24-7065

No. 24-

ORIGINAL

IN THE

Supreme Court of the United States

DONALD J. ENGLERT II,

Petitioner,

v.

ERNEST LOWERRE, SUPERINTENDENT
OF FIVE POINTS CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KRISTEN SANTILLO
Counsel of Record
GELBER & SANTILLO PLLC
52 Duane Street, 7th Floor
New York, NY 10007
(212) 227-4743
ksantillo@gelbersantillo.com

Counsel for Petitioner
Donald J. Englert II

379429

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether a state court's denial of a hearing on an ineffective assistance of counsel claim, when such a hearing is required by state statute, can amount to an unreasonable determination of the facts in light of the evidence presented, which is sufficient to overcome the deference accorded to state court fact-finding under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(2), or instead it is a procedural error under state law, which is not cognizable on habeas review, as the Second Circuit held below in *Englert v. Lowerre*, 115 F.4th 69, 89 (2d Cir. 2024), contrary to the precedents of this Court and other circuits?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Donald J. Englert, II, v. Ernest Lowerre, Superintendent of Five Points Correctional Facility, Case No. 22-2016, Second Circuit Court of Appeals. Order Denying Petition for Panel Rehearing or Rehearing En Banc, entered October 25, 2024

Donald J. Englert, II, v. Ernest Lowerre, Superintendent of Five Points Correctional Facility, Case No. 22-2016, Second Circuit Court of Appeals. Judgment entered August 15, 2024

Donald J. Englert, II, v. Michael Colvin, Superintendent of Five Points Correctional Facility, Case No. 6:18-cv-06871-CJS, U.S. District Court for the Western District of New York. Judgment entered August 10, 2022

The People of the State of New York v. Donald J. Englert, II, Indictment No. 12-0626, Appellate Division, New York's Fourth Department. Order Denying Leave to Appeal, entered on November 15, 2018

The People of the State of New York v. Donald J. Englert, II, Indictment No. 12-0626, Supreme Court of New York, County of Monroe. Judgment entered on June 4, 2018

The People of the State of New York v. Donald J. Englert, II, Indictment No. 12-0626, Supreme Court of New York, County of Monroe. Judgment entered on January 19, 2017

The People of the State of New York v. Donald J. Englert, II, State of New York Court of Appeals. Order Denying Leave to Appeal with Leave to Renew, entered on February 1, 2016

The People of the State of New York v. Donald J. Englert, II, State of New York Court of Appeals. Order Denying Leave to Appeal, entered on September 28, 2015

The People of the State of New York v. Donald J. Englert, II, Case No. KA 13-00748, Supreme Court, Appellate Division, New York's Fourth Department. Judgment entered on July 10, 2015.

The People of the State of New York v. Donald J. Englert, II, Indictment No. 2012-0626. Judgment entered on April 9, 2013.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes, Rules and Regulations

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published, appears in the Petitioner's appendix as Appendix A, and is available at *Englert v. Lowerre*, 115 F.4th 69 (2d Cir. 2024). The decision and order of the United States District Court for the Western District of New York is not published, but appears in the Petitioner's appendix as Appendix B and is available at *Englert v. Colvin*, No. 18-CV-6871 (CJS), 2022 WL 3214774 (W.D.N.Y. Aug. 9, 2022). The opinion of the United States Court of Appeals for the Second Circuit denying Petitioner's request for panel rehearing, or in the alternative, for rehearing *en banc*, is not published, but appears in Petitioner's appendix as Appendix C.

The opinion of the New York's Appellate Division, Fourth Department, denying Petitioner's direct appeal is published and available at *People v. Englert*, 130 A.D.3d 1532, 1534, 14 N.Y.S.3d 848, 850 (4th Dep't 2015), and appears in Petitioner's appendix as Appendix D. The June 4, 2018 decision and order of the Supreme Court, State of New York, County of Monroe, denying Petitioner's motion for an order pursuant to NY CPL 440.10 to vacate his judgment is unpublished and appears in Petitioner's sealed appendix as Sealed Appendix A.

JURISDICTION

The District Court had jurisdiction over this habeas petition under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2254 (federal habeas), and entered a judgment on August 10, 2022. The Second Circuit had jurisdiction under 28 U.S.C. § 1291, and affirmed the judgment in an opinion dated August 15, 2024. The Second Circuit denied Petitioner's request for panel rehearing or rehearing *en banc* on October 25, 2024. On January 18, 2025, this Court granted Petitioner's request for an extension of time to file his petition for certiorari until March 24, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

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

N.Y. Crim. Proc. Law § 440.10. Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

...

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States. ...

N.Y. Crim. Proc. Law § 440.30. Motion to Vacate Judgment and To Set Aside Sentence; Procedure

1. (a) A motion to vacate a judgment pursuant to section 440.10 of this article and a motion to set aside a sentence pursuant to section 440.20 of this article must be made in writing and upon reasonable notice to the people. Upon the motion, a defendant who is in a position adequately to raise more than one ground should raise every such ground upon which he or she intends to challenge the judgment or sentence. If the motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations thereof, whether by the defendant or by another person or persons. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief. The defendant may further submit documentary evidence or information supporting or tending to support the allegations of the moving papers. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his or her counsel, if any, an answer denying or admitting any or all of the allegations of the motion papers, and may further submit documentary evidence or information refuting or tending to refute such allegations. After all papers of both parties have been filed, and after all documentary evidence or information, if any, has been submitted, the court must consider the same for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact.

...

4. Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege any ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

5. If the court does not determine the motion pursuant to subdivisions two, three or four, it must conduct a hearing and make findings of fact essential to the determination thereof. The defendant has a right to be present at such hearing but may waive such right in writing. If he does not so waive it and if he is confined in a prison or other institution of this state, the court must cause him to be produced at such hearing.

STATEMENT OF THE CASE

The United States Court of Appeals for the Second Circuit affirmed a decision of the United States District Court for the Western District of New York, which denied, without a hearing, Petitioner Donald Englert's *pro se* federal habeas corpus petition under 28 U.S.C. § 2254 (the 2254 Motion). Through the 2254 Motion, Englert challenged on ineffective assistance of counsel grounds his 2013 New York State conviction, following a jury trial, of one count of course of sexual conduct against a child in the first degree. In its opinion, (the "Second Circuit Decision") the Second Circuit rejected Englert's contention that a motion he filed in New York state court under N.Y. Criminal Procedure Law (CPL) § 440.10 (the "440 Motion") contained sufficient

sworn, uncontroverted evidence tending to support his ineffective assistance of counsel claim that a hearing was required under N.Y. CPL § 440.30, and thus the state court's summary denial of his claim was an unreasonable determination of the facts in light of the evidence Englert presented, which should overcome the deference accorded to state court fact-finding under 28 U.S.C. § 2254(d)(2). Appendix 32a-33a.

In rejecting Englert's argument, the Second Circuit relied upon *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) for the proposition that "any procedural error by the state court . . . is not cognizable on federal habeas review." Appendix 33a. Englert brings this petition for *certiorari*, as the Second Circuit Decision conflicts with the Supreme Court's decision in *Brumfield v. Cain*, 576 U.S. 305, 307, 322 (2015), which held that a state court's failure to grant an evidentiary hearing to determine whether there was a violation of a federal constitutional right when such a hearing is required by state law can amount to an unreasonable determination of the facts under § 2254(d)(2).

The Second Circuit Decision also conflicts with decisions from other circuits, which have held that a state court's failure to grant a hearing on a federal constitutional claim for ineffective assistance of counsel can amount to an unreasonable determination of the facts in light of the evidence presented. *See e.g., Velasquez v. Ndoh*, 824 F. App'x 498, 499 (9th Cir. 2020) (in light of evidence of trial counsel's errors, "the state court's refusal to grant Petitioner an evidentiary hearing resulted in a decision based upon an unreasonable determination of the facts"); *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018) ("sometimes declining to hold an evidentiary hearing may so affect, and indeed infect, a state court's fact-finding process that it renders the court's factual determinations unreasonable"). Since the Second Circuit's decision in *Englert* conflicts with the Supreme Court's decision in *Brumfield* and decisions of other circuits, this Court should

grant *certiorari* to clarify that a state court's denial of a hearing when a state statute requires such a hearing can amount to an unreasonable application of facts under § 2254(d)(2)).

I. Factual and Procedural Background

a. The Trial and Direct Appeal

Englert's conviction turned on the testimony of a 12-year-old girl, N.L., who was undisputedly the only eyewitness to any alleged sexual abuse. The prosecution contended that Englert, who was a father figure to N.L., had repeatedly and painfully vaginally and anally penetrated her for years. Yet when N.L. was examined by nurse practitioner Cecilia Lyons six months to one year after she claimed the sexual abuse occurred, there was no medical evidence of abuse, and Lyons described the results of the examination as "normal." Sealed Appendix 22a.[1]

Even though the exam was "normal," Lyons testified at trial that N.L.'s examination was consistent with child sexual abuse based on N.L's "story," which was part of her medical history. *Id.* at 24a-26a. In testimony that was laden with statistics derived from her own practice, Lyons further testified that a "normal" exam was the expected result, as less than 5 percent of the nearly 1,000 examinations she performed showed no findings of sexual abuse after a delayed disclosure because the injuries had time to heal. *Id.* at 24a, 19a. Lyons also testified that it was normal that N.L.'s hymen was intact with no observed injuries even after the abuse she described, as unspecified research showed that hymens regenerate. *Id.* at 25a, 46a-47a.

The state court trial record shows that, even on the day of her testimony, trial counsel had no familiarity with Lyons' background and did not know that she, a nurse practitioner, conducted N.L.'s exam, instead of a doctor. *See* Confidential Appendix-1389. While trial counsel cross-

[1] References to the Appendix and the Special Appendix are to the Appendices filed with this Court. References to the Confidential Appendix are to the Confidential Appendix filed with the Second Circuit.

examined Lyons, asking Lyons about a laundry list of conditions which were not found during N.L.'s exam, Lyons countered that many of the conditions were irrelevant to child sex abuse. *See, e.g.*, Sealed Appendix at 30a-31a, 41a-42a. Trial counsel further failed to establish any scientific significance for the absence of physical evidence of abuse. With no expert support, trial counsel urged the jurors to use their "common sense" to disregard Lyons' expert opinion, and to conclude that if N.L.'s allegations were true, there would have been medical evidence of the abuse. Sealed Appendix 51a-52a. The prosecution, on the other hand, urged the jurors to credit Lyons because of her expertise. Sealed Appendix 53a ("[Lyons] is a medical expert... She never expected to find anything. And neither should you. That's why she was called.") During their deliberations, the jurors asked for a readback of Lyons' testimony shortly before returning a verdict against Englert, demonstrating that her testimony was pivotal to their decision. Confidential Appendix-1768-1770.

Englert appealed his conviction and sentence to the Appellate Division, Fourth Department, arguing, among other errors, that he received ineffective assistance of counsel when trial counsel failed to call a medical expert. Englert's claim was denied on direct appeal on July 10, 2015 because, limited to the record on direct appeal, he had not shown that such testimony was available, that it would have assisted the jury in its determination, or that Englert was prejudiced by its absence. Appendix 57a-58a. Leave to appeal to the New York Court of Appeals was denied in September 2015.

b. The State Court Post-Conviction Proceedings

After his direct appeal was denied, Englert brought a *pro se* motion in the Supreme Court, Monroe County, to vacate the judgment under N.Y. Crim. Proc. Law § 440.10 (the "440.10 Motion"), on the grounds that he was denied the effective assistance of counsel under state and federal law. Under New York law, to obtain a hearing on such a claim, movants must submit sworn

allegations "substantiating or tending to substantiate all the essential facts." N.Y. CPL § 440.30(4)(b). If the movant meets that threshold, a hearing is required unless the claim is contradicted by the trial record or, "[a]n allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof." N.Y. CPL § 440.30(4)(c)-(d); N.Y. CPL § 440.30(5).

In support of the 440.10 Motion, Englert included his own sworn affidavit, affidavits from several family members, and affidavits from two experts, which as detailed below, at minimum tended to substantiate his claim that his trial counsel was ineffective for, among other reasons, failing to consult with or call a medical expert. The prosecution did not submit any of its own affidavits in opposition.

In his own affidavit, Englert noted that trial counsel met with him only once, on January 19, 2013, three days before trial, to discuss his case. Confidential Appendix-303. During the meeting, the defendant and his family asked, "[d]o we need experts?," and trial counsel responded by saying they did not because the burden of proof rested with the state. Confidential Appendix-293 and 303. Affidavits from Englert's family, who were present, confirmed the substance of this meeting. Confidential Appendix-304-310. Nonetheless, despite his lack of preparation and stated reasoning for failing to call an expert, trial counsel shifted the burden to himself to prove Englert's innocence in his opening statement. Confidential Appendix-993 ("I'm going to prove to you that my client is innocent.") Englert's cousin, Jean Black, submitted an affidavit stating that trial counsel told her that "he didn't have sufficient time to locate and hire an expert before the trial began." Confidential Appendix-308.

The expert affidavits Englert attached to his 440.10 Motion included an affidavit from Dr. Jeffrey Bomze (the "Bomze Affidavit"), a pediatrician who had evaluated and treated cases of sexual abuse and had previously testified as a forensic expert. The Bomze Affidavit detailed the advice he would have given trial counsel, and testimony he could have offered if consulted.

In contradiction to Lyons' testimony that N.L.'s "story" was consistent with abuse, Bomze outlined physical, social, emotional and psychological problems associated with children who are abused, which N.L. did not have, including: "rectal and/or urinary incontinence, abdominal pain unrelated to constipation, bleeding, discharge, irritation, anxiety, depression, sexually acting out, school problems and social problems." Sealed Appendix 58a.

In contrast to Lyons' testimony that she did not expect to see any physical signs of abuse upon her examination, Dr. Bomze noted that: "Studies in the literature indicate that the findings that are highly predictable to be associated with sexual abuse are complete hymenal transections, not healed or regenerated, as well as absence of posterior hymenal tissue, bruising/hematoma and pregnancy...." Sealed Appendix 58a. He further noted that bleeding should have occurred from the alleged abuse. Sealed Appendix 60a ("since no lubricant was used in the alleged vaginal and anal acts, bleeding should have occurred because of the size of an adult erect penis (as described in interviews and testimony by the child) and a child's small prepubertal genitalia and anus.")

With regard to Lyons' testimony that hymens regenerate, which Dr. Bomze described as "most confusing," Dr. Bomze explained that it is true that hymenal lacerations can heal in many cases, but Lyons "did not differentiate between complete lacerations of the hymen, which may not fully heal, or other deep lacerations of the posterior hymen, which may leave a cleft or notch and not fully heal. Findings diagnostic of sexual abuse include scarring of the posterior fourchette or

fossa, hymenal transection and missing posterior hymenal tissue, which were not observed during the examination of normal." Sealed Appendix 59a.

Dr. Bomze also emphasized the significance of the lack of any physical evidence on the examination for anal abuse, noting "there are studies which document that residual findings in anal abuse occur at a much greater frequency than vaginal sexual abuse.... For the anal area, findings such as venous pooling/congestion, asymmetry of the anal folds, certain fissures and a specific amount of reflex anal dilatation are seen in children with prior anal sexual abuse." Sealed Appendix 61a. He also noted that "there are studies indicating a significantly higher proportion of children anally abused have residual findings on exam than indicated by the prosecution expert," and described Lyons' testimony about the low percentage of findings in cases of anal sex abuse misleading because "[t]here are studies reporting a much higher percentage of children who have been abused anally and have positive exam findings such as anal venous pooling and a specific amount of reflex anal dilatation." Sealed Appendix 61a, 63a.

The Bomze Affidavit thus detailed multiple ways Lyons' testimony could have been challenged if an expert had been consulted or called. Particularly since the jury was so focused on Lyons' testimony in its deliberations, the 440.10 Motion thus tended to establish that there was a reasonable probability that consulting with an expert such as Dr. Bomze would have made a difference at Englert's trial.

Englert raised other issues in his affidavit which also tended to establish that his trial counsel was unprepared for trial, and his trial decisions were not strategic. According to Englert, at his first meeting with his attorney three days before trial, "trial counsel was handed over 100 pieces of paper to help in my defense, which barely if any was used in my defense." Confidential Appendix-303. Englert's allegation was corroborated by the record. On the morning of opening

statements, trial counsel stated "I would note that I made a lot of copies of records, and I did turn them over.... I don't know if they're relevant. I don't know if they are important. I don't know if they have any basis of anything, but just in fairness, I wanted to make sure that [the prosecutor] gets whatever I have." Confidential Appendix-957. The prosecution also described documents trial counsel tried to show a witness as "a mess," and trial counsel was unsuccessful in introducing a single document in Englert's defense. Confidential Appendix-1351; *Id.* at 482 (list of admitted exhibits showing no admitted defense exhibits.); *Id.* at 1344-54 (failed effort to confront N.L.'s mother with documents.) The record thus did not conclusively refute Englert's claim that his trial counsel was ineffective.

Despite the significant factual issues raised by Englert's submission, the trial court denied the motion without a hearing, issuing a written opinion (the "State Court Decision"). Sealed Appendix 1a-9a. Although the Bomze Affidavit tended to contradict Lyons' testimony that N.L.'s "story" was consistent with abuse, and that normal findings on N.L.'s physical exam were to be expected if the abuse N.L. alleged occurred, the trial court found that "nothing in it contradict[s] Lyons' key conclusions: that the victim's hymen, anal cavity, and vaginal cavity appeared 'normal.'" Sealed Appendix 5a. Without providing Englert the opportunity to further develop his claim at a hearing, the state court further found that "it cannot be said that Bomze's conclusions would have assisted the jury in any way." *Id.* Contrary to the corroborated claims in Englert's affidavit that his trial counsel met with him only once and did not use any documents Englert provided in his defense,[2] the trial court found that his trial attorney was "fully engaged,

[2] While the state court questioned the veracity of similarly-worded affidavits from Englert's relatives, they were all sworn and not "conclusively refuted," and all witnesses offered to testify at a hearing.

knowledgeable, and aggressive in his cross examination of the People's witnesses," and Englert received meaningful representation. Sealed Appendix 7a-8a.

Englert sought leave to appeal the State Court Decision, but leave to appeal was denied. Since the State Court Decision was the last substantive state court decision to address Englert's ineffective assistance of counsel claim, the Second Circuit considered the State Court Decision when determining whether Englert could establish an entitlement to relief. *See, e.g., Scrimo v. Lee*, 935 F.3d 103, 111 (2d Cir. 2019) (Because the New York Appellate Division denied leave to appeal the state trial court's decision, we review the trial court's decision as it is "'the last related state-court decision that ... provide[s] a relevant rationale.'") (*quoting Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)).

c. The Federal Post-Conviction Proceedings

On December 3, 2018, Englert filed a *pro se* petition in the United States District Court for the Western District of New York under 28 U.S.C. § 2254, alleging that he was denied effective assistance of counsel, among other errors. The district court denied the motion without a hearing (Appendix 35a-55a), and Englert timely appealed.

On March 15, 2023, the Second Circuit issued a Certificate of Appealability, permitting Englert to address: 1) whether the district court erred in denying Englert's claim that trial counsel was ineffective for not consulting or calling an expert medical witness; and 2) whether the district court erred in denying Englert's claim that counsel's cross examination of the state's medical expert was ineffective. Although Englert appeared pro se in the state post-conviction proceeding and in litigating the 2254 Motion in the federal district court, he was appointed counsel in the Second Circuit.

The Second Circuit denied Englert's appeal on August 15, 2024. Appendix 1a-34a. For the bulk of the decision, the Second Circuit addressed whether Englert met the standard for habeas relief under 28 U.S.C. § 2254(d)(1), which requires deference to state court decisions unless they are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," and not under § 2254(d)(2), which provides an independent means of overcoming AEDPA deference. *See, e.g., Brumfield,* 576 U.S. at 324 (noting that by showing the state court unreasonably denied a hearing, "Brumfield cleared AEDPA's procedural hurdles"). The Second Circuit held that Englert failed to show that the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in holding that Englert was not prejudiced by his attorney's failure to consult an expert or call a medical expert because defense counsel, among other things, elicited from the prosecution expert that the child's normal physical examination was consistent with a lack of abuse. Appendix 32a.

With regard to Englert's argument that the state court's denial of a hearing in and of itself was an unreasonable application of the facts to the law, the Second Circuit, relying on *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991), found that any procedural error by the state court in denying a hearing under state law is not cognizable on federal habeas review. Appendix 33a. Since the Second Circuit concluded that *Estelle*, 502 U.S. 62 precluded consideration of the reasonableness of the state court's denial of an evidentiary hearing, the Second Circuit did not engage in the necessary, threshold analysis of determining on the merits whether the state court's denial of a hearing was unreasonable within the meaning of § 2254(d)(2).

Additionally, in its deferential analysis under §2254(d)(1), the Second Circuit parsed the affidavits Englert submitted with his 440.10 Motion and found them insufficient to establish deficient performance or prejudice under *Strickland*, without accounting for the fact that New York

law only required Englert to present sworn allegations that tended to substantiate his claims to trigger a mandatory hearing, at which he could have further developed his claims. NY CPL § 440.30(4)(b). For instance, the Second Circuit diminished the probative value of the Bomze Affidavit, noting he "does not even opine that identifiable trauma is likely in this case." Appendix at 28a. But Bomze's opinion that "bleeding should have occurred" if the abuse occurred as alleged (Sealed Appendix 60a) at least tended to establish that N.L. would have sustained trauma from the alleged abuse, which Bomze could have expanded upon at a hearing.

The Second Circuit also dismissed the significance of the Bomze Affidavit with regard to anal abuse, noting "N.L. testified that Englert's penis penetrated her buttocks 'only a little bit,' undercutting the value of Dr. Bomze's opinion regarding injuries in this case." Appendix at 29a. But N.L. testified that Englert put his penis in "her anus, rectum, oral [orifice], however you want to put it" on multiple occasions and that it hurt. Confidential Appendix-1187. Moreover, Bomze reviewed not only N.L.'s trial testimony, but also interviews with N.L. on multiple dates, before concluding that "bleeding should have occurred" if the abuse occurred as she described. Sealed Appendix 60a. His expert opinion, based upon a review of extra-record materials, was not "conclusively refuted" by the record or contrary affidavits, and New York law makes clear that it should not have been disregarded without a hearing.

The Second Circuit further noted that consultation with an expert could have undermined trial counsel's ability to appeal to the juror's "common sense" that there should have been some injury. Appendix at 29a. But a dispute about the medical significance of the lack of physical evidence is not something the jury could be expected to resolve in the defense's favor based on "common sense," particularly when the prosecutor urged the jury to rely upon Lyons' expertise to dismiss the significance of the "normal findings" during N.L's physical examination. Sealed

Appendix 53a. It was therefore premature without a hearing to determine that "common sense" was an adequate substitute for expert consultation in Englert's case. *See United States v. Nolan*, 956 F.3d 71, 81 (2d Cir. 2020) (finding ineffective assistance in failing to retain an expert where "the eyewitness testimony was sufficiently unreliable in ways not readily apparent to a lay jury").

The Second Circuit thus put the cart before the horse, as it decided that Englert had not demonstrated ineffective assistance of counsel based upon the proof he presented at the motion stage, before addressing under the correct legal standard whether he should have been given an opportunity to further develop his claim at a hearing. *See Brumfield,* 576 U.S. at 321 (emphasizing that "Brumfield had not yet had the opportunity to develop the record"). The Second Circuit Decision, which applies deference under § 2254(d)(1) that would be unwarranted if Englert satisfied § 2254(d)(2) and fails to account for evidence that could have been developed at a hearing, thus does not relieve the need for the Supreme Court to resolve the circuit split created by the Second Circuit's misplaced reliance upon *Estelle*, 502 U.S. 62.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Opinion Conflicts with *Brumfield* and Precedents from Other Circuits

In *Brumfield,* 576 U.S. at 307, the Supreme Court held that a Louisiana state court's denial of a hearing under state law standards was an unreasonable determination of the facts within the meaning of 28 U.S.C. § 2254(d)(2), and thus the state court's decision was not entitled to AEDPA deference and the petitioner's claim could be reviewed and further developed through a hearing in federal court. Specifically, Louisiana developed a standard to determine when a competency hearing was required to determine whether a person was intellectually disabled, such that executing such person would violate the Eighth Amendment. Under Louisiana law, a competency hearing was required when an inmate put forward "sufficient evidence" to raise a "reasonable

ground" to believe he was intellectually disabled. *Id.* at 309. The Supreme Court concluded that the record before the state court "contained sufficient evidence to raise a question" as to whether Brumfield was intellectually disabled to require a hearing. *Id.* at 317. The Court emphasized that it was "critical to remember" that under state law, "Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing." *Id.* at 320. The Court concluded that denying Brumfield a hearing when the record raised such a doubt was unreasonable. *Id.* at 322.

New York law similarly provides clear standards for when a hearing must be granted to a petitioner alleging ineffective assistance of counsel. As noted above, under New York CPL § 440.30(1)(a), a motion to vacate a judgment under § 440.10 need only contain "sworn allegations" and documentary evidence "supporting or tending to support the allegations." Further, New York courts only have discretion to deny a motion without a hearing if: (a) the papers do not allege a ground constituting a legal basis for the motion; (b) the moving papers "do not contain sworn allegations substantiating or tending to substantiate all the essential facts,"; or (c)-(d) an essential factual allegation "is conclusively refuted by unquestionable documentary proof;" or is "contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence," and there is no reasonable possibility that such allegation is true. CPL § 440.30(4)(a)-(d). Since New York law clearly directs when a hearing is required, *Brumfield* establishes that a New York state court's denial of a hearing when the threshold for obtaining such a hearing is met can amount to an unreasonable determination of the facts presented under § 2254(d)(2).

Other circuits have also recognized that, under certain circumstances, a state court's denial of a hearing can amount to an unreasonable determination of the facts under § 2254(d)(2). *See, e.g., Velasquez v. Ndoh,* 824 F. App'x 498, 499 (9th Cir. 2020); *Smith v. Aldridge*, 904 F.3d 874, 882 (10th Cir. 2018). As the Ninth Circuit explained in a case similar to Englert's, where the petitioner was denied an evidentiary hearing by the state court despite presenting evidence of his trial counsel's serious errors:

> We will not defer to state court factual findings where the fact-finding process itself is defective. ... We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient, and not entitled to deference.... In light of the evidence that trial counsel [committed multiple errors], the state court's refusal to grant Petitioner an evidentiary hearing resulted in a decision based upon an unreasonable determination of the facts.

Velasquez, 824 F. App'x at 499 (citations and quotations omitted) (reversing and remanding for an evidentiary hearing).

Other courts within the Ninth, Tenth, and Fifth Circuits have reached the same conclusion with regard to ineffective assistance of counsel and other federal claims. *See, e.g., Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005) ("It is evident from the record that [defendant] has never received an opportunity to develop his claim of prosecutorial misconduct" because the state court never granted him an evidentiary hearing even though he raised this claim on habeas and "adequately proffered [it] to the state court"; "consequently, the state court decision summarily denying him habeas relief was based on an unreasonable determination of the facts."); *Hurles v. Ryan*, 752 F.3d 768, 790 (9th Cir. 2014) ("We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, 'the fact-finding process itself is deficient' and not entitled to deference."); *Smith*, 904 F.3d at 882 ("We ... have little trouble concluding the procedures a state court employs to make

factual determinations—here, deciding whether to order an evidentiary hearing—can affect the reasonableness of the court's subsequent factual determinations. And sometimes, declining to hold an evidentiary hearing may so affect, and indeed infect, a state court's fact-finding process that it renders the court's factual determinations unreasonable."); *Neal v. Vannoy*, No. CV 15-5390, 2021 WL 1212663, at *16 (E.D. La. Mar. 30, 2021) (concluding that "the state court's failure to hold a hearing rendered the state court's fact-finding process inadequate" and so it was not entitled to deference).

Without grappling with or even addressing *Brumfield*, which Englert cited in briefing, or the decisions of other circuits, the Second Circuit relied upon *Estelle*, 502 U.S. at 67–68, which pertains to inapposite freestanding due process claims, when concluding that "any procedural error by the state court in denying a hearing under state law is not cognizable on federal habeas review." Appendix at 33a. This holding cannot be reconciled with *Brumfield*, and it is in conflict with the Ninth and Tenth Circuit decisions cited above, which squarely recognize that a state court's unreasonable denial of an evidentiary hearing can overcome AEDPA deference. A writ of *certiorari* is warranted so that this Court can resolve the conflict between the Second Circuit's decision in *Englert* and the precedents of this Court and other circuits.

II. This Case Raises a Question of Exceptional Importance to Habeas Petitioners

This petition should further be granted because it raises a question of exceptional importance to habeas petitioners. In *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), this Court held that a federal court's review of the federal constitutional claims of a petitioner convicted in state court is "limited to the record that was before the state court that adjudicated the claim on the merits." Thus, in most cases, state courts provide the first and only opportunity for petitioners to develop their federal constitutional claims through a hearing. The Second Circuit Decision in

Englert effectively holds that, even when state courts deny petitioners hearings to which they are plainly entitled by state statute to develop their federal claims, those petitioners have no recourse, and no forum in which to develop their federal claims. A writ of certiorari is warranted to clarify that, under § 2254(d)(2)), a federal court need not defer to a state court's resolution of federal constitutional claims when a state court unreasonably denies a petitioner a hearing after the petitioner has met all of the requirements for obtaining such a hearing under state statute.

III. Conclusion

For the foregoing reasons, this petition should be granted.

Dated: March 24, 2025

Respectfully submitted,

GELBER & SANTILLO PLLC

/s/ Kristen M. Santillo
Kristen M. Santillo, Esq.
52 Duane Street, 7th Floor
New York, NY 10007
(212) 277-4743
ksantillo@gelbersantillo.com
Attorney for Petitioner-Appellant
Donald Englert