No. ______________ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

MILTON DWYANE GOBERT

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

TIVON SCHARDL
Chief, Capital Habeas Unit
DONNA COLTHARP*
AMY FLY
Assistant Federal Public Defenders
919 Congress Avenue, Suite 950
Austin, Texas 78701
737-207-3017
Donna_Coltharp@fd.org

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

1. Does this Court's clearly established precedent under Strickland v. Washington, 466 U.S. 668 (1984), and its progeny permit lower courts to hold that trial counsel’s performance categorically “cannot be [ ] unreasonable” whenever they, without any investigation, follows their client's instructions?

2. Whether lower courts faithfully apply the standard for substitution of counsel under 18 U.S.C. § 3599 when those courts, unlike their sister courts, require that capital habeas petitioners satisfy a substantive burden beyond showing a facially sound reason for substitution of counsel before conducting the inquiry required by this Court’s cases.

PARTIES TO THE PROCEEDING

The Petitioner is Milton Dwyane Gobert. The Respondent is Bobby Lumpkin, the Director of Texas Department of Criminal Justice, Correctional Institutions Division. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

Gobert v. Lumpkin, No. 22-70002, 2023 WL 4864871 (5th Cir. July 31, 2023)

Gobert v. Lumpkin, Memorandum Opinion and Order, No. 1:15-CV-42-RP (W.D. Tex. Mar. 3, 2022)

Ex parte Gobert, No. WR-77,090-01, 2014 WL 12702626 (Tex. Crim. App. Jan. 14, 2014) (denying state habeas relief)

Gobert v. State, No. AP-76,345, 2011 WL 5881601 (Tex. Crim. App. Nov. 23, 2011) (denying direct appeal from conviction and sentence)

State v. Gobert, 275 S.W.3d 888 (Tex. Crim. App. 2009) (reversing court of appeals and affirming trial court's decision granting motion to suppress)

State v. Gobert, 228 S.W.3d 221 (Tex. App.—Austin 2007) (affirming trial court's decision granting motion to suppress), *overruled on rehearing by* 244 S.W.3d 861 (Tex. App.—Austin 2008)

State v. Gobert, No. D-1-DC-06-904006 (331st Dist. Court Travis Co., Tex., Jan. 18, 2005) (Trial)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Milton Dwyane Gobert respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court for the Western District of Texas's opinion denying Gobert's habeas corpus petition is attached as Appendix B. The Fifth Circuit's opinion in this case denying a certificate of appealability (COA) to review the district court's judgment is attached as Appendix A.

JURISDICTION

The Fifth Circuit denied Gobert's motion for a certificate of appealability on July 31, 2023. App. A. Gobert filed an Unopposed Application for Extension of time to file a petition for writ of certiorari on October 6, 2023. This Court granted that Application, extending the time to file until November 28, 2023. Pursuant to that order, and Supreme Court Rule 30.1, this petition is filed timely. This Court has jurisdiction to review this petition under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment, U.S. Const. amend. VI, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."

Title 18 U.S.C. § 3599(e) states, in relevant part: "Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings…"

STATEMENT OF THE CASE

Facts. In 2010, Milton Gobert was convicted of capital murder and sentenced to death for killing Mel Cotton in the course of a robbery or, alternatively, a kidnapping. Among the evidence the State offered against Gobert at trial was the testimony of a jailhouse informant who claimed that, while the two were confined in jail together before Gobert's trial, Gobert bragged about stabbing Cotton and her young son. ROA.4083-84. To rebut this evidence, Gobert insisted his counsel call Tasha Lass, a sheriff's deputy and jail guard, to testify that the inmates did not have privacy in their jail cells, and that the cellmate could have learned details about the murder from reading Gobert's legal papers. ROA.4143. Lass, however, had never worked at the Travis County Correctional Complex, where Gobert and the informant shared a cell. *Compare* ROA.4083 *with* ROA.4143. She worked, instead, at the Travis County Jail, where Gobert was eventually moved and was housed during trial.

Lass took the stand again during the punishment phase of trial—but this time, she was called by the State to establish the threshold requirement for a death sentence in Texas, that the defendant is a future danger to society.[1] ROA.4275. During her second appearance, Lass testified that she had been fraternizing with Gobert for several weeks. ROA.4275. She confessed that she had, in violation of the jail's rules, brought Gobert a contraband cell phone so the two of them could have unrecorded phone calls. ROA.4278. They talked on the phone every day, and Gobert repeatedly told Lass that he loved her. ROA.4275-78.

[1] Tex. Code Crim. P. art. 37.071, §§ 2(b)(1) & (c).

Defense counsel did not cross-examine Lass. ROA.4278. After her testimony, Lass was arrested for supplying Gobert with the phone. ROA.4434.

After the State and the defense rested their sentencing cases, and over defense counsel's objection, the State asked to reopen its case to present testimony from two witnesses. ROA.4432-33. The first of the witnesses was Tasha Lass. This time Lass testified that she and Gobert had devised a plan for Gobert to escape from jail and go to either "the Sears Tower" or "Dubai." ROA.4438. According to Lass's third account, Gobert asked her to bring a gun into the jail for him to facilitate his escape. ROA.4438. She told the jury Gobert intended to shoot a jail officer and any inmate or officer who might witness the escape. ROA.4439-40. Lass said she regretted her actions and felt she had "put [her] coworkers and the city of Austin and everyone in danger." ROA.4443. The State's other witness was psychiatrist Dr. Richard Coons, who offered his expert opinion that "there is a probability" that a hypothetical person with Gobert's history and character "would commit criminal acts of violence in the future." ROA.4465.

After Lass's third appearance on the stand, defense counsel requested a continuance to "check [Lass's] background, check some of the stuff she said…." *Id.* In the presence of the jury, counsel characterized her testimony as "devastating, to say the least" and stated that the defense was "left with nothing." *Id.* The prosecutor objected, pointing out that defense counsel had "sponsored" this witness by calling her and should not now complain about her credibility. ROA.4443-44. Defense counsel responded, "Yeah, but I mean, we called her for that limited purpose with the only information we had and then that was the end of it." ROA.4444. The court proceeded to take evidence but ordered that defense counsel be allowed to cross-examine Lass on the next day of trial, so that the defense investigator could look into her background and record. ROA.4445-46. According to a later-produced affidavit by co-counsel Kent Anschutz, the investigation turned up nothing that would have raised initial concern about Lass for trial counsel. App. E at 91a.

Direct appeal. On direct appeal in the Texas Court of Criminal Appeals (TCCA), Gobert argued that trial counsel had been ineffective for calling Lass to testify without investigating her first. *See Gobert v. State*, No. AP-76,245, 2011 WL 5881601, at *10 (Tex. Crim. App. 2011). The TCCA recognized that "[c]ounsel has a duty to conduct an independent investigation into the facts of the case and 'should not blindly rely on the veracity either of his client's version of the facts or witness statements in the State's file." *Id.*; *id*. at n.34 (citing *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996)). The court found that there was no reason that trial counsel should have anticipated Lass's relationship with Gobert or that the two had made an "escape plan" together. *Id.* Because Gobert and Lass were the only people who knew about the relationship and the plan, trial counsel's failure to investigate was not unreasonable. *Id.* at *11.

State habeas review. Gobert also raised the issue again in his state habeas petition. ROA.2725-31. In response to that claim, the state offered the affidavits of Gobert's trial attorneys. Co-counsel Kent Anschutz stated that, "[a]s part of trial preparation," trial counsel asked Gobert to provide the names of "Travis County jail personnel" who might say "positive things" about him. App. E at 91a; *see also* App. C at 82a. Counsel also told Gobert that, to rebut the testimony of the informant, they needed a witness who had knowledge of "Travis County" jail procedures. App. E at 91a. According to Anschutz, of the names Gobert provided, they were only able to reach Lass. *Id.* Lead counsel Leonard Martinez said "no one in the defense team wanted to put Ms. Lass on the witness stand," and "[i]t was Mr. Gobert who very insistently ordered us to put her on the witness stand saying she could dispel any so called jailhouse evidence." App. G at 95a - 96a; *see also* App. C at 82a – 83a. Paul Quinzi, who worked on the defense team "in a purely voluntary capacity," called the "idea that [defense counsel] did not investigate Lass" "ludicrous," solely because they had only called her at "Mr. Gobert's insistence." App. F 93a; *see also* App. C at 83a.

The trial court held no hearing on the habeas application. In adopting verbatim the State's proposed findings of fact and conclusions of law, the trial court held that counsel's actions could not be unreasonable under *Strickland*, because "[w]hen a defendant preempts his attorney's strategy by insisting that…certain evidence be put on or kept out, no claim of ineffectiveness can be sustained." App. C at 84a. Although, in disposing of Gobert's *Strickland* claim on direct appeal, the TCCA did not apply such a per se rule but instead endorsed a fact-specific analysis under *Strickland*, on review of the habeas court's recommendation it adopted the trial court's conclusions—including the per se rule—and denied habeas relief. *See* App. D at 89a.[2] Neither the trial court nor the TCCA addressed the question of prejudice from counsel's performance.

[2] Although the Order is dated January 14, 2014, that date is erroneous; it was issued a year later.

Federal habeas review. Gobert then sought federal habeas review, under 28 U.S.C. § 2254(d). He again argued that trial counsel had been ineffective for blindly following Gobert's instruction to call Tasha Lass without conducting any investigation.

During federal habeas proceedings, Gobert complained of a breakdown in communications between himself and his attorneys. After the petition was filed, but before the district court entered an order, Gobert filed a *pro se* Motion for Opportunity to Be Heard, raising specific claims about habeas counsel's performance. ROA.807-15. When he received no response to his motion, Gobert continued to press his complaints. *See, e.g.*, ROA.821-22 (letter to attorneys, copied to court, saying he had no working relationship with counsel); ROA.862 (letter to court saying he had not heard from attorneys or been told one of them had a new address and informing court he has IQ of 73); ROA.873 (letter stating differences were unreconcilable and naming seven possible attorneys who could take his case).

Gobert's federal habeas counsel filed, *ex parte,* an "Advisory to the Court." *See* State's Suppl. Resp. Mot. COA at 3-4, *Gobert v. Lumpkin,* No. 22-70002 (5th Cir. Mar. 23, 2023). The advisory did not refute Gobert's assertion that there had been a breakdown in communications between himself and his attorneys. Habeas counsel did not deny that they had not written to Gobert in more than a year. In addition, even though counsel claimed that "Gobert's concerns [had been] satisfied," they admitted that problems in the attorney-client relationship continued: "[s]ubsequently [ ], Gobert has continued to voice unhappiness and request new counsels." *Id.* The district court did not make any inquiry about counsel's advisory. Instead, it denied Gobert's request for substitute counsel shortly after counsel sent the advisory and directed Gobert to cease filing documents *pro se*. ROA.842-44.

Gobert nevertheless submitted a letter requesting that the Federal Public Defender's Capital Habeas Unit ("CHU") be appointed to his case and again noting that he had an IQ of only 73. ROA.862. The Court ordered the motion be stricken. Habeas counsel then filed, at Gobert's request, an opposed motion to be replaced as counsel; that motion was denied. ROA.864-72. The head of the CHU, acting with consent of appointed counsel, filed a motion for reconsideration. ROA.876-905. The motion and declaration attached to it established that Gobert had difficulty communicating, consistent with a person with intellectual disability. The motion was denied. ROA.923.

Gobert then submitted a *pro se* "notice" advising the district court that the United States Court of Appeals for the Fifth Circuit had found his counsel behaved unethically in another case and "request[ing] once again that new counsel be appointed." ROA.924-27. On November 30, 2018, Gobert filed a *pro se* notice of appeal of the district court's order denying undersigned counsel's motion for reconsideration. ROA.929-30.

The district court denied Gobert's habeas petition and his request for a certificate of appealability. App. B. On the ineffectiveness claim, the court held that the allegation that counsel should not have called Lass to testify without any investigation "only makes sense through the benefit of hindsight." App. B-31. In addition, it said that Gobert was asking the court to "find counsel deficient 'on the ground that his lawyer[s] did exactly what he asked [them] to do. That argument answers itself.'" *Id.* at 32 (citing *United States v. Masat*, 896 F.2d 88, 92 (5th Cir. 1990).

A month later, the district court granted habeas counsel's motion to withdraw from the case and appointed the CHU based on its finding that the relationship between Gobert and counsel had "broken down." ROA.1102.

The court of appeals affirmed the denial of Gobert's motion for substitution and denied him a COA to appeal any claim for relief. App. A. As to ineffectiveness, it found that trial counsel had not rendered deficient performance in complying with Gobert's request to call Tasha Lass as a defense witness without any investigation, based on the court's "steadfast principle—a defendant cannot direct his legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those instructions." App A at 3a-4a. As to the question of substitution of counsel, the court held that "[t]he record shows that the district court had sufficient information to make a well-informed decision regarding Gobert's case." App. A at 8a.[3]

REASONS FOR GRANTING THE WRIT

I. This Court should reaffirm its clearly established law and reject the Fifth Circuit and state courts' view that counsel's compliance with their client's instructions automatically bars *Strickland* relief.

In denying a certificate of appealability for Gobert's ineffective assistance of counsel claim, the Court of Appeals applied a "steadfast principle" from its precedent—that "a defendant cannot direct their legal counsel to pursue a specific strategy and subsequently accuse them of providing inadequate representation for adhering to those

[3] Gobert raised this claim as a direct appeal from the trial court's denial of substitute counsel. Citing recent, unpublished precedent, the Court suggested it did not have jurisdiction to consider the claim unless it also certified the appeal of a claim Gobert raised in his habeas application. App. A at 6a n.1.

instructions." App. A at 3a-4a. This "principle" mirrored the rationale the state court used in denying relief on the claim: "counsel's actions cannot be held as unreasonable given that Applicant failed to be forthcoming with counsel." App C at 84a; App. D at 89a. The state court's holding (echoed in the Fifth Circuit's decision) operates as a per se rule that shields counsel's conduct from Sixth Amendment scrutiny whenever counsel complies with her client's instructions. But such a rule fundamentally departs from this Court's clearly established law.

As explained below, the state court and Fifth Circuit's per se rule overlooks two basic (and well-established) components of this Court's Sixth Amendment analysis. First, this Court's cases draw a bright line between fundamental decisions about the case that must be made by the client and tactical trial stratagems that are entrusted to the professional judgment of defense counsel. Unless a client's decision concerns a fundamental issue, counsel may not categorically excuse her deficient conduct by claiming that the client made her do it. Second, this Court's cases concerning ineffective assistance of trial counsel demand that counsel conduct reasonable investigations in light of the facts of the case and advise the client about the potential consequences of his decision. It does not excuse counsel's failure to conduct an investigation just because a client said to call a witness, for such a rule would depend not on "prevailing professional norms" but on the client's capacity, mental health, and intellectual functioning—or lack thereof—to make many technical, legal decisions.

The Fifth Circuit and Texas state courts are not alone in their approach. At least the Second, Sixth, and Eighth Circuits routinely apply the same per se rule. Many other state courts do as well. Lower courts have departed so far from the clearly established law set forth in *Strickland* and this Court's Sixth Amendment jurisprudence that this Court should exercise its discretionary review to correct these errors. Sup. Ct. Rule 10(c).

Because the state court's rigid per se rule bars *Stickland* relief regardless of the circumstances, and without determining whether counsel's decision to follow her client's wishes was itself ineffective assistance of counsel, it is an objectively unreasonable application of this Court's clearly established precedent under 28 U.S.C. § 2254(d)(1). The Fifth Circuit erred in repeating this plainly incorrect rule when it denied Gobert a certificate to appeal the district court's habeas ruling. *See* 28 U.S.C. § 2253(c).

Setting aside this unfounded rule, Gobert has demonstrated his entitlement to relief on his ineffectiveness claim. Counsel called Deputy Lass on their client's say-so without conducting even a basic interview of her about where she worked and her knowledge of the defendant. Had they conducted even a basic investigation of Lass, they would have confirmed their professional judgment not to call her. As counsel themselves recognized, in exchange for the negligible benefit of her general knowledge of jails, counsel unguardedly allowed prosecutors to introduce highly aggravating information. ROA.4443.

A. Decisions holding that counsel cannot be found ineffective for following their clients' directives on matters of trial strategy conflict with this Court's Sixth Amendment jurisprudence.

The bright-line rule applied in Gobert's case directly conflicts with *Strickland*. The *Strickland* Court explicitly declined to fashion a "particular set of detailed rules" for evaluating counsel's performance because the resolution of ineffective assistance of counsel claims is highly fact-dependent. *Strickland v. Washington*, 466 U.S. 668, 688-89

(1984). "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id*. at 689. Instead of rules, this Court adopted a standard that measures attorney performance in light of an objective standard of "reasonableness under prevailing professional norms." *Id*. at 688.

Under *Strickland*, the American Bar Association standards should inform a reviewing court's deficient performance analysis of ineffective assistance of counsel claims. *Id*. (identifying ABA standards as source of prevailing norms and specifically highlighting "The Defense Function," 4-1.1. to 4-8.6). These standards emphasize the role of the attorney's expertise in making strategic decisions, stating that, although "counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds…[c]ertain decisions relating to the conduct of the case…are for defense counsel" to make—not the client." Standard 4-5.2(a) Control and Direction of the Case, ABA Standards for Criminal Justice (4th ed. 2017). More specifically, the standards dictate that "[s]trategic and tactical decisions should be made by defense counsel." *Id*. Such decisions include, as in Gobert's case, "what witnesses to call." *Id*.

The ABA standards also acknowledge that, outside of the allocation of decision-making authority enumerated in the standards themselves or in other law applicable in the relevant jurisdiction, "[d]etermining whether a decision is ultimately to be made by the client or by counsel is highly contextual[.]" *Id*. The ABA standards, therefore, intentionally do not provide strict rules for how to resolve disagreements between counsel and client;

they merely suggest counsel "consider memorializing the disagreement." ABA Standard 4-5.2(e).

This Court has repeatedly emphasized "the vital importance of counsel's assistance" to protect the fundamental right to a fair trial in an adversarial system. *Strickland*, 466 U.S. at 685 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)). As the Court explained in *Powell*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law…He lacks both the skill and knowledge adequately to prepare his defense…If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell, 287 U.S. at 69; *see also Gonzalez v. United States*, 553 U.S. 242, 249-50 (2008); *Faretta v. California*, 422 U.S. 806, 834 (1975); *Alvord v. Wainwright*, 469 U.S. 956, 961 (1984) (Marshall J., dissenting). Because of her relative expertise, counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 688. Of course, one critical aspect of counsel's role is to conduct reasonably thorough investigations so that counsel can "consult with the defendant on important decisions and [ ] keep the defendant informed of important developments in the course of the prosecution." *Id.*; *see also Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in judgment) ("Our system of laws generally presumes that the criminal defendant, *after being fully informed*, knows his own best interests[.]" (emphasis added)).

This duty extends well beyond merely articulating the defendant's position in court: "[T]he right to an attorney is not a right to a mouthpiece or marionette, but rather to competent counsel who will employ her own professional expertise in effectively representing her client's interests." *People v. Bergerud*, 223 P.3d 686, 693 (Colo. 2010) (citing *Faretta v. California*, 422 U.S. 806, 820 (1975)); *see also* ABA Standard 4-1.2(d) ("Defense counsel is the client's professional representative, not the client's alter-ego."). Further, counsel is not merely an advisor, but an agent with decision-making authority. In *Faretta*, this Court made clear that "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." 422 U.S. at 820; *see also Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

Since *Faretta*, this Court has increasingly identified specific decisions that are allocated to counsel after a defendant "accept[s] counsel as his representative." *Faretta*, 422 U.S. at 820–21. In *Jones v. Barnes*, for example, the Court held that counsel does not have to follow a client's instructions to raise particular nonfrivolous issues on appeal "if counsel, as a matter of professional judgment, decides not to present those points." 463 U.S. 745, 751 (1983). A rule to the contrary, the Court explained, would "seriously undermine[] the ability of counsel to present the client's case in accord with counsel's professional evaluation." *Id*. This holding prioritizes counsel's professional judgment over the defendant's wishes—a reoccurring theme throughout this Court's Sixth Amendment jurisprudence. *See, e.g.*, *Martinez*, 528 U.S. at 162 ("Even at the trial level…the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.").

Jones carved out four "fundamental decisions" that the defendant has "the ultimate authority to make," even when he chooses to be represented by counsel—whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. *Jones*, 463 U.S. at 751. All non-fundamental decisions are considered tactical, and therefore belong to counsel. According to this Court, "the lawyer has—and must have—full authority to manage the conduct of the trial." *New York v. Hill*, 528 U.S. 110, 115 (2000) (quoting *Taylor,* 484 U.S. at 417–18). Otherwise, "[t]he adversary process could not function effectively[.]" *Taylor,* 484 U.S. at 418; *see also United States v. Boyd*, 86 F.3d 719, 723–24 (7th Cir. 1996).

"Beyond the four decisions the *Jones* Court deemed to be fundamental, [this Court] has been exceedingly reluctant to extend the scope of the criminal defendant's decision-making power."[4] In most cases in which this Court has determined whether a particular decision was tactical (and therefore reserved for counsel) or a fundamental (and therefore reserved for the client), this Court has held the decision was tactical and within the purview of the counsel's control. *See, e.g.*, *Taylor,* 484 U.S. at 418 ("the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial").[5]

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[4] Todd A. Berger, *The Constitutional Limits of Client-Centered Decision Making*, 50 U. Rich. L. Rev. 1089, 1100 (2016).

[5] *See also, e.g.*, *Gonzalez*, 553 U.S. at 250 (allowing a federal magistrate judge and not a federal district court judge to conduct voir dire and jury selection); *New York v. Hill*, 528 U.S. 110, 115 (2000) (scheduling matters and stipulating to the admission of certain evidence at trial); *Engle v. Isaac*, 456 U.S. 107, 110 (1982) (moving to strike an improper

In *Florida v. Nixon*, this Court stated that counsel's "duty to consult with the client regarding important decisions, including questions of overarching defense strategy…does not require counsel to obtain the defendant's consent." 543 U.S. 175, 187 (2004). While *Nixon* involved a client who remained silent rather than expressing his objections to counsel's chosen strategy, it reflects a recognition that, in some instances, counsel may act, not just without their client's consent, but against their client's express wishes. As one federal district court stated, "[t]he client's expressed disagreement with counsel's tactical decisions cannot somehow convert the matter into one that must be decided by the client." *Bell v. United States*, No. CIV. PJM 13-1682, 2014 WL 7048132, at *4 (D. Md. Dec. 9, 2014), *appeal dismissed*, 599 F. App'x 505 (4th Cir. 2015).[6]

Even in *McCoy v. Louisiana*, in which the Court held that trial counsel may not override a defendant's instructions not to concede guilt despite "counsel's experienced-

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jury instruction); *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976) (having the defendant wear civilian clothing during trial); *Henry v. Mississippi,* 379 U.S. 443, 451 (1965) (making contemporaneous objections). The ABA Standards largely mirror this Court's rulings on whether the client or counsel is the ultimate authority on a particular decision. *See* Standard 4-5.2(a) Control and Direction of the Case, ABA Standards for Criminal Justice (4th ed. 2017).

[6] In many cases, the client's wish at issue is that counsel forgo investigating or presenting mitigation evidence. A small number of cases have held that the decision whether to present mitigation evidence is "fundamental," belonging to the client. *See*, *e.g., Zagorski v. State*, 983 S.W.3d 654, 658 (Tenn. 1998). *Cf.* Schriro v. Landrigan, 550 U.S. 465, 478 (2007) ("it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence."). In all other cases—in which the decision is a tactical one—courts must, to conform with *Strickland*, decide whether trial counsel's decision to accede to her client's wishes is a reasonable one. *See Silva v. Woodford*, 279 F.3d 825, 845 (9th Cir. 2002) (there is no per se rule that a client's wishes require or justify forgoing investigation).

based view [ ] that confessing guilt offers the best chance to avoid the death penalty," the Court emphasized that "[t]rial management is the lawyer's province" and only "some decisions … are reserved for the client[.]" 138 S. Ct. 1500, 1508 (2018).[7] Though *Strickland* did not apply to McCoy's claim, *McCoy* further confirms the need for courts to consider the nature of counsel's decisions when reviewing Sixth Amendment claims involving a defendant's instructions to counsel.

This Court's precedent thus clearly establishes that criminal defense counsel is not always obligated to follow a client's instructions. There is a role for the wishes of criminal defendants in the *Strickland* analysis. As the Court stated, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. But nothing in *Strickland* suggests that a client's wishes should obviate a need for an inquiry into counsel's performance. Most of the decisions counsel faces are ultimately hers to make, regardless of the client's wishes. In some cases, counsel's choice to follow a client's instructions against her own professional judgement may be constitutionally unreasonable.[8] For that reason, a per se rule that counsel

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[7] The Court held that conceding guilt is a decision reserved for the client because it is "not [a] strategic choice about how best to *achieve* a client's objectives" but a "choice[] about what the client's objective in fact *are*." *McCoy*, 138 S. Ct. at 1508 (emphasis in original). Because the decision at issue was fundamental, not tactical, the Court applied a structural error analysis rather than its ineffective-assistance-of-trial counsel jurisprudence. *Id.* at 1510-11.

[8] In discussing this issue, a federal district court in Arizona aptly noted that "what in one case may be a routine tactical decision which counsel should make, may in another case be a fundamental decision about the nature and course of the representation such that the decision should be left to the defendant." *Navarro v. Ryan*, No. CV121899PHXGMSJFM, 2018 WL 6681867, at *28 (D. Ariz. Jan. 12, 2018). This Court need not address how to identify whether decisions are tactical or fundamental to resolve

can never be ineffective for following their client's instructions violates the Sixth Amendment.

B. The per se rule barring *Strickland* relief based on counsel's decision to accede to their client's wishes has produced unjust and absurd results in federal and state courts.

Notwithstanding this clear precedent, in assessing attorney conduct under *Strickland's* deficient performance prong, many courts of appeals and state courts have adopted the same per se rule that the Fifth Circuit applied in Gobert's case.[9] Without any additional guidance from this Court, reviewing courts will continue to routinely deny *Strickland* relief, even when it was constitutionally unreasonable for counsel to disregard her own professional judgment to follow her client's instructions.

1. The federal courts routinely apply a per se rule when counsel act according to their client's directives.

The Fifth Circuit has consistently applied the per se rule when analyzing deficient performance under *Strickland*. *See, e.g.*, *Nixon v. Epps*, 405 F.3d 318, 325–26 (5th Cir.

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the question presented in Gobert's petition. The question presented asks this Court to resolve only the narrow issue whether reviewing courts can evade *Strickland's* reasonableness analysis by employing a bright-line rule that treats tactical and fundamental decisions the same.

[9] *See e.g.*, Berger, *supra*, at 1124 ("[M]ost courts have found that once the lawyer has decided to acquiesce to the defendant's demands regarding a strategic decision, the defendant is estopped from bringing a claim of ineffective assistance of counsel based on a version of the invited error doctrine."); Joel S. Newman, *Doctors, Lawyers, and the Unabomber*, 60 Mont. L. Rev. 67, 80 (1999) ("When the lawyer does exactly what the client asks, courts rarely find ineffective assistance of counsel."); Professors Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. Kan. L. Rev. 1, 24 (1998) ("A defendant whose lawyer follows his instructions regarding a strategic trial decision rarely will be able to complain successfully on appeal that the lawyer acted unprofessionally in abiding by the client's wishes.").

2005) ("A defendant cannot block his counsel from attempting one line of defense at trial, and then on appeal assert that counsel was ineffective for failing to introduce evidence supporting that defense."); *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004) (stating petitioners can pursue a *Strickland* claim asserting counsel's ineffectiveness for following their instructions only "if the defendant was not competent to make those instructions"); *Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) ("By no measure can [a defendant] block his lawyer's efforts and later claim the resulting performance was constitutionally deficient.").

In *United States v. Masat*, 896 F.2d 88, 91-92 (5th Cir. 1990), the Fifth Circuit applied its per se rule to deny a *Strickland* claim that, but for the defendant's instructions, would have been a clear case of ineffective assistance of counsel. In doing so, the court recognized that counsel's "tactics seemed adverse to his client's interests." *Id*. at 92. The trial judge even stated that counsel "seemed to be proceeding in such a way as to secure a conviction." *Id*. The Fifth Circuit, nonetheless, found counsel's performance was not deficient solely because the defendant "insisted that his counsel conduct this peculiar defense." *Id*. In holding that "a defendant [cannot] avoid conviction on the ground that his lawyer did exactly what he asked him to do," the court ignored the fact that the tactical decisions at issue were for counsel—not the client—to make. *Id*.

The Second Circuit also employs the rule that "[d]eferring to the wishes of a client does not constitute ineffective assistance of counsel." *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 177, 196 (2d Cir. 2008) (counsel complied with client's instructions to withdraw a motion to suppress and supporting affidavit); *United States v.*

Terranova, 309 F.2d 365, 366 (2d Cir. 1962) (counsel complied with client's instructions "to remain mute" throughout trial). In *United States v. Wellington,* 417 F.3d 284, 289 (2d Cir. 2005), counsel stipulated the defendant's guilt on every element of the only charged offense, with the aim of receiving a reduction in the computed offense level for accepting responsibility for the offense. *Id.* at 288. Counsel then waived the client's right to such an adjustment. *Id*. The court of appeals characterized counsel's strategy as "ill-advised and wholly ineffective," as there is "no doubt that the stipulation directly contributed to the resulting judgment of conviction." *Id*. Despite these facts, the court disposed of the claim because counsel was following the client's instructions. *Id*.

Likewise, the Sixth and Eighth Circuits apply the same per se rule. *See e.g*., *Bell*, 460 F.3d 739, 763 (6th Cir. 2006), *reh'g en banc granted, opinion vacated on other grounds* (Dec. 15, 2006), *on reh'g en banc*, 512 F.3d 223 (6th Cir. 2008) (finding that, since "[p]etitioner made a strategic decision to pursue an identity defense at trial, even though trial counsel believed intoxication was the best defense[; p]etitioner cannot now rest the blame of that strategic decision on the shoulders of his counsel"). In *Taylor v. Steele*, 6 F.4th 796, 803 (8th Cir. 2021), *cert. denied sub nom*. *Taylor v. Blair*, 142 S. Ct. 2757 (2022), counsel followed his client's instructions to forgo closing argument at the penalty phase of his capital trial, which resulted in a death sentence. On appeal, Taylor asserted that since counsel had the ultimate decision-making power regarding whether to give closing argument, counsel should have made that decision based on Taylor's best interests instead of blindly following his client's instructions. *Id*. Despite accepting the dichotomy of fundamental and tactical decisions, the court created a new category for trial decisions, finding that counsel's compliance with Taylor's directions "was neither a trial strategy nor the absence of one. It was counsel doing as his client instructed." *Id*. In doing so, the court applied the per se rule and denied relief without conduct a reasonableness analysis.

2. The highest courts in several states have also applied the per se rule.

"State judges, like their federal counterparts, have been quite willing to find that a lawyer has rendered constitutionally adequate and effective representation even though counsel permitted her client to make a strategic decision typically made by counsel."[10] *See e.g.*, *People v. Dendel*, 748 N.W.2d 859, 870 (Mich. 2008), *amended in non-relevant part,* 481 Mich. 1201, 750 N.W.2d 165 (2008) (Corrigan, J., concurring) ("A defense counsel's decision regarding trial strategy is not demonstrably deficient if the defendant directed that strategy."); *Brown v. State*, 894 So. 2d 137, 146 (Fla. 2004) (finding no deficient performance where counsel followed defendant's instructions not to present evidence that the offense was a sex crime because "[a]n attorney will not be deemed ineffective for honoring his client's wishes."); *State v. McNeill*, 700 N.E.2d 596, 609 (1998) (finding no deficient performance where counsel followed defendant's instruction to order a presentence investigation because "[i]t is not ineffective assistance for counsel to accede to a client's wishes after advising the client of counsel's contrary opinion."); *In re Trombly*, 627 A.2d 855, 856-57 (Vt. 1993) (finding that defendant who chose, contrary to counsel's

[10] Uphoff & Wood, *supra*, at 24.

advice, not to ask for a lesser-included instruction, could not complain that counsel was ineffective because counsel acquiesced to his wishes); *State v. McDowell*, 407 S.E.2d 200, 209-10 (N.C. 1991) (holding defense counsel not ineffective for deferring to client's wishes on whether to pass or strike certain jurors). *Guinan v. State*, 769 S.W.2d 427, 429 (Mo. 1989) ("Counsel is not ineffective simply because he accedes to his client's wishes, regardless how mistaken counsel believes those wishes to be."); *State v. Rubenstein*, 531 N.E.2d 732, 740 (Ohio Ct. App. 1987) (finding counsel was not ineffective for waiving cross examination of state witnesses, stipulating to psychiatric report and waiving opening argument because defendant instructed him to do so). *But see State v. Lee,* 689 P.2d 153, 158-61 (Ariz. 1984) (concluding attorney's acquiescence to client's wishes that were against attorney's tactical advice constituted ineffective assistance of counsel).

3. This Court should resolve the issue to eliminate the absurd results caused by the per se rule.

A per se rule that counsel who acquiesces to her client will not be found ineffective—regardless of the resulting harm to the client—produces a perverse incentive for counsel to always follow their client's instructions. *See Alvord,* 469 U.S. at 961 (Marshall, J., dissenting). Some courts, in justifying the per se rule, have even stated that following the client's instructions is a function of counsel's duty. *Lowenfield v. Phelps,* 817 F.2d 285, 292 (5th Cir. 1987) ("The circumstances are extremely rare when counsel is not required to follow his client's instructions."). Even if counsel were required to follow their client's instructions most of the time, a per se rule applied every time a competent client expresses his wishes to counsel is not justified. This reduces counsel's role to that of a "marionette." *Bergerud*, 223 P.3d at 693. Given the body of law applying the per se rule, it is not surprising that a study found, "In most of the reported cases, the lawyer, although disagreeing in varying amounts of intensity with the client's wishes, ultimately accedes to them."[11] This empirical evidence highlights the importance of the question presented and the frequency with which courts must address these issues.

Additionally, the per se rule produces an absurd inconsistency in *Strickland* cases. A survey of ineffective assistance of counsel cases involving matters of trial strategy throughout the country shows that courts view a client's instructions to counsel differently depending on whether counsel followed those instructions. In cases like Gobert's, asserting ineffective assistance for *following* the client's instructions, courts generally place dispositive weight on the client's wishes and apply the per se rule to dispose of the claim. Conversely, in cases asserting ineffective assistance of counsel for *failure* to follow the client's instructions, courts generally find "counsel's decision not to abide by the wishes of his client has no necessary bearing on the question of professional competence[.]" *United States v. McGill*, 11 F.3d 223, 227 (1st Cir. 1993); *see Gov't of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1435 (3d Cir. 1996) (finding no deficient performance where defense counsel ignored client's instructions to accept the court's offer of a mistrial); *United States v. Williams*, 631 F.2d 198, 204 (3d Cir. 1980) (finding no deficient performance where counsel ignored client's repeated request to use an affidavit to impeach two prosecution witnesses); *United States v. Chapman*, 593 F.3d 365, 370 (4th Cir.

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[11] Joel S. Newman, *Doctors, Lawyers, and the Unabomber*, 60 Mont. L. Rev. 67, 80 (1999).

2010) (finding no deficient performance where defense counsel ignored client's instructions to accept the court's offer of a mistrial); *People of Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984) ("A tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel."); *Gustave v. United States*, 627 F.2d 901, 906 (9th Cir. 1980) ("[T]he decision whether to request certain voir dire questions was a strategic decision of the attorney and his failure to do so, even against his client's wishes, is not ineffective representation.").

These cases clearly "reject [the principle] that an attorney loses the right to make tactical decisions about the conduct of a criminal trial if the client expresses disagreement with the attorney's decision." *United States v. Chapman*, 593 F.3d 365, 370 (4th Cir. 2010). But that is the very principle embraced by the per se rule barring *Strickland* relief when counsel follows a client's instructions instead of exercising their own professional judgment.[12] There is no rationale for this anomaly, which denies clients relief in a significant percentage of *Strickland* cases.

C. Gobert's case presents compelling reasons for this Court to grant certiorari to bring the courts into line with its Sixth Amendment precedent.

Subjected to a reasonableness inquiry, counsel's decision to accede to Gobert's instructions was deficient. The prejudice from the flawed decision is obvious—it led to, in counsel's own words, "devastating" testimony that provided strong support for a finding

[12] Newman, *supra*, at 86 ("Apparently, it is pretty hard to show ineffective assistance of counsel when the lawyer does what the client asks. For that matter, it is pretty hard to show ineffective assistance even if the lawyer does not do what the client asks.").

that Gobert posed a risk of future dangerousness. ROA.4443. The per se rule applied by the state court was contrary to this Court's established precedent; the same rule applied by the Fifth Circuit prevented it from correcting the state court's error.

1. Gobert's trial counsel were unconstitutionally ineffective under *Strickland*.

Without the distorting lens of the per se rule, trial counsel's ineffectiveness in calling Tasha Lass is plain.

a. Counsel rendered deficient performance.

The record here shows that trial counsel did not exercise any professional judgment at all in deciding to call Lass. In fact, they acted against their professional judgment. Although everyone on the defense team "totally did not agree with Mr. Gobert" about whether to put Lass on the stand," they did so solely because Gobert insisted. App. G at 96a; *see also* App. E at 91a; App. F at 93a. Further, the record makes clear that counsel did not investigate even enough to determine whether Lass could accomplish their stated goal. "The reasonableness of pretrial investigation should be considered in light of the chosen trial strategy." *Nelson v. Davis,* 952 F.3d 651, 674 (5th Cir. 2020). During their cross-examination of Lass in the sentencing phase, counsel admitted the defense had not spoken to Lass until she showed up for court: "And the first time any of the lawyers from the Defense side talked to you was literally—you were outside the courtroom door, and I think I came out and spoke to you about what we were simply going to ask you, a few questions about conditions in the jail . . . ." ROA.4444. They did not ask her whether she actually worked at Travis County Correctional Center, the jail she was supposed to testify about.

Nor did they meet with her to assess her demeanor and its appropriateness for trial testimony. After she had testified, trial counsel also suggested, based on her demeanor, that Lass may have been "mentally ill." ROA.4481. By then, it was too late. Had counsel met with Lass before calling her to testify, he would have had an opportunity to observe her demeanor prior to deciding to call her.

Counsel did not believe they were required to exercise any judgment, because their client had "insisted" on Lass. But this belief was wrong. The decision who should be called as a witness belongs to counsel, not the client. *See, e.g., Gonzalez*, 553 U.S. at 249; *Taylor*, 484 U.S. at 417-18. And relevant ABA standards require defense counsel to interview all witnesses, including "routine witnesses" such as "custodians of record." ABA Standard 4-4.3(f). This requirement is critical in capital cases. *See Guidelines and Standards for Texas Capital Counsel*, 11.1, 11.5 (State Bar of Texas 2006); *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.7 & cmt. (Am. Bar Ass'n 2003). Counsel's decision to call Lass based solely on Gobert's wishes was objectively unreasonable under the law and under these standards. *See Strickland,* 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Counsel's mistake of law on this critical point enjoys no deference and proves their unprofessional conduct. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." (citations omitted)).

Gobert's case clearly demonstrates the error of relying solely on a client's wishes when making tactical decisions. Although counsel leaned heavily on Gobert's desires, they offered no testimony that he had the intellectual capability, education, or experience to know the consequences of his giving them Tasha Lass's name. There was no evidence, for example, that Gobert knew his attorneys would not investigate Lass, that she would be subject to impeachment on cross-examination, what the scope of cross-examination might extend to, or that the state attorneys would likely conduct their own investigation of all witnesses called by the defense. Indeed, had Gobert fully understood that counsel were relying on him to muster their evidence, he likely would not have suggested Lass, who did not even work at the facility that counsel said they wanted testimony about. *See* ROA.5748.

b. Counsel's ineffectiveness prejudiced Gobert.

The state courts did not address the prejudicial effect of counsel's decision to call Lass based on Gobert's instructions without conducting any investigation. To satisfy *Strickland*'s second prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In conducting a *Strickland*'s prejudice analysis, a court must "consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam). However, the question "is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel [had] acted differently." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (citing *Wong*, 558 U.S. at 27). Rather, the "likelihood of a different result must be substantial, not just conceivable." *Id*.

In this case, the prejudice caused by trial counsel's blind reliance on their client's wishes cannot be overstated. In this case, the prejudice caused by trial counsel's blind reliance on their client's wishes cannot be overstated.

But for the fact that counsel unreasonably followed their client's instructions to call Lass without conducting any investigation of her, counsel would not have called Lass to testify and the State would not have learned of her. Had counsel prepared adequately, they would have confirmed their view that Lass offered negligible evidence to the defense. And even if reasonable counsel had learned only that Lass fraternized with Gobert—without learning more—this would have been reason enough not to call her.

Moreover, it is simply incorrect to say, as the courts have, that there was no way for trial counsel to have learned what Lass would ultimately testify to. *See, e.g.*, ROA.1049 (Gobert cannot show that investigating Lass would have avoided the prejudicial testimony). As this Court has established, whether counsel's failure to investigate is prejudicial depends on what evidence a reasonable investigation would have uncovered. *See Wiggins v. Smith,* 539 U.S. 510, 534-35 (2003). Counsel must have already known that Gobert had previously had an improper relationship with a jail guard during an earlier detention. It would have been irresponsible not to ask Lass whether she and Gobert had a similar relationship. And in response to a direct question (and a warning about the consequences of testifying falsely), there is no suggestion that Lass would not have told the truth. The State, in turn, would never have learned about Lass had trial counsel not called her—there is no evidence that state attorneys were even aware of her.

Moreover, there is no doubt that Lass's punishment-phase testimony was catastrophic for Gobert. When lead counsel heard Lass's testimony about the escape she and Gobert had planned, he characterized her testimony as "devastating, to say the least" and stated that the defense was "left with nothing." ROA.4443. Indeed, the testimony almost guaranteed a finding that Gobert presented a risk of future danger. *See* Tex. Code Crim. Proc. art. 37.071 (jury must consider "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). That escape plan involved use of a gun, the shooting of a jail guard and anyone else who might be a witness to the crime, and locking Lass herself in a closet. ROA.4432-38.

It is simply incorrect to say, as the courts have, that there was no way for trial counsel to have learned what Lass would ultimately testify to. *See, e.g.,* ROA.1049 (Gobert cannot show that investigating Lass would have avoided the prejudicial testimony). And as this Court has established, whether counsel's failure to investigate is prejudicial depends on what evidence a reasonable investigation would have uncovered. *See Wiggins v. Smith,* 539 U.S. 510, 534-35 (2003). Even if Lass had not confessed the full extent of her relationship with Gobert to his or their escape plan to counsel, there is a high probability that Lass likely would have decided not to testify or that trial counsel would have gotten enough information to adequately counsel Gobert as to why she should not testify for the defense.

In its threshold determination of the ineffectiveness claim for a COA, the Fifth Circuit posited that the "significant body of evidence" of future dangerousness undercut any argument for prejudice. App. A at 4a. But this argument errs. In fact, some of that other evidence was derived from Lass's testimony. This was especially true of the unreliable expert testimony of psychiatrist Dr. Richard Coons, who opined that a hypothetical person with Gobert's history, conduct, and character—including the fact that the hypothetical person planned a dangerous escape from jail—would likely pose a danger of violence in the future. ROA.4463-65. The TCCA found that Coons's testimony was inadmissible because his method was scientifically unfounded and unreliable. *See* App. H at 101a (citing *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010). But the TCCA nevertheless excused the admission as harmless in part because of "the evidence of his conspiracy to commit capital murder to effectuate an escape from jail"—information that came only from Lass. *See* App. H at 101a.

As in *Buck v. Davis*, 580 U.S. 100 (2017), the harm to Gobert was amplified by several factors. The damaging testimony came from the defense's own witness. *See id.* at 122 (evidence from defense witness "in the nature of an admission against interest" that is "more likely to be taken at face value"). The State heightened the harm by having Dr. Coons opine on this information as part of his expert opinion on future dangerousness—an inquiry that "inevitably entail[s] a degree of speculation." *Id.* at 120. Dr. Coons's opinion on Gobert's dangerousness in light of the escape plan had the effect of attaching "the court's imprimatur" to his opinion since he was a "medical expert." *Id.* at 121.

2. The courts unreasonably decided Gobert's ineffective assistance of counsel claim by applying the per se rule.

In state habeas review, the trial court issued Findings of Fact and Conclusions of Law, which the Texas Court of Criminal Appeals ultimately adopted (App. D at 89a), that disposed of Gobert's claim that counsel was ineffective for calling Tasha Lass without any investigation under the rationale that "it was [Gobert]'s idea to call Lass as a witness[.]" App. C at 82a. Specifically, the court found that it was Gobert who "made the decision" and that he did so "over lead counsel's objections." App. C at 83a; *see also* App. G at 95a-96a ("[N]o one in the defense team wanted to put Ms. Lass on the witness stand."). But the court did not even attempt to address the question whether calling a witness to testify "for the limited purpose of showing [Gobert] did not have an expectation of privacy in his jail cell" was a tactical decision for counsel to make, or a fundamental decision reserved for Gobert. App. C at 82a. Similarly, the court did not grapple with the question whether it was reasonable for counsel to ignore their own professional judgment not to call Lass—without any investigation—given that Lass had no knowledge of or connection to the jail that was supposed to be the subject of her testimony. *See* ROA.4143. Nor did the court refer to prevailing professional norms that should resolve these questions. *Strickland*, 466 U.S. at 688 (1984). Yet that is precisely what a deficient performance analysis in this case requires under *Strickland* and its progeny. *See supra* § I.A.

The court did not conduct a reasonableness analysis to determine where counsel's performance was deficient. Instead, the court sidestepped the inquiry entirely by applying the per se rule that "[w]hen a defendant preempts his attorney's strategy by insisting that certain evidence be put on or kept out, no claim of ineffectiveness can be sustained." App. C at 84a (citing *McFarland v. State*, 845 S.W. 2d 824, 848 (Tex. Crim. App. 1992)). In doing so, "the state court's application of the *Strickland* standard was [itself] unreasonable." *Harrington v. Richter*, 562 U.S 86, 101 (2011).

When Gobert presented his ineffective assistance of counsel claim regarding Lass in federal habeas proceedings, the district court repeated the same error. Although the court held that Gobert's claim was governed by § 2254(d),[13] *see* App. B at 38a, the court proceeded to conduct what appeared to be an analysis under *de novo* review. App. B at 38a-41a. The court stated that "Gobert must overcome the deference afforded to state court decisions," but then did not even discuss the state court's decision. App. B at 38a. Regardless, the district court and the state court ended up in the same place in that they both disposed of Gobert's claim by applying the per se rule. App. B at 40a ("[I]t appears this Court is being asked to find counsel deficient 'on ground that his lawyer[s] did exactly what he asked [them] to do. That argument answers itself.") (*citing Masat*, 896 F.2d 88, 92 (5th Cir. 1990). As demonstrated above, the per se rule is contrary to and an unreasonable application of this Court's clearly established Sixth Amendment jurisprudence, and therefore cannot be reasonable; had the district court properly reviewed Gobert's claim under § 2254(d)(1), it would have found that Gobert was entitled to relief. *See supra* § I.A.

[13] Gobert argued the district court should review his ineffective assistance of counsel claim *de novo* because new factual allegations fundamentally altered the claim from that which was raised on direct appeal and in state habeas proceedings. The district court rejected this argument and held that Gobert's claim was subject to §2254 review. App. B at 38a.

In applying the per se rule, the Fifth Circuit replicated the error of all the courts before it, preventing Gobert from receiving review of his claim under the proper *Strickland* standard. Properly applied, that standard would, at a minimum, lead reasonable jurists to disagree "the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Finally, this case presents the question regarding counsel's duties with regard to a client's wishes on tactical matters in a novel light. *Strickland* allows for more deference to trial counsel's omissions based on the client's wishes—it says nothing about the affirmative actions counsel routinely take pursuant to their skill and experience—actions the criminal defendant is likely not to have the education or experience to choose or forgo. That is the issue Gobert presents here.

Because Gobert's case involves a decision that this Court has clearly identified as belonging to counsel, and counsel's decision to call Lass to testify was deficient but for his client's instructions, it is an ideal vehicle to address the question presented.

II. This Court should grant certiorari to resolve division among the circuits on the question whether a court has a duty to make an inquiry when a petitioner requests new counsel and alleges a serious conflict between himself and his attorneys.

In *Martel v. Clair,* this Court held that, in reviewing a decision denying a federal capital habeas petitioner's request for substitute counsel under 18 U.S.C. § 3599, courts must apply an "interests of justice" standard. 565 U.S. 648, 663 (2012).[14] That standard contemplates a "peculiarly context-specific inquiry," and when applying it, courts of appeals must consider, among other things, "the adequacy of the district court's inquiry into the defendant's complaint." *Clair*, 565 U.S. at 663. This case presents a question that has divided the courts—what triggers the trial court's duty to conduct a hearing, or at least inquire further? The Fifth, Eighth, and Eleventh circuits require that the initial motion or request satisfy a threshold burden, beyond assertions showing a plausible basis for substitution, in order to trigger the duty to inquire. In Gobert's case, the court of appeals affirmed the trial court's record-based decision to deny substitution because, even though Gobert alleged a total breakdown between himself and trial counsel, the allegation was too "general" and therefore did not meet the threshold burden. App. B at 45a; App. A at 8a.

In contrast, the Third, Sixth, and Ninth Circuits do not place such a burden on indigent capital habeas petitioners seeking new counsel. They hold that, except when the request is facially futile, the motion or request itself triggers an inquiry requirement. This Court should grant certiorari to resolve this division.

A. The circuit courts are divided regarding whether a request for substitute criminal defense counsel must satisfy some threshold burden to trigger a court's duty to conduct a hearing or inquire into the request for substitute counsel.

The court of appeals concluded that the trial court was not required to make inquiries regarding Gobert's requests for new counsel. It held instead that the trial court had an

[14] This decision brought the § 3599 analysis into alignment with that given to substitution requests made by indigent defendants, under 18 U.S.C. § 3006A. *Clair*, 565 F.3d at 658.

adequate record before it. It reached this conclusion even though the record amounted to no more than letters and motions from Gobert—who has an IQ of 73—and even though Gobert was not given the chance to respond to assertions from trial counsel that the conflict Gobert had identified had been resolved. It did not address the fact that counsel acknowledged there were continued problems, and it did not solicit input from Gobert. The court of appeals suggested that, based on this record, Gobert was not entitled to a hearing on his requests because his assertions did not satisfy a substantive burden—they were too "general" and did not rise above mere unhappiness "with the work of his current federal habeas counsel." App. A at 8a; *see also United States v. Quinn*, 826 F. App'x 337, 343 (5th Cir. Sept. 3, 2020) (finding court could decide motion to substitute on record, even though record required speculation on significant allegation by defendant); *United States v. Davis*, 655 F. App'x 1017, 1019 & n.1 (5th Cir. 2016) (affirming denial of substitution motion, without hearing, based solely on cost to government).

The Eighth and Eleventh circuits impose a similar threshold burden on individuals seeking substitute counsel. *See*, *e.g.*, *United States v. Jones*, 795 F.3d 791, 796 (8th Cir. 2015); *United States v. Davis*, 777 F. App'x 360, 364 (11th Cir. 2019), *vacated on other grounds*, *Davis v. United States*, 140 S. Ct. 952 (2020) (finding no error in failure to engage in probing inquiry because court "reasonably could have" relied on reasons set forth in substitution motion). For example, the Eighth Circuit requires a substantial complaint that demonstrates "justifiable dissatisfaction." *Jones*, 795 F.3d at 796 (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir.1991)). In *Jones*, the defendant asserted, among other things, that his attorney had not met with him to prepare for trial and was not answering his phone calls, and that trial counsel had not filed a motion to suppress evidence or dismiss the prosecution. *Id.* at 797. The Eighth Circuit affirmed the trial court's failure to conduct an inquiry of these allegations. On the question of a breakdown of communications, it held that a defendant must claim a "complete" breakdown in order to show "justifiable dissatisfaction." *Id.* On the question of the unfiled motions, the court broadly held that "frustration" with counsel's performance or disagreement regarding strategy was also not "justifiable dissatisfaction." *Id.* This was so even though there was no evidence showing that the defendant knew the magic words "complete breakdown."

In contrast, the Third, Fourth Sixth, and Eleventh circuits treat the motion or request for substitute counsel itself as the trigger for an inquiry. *See, e.g.*, *United States v. Senke*, 986 F.3d 300, (3d Cir. 2021); *United States v. Blackledge*, 751 F.3d 188, 194 (4th Cir. 2014) (request must merely raise "seemingly substantial" claim); *United States v. Higgins*, No. 22-3538, 2023 WL 6546752, at *8 (6th Cir. Oct. 6, 2023); *United States v. Vazquez*, 855 F.3d 1021, 1034 (9th Cir. 2017) (citations and quotations omitted).[15] For example, in *United States v. Collado-Rivera*, trial counsel filed a pre-sentencing motion to withdraw at the request of their client but gave no reason for the request other than the client's wishes. 749 F. App'x 455, 459 (6th Cir. 2019). Rather than hold that counsel had not shown that the client had "justifiable dissatisfaction," the Third Circuit reversed the decision to deny substitution, in part "[b]ecause the district court did not inquire into [the defendant's] complaints." *Id.* at 466.

[15] The Fourth Circuit holds that the failure to conduct an inquiry can eliminate deference given to court's factfindings. *Blackledge*, 751 F.3d at 195.

Like the Third Circuit, the Sixth Circuit requires a hearing when a defendant brings "'any serious dissatisfaction with counsel to the attention of the district court.'" *Higgins*, No. 22-3538, 2023 WL 6546752, at *8 (6th Cir. Oct. 6, 2023) (quoting *Benitez v. United States*, 521 F.3d 625, 634 (6th Cir. 2008). It is at that hearing—not in a motion or letters to the court—that the defendant must show good cause for the motion to withdraw or substitute counsel. *Id.*

B. Requiring more than a facially sound assertion of a conflict or inadequate performance to trigger further inquiry is inconsistent with *Martel*.

Gobert's case demonstrates why courts requiring only facially sound reasons in support of a request for substitute counsel have taken the better course. Gobert's initial motion, which he filed *pro se*, was styled as a request "for an opportunity to be heard," indicating that he himself believed he needed an opportunity to explain his request. Moreover, his letters to the court remain a subject of confusion. In his initial claim, Gobert explicitly said he was not requesting hybrid counsel, but the district court thought he was—a view the State has adopted. *Compare* ROA.807 *with* ROA.844; *see* State's Response to Motion for Certificate of Appealability at 27. The court also believed, without inquiry, that Gobert was requesting the right to choose a specific attorney. ROA.843. But there is information in his letters suggesting this was not so. *See* ROA.821-22 (identifying multiple attorneys who were available to take his case). This confusion is an unsurprising result when a court is considering allegations from *pro se* individuals who are not trained in the law and who may have limited educations and intellectual deficits. Requiring their communications to satisfy a specific legal threshold without inquiry risks never fully understanding the problems they are trying to communicate and thus reaching unjust results. As the Third Circuit has said, courts should not place "an inappropriately strict requirement on *pro se* defendants to know the law and articulate the exact action they desire from the court"; instead, they "should at least attempt to inquire further when made aware of a possible breakdown in communications." *See Senke*, 986 F.3d at 310-11.

In his letters, Gobert asserted that he had "no workable relationship" with his attorneys—a claim, that, if he had an opportunity to demonstrate, would have weighed heavily in favor of granting his request. ROA.821; *see, e.g.*, *United States v. Lee*, 310 F.3d 1210, 1249 (10th Cir. 2001) (total breakdown in communications is proper ground for substituting counsel); *United States v. Reyes*, 352 F.3d 511, 516 (1st Cir. 2003) (same). In support of that claim, he said his attorneys had not communicated with him for a year. *Id.* He also pointed to matters that were of special importance to him—his attorneys did not know his biological father's name or the jail he had been housed in while he awaited trial. The trial court labeled these concerns "general," ROA.843, but—especially given the year-long silence from trial counsel, they required investigation. *See Blackledge*, 751 F.3d at 195 (when no inquiry is made regarding claim that relationship has broken down, court's factfinding to the contrary not entitled to deference).

This was especially so given Gobert's assertions that he had an IQ of 73. ROA.862. That fact warranted special attention, for at least three reasons. First, Gobert's IQ was relevant to his claims that counsel were not communicating with him effectively. If their client has intellectual deficits, counsel were required to take special pains to ensure that he understood the actions they were taking on his behalf. Second, Gobert's low IQ should have suggested to the district court that further inquiry into his complaints was required, if only to ensure that the court fully understand them. And, third, if their client had an IQ of 73, habeas counsel might have pursued an intellectual-disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)—that they did not do so may have indicated that, in fact, they were not providing adequate representation. Given the especially fact-intensive nature of the *Clair* inquiry, the Fifth Circuit's approach permitting courts to deny motions to substitute counsel without further inquiry is wrong. *See Clair*, 565 U.S. at -663-64.

Finally, shortly before the district court denied Gobert's motion, it received an advisory from habeas counsel. ROA.5956-57; *see* Suppl. Resp. Mot. COA at 3-4. That advisory did not deny that counsel did not communicate with Gobert for more than a year. And, it acknowledged that Gobert continued to want substitute counsel. But, inexplicably, the attorneys represented that Gobert's concerns "were satisfied." Relying on the assertions of possibly conflicted counsel without further inquiry does not serve the ends of justice. *See Senke*, 986 F.3d at 311 (admission of counsel that problems existed, even if counsel did not believe they amounted to reasons to substitute, gave rise to need for inquiry); *see also Holiday v. Stephens*, 577 U.S. 999 (2015) (Sotomayor, J., dissenting from denial of stay of execution) (error to rely appointed counsel's representations in denying request for new attorneys); *see Vasquez,* 855 F.3d at 1034 (when defendant asserted conflict with counsel, it is not adequate to rely solely on counsel's representations in denying request for substitution).

C. The Court should resolve the circuit conflict, which implicates both interests of justice and judicial efficiency.

This Court should grant certiorari to resolve the circuit split and hold that district courts must conduct a probing inquiry when a petitioner has made facial assertions supporting substitution under 18 U.S.C. § 3599. *See* Sup. Ct. Rule 10(a) (certiorari warranted when circuits are in disagreement on the same important matter). Such a holding would serve both interests of justice and judicial efficiency. Requiring additional inquiry will ensure that, should inquiry warrant it, petitioners will receive new, unconflicted counsel who can advise them and assist them to a just resolution of their cases. In addition, the approach taken by the Fifth, Eighth, and Eleventh circuits endorses resolution on inadequate records and creates significant risk of unjust results. Inquiry is essential to "meaningful appellate review." *Clair,* 565 U.S. at 664 (internal quotation marks, citation, and alterations omitted).

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

Maureen Franco
FEDERAL PUBLIC DEFENDER
Western District of Texas
Tivon Schardl
CHIEF, CAPITAL HABEAS UNIT

/s/ Donna Coltharp

Donna Coltharp
Amy Fly
ASSISTANT FEDERAL PUBLIC DEFENDERS
919 Congress Ave., Suite 950
Austin, Texas 78701
(737) 207-3017 (tel.)
(512) 499-1584 (fax)
Donna_Coltharp@fd.org

Counsel for Petitioner

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