

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRILL SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**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

1. Whether, after *Harrington v. Richter*, 562 U.S. 86 (2011), trial counsel still has a duty to investigate whether expert testimony could significantly bolster the defense regarding what is obviously a critical issue in a criminal case when it is clear the government will present specialized testimony on the issue.
2. Whether a defendant is prejudiced by the failure to investigate potential expert testimony about a critical issue in the case if a reasonable juror could decline to convict after hearing the expert testimony proffered in postconviction proceedings.

RULE 14.1(b) STATEMENT

(i) The parties to the proceeding are Terrill Smith and the United States of America.

(ii) The petitioner is not a corporation.

(iii) The following are directly related proceedings:

United States v. Smith, No. 2:16-cr-00734-SPL-1 (D. Ariz.).

United States v. Smith, Ninth Cir. No. 18-10289.

Smith v. United States, No. 2:21-cv-01928-SPL (D. Ariz.).

Smith v. United States, Ninth Cir. No. 23-15637.

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Petitioner Terrill Smith respectfully requests a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Court of Appeals’ opinion (Pet. App. A at 1a-5a) is unpublished but is reported at 2026 WL 64290.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 8, 2026. App A at 1a. The Court of Appeals denied Petitioner’s petition for rehearing on April 15, 2026. App. B at 6a. On July 8, 2026, Justice Kagan extended the time for filing the petition for a writ of certiorari to August 28, 2026. No. 26A41. The Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. CONST. amend. VI.

INTRODUCTION

For decades, it was settled that the non-strategic failure to investigate whether expert testimony could counter the government’s proposed expert testimony on the central issue in a criminal case was unreasonable and contravened the Sixth Amendment’s guarantee of effective assistance of counsel. This rule flowed from this Court’s holding in *Strickland v. Washington*: “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. 668, 690-91 (1984); *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (holding, on AEDPA¹ habeas review of a state capital conviction, that counsel’s limited investigation into the petitioner’s life history was deficient and prejudicial).

In *Harrington v. Richter*, 562 U.S. 86 (2011), this Court, reviewing under AEDPA, reversed the Ninth Circuit and upheld the state court’s determination that counsel’s failure to consult with experts about blood evidence was reasonable. But, in *Harrington*, it was not clear before trial that the blood evidence would be central to the prosecution’s case, and focusing on that evidence could have prompted the prosecution to pursue testing that may have doomed the defense. *Id.* at 106–08. The Ninth Circuit has overcorrected in its attempt to comply with *Harrington*. In Petitioner’s unpublished case and in another recent published decision—*Garding v.*

¹ Antiterrorism and Effective Death Penalty Act.

Montana Dep't of Corr., 105 F.4th 1247, 1258 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1951 (2025)—the Ninth Circuit relied on *Harrington* to deny relief when trial counsel failed to even investigate whether expert testimony could refute the government's specialized testimony on the central issue. There was a strong dissent in both cases. App A at 3a–5a (Rawlinson, C.J., dissenting); *Garding*, 105 F.4th at 1260–69 (W. Fletcher, C.J., dissenting). Research did not, however, reveal similar misapplications of *Harrington* by other federal courts of appeal.

This Court should grant the writ to resolve the split between the Ninth Circuit and other circuits and to clarify the important federal question of whether it is ever reasonable for counsel to fail to investigate whether expert testimony could significantly bolster the defense in regard to what reasonable counsel would recognize at the time of trial as a critical issue in the case. Sup. Ct. R. 10(a) & (c). This Court should also clarify how to evaluate prejudice from such a failure, i.e., whether it is sufficient to show that a reasonable juror could decline to convict after hearing the expert testimony that should have been introduced at trial and was instead proffered in postconviction proceedings. In Petitioner's case, the court of appeals decided this important federal question in a way that conflicts with this Court's long-standing rule. S. Ct. R. 10(c).

STATEMENT OF THE CASE

(The opening brief provides a detailed recitation of the facts, with record citations. *See* Opening Brief (Doc. 11) in Ninth Cir. No. 23-15637, pp. 4-25 (Op. Br.)).

In June 2016, Petitioner was charged with attempted transportation of an individual to engage in prostitution under 18 U.S.C. § 2421 (count 1) and attempting to induce an individual to travel to engage in prostitution under 18 U.S.C. § 2422(a) (count 2).

Petitioner's charges were based on Facebook chats, texts, and one phone conversation with undercover agents posing as "Vanessa Thompson." "Vanessa" had reached out to Petitioner on Facebook with a hard-luck story about how much she wanted to escape her life as a stripper in the Phoenix area. When he seemed to lose interest, she repeatedly recontacted him. The only issue in the trial was whether Petitioner intended for "Vanessa" to come to Las Vegas to engage in prostitution. He never explicitly suggested that she do so but instead told her about ways that an attractive young woman could make money in Las Vegas through dancing, escorting, and related lawful activities. But—apparently realizing that Petitioner's suggestions did not reflect criminal intent—"Vanessa" pressed him to answer questions related to sexual acts and prostitution. Although Petitioner politely answered "Vanessa's" questions, he repeatedly reminded her that she did not need to engage in illicit activities to make a good living in Las Vegas's adult entertainment industry.

Consistent with its Rule 16 notice, the government presented the expert testimony of two detectives that, although it is technically possible to be an escort without engaging in prostitution, in reality escorting and prostitution are interchangeable. At the 2018 trial, defense counsel neither objected to the reliability of that testimony nor presented a defense expert to counter it.

Apart from the expert testimony, the evidence against Petitioner consisted of his text messages, Facebook chats, and recorded conversation with “Vanessa.” He did not dispute the substance of these communications. What he disputed were the inferences that should be drawn from them. As the government acknowledged in its closing argument, Petitioner did not explicitly ask “Vanessa” to engage in illegal sex acts. He spoke of dancing and lawful opportunities in the escort business. But the government’s law enforcement experts—who testified based on their experience but had never worked in Las Vegas—told the jury that there was virtually no such thing as legal escorting.

In his collateral attack under 28 U.S.C. § 2255, Petitioner proved that this is not the case, at least not in Las Vegas. In those proceedings, University of Nevada at Las Vegas Professor Barbara Brents attested, based on decades of interviews and research, that legal escort services are indeed common in the Las Vegas area. Petitioner’s trial counsel, however, had neither investigated nor presented such evidence. Indeed, counsel avowed in the § 2255 proceedings that he did not even *consider* consulting with an expert.

The jury convicted on the count alleging attempted transportation for prostitution but not on the inducement charge.

Following an unsuccessful direct appeal, Smith alleged ineffective assistance of counsel in a motion to vacate his conviction under 28 U.S.C. § 2255, which the district court denied.

On appeal from that denial, Petitioner alleged that counsel was ineffective for, *inter alia*, failing to even investigate whether a defense expert could counter the government's experts on the only disputed issue in the case and bolster Petitioner's only defense—that he intended for “Vanessa” to come to Las Vegas to engage in legal escort services, not prostitution. The majority of the court of appeals panel—relying on *Harrington v. Richter*, 562 U.S. 86 (2011)—rejected Petitioner's claim, App. A at 1a, but Judge Rawlinson lodged a strong dissent. App. A at 3a.

In her dissent, Judge Rawlinson emphasized the majority's failure to abide by precedent establishing that trial counsel is ineffective if he fails to even investigate whether a defense expert could counter government expert testimony that “directly contradicts the defense theory.” App. A. at 4a. Judge Rawlinson also explained that the majority held Petitioner to an improperly high burden to show prejudice, when all he needed to do was to show a realistic possibility that “at least one juror would have harbored a reasonable doubt” after hearing the expert testimony Petitioner proffered in his § 2255 proceedings. *Id.*

Petitioner filed a petition for panel and en banc review, which the court denied, although Judge Rawlinson voted to grant rehearing. App. B at 6a. This timely petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

- I. **This Court should grant the writ to correct the Ninth Circuit’s misapplication of *Harrington v. Richter*, as the Ninth Circuit—unlike other circuits—has repeatedly relied on *Harrington* to deny ineffective assistance of counsel claims based on trial counsel’s failure to even investigate whether expert testimony could counter the government’s specialized testimony on the central issue in the case.**

In *Harrington v. Richter*, 562 U.S. 86 (2011), this Court, reviewing under AEDPA, determined that the Ninth Circuit erred in granting habeas relief based on Richter’s claim that his trial counsel had rendered ineffective assistance of counsel (IAC) by failing to consult with or call blood-spatter and serology experts in a murder case. This Court observed that it was not clear at trial that the blood evidence was an important issue and that focusing on that issue might have prompted the state to pursue forensic testing, which posed a “serious risk that [the prosecution would proffer] expert evidence [that] could destroy Richter’s case.” *Id.* at 106–08. This Court declined to decide whether counsel’s failure to consult with an expert was unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, *Harrington*, 562 U.S. at 109, because it held that Richter’s claim failed under AEDPA’s highly deferential standard of review, which requires a federal finding that the state court’s determination was unreasonable, such that

“fairminded jurists” could not possibly disagree about the “correctness of the state court’s decision.” *Id.* at 101.

This Court, however, recognized that, while cross-examination is often sufficient to address the prosecution’s expert testimony, *id.* at 111, “[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both,” and that reviewing federal courts have significantly greater authority to so find on de novo review of an IAC claim than on AEDPA review of a state court, which has “wide latitude in applying” the *Strickland* standard. *Id.* at 106. As this Court noted, in some cases experts in many fields might possibly provide “useful [] insight[s],” and it is often reasonable for counsel to forgo investigating potential expert testimony “that appear[s] ‘distractive from more important duties.’” *Id.* at 107 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam)).

This Court emphasized that, in evaluating whether counsel’s representation was reasonable, courts “may not indulge ‘*post hoc* rationalization’ for counsel’s decision making that contradicts the available evidence of counsel’s actions,” *id.* at 109 (citing *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)), but cautioned that courts likewise may not disregard “the strong presumption” that focusing on certain issues instead of others reflects strategy rather than unreasonable neglect. *Id.* And, while this Court observed that “it is difficult to establish ineffective assistance when counsel’s overall performance indicates active and capable advocacy,” it reaffirmed

that “even an isolated error’ can support an ineffective-assistance claim if it is ‘sufficiently egregious and prejudicial.’” *Id.* at 111 (citation omitted).

Prior to *Harrington*, the weight of federal authority established that, when the government’s proffered expert testimony concerns a key disputed issue in the case, trial counsel must investigate whether a defense counter-expert is available to refute it in order to provide effective representation. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (defense counsel has a duty to investigate whether a defense expert could refute the prosecution’s expert testimony that “directly contradicts the defense theory”); *Dugas v. Coplan*, 428 F.3d 317 (1st Cir. 2005) (failure to consult arson expert as part of investigation into arson charge constituted ineffective assistance); *Holsomback v. White*, 133 F.3d 1382, 1387–89 (11th Cir. 1998) (failure to call expert constitutes IAC if the expert could have added credibility and support to a proffered defense); *United States v. Tucker*, 716 F.2d 576, 580–81 (9th Cir. 1983) (reversing conviction due to ineffective assistance where consulting with accounting expert was “crucial . . . to undermine the credibility of the chief government witnesses and to establish the plausibility” of the defense);

The Ninth Circuit and other federal courts of appeal have taken different approaches on this issue after *Harrington*. Other circuits have continued to grant IAC claims based on failure to consult with an expert when it was apparent that the subject of the expert’s testimony would be central to the case. For example, in *United States v. Laureys*, the court held that, despite trial counsel’s otherwise “conscientious” representation (including consultation with experts about a possible

diminished capacity defense), counsel rendered prejudicial ineffective assistance in failing to offer expert testimony to support the defendant's testimony that he did not cross state lines with the intent to engage in sex with a prepubescent girl, despite explicit expression of a desire to do so in internet chats, but rather was engaging in fantasy with the undercover detective. 866 F.3d 432, 436-37, 439-40 (D.C. Cir. 2017). The proffered defense expert opined that "significant numbers of chat participants are interested in meeting one another to have adult sex while fantasizing about children," and, "that . . . it can be very difficult to distinguish chats in which adults are arranging for sex with children from chats in which adults are arranging to meet one another and pretending that a child will join them." *Id.* at 436. This testimony would have rebutted a detective's "quasi-expert" trial testimony that allowed the jury to infer that Laureys' behavior was not consistent with someone who only wanted to engage in child-sex fantasy rather than actually meet and engage in sex with a child. *Id.* at 436, 440. The court noted that, without supporting expert testimony, a jury likely would not find the defense credible. *Id.* at 438. "[T]here is no question," the court said, "that Laureys' defense, and his own testimony, would have been significantly bolstered by expert testimony regarding . . . the existence of a subculture of men who meet first online and then offline for sex with one another spurred on by child sex fantasies, such that a 'reasonable probability' of a different outcome at trial exists." *Id.* at 440. In this case, the court was not constrained by AEDPA's doubly deferential standard.

Similarly, in *Thomas v. Clements*, the court—which reviewed de novo because the state court did not address the issue—held that defense counsel was “deficient in failing to consider and consult with a pathologist who would have reviewed the autopsy report and possibly testified.” 789 F.3d 760, 768 (7th Cir. 2015). The defendant admitted that he had his arm around his ex-wife’s neck while they were having sex, and it was undisputed that she died from strangulation *Id.* at 764. The defendant, however, said the death was accidental. The medical examiner, who testified at trial, opined that the strangulation was not an accident, even though there were no marks on the victim’s neck. *Id.* In post-conviction proceedings, defense counsel admitted that he simply did not think about consulting with an expert to review the medical examiner’s conclusions, so his failure to do so could not be attributed to strategy. *Id.* at 768. The proffered defense expert testified that, while the victim died of pressure on the neck, there was “no physical evidence that ‘intentional’ pressure was applied to the neck.” *Id.* at 765. The court held that failure to consult with an expert, when the only issue was whether the strangulation had been accidental or intentional, was unreasonable and prejudicial. *Id.* at 769. And, although trial counsel tried to undermine the medical examiner’s testimony during cross-examination by highlighting the lack of evidence of a physical struggle or marks on the victim’s neck, the most the examiner would concede was that she didn’t “believe it was an accident.” *Id.* at 770.

In contrast, Ninth Circuit panels, including Petitioner’s, have relied on *Harrington* in both AEDPA and non-AEDPA cases to deny relief even when the

necessity to consult with an expert about a central issue was clear before trial and when the available evidence reflects that trial counsel did not consider investigating potential expert testimony.

In *Garding v. Montana Dep't of Corr.*, 105 F.4th 1247 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1951 (2025), a divided Ninth Circuit panel overturned the district court's grant of the writ in a case stemming from a Montana conviction for vehicular homicide. The victim was struck while walking on the side of a highway early New Year's Day 2008. *Id.* at 1250. From the outset, state investigators focused on looking for a vehicle with front-end damage consistent with the victim's injuries. *Id.* at 1250-51. They even stopped Defendant Garding's vehicle to investigate if a crack on her windshield was consistent with the expected damage but ruled out her vehicle upon further inspection. *Id.* at 1250. State investigators reversed course after an inmate seeking leniency claimed to have "taped up" damage to Garding's bumper shortly after the crash. *Id.* at 1251. Garding was charged soon afterward. *Id.* at 1250-51; *id.* at 1261 (W. Fletcher, J., dissenting).

Garding steadfastly maintained her innocence, even turning down a plea offer calling for no prison time. *Id.* at 1261 (W. Fletcher, J., dissenting). Although the state did not notice an expert before trial, state troopers, as anticipated, opined at trial without objection from defense counsel about the mechanics of the accident and the consistency between the victim's injuries and the vehicle's minimal damage. *Id.* at 1251; *id.* at 1263 (W. Fletcher, J., dissenting).

In addition to the troopers' quasi-expert testimony, the state relied heavily on the testimony of Garding's ex-boyfriend, who was her passenger at the time of the accident and who obtained a favorable plea deal on an unrelated burglary charge in exchange for his testimony. *Id.* at 1261–62 (W. Fletcher, J., dissenting). Prior to his testimony, he changed his story several times, including to match the location of the accident after a trooper apprised him of it; previously, he had said they were traveling in the opposite direction. *Id.* (W. Fletcher, J., dissenting). His testimony, which conflicted with that of an eyewitness to the accident as well as the other passenger in Garding's vehicle, was thoroughly impeached at trial. *Id.* at 1262. The other passenger turned down an immunity deal offered by the state in exchange for testimony against Garding and testified at trial that she "hit nothing" and her ex-boyfriend's story was "pure fiction." *Id.* at 1262.

Trial counsel did not call an accident reconstruction expert to rebut the trooper's opinion testimony, even though the mechanics of the accident and the relationship between the victim's injuries and damage to the vehicle were obviously the linchpin of the case in the light of the problems with the ex-boyfriend's eyewitness testimony.

In support of her motion for postconviction relief, Garding presented evidence from three accident reconstruction experts, all of whom had decades of experience. *Id.* at 1263-64 (W. Fletcher, J., dissenting). They each "identified critical flaws with the State's theory." *Id.* at 1264. They "unanimously concluded," based on systems analysis "that Garding's undamaged vehicle could not have possibly struck" the

victim. *Id.* at 1265 (W. Fletcher, J., dissenting). Trial counsel also testified in postconviction proceedings that her failure to consult with an accident reconstruction expert “had nothing to do with strategy.” *Id.* (W. Fletcher, J., dissenting). That testimony was corroborated by trial counsel’s defense investigator, who said that counsel “never discussed the possibility of consulting with or procuring an accident reconstructionist during the investigation and leading up to [the] trial.” *Id.* (W. Fletcher, J., dissenting).

Despite these circumstances, the state court ruled that trial counsel’s representation was not constitutionally deficient because she “effectively cross examined the State’s witnesses” and—despite the absence of evidence to the contrary—it rejected trial counsel’s sworn and corroborated testimony that she lacked a strategic basis for failing to consult with an accident reconstruction expert. *Id.* at 1253. Instead, it found that she made a “calculated decision” to rely on cross-examination alone to undermine the state’s case *Id.* at 1253, 1258.

Relying on *Harrington*, the majority held that the state court’s determination that trial counsel was not ineffective for failing to even consult with an expert was not unreasonable, just as it was at least arguable that Richter’s attorney reasonably chose not to consult with blood experts. *Id.* at 1258. But, in *Harrington*, it was not apparent at the time of trial that the blood evidence was important. 562 U.S. at 107. That was not the case in *Garding*, where it was clear from the outset that accident mechanics would be the key issue. The *Garding* majority’s holding is contrary to this Court’s acknowledgement in *Harrington* that in *some* cases an issue is so

central to a case that, to be effective, counsel must at least investigate whether expert testimony could bolster the defense. 562 U.S. at 106. Indeed, *Harrington* did not disturb this Court’s long-standing rule that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *see Harrington*, 562 U.S. at 106 (recognizing the legitimacy of this principle).

The *Garding* majority also held that the state’s court’s determination on trial strategy was reasonable, despite the sworn testimony of trial counsel and the trial investigator that the failure to consult with an accident reconstructionist was *not* strategic, largely because trial counsel had used an accident reconstructionist in the past. 105 F.4th at 1258. But it did not explain why trial counsel’s prior use of such an expert cast doubt on her testimony about Garding’s case. *Id.* This holding contravenes *Harrington*’s reaffirmance that courts “may not indulge ‘post hoc rationalization’ for counsel’s decision-making that contradicts the available evidence of counsel’s actions.” *Id.* at 109. It is not reasonable to assume—contrary to trial counsel’s sworn and corroborated testimony—that counsel considered consulting with an expert in a case simply because counsel had previously consulted with an expert in the field in an unrelated case.

The majority in Petitioner’s case also inappropriately relied on *Harrington* to deny relief on Petitioner’s IAC claim, which was based on failure to consult with an expert on the only disputed issue in the case, App. A at 1a, but the error was even more egregious because review was de novo in Petitioner’s appeal from the denial of

his petition to vacate his federal conviction under 28 U.S.C. § 2255. The government’s case, and Petitioner’s defense, hinged on whether escorting and prostitution are interchangeable—as the government’s law enforcement experts testified—or whether legal escort services could be lucrative for a young woman in Las Vegas, as Petitioner advised “Vanessa.” Although Petitioner elicited from these experts on cross-examination that it was “possible” to engage in legal escort services, both maintained that legal escorting is exceedingly rare. This concession therefore did little to bolster Petitioner’s defense, especially because the government urged the jurors in closing remarks to discount counsel’s arguments because they required the jurors to rely upon their own “notions[s]” “instead of the experts” the government had called to the stand. *See* Op. Br. at 37 (citing record).

But if a counter-expert such as Dr. Brents had explained to the jury that legal escort services are, in fact, common in Las Vegas, where Petitioner suggested Vanessa work, the jurors likely would have viewed Petitioner’s defense in an entirely different light. And trial counsel avowed in post-conviction proceedings that he did not even consider consulting with an expert, so—contrary to the majority’s suggestion, App. A at 1a—the failure to do so did not reflect “sound trial strategy,” as the dissent pointed out. App. A at 3a. Trial counsel’s failure to consult with an expert on the nature of escort services—the fulcrum of both the government’s case and Petitioner’s defense from the outset—is a quintessential example of the hypothetical case described in *Harrington* where the failure to conduct an expert

investigation was patently unreasonable because, in the context of the case, this error was “sufficiently egregious and prejudicial.” 562 U.S. at 111.

This Court should grant the writ to resolve the split between the Ninth Circuit and other circuits and to clarify whether, after *Harrington*, failure to investigate whether a defense counter-expert is available to refute anticipated government expert testimony on the only disputed issue is unreasonable even if trial counsel otherwise provides vigorous advocacy.

II. This Court should also clarify how to evaluate prejudice under the *Strickland* standard, which is an important, recurring federal question.

The majority in Petitioner’s case also held that Petitioner failed to demonstrate prejudice from trial counsel’s failure to consult with an expert on the nature of escort services in Las Vegas. App. A at 2a. Although it failed to articulate the standard for determining whether ineffective assistance of counsel prejudiced Petitioner, it characterized the standard as “highly demanding,” App. A at 2a, as this Court has done on a handful of occasions. *See Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). *See also Shinn v. Kayer*, 592 U.S. 111, 117, (2020) (quoting *Kimmelman*); *Lockhart v. Fretwell*, 506 U.S. 364, 379 (1993) (Stevens, J., dissenting) (quoting *Kimmelman*). But the question is simply whether Petitioner could show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694. This Court has repeatedly made clear that this standard does not require a showing that, absent counsel’s deficiencies, a different outcome would have been

more likely than not; instead, all that is required is a probability “sufficient to undermine confidence in the outcome.” *Id.* at 693–94. *See also Harrington*, 562 U.S. at 111–12 (affirming the *Strickland* standard)

In Petitioner’s case, as the dissent pointed out, this standard boils down to whether there is “a reasonable probability that . . . at least one juror would have harbored a reasonable doubt about [Petitioner’s] guilt” after hearing the testimony from Dr. Brents that legal escort services are quite common and lucrative in Las Vegas. App. A at 4a (Rawlinson, C.J., dissenting) (quoting *Browning v. Baker*, 875 F.3d 444, 475 (9th Cir. 2017)). The majority’s prejudice analysis focused on two pieces of evidence: (1) the call between Petitioner and “Vanessa,” in which “Vanessa” asked Petitioner about matters related to sex, and he reiterated that she would not need to engage in illicit sex to make good money in the Las Vegas adult entertainment industry, and (2) Facebook communications between Petitioner and Bunny Jordan, an old friend who was apparently working as a prostitute in another state. *See* App. A at 2a.

“Vanessa’s” determination to ask about illicit sex in the face of Petitioner’s repeated advice that she would not need to break the law as an escort might say a lot about what “Vanessa” wanted to do in Las Vegas if “Vanessa” were a real person. Because she was not a real person but rather a persona portrayed by undercover officers, these questions reflected only what zealous cops were willing to do to try to concoct criminal charges against Petitioner. But what *Petitioner* intended when he

suggested “Vanessa” could be a successful legal escort in Las Vegas was the only issue that mattered.

The majority’s reliance on the conversations with Bunny Jordan was also flawed. All Petitioner conveyed in those conversations²—which Jordan initiated—was that Jordan should leave her abuse-ridden life of prostitution behind because she could make a killing providing legal escort services in Las Vegas. Because the jury undoubtedly would have viewed this evidence in an entirely different light if Dr. Brents had testified about the nature of escort services in Las Vegas, the Bunny Jordan evidence simply underscores why Petitioner was prejudiced by his trial counsel’s failure to seek out such testimony.

As the dissent explained, Petitioner “easily” meets the standard to establish prejudice, “because even without the expert testimony of Dr. Brents” the jury did not convict on the government’s charge that Petitioner attempted to induce “Vanessa” to travel to Las Vegas for prostitution. The jurors were skeptical of the government’s case, and they likely would have been much more so if they had learned from an authoritative expert like Dr. Brents that the government’s experts were flat wrong about the prevalence of legal escorting, at least in Las Vegas. That the majority nevertheless found no prejudice demonstrates the need for this Court to provide guidance on the issue, particularly in light of the relationship between the *Strickland* prejudice standard and the right to trial by jury.

² See Op. Br. at 19-20.

III. This case is an excellent vehicle for examining the questions presented.

It is undisputed that the central issue in Petitioner’s case was whether it was realistic that “Vanessa” could engage in lucrative *legal* escort services in Las Vegas, as Petitioner suggested, or whether instead prostitution and escort services were almost always the same thing, as the government’s experts testified. It is also undisputed that trial counsel did not even consider investigating whether expert testimony on this issue could bolster the defense and that an experienced expert, Dr. Barbara Brents, was readily available at the University of Nevada at Las Vegas at the time of Petitioner’s trial. This case therefore provides an excellent vehicle for clarifying whether it is unreasonable to fail to even investigate potential expert testimony to counter anticipated testimony by government experts on what reasonable counsel would recognize as the central issue in the case.

And, under the circumstances, it is difficult to fathom how the majority concluded that it wasn’t reasonably probable that at least one juror would have declined to convict after hearing from an expert such as Dr. Brents that legal escort services are commonplace in Las Vegas. This case therefore also provides an excellent vehicle for explicating what it takes to meet the *Strickland* prejudice standard.

Although the decision in Petitioner’s case is unpublished, the lengthy Memorandum is readily available on legal databases (see *Smith v. United States*, 2026 WL 64290 (9th Cir. 2026)) and may be cited and relied upon for its purported persuasive value. FRAP 32.1. And, as explained above, its faulty reasoning closely

resembles that in a recent published Ninth Circuit opinion, *Garding*, 105 F.4th 1247. If it stands, the decision will mislead jurists and practitioners into believing that defense attorneys are not ineffective if they fail to even investigate the reliability of the government’s expert testimony on the only disputed issue in the case—testimony that strikes at the heart of the sole defense.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant a Writ of Certiorari.

Respectfully submitted on August 28, 2026.

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2026 WL 64290

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United States Court of Appeals, Ninth Circuit.

Terrill SMITH, Petitioner-Appellant,

v.

UNITED STATES of America, Respondent-Appellee.

No. 23-15637

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Argued and Submitted May 15, 2025 Phoenix,

Arizona

|

FILED JANUARY 8, 2026

Appeal from the United States District Court for the District of Arizona, Steven Paul Logan, District Judge, Presiding, D.C. No. 2:21-cv-01928-SPL

Attorneys and Law Firms

M. Edith Cunningham, FPD AZ—Federal Public Defender's Office, Tucson, AZ, for Petitioner-Appellant.

Mary Bridget Minder, U.S. Attorney, DOJ-Office of the U.S. Attorney, Phoenix, AZ, for Respondent-Appellee.

Before: RAWLINSON, BUMATAY, and SANCHEZ, Circuit Judges.

Dissent by Judge RAWLINSON.

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

***1** Terrill Smith (“Smith”) appeals the denial of his 28 U.S.C. § 2255 motion for alleged ineffective assistance of counsel. We review a district court’s denial of a § 2255 motion de novo, and the decision whether to hold an evidentiary hearing on such a motion for an abuse of discretion. *United States v. Rodriguez*, 49 F.4th 1205, 1211 (9th Cir. 2022). We affirm.

1. Smith’s trial counsel did not provide prejudicial ineffective assistance under *Strickland v. Washington*, 466 U.S. 668

(1984), for failing to consult with or present a sex-industry expert at trial. To obtain relief for ineffective assistance of counsel, Smith must show that his attorney’s performance fell below an objectively reasonable standard and that he suffered prejudice as a result. *Rodriguez*, 49 F.4th at 1213; *see also United States v. Osorio-Arellanes*, 112 F.4th 647, 665 (9th Cir. 2024) (“[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”).

Relying on the declaration of Dr. Barbara Brents, Smith argues that a sex-industry expert would have made it clear to the jury that legal escort services are commonplace in Las Vegas. However, our assessment of attorney performance is “highly deferential: [Smith] must surmount the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Rodriguez*, 49 F.4th at 1213 (internal quotation marks and citation omitted). Smith’s trial counsel elicited favorable concessions on cross-examination from the Government’s experts. Agent Michael Russo and Detective Christi DeCoufle both admitted that it was possible to work as an escort without being a prostitute. That a different attorney would have called an expert does not mean Smith’s trial counsel was ineffective in failing to do the same. *See Harrington v. Richter*, 562 U.S. 86, 111 (2011) (“*Strickland* does not ... require[e] for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert’s presentation.”); *Chong v. United States*, 112 F.4th 848, 861 (9th Cir. 2024) (per curiam) (“Counsel’s performance must have done more than just ‘deviated from best practices or most common custom.’ It must have essentially ‘amounted to incompetence under prevailing professional norms.’ ” (internal citation omitted)). Here, Smith’s trial counsel strategically objected to the Government’s evidence, effectively cross-examined the Government’s witnesses, moved for a judgment of acquittal, highlighted the weaknesses in the Government’s case, and argued in his opening and closing statements that Smith intended to help Vanessa get a legal job after arriving in Las Vegas. The record establishes that Smith’s trial counsel provided “active and capable advocacy.” *Harrington*, 562 U.S. at 111.

Smith overlooks the fact that a defense expert might have been forced to concede on cross-examination that certain sex acts discussed between the undercover officer posing as “Vanessa” and Smith were illegal. Vanessa asked Smith about the legal consequences of prostitution and whether she could use

condoms to protect herself against sexually transmitted diseases. Smith answered all of Vanessa's questions, explaining that a lawyer and bail bondsman would help her if she got into trouble and that prostitution is a misdemeanor in Las Vegas. Having a defense expert make damaging concessions on the witness stand could have undermined Smith's defense. *See Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995) (noting that expert testimony “would have opened the door to precisely the type of cross-examination that [defense counsel] sought to avoid”).

*2 Smith also contends that his trial counsel was ineffective for failing to challenge the reliability of the Government experts' opinions. A prior panel of this court rejected a similar challenge to Detective DeCoufle's testimony on direct appeal. *United States v. Smith*, No. 18-10289, 817 F. App'x 450, 451-52 (9th Cir. Aug. 17, 2020) (“Given Detective Decoufle's background and experience, Smith's assertion that Detective Decoufle's expertise was limited to prostitution in Arizona is unpersuasive.”). Given that Agent Russo had far more experience in sex-trafficking investigations than Detective DeCoufle, we see no ineffective performance in counsel's failure to object.

Smith also fails to demonstrate prejudice. “The *Strickland* prejudice standard is ‘highly demanding,’ ” and “the likelihood of a different result must be ‘substantial, not just conceivable.’ ” *Osorio-Arellanes*, 112 F.4th at 666 (citations omitted). The Government's evidence against Smith was substantial, and included a phone call in which Smith and Vanessa discussed particular types of unlawful sex acts, whether clients would need to use a condom, and how much money to charge. The Government also presented numerous Facebook communications between Smith and a known prostitute, Bunny Jordan, about Jordan's prostitution activities in Oklahoma.

2. Trial counsel's failure to object to FBI Agent Blake Childress's testimony about an unnamed individual's trafficking conviction did not constitute prejudicial ineffective assistance. Childress testified about a Facebook post by “Mitchell Moola” which invited women to reach out to the individuals tagged in the post if they wanted someone to help them build a career in prostitution. Childress stated that “one of the individuals that was tagged in that post was an individual that was previously charged and convicted here in the District of Arizona for trafficking. So him as well as, approximately 64, 65 other individuals.”¹

¹ The jury did not hear anything else about the convicted individual.

Defense counsel's decision not to object at that point was clearly strategic because counsel indicated he would address this testimony in his closing arguments. In closing, counsel stated that the Government could not prove that Smith knew anything about the Moola post nor could Smith do anything about being tagged in the post. Smith's trial counsel even offered a hypothetical about Agent Childress being tagged in a post about corrupt FBI agents to illustrate being tagged in a post did not mean it was true.

3. Smith's trial counsel was not ineffective for failing to object to alleged hearsay. Before Smith's conversation with Vanessa, one of Smith's Facebook friends, Cee Chizzle, sent him a message referring to him as “P” and warning Smith about Vanessa. Smith asserts that his trial counsel was ineffective for failing to object to the message on hearsay grounds. But Smith has failed to establish that Chizzle's message was offered for its truth. Fed. R. Evid. 801(a). As a prior panel concluded, the message, including the “P” salutation, could have been introduced to show Smith's knowledge and intent. *Smith*, 817 F. App'x at 451. Smith has not demonstrated that a hearsay objection would have been sustained by the district court.

Nor has Smith shown any prejudice by the admission of this message. The jury saw multiple memes that Smith himself posted referring to pimps and prostitution. In view of the substantial evidence at trial against Smith, including his conversations with Bunny Jordan and Smith's own statements to Vanessa regarding which sex acts she could perform and the legal consequences if she were caught, there is no substantial likelihood that excluding evidence of the letter “P” in a message to Smith would have affected the outcome of trial.²

² Because Smith fails to show any error in his trial counsel's performance, there is no cumulative error. *See Lopez v. Allen*, 47 F.4th 1040, 1053 (9th Cir. 2022).

*3 4. Finally, the district court did not abuse its discretion in declining to hold an evidentiary hearing. The court based its decision on a fully developed record from the pre-trial, trial, and post-trial proceedings. In doing so, the district court did not contest any facts provided by Smith's declarants or question their credibility. An evidentiary hearing was thus unnecessary to assess the declarants' credibility or further

develop their testimony. *See Watts v. United States*, 841 F.2d 275, 277 (9th Cir. 1988).

AFFIRMED.

Rawlinson, Circuit Judge, dissenting:

I respectfully dissent from the decision of my colleagues denying habeas relief to the Petitioner, Terrill Smith (Smith). In my view, Smith was denied the effective assistance of counsel in the following three instances:

1. Failure To Investigate A Sex Industry Expert

At Smith's trial for sex trafficking, the government called two detectives who testified that in their experience, escorting and prostitution are synonymous. Although the detectives acknowledged on cross-examination that it is possible to be an escort without being a prostitute, they both reiterated that in their years of experience, prostitution and escorting were interchangeable.

Smith's defense counsel admitted that he never even thought of investigating the existence of an expert to testify regarding the difference between escorting and prostitution. This distinction was crucial because Smith's defense was that he was recruiting the officer posing as the victim to be an escort, rather than a prostitute. In addition, because the officer posing as the victim was the source of most of the comments mentioning prostitution, the expert's testimony would corroborate Smith's statements that the "victim" could make a living as an escort in Las Vegas, without engaging in prostitution. Finally, and most importantly, the proffered expert for the defense studied the sex industry in Las Vegas, the destination for the victim rather than in Arizona, where the prosecution's witnesses garnered their knowledge of sex workers.

"This court has repeatedly held that a lawyer who fails adequately to investigate and introduce evidence that ... raises sufficient doubt ... to undermine confidence in the verdict, renders deficient performance...." *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008) (citations, alterations, and internal quotation marks omitted.) "We allow lawyers considerable discretion to make strategic decisions about what to investigate, but only *after* those lawyers have gathered sufficient evidence upon which to base their tactical

choices...." *Id.* at 1235 (citation and internal quotation marks omitted) (emphasis in the original). Here, it is undisputed that defense counsel never even considered obtaining expert testimony on the difference between an escort and a prostitute, or the "nature of escorting and related services in Las Vegas."

Indeed, a criminal defense attorney in Arizona who has "been involved in numerous sex cases, including sex trafficking cases," filed a declaration attesting that she "readily identified ... Barbara Brents, from the University of Nevada at Las Vegas (UNLV)," who would be "able to refute the testimony of the Government's police officers."

The declaration of Dr. Barbara Brents, established that she is a professor in the Sociology Department at UNLV, with a Ph.D. and M.A. in Sociology. She teaches university level courses and supervises "Ph.D. research projects in the areas of sexuality, gender and the law." Dr. Brents has "conducted and supervised research on the sex industry in Nevada, the United States, and other nations for more than 25 years." Her research "has included interviews with sex workers and managers, surveys including more than 2,000 clients, and observations in a wide variety of venues." Her research projects "have been published in peer-reviewed academic journals, edited collections and in two co-authored books." Finally, Dr. Brents "regularly consult[s] with sex worker support organizations and policy makers on issues surrounding the sex industry."

*4 Based on her extensive and prolonged study of the sex industry, Dr. Brents opined that:

1. There are many individuals who work in formal and informal service working providing adult entertainment, leisure, and intimate services in person or in the online, freelance, 'gig' economy that do not exchange sex for money.
2. There is an extremely wide range of informal, adult, entertainment, leisure, and intimate services that individuals who may be considered attractive may provide in tourist towns like Las Vegas that do not include sex.

Dr. Brents listed the following activities as examples of interactions for escorts as not involving sex acts:

1. Interacting with and accompanying individuals while they gamble
2. VIP services

3. Dating
4. Companionship
5. Tickle parties
6. House shows
7. Dancing (nude or semi-clothed)
8. Sensual massage without penetration or touching genitals
9. “Sugaring”
10. “Professional domination”
11. Only Fans and similar webcam experiences
12. “Ignore” interactions
13. “[F]inancial domination”

This expert testimony would have bolstered Smith's defense that he was not soliciting the undercover officer to perform acts of prostitution. “Although it may not be necessary in every instance to consult with or present the testimony of an expert, when [as here] the prosecutor's expert witness testifies about pivotal evidence or directly contradicts the defense theory, defense counsel's failure to present expert testimony on that matter may constitute deficient performance.” *Duncan*, 528 F.3d at 1235. Dr. Brent's sterling academic and professional credentials would have given her testimony a gravitas that would have effectively encountered the testimony of the law enforcement witnesses. *See United States v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001) (“By and large the relationship between prostitutes and pimps is not the subject of common knowledge....”) (citations omitted).

The majority disposition relies on the reasoning that “a defense expert might have been forced to concede on cross-examination that certain sex acts discussed between [the officer posing as the victim] and Smith were illegal.” *Majority Disposition*, p. 3. But the same was true for the prosecution's experts, who were “forced to concede” that it is possible that escorting may occur without engaging in prostitution. This situation proves the point that the jury should have been presented with expert testimony from both sides when considering the defense theory of the case. *See United States v. Julian*, 440 F.2d 779, 780 (9th Cir. 1971) (noting that the jury is to weigh competing expert testimony). In addition, defense counsel could have pointed out that most of the

references to acts involving prostitution were initiated by the officer posing as the victim rather than by Smith.

Finally, the majority posits that Smith was not prejudiced by his counsel's failure to even consider calling an expert witness. *Majority Disposition*, p.5. A defendant is prejudiced by his counsel's ineffective performance when “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *Browning v. Baker*, 875 F.3d 444, 474-75 (9th Cir. 2017), *as amended* (citation and internal quotation marks omitted). Smith easily meets this standard because there is a “reasonable probability that ... at least one juror would have harbored reasonable doubt about [Smith's] guilt” after hearing the testimony from Dr. Brents. *Id.* at 475 (citation and internal quotation marks omitted). We know this because even without the expert testimony from Dr. Brents, Smith was acquitted on one of the charges.

2. Failure To Object To Testimony Linking Smith To A. Convicted Sex Trafficker

***5** At trial, one of the prosecution witnesses testified that one of the people “tagged” in a Facebook post with Smith was a convicted sex trafficker. Despite the district court specifically interjecting to ask defense counsel if he wanted to object to this evidence, counsel declined to object. Rather, he opted to address this testimony in closing argument.

Counsel's approach was ineffective for two reasons. The first is that any trial counsel worth his salt knows that if a judge is soliciting an objection, that objection is likely to be sustained. The second is that the jury is instructed that argument of counsel is not evidence. Consequently, rather than objecting to the evidence in response to the court's invitation and likely having the testimony stricken, counsel left this damaging evidence essentially un rebutted by addressing it during oral argument, and not during the evidentiary phase of the trial.

In a case where the defendant is being accused of sex trafficking, testimony linking him to a convicted sex trafficker only serves to bolster the prosecution's case and prejudice the defendant. *See, e.g., United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998) (discussing a conviction that was overtured due to reference to gangs).

3. Failure To Object To Testimony That Reference To Smith As “P” Referred To “Pimp”

As with the prior failure to object, this evidence labeled Smith as a sex trafficker in the eyes of the jury. There was no strategic reason for failing to object to this testimony labeling Smith as a pimp, especially in view of the prosecution's concession during closing argument that Smith never said he was a pimp, never said he wanted the “victim” to “sell [her] body in exchange for money,” and never said he wanted the “victim” to “engage in a commercial sex act.” As in *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008), “[t]o the extent there was any strategy involved” in the decision not to object to this evidence, “it cannot be considered a reasonable strategy by any objective measure.”

In summary, and importantly, the failure to call an expert alone would support reversing Smith's conviction. However, the cumulative effect of these three crucial derelictions leave no doubt that Smith was deprived of a fair trial due to his counsel's ineffectiveness. See *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1998) (“We have previously recognized that prejudice may result from the cumulative impact of multiple deficiencies....”) (citation and internal quotation marks omitted). I respectfully dissent.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TERRILL SMITH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 23-15637

D.C. No. 2:21-cv-01928-SPL
District of Arizona,
Phoenix

ORDER

Before: RAWLINSON, BUMATAY, and SANCHEZ, Circuit Judges.

Judge Bumatay and Judge Sanchez voted to deny the petition for panel rehearing and rehearing en banc, and Judge Rawlinson voted to grant the petition for panel rehearing and rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40. The petition for panel rehearing and rehearing en banc (Dkt. No. 42) is **DENIED**.