NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R.D. CALLIOUX,

Petitioner,

v.

TIM LANG, Secretary,
Washington State Department of Corrections,
KARIN ARNOLD, Superintendent,
Stafford Creek Corrections Center,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Petitioner Robert Callioux was found guilty by jury in Washington State of felony sex offenses, and sent to prison. At trial, Mr. Callioux's attorney failed to call the key defense witness whose testimony could have exonerated him. Asserting ineffective assistance of counsel, he appealed, exhausting his state appellate remedies before seeking habeas relief pursuant to 28 U.S.C. § 2254. The District Court denied his petition and denied a certificate of appealability (COA). Interpreting the Antiterrorism and Effective Death Penalty Act (AEDPA), the District Court deferred to the decision of the Washington State Court of Appeals, which had found no ineffective assistance of counsel. The Ninth Circuit denied Mr. Callioux's motion for a certificate of appealability and then denied his motion for rehearing, holding that Mr. Callioux did not make a substantial showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2). The questions presented are:

1. Whether the "independent judgment" required of federal courts under Article III, as reaffirmed in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), renders the deferential standard of review for AEDPA, 28 U.S.C. § 2254(d), unconstitutional.

2. Whether a Certificate of Appealability should issue where trial counsel failed to call a known exculpatory witness whose testimony would have established reasonable doubt, and whether such conduct constituted ineffective assistance of counsel under the Sixth Amendment and *Strickland v. Washington*?

PARTIES TO THE PROCEEDING

Robert Callioux, petitioner on review, was the appellant below.

Tim Lang, respondent on review, is the current Secretary of the Department of Corrections in Washington State. His predecessor was Cheryl Strange. Karin Arnold, respondent on review, is the Superintendent of Stafford Creek Corrections Center in Aberdeen, Washington, where Mr. Callioux is in custody. Her predecessor was Jason Bennett.

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I. PETITION FOR A WRIT OF CERTIORARI

Robert Callioux petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit and the United States District Court, Western District of Washington.

II. PROCEEDINGS BELOW

The Ninth Circuit's Order denying the motion for a certificate of appealability, filed June 9, 2025, is attached as Appendix 4. The Ninth Circuit's Order denying the motion for rehearing or rehearing en banc, filed on July 30, is attached as Appendix 3. Subsequently, the Ninth Circuit vacated the Order of July 30, and re-entered it on November 10, 2025, attached as Appendix 2. A second subsequent Order Denying Rehearing was entered by the Ninth Circuit on February 20, 2026, attached as Appendix 1.[1]

The petition for a writ of habeas corpus was filed

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[1] Petitioner never received notice of the Ninth Circuit Court's Order Denying Rehearing on July 30, 2025 and requested the Court vacate and re-enter its order, which the Ninth Circuit did on November 10, 2025, which started the 90 day period to seek certiorari. Supreme Court Rules 13.1, 13.3. *See generally, Parrish v. U.S.*, 605 U.S. 376 (2025). The Petitioner then timely filed this Petition with the Clerk on February 5, 2026. The Clerk returned the Petition as untimely, citing Rules 13.1, 29.2, and 30.1. Petitioner sought a clarifying order from the Ninth Circuit, which was granted on February 20, 2026 (Appendix 1). This Petition is timely filed in compliance with Rule 13.1; 13.3.

in the United States District Court, Western District of Washington. Judge Benjamin Settle denied the petition by Order on December 16, 2024, attached as Appendix 5.

Judgment entered in the District Court on that same date, attached as Appendix 6.

After Mr. Callioux's conviction in state court, he appealed to the Washington Court of Appeals, opinion affirming conviction attached as Appendix 8. Mr. Callioux filed a petition for review to the Washington Supreme Court, which denied his petition on February 7, 2024, which exhausted his state remedies as required by 28 U.S.C. § 2254(b)(1)(A), attached as Appendix 7.

III. JURISDICTION

The Ninth Circuit entered its Order denying rehearing on February 20, 2026. *See* Appendix 1. This petition is timely filed pursuant to Supreme Court Rules 13.1, 13.3. This Court has jurisdiction to review on a writ of certiorari under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 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 defence."

2. 28 U.S.C. § 2254(d)(1) provides:

"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 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."

V. STATEMENT OF THE CASE

A. Statement of Facts.

Robert Callioux was charged by the King County prosecutor's office with one count of First Degree Rape of a Child and two counts of First Degree Child Molestation against his then-minor daughter in King County Superior Court in Seattle, Washington, No. 21-1-02497-4. *State v. Callioux*, No. 84763-5 (Wash. Ct. App.)

The state's charges centered around events allegedly taking place in Mr. Callioux's home from 2008 to 2013. The complaining witness, M.Y., claimed that she was sexually abused by her father during her overnight stays with him. However, another witness, D.C., the niece of Mr. Callioux, told police in an initial interview that she was with M.Y. almost every other weekend whenever she stayed over at Mr. Callioux's

home, and she never witnessed any abuse or unusual behavior. The prosecutor, in its trial brief, told the judge that D.C.'s testimony could establish the reasonable doubt that would exculpate Mr. Callioux. To counter the impact of that anticipated testimony, the state sought leave to impeach D.C. with a series of misdemeanor theft convictions as well as pending theft charges, which the trial court granted without defense objection. Mr. Callioux's trial counsel interviewed D.C. and then repeatedly told the trial judge, even well into the jury trial, that he planned on calling D.C. to testify.

At trial, the state presented no physical evidence, no medical evidence, no expert opinion, no eyewitness testimony and no contemporaneous complaint evidence. Robert Callioux did not testify. Mr. Callioux's trial counsel did not call D.C. to testify, and gave no reason for the failure to call D.C. on the record. The attorney did call D.C.'s mother, Linda Callioux, who testified that her daughter D.C. was always over at Mr. Callioux's home whenever M.Y. stayed over. D.C.'s testimony would have been the only direct evidence countering M.Y.'s claims of abuse that occurred in the home of Robert Callioux.

Mr. Callioux was found guilty as charged. He was sentenced to a minimum term of 192 months imprisonment with a maximum term of life imprisonment. He had no prior criminal history.

An appeal to the Washington State Court of Appeals in Seattle was filed. Among other issues,

Callioux argued that his attorney was ineffective for the failure to call D.C. to testify. On October 2, 2023, that court affirmed his convictions, finding no ineffective assistance of counsel. Appendix 8. Mr. Callioux petitioned the Washington Supreme Court for review, which was denied on February 7, 2024. Appendix 7.

B. Procedural History in Federal Court.

On May 17, 2024, Mr. Callioux filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 with the Western District of Washington. On December 16, 2024, Judge Benjamin Settle entered an Order adopting the Report and Recommendation of Magistrate Judge Grady Leupold, and issued a Judgment denying the petition and denying a certificate of appealability. Appendix 5, 6.

On January 15, 2025, Mr. Callioux filed a notice of appeal and request for certificate of appealability with the Ninth Circuit. That court denied Mr. Callioux's request on June 9, 2025. Appendix 4. Mr. Callioux filed a motion for rehearing or rehearing en banc with the Ninth Circuit on June 20, 2025. The Ninth Circuit denied that motion on July 30, 2025. Appendix 3. On November 10, 2025, the Ninth Circuit vacated the order of July 30 and re-entered it. After the Clerk of this Court returned Mr. Callioux's petition sought to be filed on February 5, 2026 as untimely, the Ninth Circuit issued an order of February 20, 2026 denying rehearing and starting or re-

starting the 90 day clock for certiorari. Appendix 1.

Mr. Callioux's Petition to this Court now follows.

C. When Federal Questions Raised (Supreme Court Rule 14.1(g)(i)).

This Court decided *Loper Bright* on June 28, 2024. Mr. Callioux's habeas petition and memorandum in support was filed with the District Court prior to that date. His first opportunity to raise the federal question concerning the import of *Loper Bright* and AEDPA was in the Ninth Circuit, which was done in the appeal to that court on January 15, 2025. The Ninth Circuit issued a one-sentence order on June 9, 2025, stating: "The request for a certificate of appealability is denied because appellant has not made a 'substantial showing of the denial of a constitutional right.'" Appendix 4. The Ninth Circuit did not analyze Mr. Callioux's federal questions raised relating to the impact of *Loper Bright* on AEDPA.

On June 20, 2025, Mr. Callioux moved for rehearing with the Ninth Circuit, and again raised the federal questions at issue here, and again the Ninth Circuit summarily denied the motion by order on July 30, stating: "The petition (Docket Entry No. 5) for rehearing and rehearing en banc is construed as a motion for reconsideration and reconsideration en banc, and is denied." *See* Appendix 1-3.

VI. REASONS FOR GRANTING THE WRIT

A. This Case Presents an Issue of First Impression and National Importance: Article III, *Loper Bright* and the Future of AEDPA Deference.

This case provides a question of first impression for the Court and a critical vehicle to resolve the post-*Loper Bright* viability of AEDPA deference.

The bedrock of this Court's jurisprudence is that Article III of the Constitution "assigns to the Federal Judiciary the responsibility and power to adjudicate 'cases' and 'controversies,'" which includes the duty to "say what the law is." *Loper Bright*, 144 S. Ct. 2244, 2257. By overruling *Chevron v. NRDC*, 467 U.S. 837 (1984), this Court held that federal courts may not abdicate their duty to interpret federal law in favor of executive agencies. "[J]udges abdicate a large measure of... responsibility in favor of agency officials." *Loper Bright*, 144 S.Ct. at 2281 (Gorsuch, J. concurring).

The same constitutional logic applies with even greater force here. 28 U.S.C. § 2254(d) currently requires federal courts in habeas actions to defer to state court interpretations of the U.S. Constitution unless they are "unreasonable." *Williams v. Taylor*, 529 U.S. 362 (2000). "[A] state-court decision is an unreasonable application of clearly established precedent if it correctly identifies the governing legal rule... but applies that rule unreasonably to the facts of

a particular prisoner's case." *White v. Woodall*, 572 U.S. 415 (2014). But if federal courts are constitutionally barred from deferring to federal agencies on statutes, they must also be barred from deferring to state courts on the Sixth Amendment.

Loper Bright affirms what this Court has held for more than two centuries: that Article III requires federal judges to exercise their independent judgment to interpret federal law. That constitutional precept cannot coexist with a standard of review that requires federal courts to defer to state courts on matters of federal constitutional law, as held by *Williams*.

AEDPA deference cannot be reconciled with Article III or *Loper Bright*. Under AEDPA deference, which interprets 28 U.S.C. § 2254(d)(1), a federal habeas court "may not grant relief" unless the state court decision was unreasonable—even if the federal court "concludes in its independent judgment" that the state court decision wrongly applied federal law. *Williams*, 529 U.S. at 365. The standard is "highly deferential." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). It is not enough that a federal habeas court's independent review of a legal question leaves it with a "firm conviction" that the state court was wrong. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). Instead, the state court's decision must have been "so obviously wrong as to be beyond any possibility for fairminded disagreement." *Shinn v. Kayer*, 592 U.S. 111, 124 (2020) (per curiam) (quotation marks omitted). In other

words, even when a federal court knows a person's sentence violates the Constitution, it cannot act. This outcome cannot be squared with *Loper Bright*.

B. A Nascent Philosophical Conflict Amongst the Circuits Has Emerged.

The Seventh Circuit foreshadowed this problem almost thirty years ago, observing that if AEDPA deference were unconstitutional, it would mean that *Chevron* deference is also unconstitutional. *Lindh v. Murphy*, 96 F.3d 856, 868, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) ("This position would demolish numerous doctrines in the law... that no one (until now) has supposed pose constitutional difficulties."). As it turned out, *Loper Bright* overruled *Chevron* first, so now the converse is equally true: where *Chevron* deference is unconstitutional, so is AEDPA deference.

In the wake of *Loper Bright* there is "doubt" amongst the lower federal courts on the continuing vitality of AEDPA deference. *Cf. United States v. Chandler*, 114 F.4th 240, 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of rehearing en banc); *United States v. Boler*, 115 F.4th 316, 322 n.4 (4th Cir. 2024) (*Loper Bright* "calls into question the viability of *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] deference"); *United States v. Trumbull*, 114 F.4th 1114, 1126–27 (9th Cir. 2024) (Bea, J., concurring) (even where *Loper Bright*

did not "expressly overrule" a type of deference, courts "should hesitate to expand [that] deference"). But despite this doubt, AEDPA and *Williams* remain established law, and so an emerging conflict is brewing between the champions of past precedent (AEDPA under *Williams*) and the prophets of the future (*Loper Bright*).

In *Lopez v. Bondi*, No. 23-870 (Aug. 25, 2025), the Ninth Circuit denied rehearing en banc of a case where the panel denied Mr. Lopez's petition for review of a Board of Immigration Appeals decision. Judge Bumatay dissented, arguing that the Ninth Circuit erred in deferring to the BIA's decision.

Judge Bumatay, joined by two other judges, stated:

> "When the Supreme Court handed down *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), it announced a sea change in how federal courts must treat the Executive Branch's interpretation of the law. The instruction was clear: Courts must independently interpret statutes and must not defer to an executive agency's legal interpretations. *See Loper Bright*, 603 U.S. at 412–13. In other words, the days of our courts' binding deference to agency interpretations under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), are gone. *Chevron* is dead and buried and the

> separation of powers is restored. Now our duty as judges is to 'use every tool at [our] disposal to determine the best reading of the statute.' *Loper Bright*, 603 U.S. at 400."
>
> *Lopez v. Bondi*, dissenting slip. op. at 3-4.

Likewise, the Sixth Circuit has found itself grappling with the deference framework in light of *Loper Bright*. In *Niblock v. University of Kentucky*, No. 24-6060 (January 20, 2026), the Sixth Circuit decided a Title IX women's sports case on narrow factual grounds, but included a discussion by Chief Judge Sutton about the current state of federal court deference on interpretations of federal law:

> "We no longer defer to agency interpretations of the statutes they administer. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (overturning *Chevron U.S.A. Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). We now treat all laws alike, 'independently interpret[ing] the statute and effectuat[ing] the will of Congress subject to constitutional limits,' without abdicating that responsibility to executive agencies. See *id.* at 395; *Pickens v. Hamilton-Ryker IT Sols., LLC*, 133 F.4th 575, 587 (6th Cir. 2025). ... And we no longer lightly defer to agency interpretations of their own

> regulations. *See Kisor v. Wilkie*, 588 U.S. 558, 573–80 (2019) (narrowing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)); *id.* at 632 (Kavanaugh, J., concurring in the judgment) (*Kisor* "clarif[ies] and narrow[s]" *Auer*) (quotation omitted). ... Knock out *Chevron*, and the scope of *Auer* deference narrows considerably, if indeed it remains meaningful at all."

Niblock, 24-6060, slip. op. at 17 (Sutton, C.J., concurring).

In *Lesko v. U.S.*, No. 2023-1823 (December 12, 2025), the Federal Circuit considered a class-action lawsuit concerning federal employee overtime pay. But the decision provides a roadmap for how this Court might dismantle AEDPA deference using *Loper Bright*.

The issue in *Lesko* involved a nurse practitioner who was denied overtime because it wasn't "authorized in writing," as required by a federal Office of Personnel Management (OPM) regulation. The rule merely said overtime must be "officially ordered or approved."

For decades, courts deferred to OPM's "writing" requirement under *Chevron*. But the *Lesko* court *sua sponte* accepted en banc review to decide if it should stop deferring to OPM. While the court ultimately upheld the regulation, it did so by exercising "independent judgment"—performing its own analysis of

the rule rather than simply deferring to the agency's "reasonable" interpretation. If *Lesko* (and *Loper Bright*) stands for the proposition that a reviewing federal court must find the "best and correct" reading of a labor rule, why should it be allowed to abdicate its duty by accepting a "wrong but reasonable" state court reading of the Constitution under AEDPA?

The future apart from AEDPA deference was foreseen by Justice Stevens in his concurrence in *Williams*. Joined by three justices, Stevens noted that the word "deference" does not actually appear in 28 U.S.C. § 2254. Justice Stevens concluded that "[w]hatever 'deference' Congress had in mind . . . it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error." *Williams*, 529 U.S. at 387. The purposes of AEDPA, in part, are to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Id.* at 386. Justice Stevens's approach is simple: to remain faithful to Article III, federal courts must "attend to every state-court judgment with utmost care." *Id.* at 389. However, a federal judge's judgment remains supreme: "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody... violates the Constitution, that independent judgment should prevail." *Id.*

Under this clear interpretation of § 2254(d), the

words "contrary to" are not read out of the text of the statute. In addition, the words "unreasonable application" could be interpreted correctly, by requiring a federal court to affirmatively evaluate the state court's application of the law to the facts—its reasoning.

This Court can help the lower courts uphold the mandate of "independent judgment" for Article III courts that was reaffirmed in *Loper Bright*. The "deference era" is now over; Petitioner urges this Court to complete the transition back to the independence of the federal courts by granting the Petition and considering AEDPA in light of *Loper Bright*. It is the "province and duty of the judicial department to say what the law is," whether confronted by the interpretation of a federal agency or a state court. *Loper Bright*, 144 S.Ct. at 2283 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).[2]

C. The Lower Courts Should Have Granted a COA Where Petitioner Received Ineffective Assistance of Counsel Due to His Trial Counsel's Failure to Call the Key Defense Witness to Testify

The decision whether to grant a COA requires

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[2] This Court recently decided *Klein v. Martin*, 607 U.S. ___ (January 26, 2026), an AEDPA case from a prisoner, and held, without any discussion of the implications of *Loper Bright*, that the Fourth Circuit did not give proper deference to the decision of the highest state court.

nothing more than debatability. In order to obtain a COA, the petitioner or movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

When a district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," this Court has held that "a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

This standard is satisfied "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Despite this modest standard, the District Court below denied Mr. Callioux's habeas petition and refused to issue a COA. The Ninth Circuit affirmed the denial without opinion or analysis. But in doing so, the lower federal courts failed to follow clear precedent from this Court demonstrating that a trial lawyer's failure to investigate and call exculpatory witnesses to his client's defense constitutes ineffective assistance of counsel

under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a Sixth Amendment violation, *Strickland* requires both deficient performance and prejudice, and asks the basic question: but for counsel's unprofessional errors, is there an objectively reasonable probability that the result of the proceeding would be different? 466 U.S. at 694.

In the present case, both Mr. Callioux's trial counsel and counsel for the prosecution knew that D.C.'s testimony could establish reasonable doubt for Mr. Callioux. Mr. Callioux's defense counsel repeatedly told the trial court that he planned on calling D.C. to the witness stand. Trial counsel also called D.C.'s mother to "corroborate" the anticipated testimony of D.C., which *he never presented to the jury.*

A lawyer who abandons, without explanation, the only witness who could potentially supply reasonable doubt to the jury, is not making a tactical or strategic decision on his client's behalf, but rather a professional lapse in judgment.

The Ninth Circuit declined to follow its own precedent in denying a COA for Mr. Callioux. In *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999), Hart was charged and convicted of molesting his daughter in the State of California. His trial involved a virtually identical fact-pattern to Mr. Callioux's case where an uncorroborated complaining witness alleged sexual misconduct against her father over a lengthy period of time on weekends in

a single location when there were never any other people present. 174 F.3d at 1068. The difference in the two cases is that in *Hart* "the key defense witness" testified in front of the jury, at 1073, that she was present on each of the alleged criminal occasions but there was no corroboration of her presence due to ineffective counsel, whereas in Mr. Callioux's case the key defense witness did *not* testify in front of the jury due to ineffective counsel but corroboration was adduced of the witness' anticipated testimony that she was present on each of the alleged criminal occasions. *Hart* is the mirror image of *Callioux*.

In finding ineffective assistance of counsel under these circumstances, the Ninth Circuit stated:

> "A lawyer who fails adequately to investigate, and to introduce into evidence, records that demonstrate his client's factual innocence, or that raise sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. [The witness's] evidence, if believed by the jury, would have demonstrated the truthfulness of her testimony and established that... no molestation occurred during the time period set forth in the information – or at the least that the molestation as charged in the information had not been proved beyond a reasonable doubt. Rather than investigating the relevance of the records, and introducing them to corroborate [the witness's testimony], [the

> attorney] totally ignored her pleas. Such conduct is 'outside the wide range of professionally competent assistance.' *Strickland,* at 690 ...
>
> [I]t is simply inconceivable that [the attorney's] decision not to introduce documentary evidence fully corroborating [witness's] testimony was a strategic one."
> *Hart,* 174 F.3d at 1070-71 (citing *Strickland).*

This Court has long held that "strategic choices... are reasonable only to the extent that reasonable professional judgments support the limitations... ." *Wiggins v. Smith*, 539 U.S. 510, 512 (2003)(quoting *Strickland*, 466 U.S. at 690-691).

In *Wiggins*, this Court reversed the murder conviction of a man sentenced to death. At the sentencing hearing, his lawyers failed to present evidence that the client's childhood and upbringing were difficult, despite promising the jury that it would receive this information. Instead, on appeal, the lawyers claimed that it was a tactical decision not to present this evidence, and instead focus on the theory that their client was not the direct killer involved in the crime. This Court was not moved by the argument, found trial counsel was ineffective, and reversed. 539 U.S. at 522.

While it is true that this Court has stated that courts must "indulge a strong presumption" that counsel's conduct falls within the range of reasonable

professional assistance, *Strickland*, 466 U.S. at 689-690, nonetheless an unexplained failure to present key evidence is the very definition of deficient performance.

In *Wiggins*, this Court found that the lawyers had failed to properly conduct an investigation into their client's past history, so the lawyers really did not even understand what evidence might have been presented.

Petitioner's case is stronger than *Wiggins*, because here, Mr. Callioux's trial attorney knew (as did the state) how the key witness would testify, so there was no mystery. And unlike *Wiggins*, where the lawyers there had at least a plausible alternative "strategy" or reason for the failure to present the mitigation evidence, in the present case, Mr. Callioux's defense rose or fell on the testimony of the only percipient witness to the event, D.C. The District Court below's "deference" to the Washington Court of Appeals involved speculation by that court as to why a lawyer wouldn't have called the key witness. Perhaps "D.C. would not present as credible" or D.C.'s memory might have been poor. Appendix 8, at 27A. The notion that D.C., the key witness to a defense victory, was judged completely worthless by trial counsel because she *might* not present absolutely bulletproof testimony, is not a "reasonabl[e] determin[ation]" by trial counsel, the state court of appeals, nor any lower federal court using AEDPA deference. All witness testimony is subject to impeachment. Regardless of how much the witness could be impeached, it can never be a "tactical" or

"strategic" decision for a trial counsel to throw away his only realistic chance of winning by refusing to call the key defense witness, whose testimony would cause reasonable doubt, or at the least, "a reasonable probability that... the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. Mr. Callioux may have won or lost the case if D.C. was called, but without her, he had essentially no chance of winning. A strategic decision by trial counsel that all but guarantees a verdict against his client is not entitled to a presumption of reasonableness. Such a move is a fatal blunder, not a strategic maneuver.

This Court reaffirmed the obligation of a lawyer to follow-through with a complete presentation of evidence in *Sears v. Upton*, 561 U.S. 945 (2010). Similarly to the *Wiggins* case, in *Sears* the defendant's lawyer failed to investigate and present all the available mitigation evidence. The lawyer, like the ones in *Wiggins*, did present some evidence, however, just as in the present case. But this Court, relying on *Strickland*, specifically held that just presenting some evidence does not shield a lawyer from his duty under the Constitution:

> "We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland*

> inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below."
>
> *Sears*, 561 U.S. at 955 (emphasis Court's).

Thus, there is no escaping a claim of ineffective assistance here by arguing that Mr. Callioux's trial counsel presented some evidence and that was good enough. In fact, the case is analogous to the line of cases holding that a trial lawyer's "broken promise" or "logic gap" to the jury can be grounds for ineffective assistance of counsel. Here, the expectation of D.C.'s testimony was clearly laid by Mr. Callioux's lawyer (and promised to the judge) through the calling of witnesses whose testimony would be relevant only when considered *in conjunction* with the testimony of D.C. (the testimony of Linda Callioux, for example, stating that D.C. was always over with M.Y. during her visits). Calling a "secondary" witness to testify about a "primary" witness's presence (without ever calling the "primary" witness) is precisely the kind of incomplete defense this Court found unacceptable in *Sears*. By mentioning D.C. through others, trial counsel "primed" the jury to want to hear her; by not calling her, he invited the jury to wonder what she or the defense was hiding.

While this Court has never directly reviewed a case in the context of a "broken promise," lower federal courts have repeatedly seen such cases and have found that conduct to be "indefensible." *See, e.g., Ouber v.*

Guarino, 293 F.3d 19, 27 (1st Cir. 2002)(promise that defendant would testify who then refused held ineffective assistance); *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988) (promise to call doctor witnesses with no follow-through held ineffective assistance); *English v. Romanowski*, 602 F.3d 714 (6th Cir. 2010)(counsel promised to call witness to testify but failed to call witness, held ineffective assistance).

More closely related to the present case is the case of *Grant v. Lockett*, 709 F.3d 224 (3rd Cir. 2013). In *Grant*, the Third Circuit granted habeas relief for a man convicted of murder, where at trial the defense lawyer called several witnesses who gave testimony that alluded to a specific version of events, but that lawyer failed to call two witnesses who could have provided direct, exculpatory testimony that the defendant was not the killer.

While the *Grant* court found ineffective assistance on an unrelated issue, the court took time to explain why the failure to call these witnesses supported the conclusion that trial counsel was ineffective:

> "Nonetheless, we do note that [the two witness] affidavits add to the already significant evidence undermining the verdict against Grant. They also add support to our conclusion that counsel's deficient performance... prejudiced Grant's defense.

> We are particularly troubled by the District Court's conclusion that Grant was not prejudiced by trial counsel's failure to call [the witnesses] because their testimony would have been "cumulative" since other witnesses already testified that Grant was not the shooter. [The uncalled witness] affidavits do not provide cumulative testimony on a collateral issue. Rather, the affidavits present eyewitness accounts of the identity of the shooter. It is hard to understand how having a third eyewitness testify that the defendant was not the shooter would have been "cumulative" and therefore inconsequential, as the District Court concludes." *Grant*, 709 F.3d at 239.

In *Hinton v. Alabama*, 571 U.S. 263 (2014), this Court concluded that Mr. Hinton's trial attorney was constitutionally ineffective where he failed to call a ballistics expert to testify at trial. The lawyer knew he needed an expert, and he actually hired an expert, but later came to believe that the expert was unqualified to assist. The lawyer's performance was deficient, however, because the lawyer failed to retain another expert, claiming that they did not know they could do so, even where state law permitted seeking additional funding to pay for a second expert. This Court focused on the lawyer's inconsistency. "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*." *Hinton*, 571 U.S. at 274. Like the present case, Mr. Callioux's trial lawyer knew that D.C.'s testimony would be valuable - the witness was interviewed and was mentioned to the trial judge as an endorsed defense witness. But just like in *Hinton*, when the time came to actually make use of the witness, trial counsel failed to do so. Such failure was, like *Hinton*, done with counsel's full knowledge. In *Hinton*, counsel had an understanding of the importance of an expert; here, trial counsel had an understanding of the importance of D.C., or else he would not have repeatedly told the trial court that he was planning on calling D.C. to testify.

The District Court's decision to provide "double deference" to a silent record—inventing tactical reasons for counsel's failure that trial counsel himself never offered—is a departure from the "debatable" or "modest standard" required for a COA. *Lambright v. Stewart*, 220 F.3d 1022, 1024-1025 (9th Cir. 2000). Reasonable jurists could, at the very least, debate whether the failure to call a key exculpatory witness constitutes ineffective assistance under *Strickland*.

This Court should therefore review the district court's denial of the COA in light of the effect of *Loper Bright*, and "carefully weigh[] all the reasons for

accepting [the] state court's judgment," but ultimately decide for itself whether Mr. Callioux's custody violates the Constitution. *Williams*, 529 U.S. at 389 (2000) (Stevens, J., concurring).

VII. CONCLUSION AND PRAYER FOR RELIEF

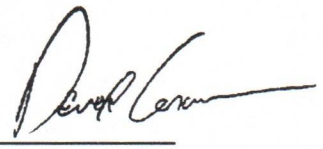
The petition for a writ of certiorari should be granted and the case heard on the merits. The lower federal courts need guidance about how to apply this Court's holding in *Loper Bright* to habeas cases using AEDPA.

This Court should grant certiorari to review the Ninth Circuit's order denying rehearing and the District Court's judgment refusing to grant both the habeas petition and the certificate of appealability, hold that Article III demands the independence of the federal judiciary in considering habeas petitions brought under AEDPA, and reverse the lower courts in this matter, or grant such other relief as justice requires.

This Court should also grant relief from Mr. Callioux's conviction where his trial lawyer was constitutionally ineffective at trial through his failure to call the key defense witness. Under *Strickland*, such failure was not a strategic decision; it was a major error that foreclosed any realistic possibility of Mr. Callioux's acquittal. The state court's speculation as to why a defense lawyer might deliberately take away his client's only prospect for exoneration is as unpersuasive as it is

unreasonable, and the lower courts erred in deferring to that speculation.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

NO. _____

ROBERT R.D. CALLIOUX,
Petitioner,

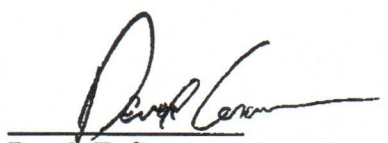
v.

TIM LANG, Secretary,
Washington State Department of
Corrections, and
KARIN ARNOLD, Superintendent,
Stafford Creek Corrections Center,
Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 5,312 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2026.



Derek T. Conom
Counsel of Record

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 25-335
D.C. NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: February 20, 2026

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

The petition (Docket Entry No. 5) for rehearing en banc is construed as a motion for reconsideration and reconsideration en banc, and is denied. *See* 9th Cir.R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 25-335
D.C. NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: November 10, 2025

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

Appellant's correspondence (Docket Entry No. 7) is construed as a motion to vacate and reenter this court's July 30, 2025, order, and is granted.

The clerk will vacate and reenter the July 30, 2025 order. No further filings will be entertained in this closed case.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 25-335
D.C. NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: July 30, 2025

ORDER

Before: CALLAHAN and FORREST, Circuit Judges.

The petition (Docket Entry No. 5) for rehearing and rehearing en banc is construed as a motion for reconsideration and reconsideration en banc, and is denied. *See* 9th Cir.R. 27-10; 9th Cir.Gen.Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 25-335
D.C. NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: June 9, 2025

ORDER

Before TASHIMA and LEE, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

APPENDIX 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: December 16, 2024

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS MATTER comes before the Court on United States Magistrate Judge Grady J. Leupold's Report and Recommendation (R&R), recommending the Court deny petitioner Robert R. D. Callioux's 28 U.S.C. § 2254 writ of habeas

corpus and deny a certificate of appealability. Dkt. 14. Callioux objects to the R&R, alleging Judge Leupold did not "conduct a fair or complete *Strickland* analysis" of his ineffective assistance of counsel claim. Dkt. 15.

The R&R is adopted because Callioux cannot establish the state court'sdetermination of his ineffective assistance of counsel claim was unreasonable.

I. BACKGROUND

In 2022, Callioux was convicted in King County superior court of one count of first degree rape of a child and two counts of first degree child molestation for abusing his daughter, M.R.Y. He appealed, arguing in part that his defense counsel was ineffective for failing to call a witness, D.C., to testify at trial. Dkt. 11-1, Exhibit 2.

The state court of appeals affirmed his conviction in October 2023. The court held that Callioux had not rebutted the presumption that his counsel's decision not to call D.C. as a witness was reasonable. Dkt. 11-1 at 25. The court declined to presume deficient performance from the record, which was silent on defense counsel's rationale. There were

"conceivable tactical reasons to explain counsel's decision," including the possibility that D.C.'s memory was not credible or that calling D.C. would undermine testimony from other defense witnesses. *Id.* Callioux appealed the decision, and the state supreme court denied review. *Id.* at 157.

In May 2024, Callioux filed a habeas petition under 28 U.S.C. § 2254. Dkt. 1. His sole claim remains that his trial counsel provided him with ineffective assistance because counsel failed to have D.C. testify. Judge Leupold recommended the petition be denied because the "state courts' adjudication of [Callioux's claim] . . . was not contrary to, nor an unreasonable application of, clearly established federal law." Dkt. 14 at 1.

Callioux objects to the R&R, arguing that the court of appeals ignored the importance of D.C.'s testimony in light of the "weakness of the state's case." Dkt. 15 at 2-3. He asserts the state admitted in its trial briefs that D.C.'s testimony would have been dispositive because it could establish reasonable

doubt as to his guilt.[1] *Id.* at 3-4. He points to a February 2024 declaration by D.C. in which she states would have testified that she "was always present" on M.R.Y's overnight weekend visits with Callioux and "never observed any sexual misconduct or any other improper or criminal conduct." Dkt. 3-1 at 260–61. He contends it is "inconceivable that any competent defense counsel in such circumstances" would make the strategic decision to not call the "key defense witness" to the stand. Dkt. 15 at 7.

II. DISCUSSION

A district judge must determine de novo any part of a magistrate judge's proposed disposition to which a party has properly objected. It must modify or set aside any portion of the order that is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a). The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

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[1] In its trial brief, the State sought to introduce evidence of D.C.'s past theft convictions. Dkt. 3-1 at 179. The State wrote, "[D.C.] should not be allowed to testify . . . without the jury knowing that within the last two years, [she] . . . committed crimes of dishonesty" because she could "potentially caus[e] reasonable doubt in the jury." *Id.*

A proper objection requires "specific written objections to the proposed findings and recommendations" in the R&R. Fed. R. Civ. P. 72(b)(2). In providing for a de novo determination, Congress "intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations." *United States v. Raddatz*, 447 U.S. 667, 676 (1980) (internal quotation marks omitted). Thus, the district court is required only to indicate that it reviewed the record de novo and found no merit to the objections in order to summarily adopt the R&R's analysis. *United States v. Ramos*, 65 F.4th 427, 433 (9th Cir. 2023). The district court is not obligated to "expressly address" every objection. *Id.* at 437.

A federal court may not grant habeas relief to a prisoner on a claim that was adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(1)–(2).
Strickland v. Washington governs ineffective assistance of counsel claims. 466

U.S. 668 (1984). First, the defendant must show counsel's performance was deficient with "errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. The defendant must also establish the "deficient performance prejudiced the defense" so as to "deprive the defendant of a fair trial." *Id.*

Courts assess counsel's performance per "an objective standard of reasonableness" based on the "facts of the particular case, viewed as of the time of counsel's conduct." *Id.*at 690. The standard is "highly deferential," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Prejudice exists if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 984.

Federal courts must be "'doubly deferential'" to defense counsel and the state court when addressing an ineffective assistance of counsel claim in a habeas petition. *Dunn v. Reeves*, 594 U.S. 731, 739 (2021) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's

performance fell below *Strickland's* standard." *Harrington v. Richter*, 563 U.S. 86, 101 (2011). The defendant bears the heavy burden of rebutting the strong presumption of reasonableness. *Dunn*, 584 U.S. at 739. Relief is warranted "only if *every* 'fairminded juris[t]' would agree that *every* reasonable lawyer would have made a different decision." *Id.* at 740 (quoting *Richter*, 562 U.S. at 101).

Callioux does not establish that state court of appeals was unreasonable in its analysis of his counsel's performance. Applying *Strickland*, the court presumed counsel's reasonableness based on several "conceivable tactical reasons" for the decision, despite the record's silence on the issue. Dkt. 11-1 at 25. Callioux asserts this is "pure speculation," rather than objective analysis. Dkt. 15 at 7. He argues it is "'inconceivable' that any competent defense counsel would fail to both call the single available percipient witness *and* introduce available evidence corroborating the personal presence of that witness at the relevant times. Dkt. 15 at 5 (citing *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999)).

The certification of probable cause states that D.C. told the Kirkland Police Department "she would pretty much spend the night with MRY *almost every other weekend*" at Callioux's house. Dkt. 3-1 at 229 (emphasis added). As the court of appeals noted,

this inconclusive statement supports the possibility that "counsel reasonably determined that D.C. would not present as credible." Dkt. 11-1 at 25 n.2. The fact that the State wrote in its trial brief that D.C. could "potentially caus[e] reasonable doubt in the jury" does not rebut the presumption that defense counsel's decision not to call D.C. as a witness was a reasonable and professional one. Dkt. 3-1- at 179; *see Strickland*, 466 U.S. at 690.

Callioux now relies on D.C.'s declaration to allege D.C. would have testified that she "was always present with [M.R.Y] during the overnight weekend sleepovers." Dkt. 3-1 at 261. But the declaration is not part of the record; it was filed in February 2024, well after the court of appeals decision. The Court cannot consider D.C.'s late declaration. *See* 28 U.S.C. § 2254(d)(2)(the court considers the state court's decision in the "light of the evidence presented in the State court proceeding"). The Court concludes the state court was reasonable in rejecting Callioux's ineffective assistance of counsel claim.

The R&R, Dkt. 14, is **ADOPTED**. Callioux's objections to the R&R, Dkt. 15, are **OVERRULED**, and his § 2254 petition, Dkt. 1, is **DENIED**. The Court declines to issue a certificate of appealability because Callioux has not made a substantial showing of the

denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

The Clerk shall enter **JUDGMENT** and close this case.

IT IS SO ORDERED.

Dated this 16th day of December, 2024.

s/ Benjamin H. Settle
United States District Judge

APPENDIX 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. 2:24-CV-00687-BHS

ROBERT R.D. CALLIOUX,

v.

CHERYL STRANGE, Secretary, Washington State Department of Corrections and JASON BENNETT, Superintendent, Stafford Creek Corrections Center.

Dated: December 16, 2024

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT:

The Report and Recommendation is adopted and approved. The federal habeas petition pursuant to 28 U.S.C. § 2254 and is DENIED. A certificate of appealability shall not issue in this case.
Dated this 16th day of December, 2024.

s/ Ravi Subramanian
Clerk
s/ Carrie Smith
Deputy Clerk

APPENDIX 7

THE SUPREME COURT OF WASHINGTON

No. 102487-8
Court of Appeals No. 84763-5-I

STATE OF WASHINGTON,
v.
ROBERT R.D. CALLIOUX.

Dated: February 7, 2024

ORDER

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its February 6, 2024, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 7th day of February, 2024.

s/ Gonzalez, C.J.
Chief Justice

APPENDIX 8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 84763-5-I
Division One
STATE OF WASHINGTON,
v.
ROBERT R.D. CALLIOUX.

Dated: October 2, 2023

UNPUBLISHED OPINION

SMITH, C.J. — Robert Callioux appeals his convictions of one count of rape of a child in the first degree and two counts of child molestation in the first degree for abusing his daughter, M.R.Y. He argues the trial court committed evidentiary error and deprived him of his right to present a defense by ruling *in limine* that the State could cross-examine one of Callioux's potential witnesses, D.C., about specific instances of dishonesty if she were to testify. He also argues that his trial counsel was ineffective for not calling D.C. to testify.

Because D.C. did not testify, Callioux's claim of evidentiary error is not reviewable. Also, Callioux fails to establish that the trial court's *in limine* ruling

deprived him of his right to present his defense or that his trial counsel's performance was deficient. Accordingly, we affirm.

FACTS

In July 2019, M.R.Y., who was then 16 years old, disclosed that her father, Callioux, had sexually abused her when she was a child. M.R.Y. later testified that the abuse began when she was four or five years old and stopped when she was about nine-and-a-half years old. M.R.Y., who resided primarily with her mother, recalled that the abuse would occur at night in Callioux's bedroom during M.R.Y.'s alternating weekend visitations to Callioux's apartment.

The State charged Callioux with one count of rape of a child in the first degree and two counts of child molestation in the first degree. It later moved *in limine* to cross-examine one of Callioux's potential witnesses, D.C., about specific instances of dishonesty, which were the subject of pending charges for theft, false statements, and false reporting, if D.C. were to testify. According to the State's motion, D.C., who is M.R.Y.'s cousin and Callioux's niece, "purport[ed] to have been at [Callioux's] home *every weekend* [M.R.Y.] was there" and "state[d] that because she was present every weekend [M.R.Y.] was present that [Callioux] could not possibly have sexually abused [M.R.Y.]" It asserted that D.C.'s credibility was "important and at issue," that the State should be allowed to cross-

examine her "about her instances of dishonesty pending currently in the courts," and that those instances were "highly relevant . . . and more probative than prejudicial."

Callioux objected, arguing through counsel that "on pending cases that have not been adjudicated, we would suggest that they're not appropriate for specific instances and use by the State." The trial court disagreed and granted the State's motion, stating, "I think these are examples of instances of evidence that would fall under [ER] 608."

At trial, Callioux did not call D.C. to testify. M.R.Y. testified that although her cousins would come over to Callioux's apartment occasionally during the years that he was abusing her, they did not come over every weekend that she visited Callioux. Meanwhile, one of Callioux's sisters testified that she could verify that M.R.Y. was never alone with Callioux during any of the times M.R.Y. visited him. Another of his sisters—D.C.'s mother—testified that D.C. was with M.R.Y. every weekend, including overnights, that M.R.Y. visited Callioux.

The jury found Callioux guilty as charged. Callioux appeals.

ANALYSIS

ER 608 Ruling

ER 608 provides, as relevant here, that specific instances of a witness's conduct "may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." ER 608(b). ER 608 is subject to the overriding protections of ER 403, which gives the trial court discretion to exclude evidence if its probative value is outweighed by the danger of unfair prejudice. State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). Callioux contends that the the trial court abused its discretion by ruling that if D.C. testified, the State could cross-examine her about her pending criminal charges for theft, false statements, and false reporting. We hold that because D.C. did not testify, the trial court's ruling is not reviewable. State v. Kimp, 87 Wn. App. 281, 941 P.2d 714 (1997), is instructive. In Kimp, the State moved under ER 608(b) to cross-examine a witness—there, the defendant—about her alleged unauthorized use of a credit card if she testified. 87 Wn. App. at 282. The trial court ruled *in limine* that the prosecutor could question the defendant about whether she told the police about the incident, wherein she allegedly took her supervisor's credit card without permission and used it in several stores, signing her supervisor's name. Id. The defendant stated that she was not going to testify because of the trial court's ruling. Id.

She also made an offer of proof claiming that she would have testified, with regard to the assaults that were the subject of her trial, that she did not hit one of the victims and that she struck the other in self defense. Id. at 282-83.

The defendant was convicted of assault, and on appeal, she challenged the trial court's ER 608 ruling. Id. at 283. We held that because the defendant did not testify, the trial court's ruling was not reviewable. Id. at 284-85. We observed that, as noted above, "in order to admit ER 608 evidence, the court must balance the probative value of the conduct against the danger of undue prejudice." Id. at 284. And "[t]o evaluate the danger of undue prejudice posed by prior misconduct evidence, the trial court needs to consider the substance of the witness' testimony." Id. "Similarly, to evaluate the trial court's decision, the appellate court needs to review both the witness' testimony and the impeaching evidence," and "there cannot be any meaningful review of a[n] ER 608(b) claim unless the witness has testified." Id. We noted, additionally, that "the failure of the defendant to testify renders any harm flowing from the ruling totally speculative because it would be uncertain whether the impeaching evidence would even be offered." Id. (citing Luce v. United States, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)).

Here, as in Kimp, the fact that D.C. did not testify renders any harm flowing from the trial court's

in limine ruling entirely speculative. Without D.C.'s testimony, we cannot know how her cross-examination would have played out. For example, and as the parties' disagreement on this point highlights, the record is unclear about whether the State intended to ask D.C. whether she had been charged with certain offenses, as distinct from inquiring about the underlying conduct. To this end, the State suggested below that the precise nature of its cross-examination could be discussed at a later time "in terms of what's appropriate and doesn't make it more prejudicial than necessary." It is entirely possible that, depending on the State's actual line of questioning, Callioux would have renewed his objection and the trial court would have revised its ruling or directed the State to ask only specific questions after balancing the probative value of D.C.'s alleged conduct against the potential for unfair prejudice. Cf. Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 466, 232 P.3d 591 (2010) (observing that motions *in limine* "often are tentative and subject to change at trial"). It is also possible that the State would elect not to question D.C. about her pending charges and instead rely solely on two prior theft convictions, which Callioux agreed were admissible, to call D.C.'s credibility into question. As in Kimp, we cannot meaningfully evaluate the trial court's ruling in view of D.C.'s actual testimony. Thus, as in Kimp, we do not review Callioux's claim of evidentiary error. Callioux contends Kimp was wrongly decided because it failed to consider State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991). Ray involved a trial court

ruling excluding exculpatory evidence. 116 Wn.2d at 543. Under ER 103(a)(2), to preserve error predicated on such a ruling, "the substance of the evidence [must be] made known to the court by offer or [be] apparent from the context within which questions were asked." The Ray court held that although the defendant did not make a formal offer of proof about the witness's anticipated testimony, no formal offer was necessary "because the colloquy of the parties and the court, on the record, revealed the substance of the proposed testimony." 116 Wn.2d at 539. Callioux argues that similarly, here, D.C.'s testimony that she was at Callioux's home each weekend that M.R.Y. was there "was known to both parties, and to the trial court to a degree sufficient to allow review."

But Callioux focuses on the wrong aspect of D.C.'s would-be testimony. The trial court here did not, as the trial court did in Ray, exclude any of D.C.'s anticipated *exculpatory* testimony. Instead, it ruled that if Callioux were to elicit that testimony, the State would be allowed to cross-examine D.C. about her character for truthfulness by asking her about specific instances of conduct. It is the unknown nature of that cross-examination—not of D.C.'s testimony about her presence at Callioux's home—that makes Callioux's claim of error unreviewable. Ray does not control.[1]

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[1] In his reply brief, Callioux urges us to adopt the reasoning of a North Carolina case, State v. Lamb, wherein the trial court denied the defendant's motion in a murder trial to prevent the prosecutor from questioning her about her alleged involvement in

Right to Present a Defense

Callioux also argues that the trial court's ruling *in limine* deprived him of his right to present a defense. In support, Callioux relies on State v. Broussard, 25 Wn. App. 2d 781, 525 P.3d 615 (2023), State v. Chicas Carballo, 17 Wn. App.2d 337, 486 P.3d 142 (2021), State v. Cox, 17 Wn. App. 2d 178, 484 P.3d 529 (2021), State v. Orn, 197 Wn.2d 343, 482 P.3d 913 (2021), State v. Cayetano-Jaimes, 190 Wn. App. 286, 359 P.3d 919 (2015), and State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). But each of these cases involved a ruling that excluded or prevented the defense from eliciting certain testimony. See Broussard, 25 Wn. App. 2d at 785; Chicas Carballo, 17 Wn. App. 2d 345; Cox,17 Wn. App. 2d at 185; Orn, 197

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other killings. 321 N.C. 633, 636, 365 S.E.2d 600 (1988). But the Lamb court "express[ed] no opinion" on whether the defendant's decision not to testify rendered the trial court's ruling unreviewable, instead granting the defendant a new trial where it was "abundantly clear from the record . . . that defendant intended to testify unless her motion *in limine* was denied" and the evidence at issue was inadmissible under ER 608(b) because it "show[ed] specific instances of conduct relating to violence against other persons" and, thus, was "irrelevant to defendant's veracity." Lamb, 321 N.C. at 646-48. Here, Callioux does not point to anything in the record to show that D.C. would have testified if not for the trial court's ruling, and it is undisputed that D.C.'s at-issue conduct was probative of her veracity. Not only is Lamb not binding, it is readily distinguishable.

Wn.2d at 351-52; Cayetano-Jaimes, 190 Wn.App. at 303-04; Jones, 168 Wn.2d at 717-18. Here, by contrast, the trial court's ruling did not exclude any of D.C.'s testimony or prevent Callioux from eliciting that D.C. was with M.R.Y. every weekend that M.R.Y. was with Callioux. As much as Callioux urges us to treat the trial court's ruling here as a "constructive" exclusion of D.C.'s testimony, it was not. Cf. Cayetano-Jaimes, 190 Wn. App. at 302, 304 (characterizing as exclusionary the denial of a motion to allow telephonic testimony where there was no dispute about the witness's unavailability to appear in court). Callioux fails to show that the trial court's ruling deprived him of his right to present a defense.

Ineffective Assistance of Counsel

Finally, Callioux argues that his trial counsel was ineffective. We disagree.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on a claim of ineffective assistance, a defendant must establish that (1) his attorney's performance was deficient and (2) the deficiency prejudiced him. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Because both prongs of the ineffective assistance of counsel test must be met, the failure to demonstrate either prong will end our inquiry." State v. Johnson, 12 Wn. App. 2d 201, 210 , 460 P.3d 1091 (2020).

Here, Callioux argues that his trial counsel was ineffective for not calling D.C. as a witness. "To prevail on an ineffective assistance claim, a defendant . . . must overcome 'a strong presumption that counsel's performance was reasonable.' " State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Kyllo, 166 Wn.2d at 862). "A decision not to call a witness is a matter of trial tactics that generally will not support a claim of ineffective assistance of counsel." State v. Krause, 82 Wn. App. 688, 697-98, 919 P.2d 123 (1996). But "a criminal defendant can rebut the presumption of reasonable performance by

demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.' " Grier, 171 Wn.2d at 33 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Callioux does not rebut the presumption that counsel's decision not to call D.C. as a witness was a reasonable one. As Callioux himself acknowledges, the record does not reveal why defense counsel did not call D.C. to the stand. And "we will not presume deficient performance from a silent record." State v. Heng, 22 Wn. App. 2d 717, 744, 512 P.3d 942 (2022), review granted in part, 200 Wn.2d 1025 (2023). Although Callioux asserts that "[t]here was no downside to presenting [D.C.'s] testimony," we cannot know that from this record. As the State points out, it is conceivable that counsel reasonably determined that D.C. would not present as credible. It is also conceivable that defense counsel had reason to believe D.C.'s recollection about her weekends with M.R.Y. was not as unwavering as Callioux represents it would have been.[2] In either case, it is further conceivable that defense counsel reasonably believed putting D.C. on the stand would undermine D.C.'s mother's and aunt's testimony in

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[2] We note that the record does not include a sworn statement or testimony from D.C., and that according to the certification of probable cause, D.C. stated during her interview that "she would *pretty much* spend the night with [M.R.Y.] *almost* every other weekend when [M.R.Y.] was with [Callioux]." (Emphasis added.)

that regard. On this record, Callioux does not rule out conceivable tactical reasons to explain counsel's decision. Consequently, his ineffective assistance claim fails. Cf. State v. Linville, 191 Wn.2d 513, 525, 423 P.3d 842 (2018) (ineffective assistance claim failed where record was silent as to counsel's reasons for not objecting and, thus, it was impossible to tell whether any hypothesis as to counsel's reasons was correct).

Callioux cites a number of cases in support of reversal but they each involved counsel's *uninformed* decision not to call a witness or, in one case, a decision that was unreasonable because it was based on an actual conflict of interest. See State v. Jones, 183 Wn.2d 327, 345, 352 P.3d 776 (2015) (counsel failed to interview clearly identified and accessible witnesses); State v. Robinson, 79 Wn. App. 386, 399, 902 P.2d 652 (1995) (counsel decided not to call a witness, whom he also represented, due to an actual conflict of interest); State v. Thomas, 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987) (counsel failed to investigate his own expert's qualifications, which investigation would have revealed were lacking); State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (counsel failed to interview a witness); State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978) (counsel "made virtually no factual investigation" and "admit[ted] he was unprepared for trial"). Callioux does not show that counsel's decision not to call D.C. was uninformed or the result of a conflict of interest.

We affirm.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT R.D. CALLIOUX,
Petitioner,

v.

TIM LANG, Secretary,
Washington State Department of
Corrections, and
KARIN ARNOLD, Superintendent,
Stafford Creek Corrections Center,
Respondents.

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I hereby certify that three copies of the Petition For A Writ of Certiorari in *Callioux v. Lang, et al.*, were served via U.S. mail, first class, on all parties required:

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I declare under penalty of perjury that the foregoing is true and correct.

Date: April 2, 2026

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