. G at 2. The court also stated, "this case bothers me -- I didn't – and I'm very serious this is one of the toughest cases I've had, and I've had hundreds. I really think trial counsel should have done a better job for this gentleman." App. G at 3.

However, despite finding that Mr. Sandoval's counsel was constitutionally deficient, the state post-conviction court found that Mr. Sandoval did not prove prejudice. Although the court noted that prejudice required the court "to look at all of the evidence that was presented," it did not do so. The judge said, "I had the trial transcript and I've read 90 percent of it. I hope it was the second trial and not the first trial, but I believe it was." App. G at 2-3.

Based upon the court's incomplete review of the evidence, the court found that "[t]he evidence was extremely strong, circumstantial or not, that this was a setup -- albeit, a really creative and unusual setup." App. G at 3. Thus, while expressing "some reluctance" because "this is one of the toughest cases I've had" and "trial counsel should have done a better job for this gentleman," the court ruled, "there is enough evidence for the jury in this case, even hearing the experts that I've said I believe should have been called or at least consulted, that I don't -- I cannot find as a

matter of law that the deficiencies by trial counsel had a tendency to affect and result under the standards set forth not only by *Strickland*, but by *Green v. Franke*." *Id*.

This ruling was affirmed by the Oregon Court of Appeals without opinion and the Oregon Supreme Court denied review. Apps. C; D. *Sandoval v. Nooth*, 294 Or. App. 511 (2018), *rev. denied*, 364 Or. 535 (2019).

After exhausting his remedies in state court, Mr. Sandoval sought habeas relief from the federal courts on his ineffective assistance of counsel claim against his trial counsel. The district court denied the petition. The court characterized the state court's admission that it reviewed "90 percent" of what it "hope[d]" was the correct transcript as a "targeted review of the record" and thus rejected Mr. Sandoval's arguments under § 2254(d)(1) and (2). App. B at 16. The district court district court denied Mr. Sandoval's petition for habeas relief but granted a certificate of appealability for his claims of ineffective assistance related to trial counsel's failure to call use of force and military experts and to obtain Mr. Sandoval's military records. App. B at 20. The Ninth Circuit affirmed the district court's ruling in a memorandum opinion. App. A.

Reasons For Granting the Petition

A. The decision below contravenes Supreme Court precedent.

The state court agreed that Mr. Sandoval's trial counsel had performed deficiently by not requesting Mr. Sandoval's military records and failing to consult use-of-force and military combat experts. But even though the evidence that counsel deficiently failed to investigate and present struck at the heart of the State's theory of guilt, the court did not find prejudice, applying an incorrect standard that had been adopted as a judicial shortcut by the Oregon courts.

Specifically, the court determined that "there [was] enough evidence for the jury in this case," and thus declined to find that Mr. Sandoval was prejudiced by his lawyer's omissions. App. G at 3.

1. Strickland requires reviewing the "totality of the evidence."

In *Strickland*, this Court emphasized that a review of the totality of the evidence is crucial to determining prejudice because some errors by counsel can affect the entirety of the evidence presented:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Id.at 295-96 (emphasis added). *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (repeating that the court "must consider the totality of the evidence before the judge or jury").

Applying this standard to capital sentencing, this Court has instructed that if a state court fails to evaluate the totality of the mitigating evidence, including "both that adduced at trial, and the evidence adduced in the habeas proceeding" against the totality of the aggravating evidence, the analysis is contrary to and an unreasonable application of *Strickland*. *Williams v. Taylor*, 529 U.S. 362, 367 (2000). *See also Berghuis v. Thompkins*, 560 U.S. 370, 372 (2010) ("Here, the Sixth Circuit did not account for the other evidence presented against Thompkins"); *Porter v. McCollum*, 558 U.S. 30, 41 (2009) ("To assess th[e] probability [of prejudice], we consider 'the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding'--and 'reweig[h] it against the evidence in aggravation.'"(internal citations omitted)).

2. Oregon case law on Strickland prejudice permits incorrect judicial shortcuts like the one took place here.

That a standard "is stated in general terms [by a state court] does not mean the [court's] application was reasonable." *Panetti*, 551 U.S. at 953. In this case, proper application required the court to evaluate the totality evidence from the trial and post-conviction proceedings, weighing the trial that would have occurred but for trial counsel's deficiencies against the one that took place. The Oregon post-conviction court instead employed an improper judicial shortcut authorized under Oregon law.

Oregon case law asserts that the state's standards for determining the effective assistance of counsel are "functionally equivalent" to the federal standard. *Montez v. Czerniak*, 355 Or. 1, 6-7 (2014). However, although *Montez* references the duty to consider the "totality of the evidence," the court collapses this review into the performance prong. *See Montez*, 355 Or. at 7-8 (instructing, "[a]ppellate courts reviewing Sixth Amendment claims 'must consider the totality of the evidence before the judge or jury.' At the end of the day, the court must evaluate the reasonableness of counsel's representation 'from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.'" (quoting *Strickland*, 466 U.S. at 695, *Kimmelman*, 477 U.S. at 381)). The court otherwise does not mention any obligation for courts to consider the totality of the evidence.

The case cited by the state post-conviction court, *Green v. Franke*, omits the "totality of the evidence" requirement altogether. *See* 357 Or. at 311-12. In leaving out that requirement, *Green* instructs Oregon courts to decide prejudice to a defendant based on a generalized assessment "whether trial counsel's acts or omissions could have tended to affect the outcome of the case." *Id*. at 323 (cleaned up). Leaving out the integral "totality of the evidence" review from this test

dilutes the Sixth Amendment standard. Instead, as happened in this case, courts may uphold convictions if they find sufficient evidence to support the verdict.

3. Application of the correct prejudice standard in this case demonstrates that certiorari should be granted.

Illustrating that this danger is real, not speculative, the state court here held there was "enough evidence," to support the State's set-up theory. This converted the *Strickland* prejudice analysis into a sufficiency-of-the-evidence analysis, contravening Supreme Court precedent. App. G at 3 Instead of affirming based on a finding that the trial evidence was sufficient to support guilt, the court had to reverse unless it found there was no reasonable probability that the omitted evidence could have made a difference to the result. 466 U.S. at 694-95.

The key factual dispute at Mr. Sandoval's trial was whether Mr. Sandoval shot Mr. Whitcraft from inside his vehicle. Under Oregon law, the initial aggressor in an encounter cannot claim self-defense. Or. Rev. Stat. § 161.215(2) (2001). Persuading the jury that Mr. Sandoval initiated the encounter and "set up" Mr. Whitcraft to react to Mr. Sandoval's initial use of force thus would defeat his self-defense claim.

Understanding this, at trial, the State argued that Mr. Sandoval's account of shooting Mr. Whitcraft lefthanded from within his vehicle was implausible, and that "if [Sandoval] did get out of [his] vehicle it shows [he] had a plan and it shows [he was] the aggressor and it shows [he was] provoking the event." App. F at 300. In the prosecutor's own closing words, "Why did [Mr. Sandoval] say he didn't get out of his vehicle when in fact he did?" *Id*. The prosecutor dedicated much of his closing argument to the implausibility of Mr. Sandoval's account, starting with the implausibility of Mr. Sandoval's "acrobatic, heroic movement with his gun." *See* App. F at 297-305.

During post-conviction proceedings, the trial prosecutor admitted that "if the events unfolded as petitioner said they did, he would have a valid claim of self-defense." App. I at 1. He even acknowledged, "assuming petitioner was innocently following Whitcraft, who slammed on his brakes, reversed into petitioner's car, retrieved a gun, and pointed it at petitioner, all without any provocation from petitioner, there is no doubt that an objectively reasonable person would fear for his life." *Id*.

Without testimony about Mr. Sandoval's highly specialized training as a helicopter gunner and his unique combat experience, the jury had no foundation from which to counter the prosecution's implausibility argument. Evidence demonstrating that Mr. Sandoval's military experience rendered him uniquely capable of making this seemingly implausible shot was necessary to support Mr. Sandoval's self-defense claim. Experts Bedard and Charpenter did not merely find Mr. Sandoval credible; instead, considering his military training, they believed it improbable that Mr. Sandoval would have exited his vehicle to take the fatal shot, as the State had theorized. Applying the correct totality of the evidence standard, therefore, it is reasonably probable that presenting that evidence at trial would have led to an acquittal.

The "necessity of uniformity" of federally guaranteed rights "upon all subjects within the purview of the constitution" is a foundational principle of constitutional interpretation. *Arthur v. Dunn*, 580 U.S. 1141, 1149 (2017) (quoting *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816)). Without uniformity in determining the prejudice prong for ineffective assistance of counsel claims, the constitutional right to effective assistance of counsel varies depending on the jurisdiction where a criminal defendant may find him or herself accused of a crime.

4. Other jurisdictions also fail to correctly evaluate prejudice under Strickland.

In several jurisdictions, courts fail to perform or misstate the analysis mandated by this Court's case law. *See e.g. State v. Bertrand*, 546 P.3d 1020, 1026 (Wash. 2024) (acknowledging that "some confusion has arisen as to whether [a claim of ineffective assistance based on the deficient failure to request a lesser included offense instruction] can ever succeed in a case where sufficient evidence supports the jury's verdict") see also *id*. at 155 (noting that majority opinion maintains "problematic application of Strickland's prejudice analysis"); *State v. Clay*, 824 N.W.2d 488, 501 (2012) (using alternative prejudice standard to assess *Strickland* prejudice); *Parkus v. State*, 781 S.W.2d 545, 547 (Mo. 1989) (declining to find due process violation even though state court expressly refused to review the whole record).

Other state courts of last resort have parroted the *Strickland* standard for assessing prejudice from ineffective assistance of counsel, but, like Oregon, misapply it or do not apply it at all. *See e.g. Zayas v. State*, 902 S.E.2d 583 (Ga. 2024) (omitting mention of totality of evidence requirement when conducting analysis, and likening "the prejudice step of the plain error standard with the prejudice prong for an ineffective assistance of counsel claim"); *Davenport v. State*, 431 S.W.3d 204, 208-09 (Ark. 2013) (assessing prejudice without reference to totality of evidence).

As the discussion above demonstrates, state courts overlook or minimize a crucial aspect of the prejudice inquiry. At the same time, state courts of last resort wrongly believe their federal constitutional ineffective assistance of counsel analysis aligns with what the Sixth Amendment demands.

B. The question presented is critically important.

The Constitution's Due Process Clauses guarantee a criminal defendant the right to a fair trial, but the Sixth Amendment right to counsel is of "vital importance" to preserve the fundamental fairness of a criminal trial. *Strickland*, 466 U.S. at 684-85. The mere presence of counsel is not enough to preserve that fundamental fairness, so where counsel's conduct "undermined the proper functioning of the adversarial process," the result of the trial cannot be considered reliable. *Id*. at 686-87.

The correct application of the two-pronged analysis set forth in *Strickland* is therefore fundamental to vindicating a criminal defendant's Sixth Amendment and Due Process rights. Although the Court has expressed reluctance to establish "mechanical rules" that a reviewing court must follow, state courts remain bound by the guiding principle that the adversarial process must operate to ensure the defendant a reliable result according to constitutional base lines established by the Court. *Id*. at 696.

Ineffective assistance of counsel is one of the most commonly raised issues by criminal defendants on appeal or in post-conviction proceedings. The frequency with which these claims are litigated shows the necessity of ensuring uniform standards are applied to these claims. Where the defendant's counsel has performed deficiently, that calls into question whether the adversarial process functioned in that defendant's trial and, commensurately, the fundamental fairness of a defendant's conviction. If the prejudice determination is performed unequally across jurisdictions to decide which defendants are entitled to relief, then the process cannot be said to produce fair and just results. As Oregon's example shows, simply stating the standard is not proof that it is being followed. *Panetti*, 551 U.S. at 953; *see Green*, 357 Or. at 311. The courts will not correct course without the Court's intervention.

In summary, the Court should take this opportunity to clarify how courts should determine *Strickland* prejudice in guilt-phase proceedings. Ensuring uniform application by state courts protects the integrity of judicial proceedings and promotes interests of comity and federalism.

C. This case is an excellent vehicle for addressing the question presented.

This case provides an excellent vehicle to address the questions presented for three reasons. First, there are no procedural bars to any of Mr. Sandoval's claims. All his claims are timely and have been properly exhausted in state court.

Second, the state post-conviction court has already found that Mr. Sandoval's trial counsel was deficient in his performance. The state court correctly determined that Mr. Sandoval's trial counsel's failure to obtain Mr. Sandoval's military records or consult experts was deficient performance, and the courts have not revisited that portion of the analysis. Thus, the Court can evaluate prejudice without impediment.

Third, the state post-conviction court was candid about its failure to consider the totality of the evidence standard and application of a sufficiency-of-the-evidence standard. The state post-conviction judge stated on the record that he had only "read 90 percent of [the trial transcript]" and that he "read a lot of the transcript, but [he] didn't read all of it." App. G at 2-3. The judge relied on *Green v. Franke*, a state supreme court case that does not require state judges to consider the totality of the evidence to determine prejudice. Last, the judge declared that he believed the evidence of the State's setup theory was nonetheless sufficient to support a conviction.

In granting Mr. Sandoval certiorari, this Court will have the opportunity to forcefully reassert the true inquiry a lower court must conduct to determine if the deficiencies of a defendant's trial counsel prejudiced their defense. Doing so will ensure that all jurisdictions evenly apply the

standard for ineffective assistance of counsel that this Court has previously declared to be the constitutional minimum.

Conclusion

For the above stated reasons, this Court should grant the petition for writ of certiorari. On certiorari, Mr. Sandoval respectfully requests the judgment of the lower courts be reversed.

DATED this 15th day of November 2024.

/s/ Susan F. Wilk
Susan F. Wilk
Assistant Federal Public Defender
Attorney for Petitioner