No. 17-6323

# In the Supreme Court of the United States

MARK STEPHEN ELLIS,
*Petitioner,*

v.

RICK RAEMISCH, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, AND CYNTHIA COFFMAN, ATTORNEY GENERAL, STATE OF COLORADO,
*Respondents.*

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

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Does this Court's jurisprudence concerning the Sixth Amendment right to effective assistance of counsel clearly establish that the defense must present all favorable evidence deemed to have "no downside," where counsel reasonably views it as cumulative?

Does this Court's jurisprudence concerning the Sixth Amendment right to effective assistance of counsel clearly establish that, under the circumstances of this case, defense counsel was required to utilize an expert witness psychologist, despite that counsel knew from experience what such an expert could testify to, had learned from jury interviews that jurors do not consider such testimony significant, and reasonably believed the relevant points could be and were communicated through lay witnesses and argument?

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## STATEMENT OF THE CASE

The Court has ordered Respondents to file a response to the Petition for Writ of Certiorari.

***Facts.*** After Petitioner admitted to an affair, his wife Kari Ellis filed for divorce. Aplt.'s App. Vol. 1 at 287, Vol. 4 at 281-82. During this period, their nine-year-old adopted daughter, V.E., disclosed that Petitioner had been sexually assaulting her.[1] *Id.,* Vol. 1 at 287-88. She had previously disclosed this to her adoptive brother M.E., but M.E. himself then began sexually assaulting her. *Id.,* Vol. 3 at 35-42. When police searched the home, a blanket from the victim's bed was found to contain the semen of both Petitioner and M.E. Pet. *Id.,* Vol. 4 at 46, 168, 243, 259; App. G at 2.

Petitioner was charged with sexual assault on a child. For his defense, Petitioner retained an attorney who was an expert in child sex-assault cases. Counsel had handled 200 such cases, had lectured nationally on the concepts involved in defending them, and had interviewed "dozens" of juries over the years to hone his approach.[2] Aplt.'s App. Vol. 6 at 194-98, 226-34.

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[1] The victim turned ten the next month. *See* Aplt.'s App. DVD 1 at 2:15.

[2] Petitioner notes a public censuring of counsel. Pet. 4. This was twelve years before Petitioner's trial and based on counsel's neglect of two clients during counsel's first five years of practice. *People v. Stayton*, 798 P.2d 903 (Colo. 1990) (per curiam). Petitioner also notes counsel was once deemed ineffective. Pet. 4. This was based on counsel's handling of a case during his first three years of practice. Supp. Aplt.'s App. Vol. at 394. By the time of Petitioner's trial, counsel had been practicing law for approximately eighteen years. Aplt.'s App. Vol. 6 at 194.

For trial, counsel formulated a theory of defense that Petitioner had been falsely accused. He argued the young victim's precocious sexual knowledge came only from the admitted sexual abuse of M.E. And M.E., he argued, had convinced her to falsely accuse Petitioner, both to shift blame from his own abuse, and because he was angry at Petitioner over the divorce. *Id.,* Vol. 2 at 24-26, 28, 32. Counsel also contended that Ms. Ellis was angry and manipulative and had "coached" the victim. *Id.,* Vol. 2 at 29-32.

As for the semen-stained blanket, counsel elicited testimony from Petitioner that when the marriage was falling apart, he began sleeping on the couch, and he would occasionally masturbate there while using the blanket. *Id.,* Vol. 2 at 32-33. Counsel presented an expert to tell the jury that the fibers on the blanket proved it was used throughout the home, not solely on the victim's bed. *Id.,* Vol. 4 at 271-72. And counsel had another expert testify that the amount of Petitioner's semen on the blanket was much less than a "full" ejaculation, and was, therefore, consistent with an accidental transfer from a hand, as Petitioner claimed could have happened after masturbating. *Id.,* Vol. 4 at 20, 23.

The jurors also, however, heard the then-eleven-year-old victim's unwavering testimony that both Petitioner *and* M.E. had sexually assaulted her on multiple occasions. *Id.,* Vol. 2 at 51-52, 78-79. And they watched lengthy forensic interviews in which she, while only nine, described essentially the same acts she described at trial–using age-appropriate language, showing embarrassment, giving details–and yet showing concern for "dad's" future as well. *See Id.,* DVD 1 at 21:00 (Petitioner would make me watch movies of "grown-ups" doing what you do to make a baby), 31:00 (he would then rub his "private spot"), 38:00 (mom would be at work), 40:00 (he would touch my private spot with a "buzzer" [vibrator] that he said makes people feel good), 49:00 (he tried to put his "private part" in me but it hurt too much), 52:00 ("white stuff" would come out of his penis into my mouth and I would spit it in the sink), 1:20:00 (he would put his mouth on my "private spot"), 1:35:00 (I do not want him to go to jail, because he is my dad; I just want him to stop).

At a bench conference during trial, the judge observed: "This is a very, very well-fought case on both sides." *Id.*, Vol. 3 at 252-53. The jury ultimately found Petitioner guilty of sexual assault on a child and child abuse. Pet. App. G at 2.

***Direct Appeal.*** On direct appeal, the Colorado Court of Appeals affirmed, *id.*, and the Colorado Supreme Court declined review. Pet. App. F.

***Postconviction Proceedings.*** Petitioner next filed a postconviction motion asserting ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). As relevant here, Petitioner argued that counsel should have (1) interviewed and called to testify an expert witness psychologist to testify about theories of "family dynamics" and child memory, and (2) called two additional witnesses to testify that Ms. Ellis was vindictive and manipulative: Jessica Geer, an Ellis daughter who had aligned with Petitioner in the divorce; and Dr. Richard

Spiegle, who had been a court-appointed special advocate for the children in the divorce proceedings. *See* Pet. App. B at 4, 7 (district court's summary).[3]

The state district court held three days of evidentiary hearings. Trial counsel testified at length concerning his experience and defense strategy, yet acknowledged he is not perfect: "I make mistakes, there's no question," he stated, and "if I did something wrong then I accept responsibility." Aplt.'s App. Vol. 6 at 288. But he affirmed that, despite the result in this case, he had thoroughly prepared and done his best, and he did not believe the events of his personal life, or his case load, had hindered his defense. *Id.* at 287-88. "[I]f I felt that, I would have said that," he testified. *Id.* at 288.

The court denied relief in a written order. It found that, even accepting the defense witnesses' testimony as true, counsel's performance was not constitutionally deficient; and even if it were, Petitioner failed to prove prejudice. Pet. App. E at 4, 9 n.2. The Colorado Court of Appeals affirmed, finding no deficient performance, Pet. App. D at 9, and Petitioner did not seek review in the Colorado Supreme Court.

***Federal Habeas Petition.*** Petitioner next initiated the habeas action underlying the instant proceeding by filing a Petition for a Writ of Habeas Corpus

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[3] Petitioner also asserted a state-law claim of newly discovered evidence of innocence, alleging a recantation by the victim. When the evidentiary hearings were held, however, Petitioner did not call the victim to testify, and offered little beyond (1) letters in which the victim opined that Petitioner had been in prison too long, but--notably--did not suggest he was innocent, Aplt.'s App. Vol. 1 at 299, 300; and (2) the testimony of Petitioner's brother that the victim, while in high school, once came home saying she had just learned about "false memory syndrome," and might have such a condition because she could not now clearly remember "who did what" with regard to the sexual abuse, *id.*, Vol. 5 at 280.

Pursuant to 28 U.S.C. § 2254.[4] After briefing, the district court held a non-evidentiary hearing to discuss legal arguments. The court informed counsel that it had not yet read all of the trial transcripts, but had at least read most of the postconviction transcripts. Aplt.'s App. Vol. 1 at 254-55. The court also had not obtained or reviewed the victim's lengthy forensic interviews, despite that the jury had considered them in reaching its verdict. *See id.,* Vol. 1 at 219-20, 246.

During the hearing, the court announced that it would grant the writ. *Id.,* Vol. 1 at 263. It did so in a written order one week later, directing the state to release Petitioner should it fail to retry him within 90 days. *Id.,* Vol. 1 at 187, 209. The court ruled that the victim's testimony "was the central evidence in the case" and that, accordingly, "the jury's verdict did not have 'overwhelming record support.'" Pet. App. B at 10.

Because the court had not considered the victim's video interviews or any trial exhibits, however, Respondents provided the court with the interviews and the few other trial exhibits they were able to obtain without a court order. *See* Aplt.'s App. Vol. 1 at 214, 234-35. Respondents requested the court reconsider its ruling in light of all trial evidence, given that *Strickland* prejudice must be evaluated by considering "the totality of the evidence [that was] before the judge or jury," *Strickland,* 466 U.S. at 695. For the same reason, Respondents requested the court order and review the entire state record. Aplt.'s App. Vol. 1 at 235. The court did not

[4] The Antiterrorism and Effective Death Penalty Act of 1996, hereinafter "AEDPA or "§ 2254."

order the entire state record, but did issue additional findings stating that it had reviewed all transcripts and the videos of the victim's forensic interviews, and that they did not provide a basis for the court to alter its ruling. Pet. App. C at 2-3.

The court stayed the amended judgment through the conclusion of Respondents' appeal. Aplt.'s App. Vol. 1 at 250.

***Federal Habeas Appeal.*** The United States Court of Appeals for the Tenth Circuit reversed in a published decision. Pet. App. H. The opinion resolved a question of Colorado habeas corpus procedure that the court had not previously decided. Pet. App. A at 9 ("Whether [Colorado Appellate] Rule 51.1 permits state prisoners to exhaust all available state remedies without seeking discretionary relief from the [Colorado Supreme Court] is a question of first impression in this court."). The opinion thereafter applied AEDPA and reversed, ruling that the Colorado Court of Appeals did not unreasonably apply *Strickland* by concluding that counsel's performance was not constitutionally deficient. Pet. App. at 13-14.

## REASONS FOR DENYING THE PETITION

This Court grants a petition for writ of certiorari only for compelling reasons. Sup. Ct. R. 10. There are none in this case, and Petitioner's request for certiorari should be denied.

### I. This Court's jurisprudence does not clearly establish that the Sixth Amendment right to effective assistance of counsel requires counsel to present all existing favorable evidence. It establishes the opposite.

Petitioner's first question presented misapprehends the governing law. It asks whether the Tenth Circuit's opinion regarding counsel's decision not to call two witnesses–Jessica Geer and Dr. Spiegle–was "contrary to the Sixth Amendment's guarantee of effective assistance of counsel." Pet. ii.

This is a habeas case governed by 28 U.S.C. § 2254. Petitioner's claim was adjudicated on the merits in state court. Relief is barred unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

Under § 2254(d)(1), the question is whether the Colorado Court of Appeals unreasonably applied *Strickland* in concluding that counsel did not render deficient performance by choosing not to call these particular witnesses. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011). The Tenth Circuit's decision was appropriately limited to that question. *See* Pet. App. at 16 ("[I]t was not unreasonable for the CCA to determine that Mr. Stayton was not constitutionally deficient for declining to call Dr. Spiegle . . . ."); Pet. App. at 18 ("[B]ecause Mr. Stayton's decision [not to call Geer] reflected an intentional, strategic choice, within a trial lawyer's customary discretion, we cannot conclude that the CCA was unreasonable . . . .").

Petitioner casts the Tenth Circuit's rejection of his claim as a novel application of law "alter[ing] the jurisprudence of ineffective-assistance-of-counsel claims below what the Sixth Amendment will tolerate." Pet. 14. He claims to be "unaware of any other case in which a federal or state appellate court" has concluded "it was not unreasonable for [counsel] to decline to present favorable testimony from available defense witnesses solely because he did not believe he needed [it] to win the trial." Pet. 14.

This Court has itself reached that conclusion. In *Richter*, this Court recognized that even if certain testimony could have supported the defense, "it would be reasonable to conclude that a competent attorney might elect not to use it." 562 U.S. at 107.

Petitioner suggests a defense witness must be called to testify unless counsel "perceived a downside to calling the witness." Pet. 17. But *Richter* disavowed that. The Court there explained that even *apart* from the risk of opening the door to damaging evidence, counsel could reasonably decide against calling the potential witness on the general basis that the witness might "shift attention" to other matters or "distract the jury." *Richter*, 562 U.S. at 108-09. In other words, counsel could reasonably decline to present favorable testimony as part of routine decision-making about what—if any—evidence to present on various points, and how much time to spend emphasizing each one. Pet. 14.

If anything would alter this Court's ineffective-assistance jurisprudence, it is Petitioner's proposed rule. Under his approach, the Sixth Amendment requires defense counsel to present all evidence that has "no downside." *See* Pet. 19, 23. Counsel could not decide to present only the most powerful evidence, even if counsel thinks that approach would be best. Counsel would be required to present all "favorable" witnesses, even if counsel views them as being cumulative, tangential, distracting, and likely to result in a watered-down or confusing defense.

Fortunately, that is not the law. Counsel may—and generally must—draw the line somewhere. Petitioner's contrary argument starts from the false premise that some evidence simply *has* no downside. Pet. 14. Yet all evidence takes counsel's time and the jury's focus from other evidence. That is why counsel is "entitled . . . to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107.

Petitioner asserts it can never be "a reasonable criminal defense strategy to 'choose' to present information only through hostile witnesses instead of a neutral or friendly witness." Pet. 18. But of course it can. Decisions about which witnesses to call and whether to emphasize a theme with additional evidence, are quintessential strategic choices to which courts defer. *See, e.g., Snow v. Sirmons*, 474 F.3d 693, 729 (10th Cir. 2007) ("[C]ounsel's failure to call witnesses whose testimony would be corroborative or cumulative of evidence already presented at trial is not deemed constitutionally deficient."); *Valenzuela v. United States*, 261 F.3d 694, 699- 700 (7th Cir. 2001) ("[A] lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review." (quotation and alteration omitted)); *United States v. Smith*, 198 F.3d 377, 386 (2d Cir. 1999) ("[W]hether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." (quotation omitted)). Petitioner's arguments under § 2254(d)(1) are therefore unpersuasive.

Next, Petitioner argues under § 2254(d)(2) that he overcomes AEDPA on the view that the Colorado Court of Appeals based its ruling on an unreasonable determination of the facts. Pet. 17. *See* § 2254(d)(2). The court was unreasonable, he says, to believe counsel developed the themes of parental alignment, child memory, and Ms. Ellis's negative character through argument and witnesses other than Geer and Spiegle. Pet. 15-17. This fails because it is more of the same: that counsel should have used certain witnesses or evidence to develop a theme counsel determined was sufficiently communicated through other means.

Petitioner does not dispute that counsel developed these themes through argument and cross-examination, and the record confirms he did: He told the jurors in opening that the evidence would show Ms. Ellis "hates" Petitioner and "has put this hatred over from her into the children." Aplt.'s App. Vol. 2 at 32. Counsel forced the victim to admit she had "always been angry at" Petitioner and was closer to Ms. Ellis. *Id.*, Vol. 2 at 120, 178. Counsel sought to show that some of the victim's memories were impossible, inconsistent over time, and indicated embellishment or invention of the abuses alleged against Petitioner, while minimizing the abuses committed by M.E. *Id.*, Vol. 2 at 153, 159, 162, 167.

Counsel also forced M.E. to admit he was "really angry" at Petitioner and disliked him "a great deal." *Id.*, Vol. 3 at 56, 65. He forced sister Elizabeth Jefferson to admit she had "allied [her]self with [her] mother." *Id.*, Vol. 3 at 256.

He elicited that, by contrast, teenage sister Jessica Geer had "allied [her]self with" Petitioner, *Id.,* Vol. 3 at 256, and that Ms. Ellis had kicked her out of the house as a result. *Id.,* Vol. 3 at 202. He used the prosecution's own advisory witness detective to disprove Ms. Ellis's testimony that she never discussed the case with the victim after the police got involved. *Id.,* Vol. 4 at 154. And although the closing arguments were not recorded, counsel presumably continued to drive the points home then.[5]

In conclusion, the Tenth Circuit's ruling in this case was not novel or even particularly noteworthy. There is no split of authority. As noted, the opinion was published to clarify a previously unresolved matter of Colorado-specific habeas corpus procedure. *See* Pet. App. A at 9. Beyond that, the opinion applies settled law. *See id.* at 16-18 (citing prior similar opinions). The court properly applied AEDPA to this claim and correctly concluded that, at minimum, the Colorado Court of Appeals did not unreasonably apply *Strickland* in rejecting it. There is no reason to grant certiorari on this issue.

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[5] It may also be noted that, as Petitioner's experienced counsel surely knew, much of what Petitioner contends counsel could only have introduced through Geer and Spiegle to prove Ms. Ellis's alleged negative traits and past abusive behavior was inadmissible. It was character evidence, and it had marginal relevance to whether Petitioner committed the sexual assaults. *See* Colo. R. Evid. 402, 403, 404(b); *People v. Casias*, 312 P.3d 208, 214, 217 (Colo. Ct. App. 2012) (evidence of defendant's past acts of abusing toddler by slapping constituted inadmissible character evidence in case alleging murder of newborn by shaking and slamming). Even to the extent that Petitioner's proposed evidence was relevant to Ms. Ellis's character for *truthfulness*, extrinsic evidence (here, Geer's and Spiegle's testimony) on the point would not have been admissible to prove such character either. Colo. R. Evid. 608(b).

## II. This case is a poor vehicle for illustrating when defense counsel is required to utilize an expert. It illustrates the opposite.

Petitioner also asks the Court to grant certiorari and rule that "it was per se unreasonable" for his counsel "not to consult with and present testimony from an expert forensic psychologist." Pet. 25. According to Petitioner, this is "the type of case contemplated in *Richter* where use of an expert witness is the only reasonable criminal defense strategy." Pet. 25-26. Petitioner insists counsel was required to call a psychologist to educate the jury about the "science of child memory," the "coachability" of children, and the concept that when "a high-status adult in a child's life makes negative, disparaging comments about an accused," it "could increase the risk of obtaining inaccurate information from the child." Pet. 20-22 (internal quotation marks omitted). According to Petitioner, the Tenth Circuit erred by deeming reasonable the Colorado Court of Appeals' conclusion that it was reasonable for counsel to emphasize these themes through cross-examination and argument, rather than an expert. Pet. 24.

But this is hardly a case to illustrate when "the only reasonable and available defense strategy," *Richter,* 562 U.S. at 106, requires an expert. In fact, it is an example of the opposite: Counsel reasonably decided not to *consult with* an expert psychologist because he himself was well-versed in the subject matter and knew from experience what such an expert could testify to. And counsel reasonably decided not to *call* such an expert at trial because he had learned from his own "dozens" of jury interviews that such experts do little to sway jurors. *See* Aplt.'s App. Vol. 6 at 194-98, 226-34.

Specifically, counsel testified that he had learned that jurors in child sex-assault cases "don't pay a lot of attention to [these types of] experts." *Id.,* Vol. 6 at 227-28. And in this case, he decided lay witness testimony was sufficient to communicate the themes he wanted to emphasize. *Id.,* Vol. 6 at 230-32. "You don't have to have a master's degree to understand that one parent can manipulate a child," he had found, "it's intuitive." *Id.,* Vol. 6 at 233. He also believed it would have come off as "insulting to the jury" for the defense to have an "expert" testify in this way. *Id.,* Vol. 6 at 230.

Counsel's experience had also convinced him that to secure an acquittal in a child sex-assault case, the defense must win in the prosecution's case-in-chief. He had learned that "if you don't win these cases as the defense lawyer, in the prosecution case . . . you're not going to win on your side." *Id.,* Vol. 6 at 229. And counsel testified that in his cross-examination of the victim, he accordingly sought to illustrate that her descriptions of the abuse were not trustworthy for a number of reasons, including that they were inconsistent, seemed to exaggerate Petitioner's abuses over M.E.'s, and contradicted basic memory concepts such as primacy and recency. *Id.,* Vol. 6 at 263-68.

Finally, as the Tenth Circuit noted, counsel testified that "if he had called such an expert, he believed that the state would have called its own," and he "did not want to expose the defense case to 'a lot of attack.'" Pet. App. A at 16 (quoting Aplt.'s App. Vol. 6 at 229).

These were legitimate strategic bases for counsel to decide against using an expert in Petitioner's case. Again, this is an AEDPA case. The question is "whether it is possible fairminded jurists could disagree" that counsel's decision was outside the wide range of reasonable professional assistance within which defense attorneys are allowed to do their job. *Richter*, 562 U.S. at 102.

Here, even if expert testimony could have supported the defense, "it would be reasonable to conclude that a competent attorney might elect not to use it." *Richter*, 562 U.S. at 108. *See also Reinert v. Larkins*, 379 F.3d 76, 95 (3rd Cir. 2004) (not deficient for counsel to rely on cross-examining the prosecution's witnesses rather than on calling an expert); *Coleman v. Calderon*, 150 F.3d 1105, 1115 (9th Cir. 1998) (not deficient for counsel to rely on consulting an expert prior to trial and cross-examining state's witnesses, rather than calling the expert to testify), *rev'd on other grounds*, 525 U.S. 141 (1998); *United States v. Kirsch,* 54 F.3d 1062, 1072 (2d Cir. 1995) (not deficient for counsel to forgo calling fingerprint expert in forgery case; such decisions are within counsel's strategic discretion); *United States v. McGill,* 11 F.3d 223 (1st Cir. 1993) (not deficient for counsel to forgo firearms expert, because expert was subject to impeachment and counsel elicited most of the points through state's witnesses); *United States v. Maxwell*, 966 F.2d 545, 548-49 (10th Cir. 1992) (not deficient for counsel to rely on cross-examination of state's witnesses rather than on an expert who might open the door to damaging evidence).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,


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