No. _____

In The
Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,
v.
MICHAEL SKAKEL,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI WITH SEPARATE APPENDIX

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QUESTION PRESENTED

Under the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), must a court evaluate counsel's overall performance in determining whether a single error is sufficiently egregious to render counsel's representation constitutionally deficient?

TABLE OF CONTENTS

Page

Petitioner's Appendix (Volume I)

Petitioner's Appendix (Volume II)

Petitioner's Appendix (Volume III)

TABLE OF AUTHORITIES

Page

CASES

STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINIONS BELOW

The state habeas court's decision in this case is reported as *Skakel v. Warden*, 2013 WL 5815007 (reprinted in the Appendix ("App.") hereto at A-593 to A-762). The original decision of the Supreme Court of Connecticut on appeal therefrom is reported as *Skakel v. Commissioner of Correction*, 325 Conn. 426, 159 A.3d 109 (2016)(reprinted at A-333 to A-592). Upon reconsideration, the Connecticut Supreme Court reversed its original decision in an opinion reported as *Skakel v. Commissioner of Correction*, 329 Conn. 1, __ A.3d __ (2018)(reprinted at A-1 to A332).

JURISDICTION

On May 4, 2018, the Supreme Court of Connecticut entered its final judgment in this case. On July 30, 2018, Justice Ginsburg extended the time within which to file a certiorari petition to and including August 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case is here from the judgment of the Connecticut Supreme Court, which concluded that defendant, Michael Skakel, was deprived of the effective assistance of counsel because his attorneys failed to investigate a fourth witness who could have testified in support of a partial-alibi defense. App. at A-8.

In 2002, a jury of twelve found defendant guilty of the 1975 murder of fifteen-year-old Martha Moxley. App. at A-8 to A-9. The evidence established that Martha was bludgeoned to death with a golf club belonging to defendant's mother; that the then-fifteen-year-old defendant had been infatuated with Martha, whose attention was directed at defendant's older brother, Tommy; and that defendant made multiple incriminating statements, some outright admitting to the murder, to multiple people over the years between the crime and his prosecution. App. at A-11, A-345, A-346.

For his criminal trial, defendant, who had considerable financial resources, hired a private defense team, consisting of Attorney Michael Sherman and a number of his associates (hereinafter "the defense team"). The following evidence was later presented at the habeas trial as to the defense team's efforts prior to and during defendant's criminal trial: At the time, Attorney Sherman had almost thirty years of experience as a criminal

defense attorney. App. at A-348. Over the course of four years, Attorney Sherman devoted the vast majority of his professional life to this case. Habeas Trial Transcript (HT)4/16/13: 58-59. The three attorneys he hired to work on this case did likewise for the two to three-year period of their involvement. HT4/23/13: 3-4. The defense team also consulted with numerous other highly-respected criminal defense attorneys, including Barry Scheck, F. Lee Bailey, David S. Golub, William F. Dow and Richard Emanuel. App. at A-348 n.6.

Sherman hired an experienced appellate attorney, David Grudberg, to pursue two pre-trial appeals. One of these appeals resulted in a significant victory for the defendant: the state was denied access to any statements defendant may have made to the professional staff at Elan, a school for troubled youth to which his family sent him shortly after the murder. *See Skakel v. Benedict*, 54 Conn. App. 663, 738 A.2d 170 (1999). *See also State v. Michael S.*, 258 Conn. 621, 784 A.2d 317 (2001).

Sherman and his team also were successful in precluding the prosecution from using inculpatory information, including statements by the defendant and his brother, from a firm hired by the defendant's father to privately investigate the murder. HT4/17/13: 60-63. In addition, Attorney Sherman undertook apparently successful efforts to prevent the defendant's ex-wife from publishing a potentially

incriminating book about her marriage to the defendant. HT4/18/13: 45-47.

The defense team's efforts to prepare for trial were prodigious. They filed dozens of pre-trial motions seeking exclusion of various pieces of evidence, as well as dismissal of the charges on statute of limitations grounds. *See* Court File, CR00-135792T. They also reviewed thousands of pages of discovery obtained from the state, interviewed all of the anticipated state's witnesses who would meet with them, hired three private investigation firms to assist with the case and consulted with numerous experts, including those in the field of mental health and false confessions. HT4/17/13: 63, 67-70, HT4/18/13: 48-49, 50-59, 63-66, HT4/23/13: 9, 36.

Sherman had two pre-trial opportunities to cross examine key state's witnesses: the juvenile transfer hearing and the probable cause hearing. He took full advantage of both. HT4/17/13: 64-66, 4/18/13: 58-59, 63-66, HT4/23/13: 9, 36. *See* A-348 to A-349. In addition, he had witnesses present at the probable cause hearing and prepared to testify in an attempt to defeat a finding of probable cause, although the court ultimately declined to hear those witnesses. HT4/17/13: 66.

At the criminal trial, Sherman vigorously cross examined the state's witnesses, pursuing multiple avenues of impeachment. In addition, the defense

team presented numerous witnesses in support of its three-pronged attack on the state's evidence, which consisted of an attack on the credibility of the state's witnesses, a third-party culpability defense directed at Kenneth Littleton, the Skakel family's live-in tutor; and a partial-alibi defense. App. at A-349.

With respect to the partial alibi, the state presented evidence that Martha could have been killed anytime between 9:30 p.m. and 5:30 a.m. the following morning. App. at A-191 to A-201. The defendant only had alibi witnesses who could account for his whereabouts between 9:30 and 11 p.m. Specifically, two of the defendant's brothers and one of his cousins told police that the defendant was with them at his cousins' house, approximately twenty minutes away from the scene of the crime, from 9:30 to 11. The defense team called all three to the stand at trial in support of this partial-alibi defense. The defense team also argued to the jury that the evidence suggested the victim most likely was killed in the time period covered by the partial alibi. App. at A-349 to A-350.

The jury nevertheless found the defendant guilty and he was sentenced to imprisonment for twenty years to life. App. at A-26. A unanimous Connecticut Supreme Court affirmed the conviction on direct appeal and this Court denied defendant's petition for certiorari. *State v. Skakel*, 276 Conn. 633, 888 A.2d 985, *cert. denied*, 549 U.S. 1030 (2006).

Following defendant's conviction, he hired new counsel for his direct appeal and all subsequent postconviction proceedings. New counsel pursued a state petition for a new trial on defendant's behalf in 2005, raising a variety of claims. Although Connecticut procedure allows claims of ineffective assistance of counsel to be pursued in such petitions, *see State v. Taft*, 306 Conn. 749, 768, 51 A.3d 988 (2012), new counsel did not assert that claim. After a lengthy evidentiary hearing, the state trial court denied the petition for a new trial and the Connecticut Supreme Court affirmed that judgment as well. *Skakel v. State*, 295 Conn. 447, 991 A.2d 414 (2010).

Shortly thereafter, new counsel commenced the present action by way of a state petition for writ of habeas corpus. In that petition, defendant asserted that the defense team provided ineffective assistance of counsel in a number of ways, including its failure to investigate a potential fourth partial-alibi witness. App. at A-353. The pertinent evidence was as follows: Defendant, as well as all three partial-alibi witnesses who testified at trial, assured both the defense team and the police that no one else had interacted with them at the cousins' house or otherwise could corroborate that defendant was there during the relevant time period. App. at A-398 to A-401. Attorney Sherman was aware that another cousin, Georgann Dowdle, testified at the grand jury proceeding that she could not vouch for defendant's presence at the unusually large house

because she was in a far-off room with an unnamed "beau." She told the grand jury that, although she heard unidentified voices coming from the other part of the house, she never left the room to interact with anyone who may have been there. App. at A-401 to A-403. *See* App. at A-59 to A-60. Sherman testified that, consequently, he had no reason to believe that pursuing the unnamed beau would uncover anything helpful. HT4/16/13: 233-34, HT4/18/13: 187. *See* HT4/23/13: 49-50.

Eleven years after the criminal trial, however, Denis Ossorio testified at the state habeas hearing that he was Dowdle's "beau" in 1975 and that he could recall, almost forty years later, leaving the far-off room at some point and having a conversation with defendant and the others that evening. App. at A-56 to A-57, HT4/18/13: 74-79. Notwithstanding that Ossorio's account contradicted the account that defendant and all three other partial alibi witnesses provided to the police and the defense team, new counsel for the defendant argued to the habeas court that no reasonably competent defense attorney would have failed to investigate the possibility that Dowdle's "beau" could have become a fourth partial-alibi witness.[1]

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[1] New counsel made such an allegation, despite the fact that new counsel himself had had access to the grand jury transcripts since first taking over the case for the direct appeal in 2002 but made no issue of the beau in the 2005 petition for a new trial and, in fact, waited eight years after entering the case (continued...)

The state habeas court ultimately agreed with defendant on three grounds of ineffectiveness, including the claim that the defense team should have made an effort to pursue the unnamed beau as a fourth partial-alibi witness. App. at A-353.

The State appealed the habeas court's decision on the three grounds of ineffectiveness the court found meritorious. Defendant cross-appealed on the grounds of ineffectiveness that the habeas court found meritless. For its part, the State argued, as an initial matter, that the defense team's extraordinary efforts on defendant's behalf overall belied defendant's claim of ineffective assistance. State's Connecticut Supreme Court Brief at 1, 23-31. The State further argued that the habeas court erred in finding that the defense team acted unreasonably with respect to any of the challenged acts and omissions and that the habeas court also erred in finding that defendant was prejudiced thereby. *Id*. at 31-247.

On December 30, 2016, the Connecticut Supreme Court reversed the habeas court's judgment, concluding that every claim of ineffectiveness lacked merit. *Skakel v. Commissioner of Correction*, 325 Conn. 426, 159 A.3d 109 (2016) (hereinafter, *Skakel I* or "original decision"). *See* App. at A-333 to A-472.

(...continued)
to make this an issue for the first time in the 2010 habeas petition. *See* App. at A-322 to A-326 (*Espinosa, J.,* dissenting).

With respect to the three grounds that the habeas court found meritorious, the original decision concluded that the defense team did not act unreasonably. App. at A-362 to A-426. With respect to the partial alibi in particular, the original decision concluded that the defense team acted reasonably in light of the information it had from defendant, the other three partial-alibi witnesses and Dowdle's grand jury testimony. *Id.* It therefore was unnecessary for the court to address either counsel's overall performance or prejudice. Three state justices dissented from the original decision, although one dissented only on the partial-alibi witness issue. App. at A-473 to A-592.

In most cases, the Connecticut Supreme Court's original decision would have ended the habeas appeal in the state court. However, the justice who authored the majority opinion retired as of the date the decision was released. App. at A-29. This set off a series of post-decision events that ultimately led to a reversal of the original decision by a new majority, after defendant's motion for reconsideration was granted and a newly-appointed justice sided with the dissenters from the original decision to change the outcome of the appeal. *Skakel v. Commissioner of Correction*, 329 Conn. 1, __ A.3d __ (2018) (hereinafter, *Skakel II* or "new majority" opinion). *See* App. at A-30 to A-40, A-297 to A-316.

Defendant's motion for reconsideration was limited solely to the issue of the fourth partial-alibi

witness. App. at A-10. Although the motion did not present any new facts or arguments to the court, the new majority nevertheless disregarded the original decision, concluding that the defense team acted unreasonably in failing to seek out Ossorio. The new majority further concluded that because Ossorio, unlike the other three partial-alibi witnesses, was unrelated to defendant, it was reasonably probable that the defense team's failure to pursue Ossorio affected the outcome. App. at A-1 to A-141.

In its decision, the new majority made no reference to the evidence pertaining to the defense team's overall performance or the State's argument that this performance undermined any finding of ineffective assistance in this case. Moreover, in reconsidering and reversing the original decision, the new majority repeatedly emphasized that it was doing so *only* on the grounds relating to Ossorio, and was not reconsidering or reversing the original decision's conclusions that the defense team did not render ineffective assistance in any other respect. App. at A-1, A-10, A-29 & n.12.

The three remaining state justices who had joined in the original majority decision dissented from the new majority's reconsideration and reversal of that decision. One of the dissenters, Justice Eveleigh, authored an opinion which reaffirmed the dissenters' belief that the original decision correctly found that the defense team acted reasonably in not pursuing the unnamed beau and further argued that

defendant had failed to carry his burden of proving prejudice. App. at A-158 to A-296. This opinion agreed with the State's argument that the partial alibi, even if credited, by no means exonerated defendant. Justice Eveleigh analyzed the considerable evidence before the jury that the murder may well have taken place after the period of the partial alibi when, by defendant's own admission, he went looking for the victim. App. at A-191 to A-296. In his statements to others, as well as a recorded statement heard by the jury, defendant admitted that after he returned from his cousins' house, he snuck out of his own house and went "to get a kiss from Martha," ending up at the spot where the victim was attacked and killed. In some of these statements, he even admitted to having seen Martha alive after the period of the partial alibi. *Id*. This dissent also highlighted the fact that both the prosecution in its summation and the court in its instructions informed the jury that it could accept the partial alibi evidence and still find defendant guilty. App. at A-185 to A-191.

REASONS FOR GRANTING THE PETITION

Despite repeated warnings from this Court that consideration of the attorney's overall performance is essential when deciding whether a defendant was afforded the reasonably effective assistance of counsel under *Strickland*, there remains a split of opinion among the lower courts on this issue. While many federal circuit courts and state high courts

recognize the central role of overall performance in the *Strickland* analysis, some expressly dispute its relevance, while a number of others, like the Connecticut Supreme Court, simply ignore it.

The instant case illustrates perfectly the incongruity that results when overall performance is ignored. The well-to-do defendant was represented by a highly-skilled and experienced defense attorney, who was himself aided by a team of other attorneys. Together, they utilized resources that the vast majority of criminal defendants can only dream of accessing. They hired three sets of investigators and consulted with a number of experts in various fields, including many legal experts who are among the most distinguished criminal defense attorneys in the state, if not the nation. They spent years preparing their case, challenged the state on a plethora of legal issues, vigorously challenged the credibility of the state's witnesses and produced several witnesses of their own in support of multiple defenses. Nevertheless, the Connecticut Supreme Court concluded that this exceptionally-skilled and determined defense team did not even provide reasonably competent assistance *solely* because it failed to pursue a potential fourth partial-alibi witness to corroborate the other three it presented.

The Connecticut Supreme Court's erroneous determination that this defendant was not afforded the reasonably effective assistance of counsel was a direct result of that court's refusal to consider the

defense team's overall performance. This Court should grant the instant petition in order to resolve the dispute among lower courts as to the role counsel's overall performance plays in determining, under the first *Strickland* prong, whether counsel's assistance was reasonably competent and when a single error is "sufficiently egregious" to render that assistance constitutionally deficient, notwithstanding counsel's otherwise "active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

I. THIS COURT HAS STATED NUMEROUS TIMES THAT OVERALL PERFORMANCE IS THE CENTRAL FOCUS OF THE FIRST *STRICKLAND* PRONG

This Court has cautioned that "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney. . . ." *Richter*, 562 U.S. at 110 (internal quotation marks omitted). Moreover, as *Strickland* itself recognized, "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland*, 466 U.S. at 690.

Further, reversing a criminal conviction on the basis of a single misstep by counsel is rarely warranted where the government has made every effort to comply with its constitutional obligation to

insure that a defendant has access to counsel it believes, at the time of representation, will provide reasonably competent assistance. As *Strickland* further acknowledged, "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." *Strickland*, 466 U.S. at 693. Of course, this applies with even greater force in a case like this one, where defendant was not assisted by state-appointed counsel, but by private counsel of his own choosing.

Thus, unless it truly can be said that the defendant was denied *reasonably* competent counsel, i.e., was saddled, instead, with an attorney who "so undermine[d] the proper functioning of the adversarial process" that the trial could not be considered fair, *Richter*, 562 U.S. at 110, there is no inequity in requiring the defendant to bear the risk that a single act or omission by his attorney — even one resulting from "ignorance or inadvertence" — will deprive him of an opportunity to pursue a matter favorable to his case. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (discussed further *infra*). *See also id*. at 492 (rejecting proposition that "it is inappropriate to hold defendants to the errors of their attorneys").

Consistent with this view, this Court repeatedly has indicated that counsel's overall performance must be the ultimate consideration when evaluating whether a defendant was afforded the assistance of

reasonably competent counsel. For example, in *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986), this Court criticized the lower courts for not examining counsel's overall performance before concluding that counsel's single error in failing to file a motion to suppress fell below the level of reasonable professional assistance. *Kimmelman*, 477 U.S. at 386 ("the failure of the District Court and the Court of Appeals to examine counsel's overall performance was inadvisable").[2] The *Kimmelman* Court stressed that "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that a counsel rendered reasonable professional assistance. Since '[t]here are countless ways to provide effective assistance in any given case,' . . . unless consideration is given to counsel's overall performance, before and at trial, it will be 'all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a

[2] In *United States v. Cronic*, 466 U.S. 648 (1984), this Court had suggested, in *dicta*, that there may be two distinct "type[s]" of ineffectiveness claims under the Sixth Amendment, one that challenges "counsel's overall representation" and one that challenges a "specific error or omission counsel may have made." *Cronic*, 466 U.S. at 657 n.20, citing *Strickland*, 466 U.S. at 693-696. However, nothing in the cited portion of *Strickland*, in which the Court only discusses the proper standard by which to gauge "prejudice" under the second prong, lends support to this *dicta*. *See Strickland*, 466 U.S. at 693-696.

particular act or omission of counsel was unreasonable.'" *Id.* (internal citation omitted).[3]

Tellingly, *Kimmelman* also rejected an argument that challenges to counsel's failure to contest unlawful searches and seizures should not be cognizable on federal habeas review, lest federal habeas petitioners readily be able to circumvent the bar on federal habeas review of Fourth Amendment claims, established in *Stone v. Powell*, 428 U.S. 465 (1976), simply by reformulating Fourth Amendment claims as Sixth Amendment claims of ineffective assistance. The Court was confident that a claimant would *not* be able to prevail on a claim of ineffectiveness simply by demonstrating counsel's single error in neglecting to raise a meritorious Fourth Amendment claim and would, instead, have to prove that he was "denied a fair trial by the *gross incompetence*" of his attorney. (Emphasis added.) *Kimmelman*, 477 U.S. at 382.

The same day it decided *Kimmelman*, this Court issued its decision in *Carrier*, which held that counsel's isolated error in failing to raise an issue due to ignorance or inadvertence would not establish

[3] Although *Kimmelman* ultimately affirmed the finding of ineffectiveness in that case, it did not do so solely on the basis of counsel's failure to file the motion to suppress, but rather because there was a "pervasive" and "total failure to conduct pre-trial discovery," due to counsel's mistaken belief that the case would not proceed to trial. *Kimmelman*, 477 U.S. at 369, 386.

either constitutional ineffectiveness or cause to excuse a procedural default, unless that isolated error is "sufficiently egregious and prejudicial." *Carrier*, 477 U.S. at 496. Notably, the Court articulated these two requirements in the conjunctive — egregious *and* prejudicial — signaling that establishing prejudice from a single error, under the "reasonable probability of a different outcome" standard of the second *Strickland* prong, would not necessarily establish that counsel's lapse also was "sufficiently egregious."[4]

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[4] Cases other than *Carrier* also suggest that "egregious" and "prejudicial" are not synonymous in this Court's view. An egregious error may not be prejudicial. *See, e.g.*, *Smith v. Spisak*, 558 U.S. 139, 156-63 (2010) (*Stevens, J.*, concurring in part and concurring in judgment) (alternatively characterizing counsel's closing argument as "thoroughly egregious," "catastroph[ic]," "outrageous," 558 U.S. at 156, 161, and "grossly transgress[ing] the bounds of what constitutionally competent counsel would have done in a similar situation"; *id.* at 163; but nevertheless concurring that counsel's conduct not sufficiently prejudicial under *Strickland* to warrant relief; *id.* at 163-64). Conversely, a prejudicial error, i.e., one that may have affected the outcome of the proceeding, may not always be properly characterized as egregious. *See* e.g., *Kimmelman*, at 382 ("Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like respondent's, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the *gross incompetence* of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence.") (Emphasis added.).

Any doubt that whether a single error is "sufficiently egregious" is not determined merely by whether it likely made a difference in the outcome of the proceeding, as evaluated under the second *Strickland* prong, was further dispelled by this Court in *Smith v. Murray*, 477 U.S. 527 (1986). In *Smith*, counsel failed to raise a claim on appeal that the state appellate court later found meritorious in another cases. *Smith*, 477 U.S. at 534. Smith claimed that counsel's single omission in this regard demonstrated ineffectiveness (and, therefore, "cause" to excuse the procedural default) because the omission was due to counsel's "ignorance" and failure to conduct a more thorough investigation of the issue. *Id.* at 535. This Court rejected that argument, reiterating *Carrier*'s holding that a single error must be "sufficiently egregious and prejudicial" to constitute ineffective assistance. In so doing, *Smith* clarified that this means the single error must be "of such magnitude that it rendered counsel's *performance* constitutionally deficient under the test of *Strickland* . . . ." (Emphasis added.) *Smith*, 477 U.S. at 535. The *Smith* Court concluded that Smith had failed to meet that "rigorous" standard, even assuming that the claim that counsel failed to pursue would have been found meritorious and would have afforded Smith a new trial, *see Smith*, 477 U.S. at 534, noting, *inter alia*, that counsel otherwise conducted a vigorous defense at trial and sentencing and researched numerous appellate claims before deciding which to pursue. *Id.* at 536.

Thus, *Smith* makes clear that "egregiousness," as used to determine whether a single error by counsel establishes a Sixth Amendment violation, is not meant to describe the effect of the single error on the outcome of the trial, under the second *Strickland* prong, but rather describes the effect of the single error on the quality of counsel's overall *efforts* to provide reasonably competent assistance, under the first *Strickland* prong, *regardless* of the actual outcome of the trial. It is only when a court determines that the single error so impeded counsel's ability to provide reasonably competent assistance, even factoring in counsel's overall performance, that the court must also address the issue of prejudice, i.e., whether it is reasonably probable that the single error changed the outcome of the proceeding, before affording relief.

More recently, in *Richter*, this Court reaffirmed, when analyzing the first *Strickland* prong, that it should be "difficult" to establish ineffective assistance on the basis of a single, isolated error by counsel "when counsel's overall performance indicates active and capable advocacy." *Id.*, 562 U.S. at 111. *Richter* rejected the Ninth Circuit's finding of ineffectiveness, reasoning, *inter alia*, that notwithstanding counsel's erroneous belief that the prosecution was not intending to present forensic evidence, it nevertheless "would have been reasonable" for the state court to find that counsel was not deficient, particularly in light of the fact that his "attorney represented him with vigor and

conducted a skillful cross-examination." *Richter*, 562 U.S. at 86. Although *Richter* involved review of a federal habeas court's decision under 28 U.S.C. § 2254, its statement that "counsel's overall performance" must be considered came in the context of addressing *Strickland* deficient-performance prong. *Richter*, 562 U.S. at 111.

II. NEVERTHELESS, LOWER COURTS REMAIN DIVIDED OVER WHETHER COUNSEL'S OVERALL PERFORMANCE IS RELEVANT TO THE *STRICKLAND* ANALYSIS

Despite the above-cited precedent from this Court, confusion and outright disagreement continue to plague our state and federal courts on the proper method of determining, under the first *Strickland* prong, whether counsel provided "reasonably effective assistance." *Strickland*, 466 U.S. at 687. Specifically, there is a marked divergence of opinion as to whether the Sixth Amendment right to "a reasonably competent attorney," *id*., guarantees a criminal defendant only the right to an attorney whose *overall performance* demonstrates reasonably competent assistance or, instead, guarantees a criminal defendant the right to a new trial as a remedy to correct *any single error* by counsel that is reasonably likely to have had an effect on the outcome of his original criminal trial.

A. The Fourth, Fifth, Seventh and Tenth Circuits, As Well As A Number Of State Courts, Expressly Recognize That Overall Performance Must Be The Focus The First *Strickland* Prong

The Fourth, Fifth, Seventh and Tenth Circuits, as well as the state supreme courts in Arizona, Kentucky, Missouri and New York, adhere to the view that overall performance is the central focus of *Strickland*'s first prong.

Federal Courts. In *Williams v. Lemmon*, 557 F.3d 534 (7th Cir. 2009), the Seventh Circuit expressly acknowledged that "[i]t is essential to evaluate the entire course of the defense, because the question is not whether the lawyer's work was error-free, or the best possible approach, or even an average one, but whether the defendant had the 'counsel' of which the sixth amendment speaks." *Id*. at 538. Williams had asserted that his counsel provided ineffective assistance by failing to interview a potentially favorable witness. The Seventh Circuit stated that "[a]lthough 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." *Id*. The court recognized that this Court "has allowed for the possibility that a single error may suffice 'if that error is sufficiently egregious and prejudicial,'" but concluded that, "[l]est this exception swallow the rule, however, we must take the Justices at their word and search for an 'egregious' error[.]" *Id*. (quoting *Murray*, 477 U.S. at 496).

The Seventh Circuit approvingly noted that the "state's appellate court analyzed counsel's entire performance," which consisted of a wide array of active measures, and concluded that "[c]ounsel did enough to give Williams a reasonable shot at an acquittal." *Id*. The court, applying 28 U.S.C. § 2254(d), went on to find that the state court reasonably concluded that counsel did not make an egregious error in failing to interview the witness. *Id*. at 539-41.

The Seventh Circuit reaffirmed *Williams* in *Groves v. United States*, 755 F.3d 588 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 501 (2014). The court held that even if counsel erred in failing to object to the Presentence Investigation Report's characterization of his prior burglary conviction as a crime of violence, it would not constitute deficient performance. *Id*. at 593. That is because "we do not examine this error in isolation, but instead analyze counsel's performance as a whole." *Id*. After pointing to several successful challenges by counsel at sentencing, the court concluded that, "[i]n light of counsel's overall performance, his assistance of counsel was constitutionally reasonable under *Strickland*." *Id*. *See also Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997) (criticizing district court for "never ask[ing] whether [counsel] put the state's case to the test and protected [his client's] fundamental rights; instead the court asked whether a better defense would have been available, and whether [counsel] made errors along the way").

The Tenth Circuit also adheres to this Court's pronouncements in *Kimmelman*, *Smith*, *Carrier*, and *Richter*. In *Bullock v. Carver*, 297 F.3d 1036 (10th Cir.), *cert. denied*, 537 U.S. 1093 (2002), the court explained that "the Sixth Amendment does not guarantee an errorless trial" and that "[t]his is true whether the failure to raise the constitutional claim is based upon ignorance of the law or a mistake in judgment[.]" *Id.* at 1048 (internal quotation marks omitted). With that in mind, "'it will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Id.* (quoting *Kimmelman*, 477 U.S. at 386).

In *United States v. Smith*, 10 F.3d 724 (10th Cir. 1993), the Tenth Circuit applied that principle to reject an ineffectiveness claim based on counsel's failure to request a lesser-included offense. The court explained that "[t]he purpose of the effective assistance guarantee of the Sixth Amendment is to ensure that criminal defendants receive a fair trial so that the outcome of the proceeding can be relied upon as the result of a proper adversarial process." *Id.* at 728. To determine whether a defendant received such a fair trial, "counsel's representation as a whole should be considered." *Id.* The court noted that the defendant "received the assistance of an attorney experienced in criminal matters as evidenced by the well-presented defense of duress."

Id. Based on that and other considerations, the court concluded that counsel's failure to request the lesser-included instruction did not constitute deficient performance. *See also Newmiller v. Raemisch*, 877 F.3d 1178, 1196 (10th Cir. 2017) ("Even in circumstances where an attorney erred, [i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the identified acts or omissions overcome the presumption that a counsel rendered reasonable professional assistance") (internal quotation marks omitted), *petition for cert. docketed*, No. 17-8224 (U.S. Mar. 26, 2018).

The Fourth Circuit likewise adheres to the *Kimmelman* "egregiousness" standard — although it did so in a case finding counsel's performance deficient. In *Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011), the court held that defense counsel's failure to move to suppress the defendant's confession "was of sufficient magnitude" to constitute deficient performance. *Id*. at 50. The court stated that its "only reluctance in so saying is that, based on our review of the record, the assistance provided Tice by [his two counsel] throughout both trials and the first appeal was otherwise laudably effective and competent." *Id*. Citing *Richter*, the Court found that "'even an isolated error' can support an ineffective-assistance claim if it is 'sufficient egregious and prejudicial'" — and "[s]uch is the case here." *Id*. *See also Murphy v. Davis*, No. 17-70007, 2018 WL

1906000, at *10 (5th Cir. Apr. 20, 2018) (quoting the relevant passage from *Richter* and applying it to defendant's ineffectiveness claim).

State Courts. The Arizona Supreme Court has long looked to overall performance in applying *Strickland*'s first prong. In *State v. Valdez*, 806 P.2d 1376 (Ariz. 1991) (en banc), the court held that counsel's failure to object to a manifestly improper statement by the prosecutor during closing argument did not satisfy that prong. The court stated that "[e]ven though defense counsel should have made the proper objection, this single mistake, in and by itself, does not bring the defendant's representation within the purview of the first prong of *Strickland*. Viewing the trial overall, we do not find ineffective assistance of counsel." *Id*. at 1380.

The New York Court of Appeals applies the same approach. For example, in *People v. Turner*, 840 N.E.2d 123 (N.Y. 2005), the court reaffirmed its precedent holding that even a "significant" mistake by counsel would not, by itself, establish constitutional ineffectiveness "where his or her overall performance [was] adequate." *Id*. at 126. Only an "egregious" mistake could convert an "otherwise competent performance" into a deprivation of the right to counsel. *Id*. The court found that standard met, where counsel failed to raise what would have been a successful statute of limitations defense. The court observed that this "may be the first" time the court "encountered" a

mistake so egregious that it satisfied the first *Strickland* prong despite counsel's otherwise strong performance. *Id*.

The Kentucky and Missouri Supreme Courts have also adhered to this rule. *See Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006) ("court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance") (internal citations omitted), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009); *Deck v. State*, 68 S.W.3d 418, 429 (Mo. 2002) (en banc) (stating that "counsel's actions should be judged by her overall performance" in evaluating whether submission of faulty instructions on critical issue of mitigation was a "sufficiently egregious" error depriving defendant of "reasonably effective assistance" of counsel).

Importantly, these jurisdictions — federal and state — do not hold that a single error by counsel can *never* be sufficiently egregious, by itself, to have deprived the defendant of his constitutional right to reasonably competent counsel. As shown above, many of these cases have provided some guidance as to the kinds of errors that meet this criteria, guidance that this Court's jurisprudence currently is

lacking. *See*, *e.g.*, *Tice*, 647 F.3d at 106–07, 111; *Turner*, 840 N.E.2d at 126.

B. The Second Circuit And Wisconsin State Supreme Court Expressly Dispute That Overall Performance Is Even Relevant To The *Strickland* Analysis

The Second Circuit, as well as the Wisconsin Supreme Court, have expressly held that overall performance should *not* be evaluated as part of the *Strickland* analysis.

Federal Courts. The Second Circuit has been adamant that overall performance should play *no* role in the *Strickland* analysis. In fact, over the past decade, the Second Circuit has been embroiled in a battle with the New York state appellate courts over this very issue. For example, in *Henry v. Poole,* 409 F.3d 48 (2d Cir. 2005), *cert. denied,* 547 U.S. 1040 (2006), the Second Circuit took the state court to task for finding counsel's overall performance was constitutionally adequate, regardless of the challenged error, declaring that "reliance on counsel's competency in all other respects[ ] ... fail[s] to apply the *Strickland* standard at all." *Henry*, 409 F.3d at 72 (internal citation and quotation marks omitted).

This disagreement, both between the Second Circuit and the New York state appellate courts and among the judges of the Second Circuit itself, is most pointedly addressed in both *Rosario v. Ercole*, 601

F.3d 118 (2d Cir. 2010) (*Rosario I*) and the decision denying rehearing therein, *Rosario v. Ercole*, 617 F.3d 683 (2d Cir. 2010) (*Rosario II*), *cert. denied*, 563 U.S. 1016 (2011). *See Rosario I*, 601 F.3d at 139 (*Straub, J.*, dissenting) (criticizing New York state court jurisprudence looking to counsel's overall performance to determine whether defendant had "meaningful representation," notwithstanding counsel's single error, stating "[i]t 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.").[5]

State Courts. The Wisconsin Supreme Court, while acknowledging that "[a] criminal defense attorney's performance is not expected to be flawless," nevertheless has held that courts should *not* "assess the overall performance of counsel." *State v. Thiel*, 264 Wis. 2d 571, 607-08, 665 N.W.2d 305, 323 (2003).

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[5] The Second Circuit's more recent stance rejecting the relevance of overall performance is contrary to its own earlier jurisprudence. *See United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992) (noting that "[o]ut of a trial record of almost 10,000 pages, [the defendant] cull[ed] five instances of alleged deficiencies in [counsel's] performance"; after reviewing entire record concludes that counsel's "overall performance was vigorous, sustained, and effective"), *cert. denied*, 507 U.S. 1029 (1993).

C. Still Other Circuits, While Not Expressly Disputing The Relevance Of Overall Performance, Nevertheless Fail To Factor It Into Their Application Of *Strickland*

Other courts, while neither expressly acknowledging nor expressly disputing the role of overall performance, nevertheless have found the first *Strickland* prong satisfied by a single error without any indication that overall performance factored into their analysis. For example, the First Circuit omitted any discussion of counsel's overall efforts, or even any acknowledgement of that controlling principle, before concluding that counsel's single misjudgment in concluding that a motion to suppress would be futile established that his assistance was not reasonably competent under the first *Strickland* prong. *Rivera v. Thompson*, 879 F.3d 7, 13-16 (1st Cir. 2018).

The Third Circuit not only has failed to incorporate counsel's overall performance into its *Strickland* analysis, but has gone so far as to create *per se* rules of constitutional incompetence, in violation of *Strickland*'s clear directive to the contrary. See *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 238 (3d Cir. 2017) (articulating rule that whenever counsel neglects to suggest any favorable jury instructions supported by reasonably persuasive authority, that omission alone demonstrates that counsel was "constitutionally deficient" under first *Strickland* prong), *cert. denied sub nom. Gilmore v.*

Bey, 138 S. Ct. 740 (2018). *But see Strickland*, 466 U.S. at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

For reasons that will be discussed further *infra*, the Connecticut Supreme Court's decision in the instant case falls within this category of cases in which the court, while not expressly disputing the relevance of overall performance, nevertheless ignored it.

D. This Debate Needs To Be Resolved Promptly

The Sixth Amendment should not have different meanings in different jurisdictions. This Court should grant the petition in this case to promptly address, and finally resolve, this continuing debate as to what it means to be deprived of the "reasonably effective assistance" of counsel.

A claim of ineffective assistance of counsel is a powerful weapon in the arsenal of a disappointed litigant seeking to challenge his or her criminal conviction. As this Court has recognized, prisoners have the right to challenge the effective assistance of not only their criminal trial attorney, but also their appellate attorney, as well as the attorney who pursues those claims in further postconviction

proceedings. *See Martinez v. Ryan*, 566 U.S. 1 (2012). Thus, claims of ineffective assistance have become an increasingly common ground of postconviction attack over the past few decades, at the cost of any sense of finality to criminal convictions. Furthermore, meritorious claims of counsel's ineffectiveness nullify rules of procedural default, essentially resurrecting underlying claims that otherwise would be deemed waived. *Richter*, 562 U.S. at 105. *See Martinez*, 566 U.S. 1.

Those courts which either expressly dispute the relevance of overall performance or simply ignore it, as the Connecticut Supreme Court did in the instant case, are not properly applying *Strickland*'s first prong. To these courts, the "deficient performance" determination under the first *Strickland* prong now applies, not to counsel's overall performance, but rather to each individual act or omission by counsel challenged by the claimant. In their view, once a single challenged act or omission by counsel is found to be either non-strategic or the result of an "unreasonable" strategic decision, that error alone is sufficient to establish that counsel failed to represent the defendant competently, within the meaning of the first *Strickland* prong, leaving only the prejudice prong of *Strickland* to be resolved.

By finding that the first *Strickland* prong may be satisfied by the mere establishment of a single error by counsel, these courts have eliminated a substantial portion of a proper *Strickland* analysis,

i.e., *Kimmelman*'s directive that overall performance be the focus of the first *Strickland* prong and the mandate of *Carrier* and *Harrington* that an isolated error by counsel must not only be "prejudicial" but also "sufficiently *egregious*." As a result, in these jurisdictions, and contrary to this Court's directive in *Richter*, it is not "difficult" at all to meet the first *Strickland* prong of deficient performance on the basis of an isolated error, irrespective of "active and capable," or even stellar, advocacy overall.

Furthermore, federal courts that focus solely on an isolated lapse by counsel in finding ineffectiveness but fail to evaluate whether the lapse was so egregious as to render counsel's overall performance constitutionally deficient permit, under the guise of ineffectiveness, a conclusion that *Smith* expressly precludes under the "cause and prejudice" test. If a single lapse by counsel is deemed sufficient to demonstrate deficient performance, regardless of overall performance, federal habeas petitioners readily could obtain federal review of a claim defaulted in state court simply by demonstrating that (1) counsel made a single error in failing to pursue a matter due to "ignorance or inadvertence" and (2) the error was prejudicial. This would, for all intents and purposes, nullify the holding of *Smith*.

For these reasons, this Court should grant the instant petition to insure that all lower courts correctly and consistently apply *Strickland*'s first prong.

III. THIS CASE PRESENTS AN IDEAL VEHICLE BY WHICH TO RESOLVE THE DEBATE AS TO WHAT ROLE OVERALL PERFORMANCE MUST PLAY UNDER *STRICKLAND*'S FIRST PRONG

This case affords this Court an excellent opportunity to clarify whether the reasonable competence of counsel's assistance can be assessed under the first *Strickland* prong without consideration of the attorney's overall performance and, if not, what constitutes a single error that is "sufficiently egregious" to render that assistance constitutionally deficient, notwithstanding counsel's otherwise "active and capable advocacy."

As the State argued below, the efforts and performance of the defense team in the present case were not only "active and capable" but, indeed, exceptional. The team consisted of not only lead Attorney Michael Sherman, a highly skilled, experienced and sought-after criminal defense attorney, but also a number of other attorneys within his firm assigned to work on this case. Together, they spent years preparing the defense, challenged the state on legal issues, large and small, consulted with numerous experts, hired three sets of investigators and also sought advice from some of the most distinguished criminal defense attorneys in Connecticut. The team ultimately pursued, not merely one avenue of defense, but a multi-pronged defense, consisting of extensive efforts to impeach the state's witnesses, particularly those to whom

defendant made incriminating statements, pursuing a third-party culpability defense and presenting a partial-alibi. App. at A-349.

If defendant had been provided the assistance of an attorney who undertook only half the efforts his defense team undertook in this case, he still would have been afforded far better representation than that provided for the typical criminal defendant, regardless of the single investigatory omission latched upon by the new majority of the Connecticut Supreme Court to overturn its original decision. Nevertheless, the defense team's overall efforts were irrelevant to the new majority, a view of the Sixth Amendment shared by some, but not all, other state and federal courts. As a result, the new majority of the Connecticut Supreme Court wrongly concluded that defendant was not afforded the assistance of even reasonably competent counsel *solely* because the defense team failed to pursue a potential fourth partial-alibi witness. Entirely absent from the new majority's analysis was any consideration of the defense team's overall performance or whether this isolated lapse was "sufficiently egregious," in the context of counsel's extraordinary efforts overall, to render their assistance constitutionally inadequate.

Even assuming, *arguendo*, that the new majority correctly concluded that counsel's failure to search for a potential fourth partial-alibi witness was unreasonable, notwithstanding the information provided to the defense team by the defendant and

the other witnesses, it wrongly failed to consider whether this single oversight was egregious error, and whether the defense team's overall efforts nevertheless were sufficient to meet the constitutional standard. As discussed *supra*, the egregiousness of a single error is measured by whether it so adversely affected counsel's ability to mount any meaningful defense against the prosecution to have precluded counsel from functioning as the "counsel" afforded the defendant under the Sixth Amendment. Here, the defense team's failure to pursue the unnamed beau did not preclude it from zealously advocating for defendant throughout the pretrial, trial and sentencing proceedings, nor did it preclude them from pursuing numerous, viable defenses on his behalf, including the partial-alibi defense. *See supra* at 4-7. *See also* App. at A-349. This single omission did not deprive the defendant of his Sixth Amendment right to counsel.

Indeed, the instant case highlights, more than most, the absurdity of any inquiry into the adequacy of counsel's representation, under the first *Strickland* prong, that fails to take into account overall performance. The new majority of the Connecticut Supreme Court implicitly recognized that the mere fact that the fourth partial-alibi witness, unlike the other three, was unrelated to defendant hardly constituted evidence devastating enough on its own to satisfy the prejudice standard under the second *Strickland* prong and justify

reversing the conviction. Accordingly, the new majority used this single lapse by counsel as license to reopen the evidence in its entirety to support its finding of prejudice. Significantly, however, the perceived weaknesses in the state's case seized upon by the new majority to justify substituting its view of the evidence for the jury's were points that were investigated, ably presented and argued to the jury by the very defense team that the new majority nevertheless believes did not even do a minimally competent job of contesting the state's case.

Thus, the new majority was able to reference problems with the state's witnesses precisely *because* the defense team went to great lengths to uncover and proffer evidence which might call their testimony into question. *See* App. at A-95 to A-118. The new majority questioned the reliability of statements made by defendant at Elan precisely *because* the defense team investigated and presented the evidence about the atmosphere at Elan, evidence that the new majority then wrongly turned on the defense team to establish their alleged incompetence. *Id*. The new majority was convinced of the viability of the partial-alibi defense precisely *because* of the efforts of the defense team in raising such a defense, presenting numerous witnesses (albeit related ones) in support thereof and arguing why the jury should believe that the partial-alibi likely exculpated defendant. App. at A-22 to A-24, A-92 to A-99.

At bottom, the new majority was able to mount an argument for its view, contrary to the jury's, that there was reasonable doubt about defendant's guilt precisely *because* of the extraordinary efforts undertaken by the allegedly deficient defense team, efforts that are not likely to have been undertaken by the average, competent criminal defense attorney. Nevertheless, while taking full advantage, when addressing the second *Strickland* prong, of the defense team's exceptional efforts to persuade the jury — albeit unsuccessfully — of defendant's innocence, the new majority entirely failed to appreciate that these efforts themselves undermined its conclusion, under the first *Strickland* prong, that the defense team did not even do a reasonably competent job in this case.

This flawed reasoning by the new majority stemmed directly from its failure to evaluate the defense team's overall performance, believing instead that any imperfection by counsel automatically demonstrates professional incompetence under the first *Strickland* prong. The new majority was wrong in this respect and this Court should grant certiorari to correct this misperception by the Connecticut Supreme Court, as well as numerous other federal and state courts, of this important issue.

CONCLUSION

For these reasons, the writ of certiorari should issue.

Respectfully submitted,

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August, 2018