NO. 16-857

In the
Supreme Court of the United States

JASON GARNER,
Petitioner,
v.
STATE OF COLORADO,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Andrew.Cooper@coag.gov
(720) 508-6465

L. ANDREW COOPER
Deputy Attorney General
Counsel of Record

WILLIAM G. KOZELISKI
Assistant Attorney General

ABBIE J.N. CZIOK
Attorney, Attorney General's
Fellowship Program

Counsel for Respondent

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QUESTION PRESENTED

Petitioner's counsel made an informed strategic choice to base his defense at trial on the theory that Petitioner did not and could not have committed the murder for which he was charged. Consistent with this innocence defense, counsel chose not to seek a jury instruction on a conflicting defense theory: that if Petitioner *did* kill his victim, he was guilty of only second-degree murder because his self-induced intoxication from taking methamphetamine negated the specific intent required for first-degree murder. Below, the trial and appellate courts held that counsel's decision not to seek a self-intoxication instruction satisfied Petitioner's Sixth Amendment right to effective assistance of counsel.

The question presented is as follows:

Does the Sixth Amendment require counsel to request jury instructions that conflict with a strategically chosen defense theory?

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STATEMENT

A jury convicted Petitioner of first-degree murder for stabbing his girlfriend and abandoning her body in the Colorado countryside. At Petitioner's trial, his counsel pursued a defense based on the theory that Petitioner did not kill and could not possibly have killed the victim.

This defense theory of claimed innocence was consistent with Petitioner's own testimony, and his lawyers decided to pursue an innocence defense only after significant pre-trial investigation. Nonetheless, Petitioner argued in post-conviction proceedings that his two counsel were constitutionally incompetent. He claimed, among other things, that they should have sought a jury instruction on the conflicting defense theory of self-induced intoxication. Specifically, Petitioner argued that his counsel should have requested an instruction explaining, contrary to his own testimony, that if he did in fact stab the victim to death, his methamphetamine use could have negated the intent element of first-degree murder.

After an evidentiary hearing at which Petitioner had the opportunity to present evidence demonstrating that his counsel's representation was constitutionally deficient, both the trial court and the appellate court below rejected Petitioner's post-conviction claims. The lower courts concluded that Petitioner had failed to overcome "the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Petitioner asks this Court to reverse the lower courts' decisions.

1. Background. The victim, Coty Vernon, vanished in February 1998. The day before her disappearance, she and Petitioner used methamphetamine at a farm in rural Colorado, where Petitioner came into possession of a single-edged knife with an eight-inch blade. R. Tr. 175–76 (Dec. 2, 2004); R. Tr. 42–43 (Dec. 3, 2004); R. Tr. 134–35 (Dec. 6, 2004); R. Tr. 5 (Dec. 13, 2004). After sundown, Petitioner and Ms. Vernon left the farm together in Ms. Vernon's car. R. Tr. 43 (Dec. 3, 2004). That evening was the last time she was seen alive; early the next morning, Petitioner appeared alone and on foot at a ranch, asking to use the telephone. R. Tr. 10–11, 19, 21 (Dec. 6, 2004).

Several years later, a hunter discovered a human skull and other bones, as well as articles of clothing, in the area near where Ms. Vernon had disappeared. R. Tr. 101–04, 117 (Dec. 8, 2004). The remains were Ms. Vernon's. R. Tr. 83 (Dec. 9, 2004). The coroner ruled the death a homicide after discovering a sharp-force injury at the base of Ms. Vernon's spine, which was consistent with an abdominal stab wound. R. Tr. 47, 56, 77 (Dec. 13, 2004). A forensic anthropologist opined that the injury occurred before Ms. Vernon's death and could have been caused by a single-edged knife blade. R. Tr. 121–123, 126, 128–29 (Dec. 9, 2004).

2. Trial. At his trial for first-degree murder, Petitioner testified in his own defense, claiming that he and Ms. Vernon set out on foot after Ms. Vernon's car had gotten stuck the night of her disappearance. R. Tr. 174–76 (Dec. 14, 2004). He said they walked until Ms. Vernon's feet hurt, then he "started

walking in circles" and "after a while, [he] lost [Ms. Vernon's] voice." *Id.* at 184. He said that he did not know what happened to Ms. Vernon and he denied killing her. *Id.* at 202.

Consistent with Petitioner's testimony, his two counsel presented an innocence defense. A written jury instruction set forth Petitioner's position that "he did not kill Coty Vernon and that the evidence [did] not support the accusations against him." R. Tr. 73 (Dec. 15, 2004). Instead, the instruction stated, the evidence demonstrated that Petitioner "could not have killed Ms. Vernon . . . and that, in fact, it was a physical impossibility." *Id.*

The jury received an elemental instruction on first-degree murder and the lesser-included offense of second-degree murder. Pet. App. 25a. At the prosecution's request, the jury was instructed that "[d]iminished responsibility due to self-induced intoxication is not a defense to murder in the second-degree." R. Tr. 80 (Dec. 15, 2004); Pet. App. 25a; *see* COLO. REV. STAT. § 18-1-804(1). Petitioner's counsel did not seek an additional instruction stating that self-induced intoxication could negate the "after deliberation" element of first-degree murder. Counsel did not plan to make arguments to the jury based on this instruction because those arguments would have been inconsistent with counsel's chosen defense theory, the theory supported by Petitioner's own testimony: that he was innocent. R. Tr. 176–77 (Jan. 23, 2012).

The jury convicted Petitioner of first-degree murder, and he received a sentence of life in prison without the possibility of parole. R. Tr. 3, 8 (Dec. 17,

2004). Petitioner's conviction was affirmed on direct appeal. *People v. Garner*, No. 05CA0310, 2006 WL 3028152 (Colo. Ct. App. Oct. 26, 2006) (unpublished).

3. Post-Conviction Proceedings in the Trial Court. After his direct appeal, Petitioner filed a post-conviction motion alleging ineffective assistance of counsel. Petitioner made various claims challenging his attorneys' strategic decisions before and during trial, including their decision not to request an instruction on self-induced intoxication as a defense to first-degree murder.[1] Pet. App. 35a–37a, 48a. But although Petitioner called a criminal defense expert to support his post-conviction claims, the expert presented no testimony on the issue of the self-induced intoxication instruction. R. Tr. 194–210 (Jan. 23, 2012).

Indeed, evidence at the post-conviction hearing revealed that Petitioner's counsel had fully investigated the possibility of presenting expert testimony on the effects of methamphetamine use as part of a self-induced intoxication defense. But it became apparent early on that Petitioner would testify that he did not kill Ms. Vernon; he would not instead testify that although he killed her, he did so

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[1] Under Colorado law, "evidence of intoxication . . . may be offered . . . when it is relevant to negative the existence of specific intent." COLO. REV. STAT. § 18-1-804(1). Here, evidence of intoxication could have been introduced in an effort to reduce Petitioner's conviction from first-degree to second-degree murder. First-degree murder requires an intentional killing "after deliberation," which means "made after the exercise of reflection and judgment." COLO. REV. STAT. § 18-3-101(3).

because he was high on methamphetamine. *Id.* at 175–77. And, more importantly, counsel concluded that evidence of self-induced intoxication could have been highly damaging to Petitioner's defense. After consulting two experts, counsel determined that a person high on methamphetamine is likely to resort to inexplicable outbursts of violence and rage. *Id.* at 87, 146–49. Counsel were "really afraid" that, under the circumstances, presenting a self-intoxication defense would only help the prosecution because it would "show that [Petitioner] was . . . in the throes of use of methamphetamine [and] was capable of committing a violent act." *Id.* at 147–48.

And there was a final strategic reason not to seek a self-intoxication instruction. Petitioner's first-chair counsel had learned, after 30 years of experience as a criminal defense attorney, that juries respond poorly to self-intoxication defenses. *Id.* at 172. She feared that had she attempted to pursue a self-intoxication defense—particularly in light of Petitioner's general denial—she would have lost all credibility with the jury. *Id.* at 172, 177.

Based on this record, the trial court concluded that Petitioner's counsel were not constitutionally deficient. The decision not to pursue a voluntary intoxication defense, and therefore not to seek a jury instruction on self-intoxication, was carefully considered and thus "squarely within the province of 'virtually unchallengeable' strategic decisions made after proper investigation." Pet. App. 38a. Further, Petitioner failed to overcome the strong presumption that the decision was reasonable. He presented "no argument, authority, or expert testimony to suggest

that [counsel's] reasons for not requesting a [self-induced] intoxication instruction were so unreasonable as to render her strategic decision an instance of deficient performance." *Id*. at 39a.

4. Affirmance by the Colorado Court of Appeals. The Colorado Court of Appeals affirmed Petitioner's conviction, rejecting his jury-instruction claim for two independent reasons.

First, echoing the trial court's order, the court of appeals held that Petitioner failed to "present any argument on the [instructional] matter at the post-conviction hearing" and thus "did not attempt" to overcome *Strickland*'s strong presumption that the decision was "sound trial strategy." Pet. App. 27a. The court noted that Petitioner "did not ask his criminal defense expert whether trial counsels' failure to seek a complete instruction on intoxication was a decision falling within the reasonable standard of practice for a criminal defense attorney in Mesa County[, the jurisdiction in which the trial was conducted]." *Id*. The post-conviction record provided no basis to invalidate Petitioner's conviction.

Second, the court observed that in applying *Strickland*'s presumption of competence, "courts are 'required not simply to give [the] attorneys the benefit of the doubt but to affirmatively entertain the range of possible . . . reasons counsel may have had for proceeding as they did.'" *Id.* at 27a–28a (quoting *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011)). Although the court rejected counsel's explanation that the self-intoxication instruction would have injected the subject of methamphetamine use into the case, *id.* at 27a, the court explained that the

instructions actually given to the jury were more favorable to Petitioner's defense than they would have been had counsel requested a self-intoxication instruction. The actual instructions given to the jury "allowed the jury to infer that, inasmuch as self-induced intoxication was not a defense to other charges, it would be a defense to first degree murder." *Id.* at 29a. The court noted that this alternative rationale for counsel's conduct was not contrary to the record: it did "not contradict anything trial counsel said" at the hearing, because counsel were "not asked about . . . not requesting a more complete treatment of the subject of intoxication once it was injected into the instructions." *Id.* at 29a n.9.

The Colorado Supreme Court declined discretionary review. *Id.* at 68a.

REASONS FOR DENYING THE PETITION

Strickland v. Washington, 466 U.S. 668 (1984), set forth a two-part test for ineffective assistance of counsel. Under the "performance prong," the defendant must show that his lawyer made errors so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Under the "prejudice prong," the defendant must show that his counsel's errors actually prejudiced his defense. *Id.* Petitioner argues that this case provides an occasion to clarify the first prong of the *Strickland* analysis. For three reasons, Petitioner is incorrect.

First, this case is an inappropriate vehicle to address the Question Presented.

As an initial matter, Petitioner did not develop an adequate record below. Petitioner failed to support his ineffectiveness claim with any evidence or argument at the post-conviction hearing, and both the trial court and court of appeals rejected the claim for that very reason.

But even putting aside Petitioner's failure of proof, this Court would be required to affirm the decision below for at least two other independent reasons. One, the Question Presented makes assumptions that this Court must reject: that counsel's decision not to seek a self-intoxication instruction was unreasonable, and that the court of appeals' justification for counsel's decision was counterfactual. The record refutes these assumptions. Two, Petitioner will never be able to establish that he was prejudiced by his counsel's purported errors.

Second, although Petitioner asserts that an "intractable conflict" has arisen regarding whether courts may hypothesize reasons to support counsel's challenged conduct, the case law tells a different story. A close reading of the cases cited in the Petition (as well as cases omitted from the Petition) shows that any split is not among jurisdictions, but rather between two categories of claims.

On the one hand are claims involving failures that cannot possibly be explained by any viable trial strategy. These include a failure to seek suppression of a clearly unconstitutional confession or the failure to investigate an entire category of crucial evidence. In circumstances like those, courts understandably reject invitations to consider alternative strategic grounds that could have justified counsel's conduct.

On the other hand are claims involving legal decisions that were consistent with some viable trial strategy. With respect to those claims, courts—even those in Petitioner's favored jurisdictions—recognize that a lawyer's decisions are not deficient if they can be justified by a reasonable trial strategy, even one not appearing in the record.

Finally, the outcome below was consistent with this Court's precedent. The Court has repeatedly recognized that ineffective assistance of counsel arises only when a lawyer's actions fall outside the broad range of reasonable professional judgment. As the courts below recognized, it is within the range of reasonableness for a lawyer not to seek a jury instruction that is inconsistent with a strategically chosen defense theory.

I. This case is an inappropriate vehicle to address the Question Presented.

For three separate and independent reasons, this case is an unsuitable vehicle to address the Question Presented.

A. Petitioner failed to support his ineffectiveness claim with evidence or argument below.

It is a criminal defendant's burden to satisfy the constitutional test for ineffective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 658 (1984) ("[T]he burden rests on *the accused* to demonstrate a constitutional violation." (emphasis added)). Under the performance prong of *Strickland*, "[t]he *challenger's burden* is to show that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (emphasis added; internal quotation marks omitted). And, to satisfy this burden, the defendant cannot rest on mere allegations or suggestions. The defendant's showing must be strong enough to overcome the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* (internal quotation marks omitted); *see also Cronic*, 466 U.S. at 658 ("[W]e presume that the lawyer is competent to provide the guiding hand that the defendant needs . . . ."); *cf. Premo v. Moore*, 562 U.S. 115, 132 (2011) ("There is a most substantial burden on the claimant to show ineffective assistance. . . . [I]n cases where witnesses and evidence were not presented in the first place . . .

the burden the claimant must meet . . . . [h]as not been met . . . .").

Here, despite bearing the burden of proof, Petitioner made no attempt at his post-conviction hearing to demonstrate that counsel's decision not to seek a self-intoxication instruction was so unreasonable as to be constitutionally deficient. Petitioner merely identified a fully informed strategic choice that his counsel made and registered his post-hoc, hindsight-based disagreement with it. As the trial court explained, Petitioner presented "no argument, authority, or expert testimony" to support his claim under the deficiency prong of *Strickland*. Pet. App. 39a. The court of appeals agreed, concluding that Petitioner "did not attempt" to show that counsel's decision, rather than reflecting "sound trial strategy," was constitutionally deficient. *Id*. 27a. The court made clear that this failure of proof was an independent reason why Petitioner's claim failed. *Id*.

Given the post-conviction record, this Court would be required to affirm the judgments below without reaching the Question Presented. This case does not provide an occasion for the Court to clarify an unsettled point of constitutional law.

B. The facts of this case do not implicate the assumptions on which the Question Presented is based.

The Question Presented is premised on two critical assumptions. In Petitioner's view, *Strickland* is violated when (1) the "actual basis" for a lawyer's conduct was "unreasonable" and (2) a reviewing court "invent[s]" a counterfactual rationale for that

conduct. Pet. i. Both assumptions, however, are unwarranted in this case.

Regarding the first assumption, although the court of appeals rejected counsel's explanation for deciding not to seek a self-intoxication instruction, Pet. App. 27a, that explanation was, in light of the record, reasonable as a matter of law. Nothing would prevent this Court from so concluding.

Counsel's decision was undoubtedly strategic. There is no evidence that it was the result of "ignorance, inattention, slumber, or laziness." Pet. 9. To the contrary, counsel were aware that evidence of self-induced intoxication could, as a legal matter, negate the existence of specific intent. But counsel chose not to pursue that defense, or an instruction on the subject, because it was inconsistent with Petitioner's testimony and counsel's carefully chosen defense theory. Pet. App. 27a, 36a–37a. Moreover, counsel were leery of drawing attention to evidence of intoxication because it could have explained the violent outburst that led to Ms. Vernon's murder.

These strategic considerations were more than reasonable. Indeed, courts from myriad jurisdictions have held that a decision not to seek an instruction contrary to a defense theory is, by definition, *not* deficient. And that includes the decision not to seek a self-intoxication instruction:

> Having chosen a reasonable defense theory [of factual innocence] . . . [a defense attorney is] not required to pursue an intoxication defense as well. Such a defense would [be] inconsistent with counsel's strategy of denying [the defendant's] guilt. . . . An

> intoxication defense would have required the jury to posit that [the defendant] caused [the victim's] death, and to consider his mental state at the time. [Defense counsel is] not required to raise such a defense—*even in a request for a jury instruction*—when they had reasonably chosen to argue that [the defendant] did not cause [the victim's] death.

Hunt v. Comm'r Ala. Dep't of Corr., 666 F.3d 708, 727 (11th Cir. 2012) (emphasis added).[2]

Petitioner implies that there was no possible downside to asking for a self-intoxication instruction, Pet. 28–29, but this ignores the practical realities of jury trials and closing arguments. It would have been obvious that the instruction was a "defense" instruction, and the prosecution could easily have

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[2] *See also Jackson v. Shanks*, 143 F.3d 1313, 1320 (10th Cir. 1998) ("Trial counsel's decision not to present inconsistent defense theories does not constitute ineffective assistance. . . . [C]ounsel's failure to seek an intoxication instruction was reasonable, because the instruction would have conflicted with his chosen trial strategy . . . ."); *Butcher v. Marquez*, 758 F.2d 373, 377 (9th Cir. 1985) ("Defense counsel need not request instructions inconsistent with its trial theory."); *Hannon v. State*, 941 So. 2d 1109, 1139 (Fla. 2006) ("[T]rial counsel cannot be deemed ineffective for failing to pursue [a] voluntary intoxication defense because such a defense would have been inconsistent with [the defendant's] innocence theory."); *Rodriguez v. State*, 329 S.W.3d 74, 83 (Tex. Ct. App. 2010) ("[Counsel] made a strategic decision to pursue only one theory at trial."); *State v. Eckert*, 553 N.W.2d 539, 545 (Wis. Ct. App. 1996) (holding that counsel's strategic decision not to request an instruction was reasonable because it was "inconsistent with the general theory of defense").

made clear, either implicitly or explicitly, that the defense was attempting to present two entirely inconsistent theories to the jury—something counsel wanted to carefully avoid. And although Petitioner asserts that the subject of methamphetamine use had already been injected into the case, Pet. 28, the issue had not been introduced with specific reference to the elements of first-degree murder. Counsel believed that Petitioner's best chance for a favorable outcome, based on careful pre-trial investigation, was to have the jury focused on whether Petitioner actually killed Ms. Vernon, not on his level of intoxication. Pet. App. 37a. Presenting a self-induced intoxication instruction would have required the jury to at least consider that subject, undermining the theory of defense. It also risked counsel's credibility with the jury. *Id*. at 26a.

These were all reasonable judgment calls to make. To suggest otherwise reduces the complicated reality of trial to an overly simplistic exercise of hindsight, something *Strickland* itself forbids. 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

The second premise of Petitioner's Question Presented is that the appellate court invented a "counterfactual rationale" to support counsel's decision not to seek the self-intoxication instruction. Pet. 8. Yet the court explicitly did not do so. It acknowledged "that courts should 'not indulge *post*

hoc rationalization for counsel's decision-making *that contradicts the available evidence*." Pet. App. 29a n.9 (emphasis in opinion) (quoting *Richter*, 562 U.S. at 109). The rationale posited by the appellate court did "not contradict anything trial counsel said at the post-conviction proceeding" because counsel were never asked about the subject. *Id.*

The court below merely followed this Court's precedent. "*Strickland* specifically commands that a court 'must indulge the strong presumption' that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Pinholster*, 563 U.S. at 196 (internal brackets omitted) (quoting *Strickland*, 466 U.S. at 689–90). The Colorado Court of Appeals did just that, and its analysis is nothing more than a routine application of *Strickland*'s presumption of competence—a presumption that Petitioner failed to overcome.

C. Given how the Colorado Court of Appeals resolved Petitioner's claim, he can never show that he was prejudiced by his counsel's alleged errors.

Petitioner argues that considering alternative justifications for counsel's conduct muddles *Strickland's* two prongs and "injects a counterfactual inquiry better suited for the prejudice prong." Pet. 25.[3] That argument underscores a problem with this

[3] Petitioner bemoans "judicial invention" conducted as part of the deficient performance prong of the *Strickland* analysis, describing it as "unfair" and a "waste [of] courts' resources." Pet. 24. He does not explain why he believes, nonetheless, that the same practice *is* fair as part of the prejudice prong. Pet. 25.

case as a vehicle: the nature of Petitioner's deficient performance claim is such that he will never be able to establish prejudice.

Petitioner does not ask this Court to overturn the Colorado appellate court's conclusion that the instructions actually given to the jury "effectively put defendant in a better position." Pet. App. 31a. That conclusion—rooted in an analysis of state, not federal, law—is something that this Court would not have occasion to review. The issue on certiorari instead would be only whether it was improper for the Colorado Court of Appeals to reach its state-law conclusion within the context of one particular prong of the ineffective assistance analysis. *See id.* ("Consequently, a plausible reason exists for trial counsels' not having asked for a full and proper instruction on voluntary intoxication, and defendant cannot demonstrate that counsels' performance was constitutionally *deficient*." (emphasis added)). As a result, even if this Court were to agree with Petitioner that he has satisfied *Strickland's* deficient-performance prong, and remanded the case to the Colorado courts for consideration of *Strickland's* prejudice prong, it is apparent that his claim ultimately would fail: the Colorado Court of Appeals has already concluded that the instructions presented to the jury "effectively put defendant in a better position" than he would have been if the jury had been presented with the instruction he now seeks. *Id.*

Petitioner's argument that the Colorado Court of Appeals' approach "muddles" *Strickland's* two prongs thus misses an obvious point. In a case such as this,

the two prongs are related. If a reasonable attorney could have believed that the instructions read to the jury gave the defendant his best possible chance for a favorable outcome, the defendant will never be able to establish *Strickland* prejudice.

II. The cases Petitioner cites do not raise a true jurisdictional split but instead reflect different analytical approaches based on different circumstances.

A close examination of the relevant case law demonstrates that Petitioner's claim of an "intractable split" among jurisdictions is inaccurate. When determining whether to entertain hypothetical justifications for a lawyer's conduct, it is the factual context—not the jurisdiction—that ultimately determines the approach individual courts adopt. Although some courts, including the court of appeals below, have identified differing approaches in different cases, and have suggested that those differing approaches indicate a jurisdictional split, *see* Pet. App. 29a n.9, there is in fact no jurisdictional split for this Court to resolve.

A. Where lawyers make mindless errors that cannot possibly be explained by trial strategy, courts do not entertain theoretical justifications to excuse them.

All of the cases Petitioner cites from his favored jurisdictions—the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, and the District of Columbia—involve mindless, non-strategic attorney failures that significantly altered the state of the evidence before the jury. It is in those circumstances

that courts have refused to entertain alternative justifications for counsel's obvious errors. Unsurprisingly, there are cases of this sort even from the jurisdictions that Petitioner disfavors—the First and Eleventh Circuits, and the States of Pennsylvania, Missouri, and Georgia. In appropriate cases, those jurisdictions too decline to hypothesize reasons to support obviously non-strategic attorney conduct.

1. Petitioner's Favored Jurisdictions Decline to Hypothesize to Support Non-Strategic Errors. The cases Petitioner relies on from the Fourth Circuit involve either failures to file suppression motions or failures to investigate that could not plausibly be justified by any viable trial strategy. In *Tice v. Johnson*, a detective's notes revealed that the defendant's confession had been unconstitutionally obtained, but counsel inexplicably failed to seek suppression: at a post-conviction hearing, counsel "could not conceive" of a reason for the failure. 647 F.3d 87, 89, 97, 104 (4th Cir. 2011). In *Grueninger v. Virginia Department of Corrections*, counsel missed the deadline for filing a motion to suppress a confession even though the videotape of the confession plainly showed a stark violation of *Miranda*. 813 F.3d 517, 520–21 (4th Cir. 2016). And in *Griffin v. Warden*, counsel thought the defendant was going to "take a plea," so he merely "glanced" at the case file, never contacting witnesses that the defendant claimed would provide an alibi. 970 F.2d 1355, 1355–56 (4th Cir. 1992). He then stumbled—completely unprepared—into a trial at which alibi witnesses could have been crucial. *Id*.

The two cases Petitioner cites from the Fifth Circuit likewise involve glaring, non-strategic omissions by counsel that significantly altered the evidence before the jury. In one, counsel failed to present evidence that, between the time of the altercation and the victim's death, the victim had been attacked by other assailants. *Richards v. Quarterman*, 566 F.3d 553, 564–66 (5th Cir. 2009). This failure was a plain omission, not a judgment call that could have been described as strategic. *Id.* at 566. In the other Fifth Circuit case, counsel failed to interview *any* eyewitnesses, one of whom would have testified that the defendant was not present at the scene of the shooting. *Anderson v. Johnson*, 338 F.3d 382, 385, 392–93 (5th Cir. 2003).

Petitioner's cases from the Sixth, Seventh, Eighth, and Ninth Circuits also involve inexplicable failures to investigate, to present crucial exculpatory evidence, or to prevent admission of harmful evidence. *Gabaree v. Steele*, 792 F.3d 991, 998–99 (8th Cir. 2015) (counsel failed to object to testimony that impermissibly bolstered the credibility of two child victims who had recanted their allegations); *Caldwell v. Lewis*, 414 Fed. App'x 809, 816–17 (6th Cir. 2011) (counsel promised in an opening statement to call alibi witnesses but failed to do so); *Duncan v. Ornoski*, 528 F.3d 1222, 1225 (9th Cir. 2008) (counsel failed to test blood evidence that would have shown that someone other than the capital defendant was at the scene of the crime); *Marcrum v. Luebbers*, 509 F.3d 489, 506–07 (8th Cir. 2007) (counsel was precluded from calling essential mental health witnesses because he failed to timely disclose them); *Goodman v. Bertrand*, 467 F.3d 1022, 1029 (7th Cir.

2006) (counsel could not call a critical witness because he failed to subpoena her); *Alcala v. Woodford*, 334 F.3d 862, 870–72 (9th Cir. 2003) (counsel in a capital case intended to call alibi witnesses but then failed to call them); *Brown v. Sternes*, 304 F.3d 677, 680 (7th Cir. 2002) (in a "tragic breakdown" of the justice system, counsel entirely failed to investigate defendant's mental health history for an insanity defense); *Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002) (counsel failed to investigate alternative suspect evidence); *Harris v. Reed*, 894 F.2d 871, 878–79 (7th Cir. 1990) (counsel told jurors that they would hear from witnesses who would contradict the prosecution, but then decided against calling them, without even interviewing them).

Finally, the cases Petitioner cites from the District of Columbia likewise involve non-strategic failures by counsel that seriously altered the nature of the evidence that was considered by the jury. *Young v. United States*, 56 A.3d 1184, 1194–95, 1198–99 (D.C. 2012) (in a heroin distribution case, in what was "an omission, not a strategic decision," counsel failed to investigate whether the amount of money defendant gave to an undercover officer was consistent with the quantity and purity of the drugs found on the floor of a restaurant); *Chatmon v. United States*, 801 A.2d 92, 108–09 (D.C. 2002) (counsel's questions of a detective that elicited a witness's out-of-court identification of the defendant, previously found inadmissible due to being unduly suggestive, "eviscerated the defense strategy to isolate and create doubt about the government's key witness").

2. Petitioner's Disfavored Jurisdictions Decline to Hypothesize to Support Non-Strategic Errors. Importantly, the approach taken in Petitioner's favored jurisdictions is also the approach taken, in appropriate cases, by courts in jurisdictions Petitioner maintains are on the opposite side of his purported split. Although the Petition does not mention these cases, they demonstrate that where counsel's errors cannot possibly be strategic, courts in Petitioner's disfavored jurisdictions decline to hypothesize reasons to support them and focus only on the post-conviction record itself. *See*, *e.g.*, *United States v. Marquez-Perez*, 835 F.3d 153, 165–66 (1st Cir. 2016) (finding "sufficient signs" of ineffectiveness to remand for hearing where counsel failed to watch government's video evidence before trial, because the record showed that counsel himself believed that the videos contained exculpatory evidence); *DeBruce v. Comm'r*, 758 F.3d 1263 (11th Cir. 2014) (finding counsel ineffective where his own testimony "made clear that his failure to conduct adequate investigation was not the result of a strategic decision, but rather a result of the lack of time as he scrambled to prepare for [a] capital trial with less than four weeks' time while also preparing for and conducting other trials"); *Dugas v. Coplan*, 428 F.3d 317, 327–34 & n.10 (1st Cir. 2005) (focusing solely on counsel's actual reasoning and knowledge, and finding counsel ineffective for failing to consult with an arson expert); *Humphrey v. Williams*, 761 S.E.2d 297, 307–10 (Ga. 2014) (assessing only counsel's stated reasons for failing to obtain records that would have precluded damaging testimony about a prior similar act); *Taylor v. State*, 262 S.W.3d 231, 251

(Mo. 2008) (assessing only a capital counsel's stated reasons for conduct and finding counsel ineffective for failing to introduce a "treasure trove" of mitigating mental health evidence in the penalty phase of trial); *Commonwealth v. Solano*, 129 A.3d 1156, 1194–96 (Pa. 2015) (assessing capital counsel's stated reasons for conduct and finding counsel ineffective for failing to investigate mitigating evidence); *Commonwealth v. Daniels*, 104 A.3d 267, 300–03 (Pa. 2014) (finding capital counsel ineffective for failing to investigate mitigation evidence despite the Commonwealth's efforts to justify the failures).

B. Where lawyers make judgment calls that can be justified by trial strategy, courts consider alternative justifications for counsel's conduct.

Although courts across the country refuse to hypothesize reasons to support clearly non-strategic lawyer errors, those same courts—including courts in Petitioner's favored jurisdictions—entertain hypothetical rationales for a lawyer's conduct where the alleged deficiency was not obviously non-strategic.

1. Petitioner's Favored Jurisdictions Hypothesize in Appropriate Cases. Petitioner overlooks cases from many of his favored jurisdictions that engage in the same practice that he criticizes—they reject claims of ineffective assistance based on alternative justifications for counsel's conduct that, according to the record, counsel may not have considered.

One case from the Fourth Circuit is similar to this one, in that it involved an attorney's decision not

to seek a particular jury instruction. In *Leonard-Bey v. Conroy*, a jury found the defendant guilty of felony murder despite acquitting him of the underlying felony, attempted armed robbery. 27 Fed. App'x 227, 228 (4th Cir. 2001). The federal district court held that counsel was ineffective for not requesting a jury instruction specifying that, if the jurors acquitted on the underlying felony, they were required to also acquit on felony murder. *Id.* at 229. Reversing, the Fourth Circuit held that counsel's conduct was reasonable based on a strategy that may not have been in counsel's mind at all: according to the court, requesting the instruction may have increased the chance of guilty verdicts on both a murder charge and the underlying felony and made the defendant eligible for the death penalty. *Id.* at 230. The dissenting judge objected that counsel may not in fact have had this particular strategy in mind, and indeed may not have had any strategy in mind. But the majority responded that "'to uphold a lawyer's strategy, we need not divine the lawyer's mental processes underlying the strategy.'" *Id.* at 229 n.2 (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000)). In other words, the Fourth Circuit—which Petitioner claims does *not* follow the Eleventh Circuit's approach—not only followed that approach, but quoted one of the Eleventh Circuit cases that Petitioner claims is incorrect.

In *Knox v. Johnson*, the Fifth Circuit deemed counsel's conduct in a capital trial to have been reasonable based on what counsel "may" have been thinking. 224 F.3d 470, 480 (5th Cir. 2000). The court used hypothetical reasoning three times throughout

its opinion. *Id.* (rejecting an argument that counsel was ineffective for not calling an impeachment witness because "counsel *may* simply have realized that [the testimony] did little to discredit [the other witness]" (emphasis added)); *id.* *(*rejecting an argument that counsel should have objected to certain testimony because counsel "*may* have concluded that the dangers inherent in objecting—losing the objection or appearing obstructionist to the jury—outweighed the marginal benefit" (emphasis added)); *id.* (rejecting an argument about a failure to object to character evidence because "counsel's failure to object to this brief statement *may well have* reflected the statement's insignificance rather than counsel's incompetence" (emphasis added)). These assessments about what counsel "may" have been thinking indicate that, in appropriate circumstances, the Fifth Circuit, one of Petitioner's favored jurisdictions, is perfectly willing to consider hypothetical justifications for counsel's conduct.

A Sixth Circuit case is similar. In *O'Neal v. Burt*, a defendant argued that his counsel was ineffective for not using a DEA report as impeachment material. 582 Fed. App'x 566, 569–71 (6th Cir. 2014). Despite counsel's testimony at a post-conviction hearing that she had *no* strategic reason for the omission, the Sixth Circuit concluded that a competent attorney reasonably could have concluded that using the report would have been more harmful than helpful. *Id.* at 573–74. To support its reliance on this hypothesized strategic consideration, the Sixth Circuit quoted a case from the First Circuit, a jurisdiction that Petitioner disfavors, explaining that "as long as counsel performed as a competent lawyer

would, his or her detailed subjective reasoning is beside the point." *Id*. at 574 (quoting *Cofske v. United States*, 290 F.3d 437, 444 (1st Cir. 2002)).

Finally, in a Seventh Circuit case, *McAfee v. Thurmer*, a murder defendant contended that his counsel was ineffective for arguing that a police officer was the killer and had testified falsely to cover up his crime. 589 F.3d 353, 355 (7th Cir. 2009). At a post-conviction hearing, counsel said that this was an unwise decision; she testified that she had made an "overzealous probably inappropriate indictment of a police officer." *Id*. at 356–57. The Seventh Circuit nonetheless deemed counsel to have been effective, because even though "it might well have been better to urge the jury to convict on the lesser-included offense, rather than go for broke by seeking an acquittal on the more serious charge," at the time of the trial "going for broke was not an unreasonable strategy." *Id*. at 356. The court recognized that the decision "was strategic" and made after "many hours developing [a] trial strategy." *Id*. In those circumstances, the lawyer's own negative explanation for the decision was not dispositive. *Id*.[4]

2. Petitioner's Disfavored Jurisdictions Hypothesize in Appropriate Cases. The cases Petitioner cites from the First and Eleventh Circuits, two of his disfavored jurisdictions, are similar to the

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[4] The court was concerned that counsel may have been improperly "falling on her sword for the sake of her client" in hopes of securing a new trial. *McAfee*, 589 F.3d at 356–57. Petitioner ignores this potential for gamesmanship, although his favored rule could encourage it.

cases just discussed: they involve judgment calls rather than blundering omissions, and courts thus are willing to consider hypothetical justifications for them. *Wilder v. United States*, 806 F.3d 653, 659 (1st Cir. 2015) (counsel did not object to individual, in-chambers voir dire, but this may have helped the defense "because potential jurors may be more likely to be candid as to sensitive matters when they are not made to feel 'awkward' by close proximity to the defendant"); *Bucci v. United States*, 662 F.3d 18, 31–32 (1st Cir. 2011) (counsel did not object to partial closure of the courtroom during voir dire, but counsel reasonably could have believed that declining to object would best serve the defendant's interests by "conserving the defense's limited resources for other important issues"); *Hammond v. Hall*, 586 F.3d 1289, 1333 (11th Cir. 2009) (in the sentencing phase of a capital case, counsel reasonably could have chosen to object to an improper remark and obtain a curative instruction, rather than demanding a mistrial, which could have entailed a new jury that lacked "residual doubt"); *Gordon v. United States*, 518 F.3d 1291, 1302 (11th Cir. 2008) (counsel did not object to the denial of defendant's right to allocute at sentencing, but a reasonable attorney could have been concerned that the defendant's remarks would have led the sentencing court to consider the defendant even less honest and impose a heavier sentence); *Chandler v. United States*, 218 F.3d 1305, 1321 (11th Cir. 2000) (declining to hold that a decision not to call character witnesses was deficient because "a lawyer reasonably could . . . fear that character evidence might, in fact, be counterproductive: it might provoke harmful cross-examination and rebuttal witnesses").

The same is true of Petitioner's cited cases from Pennsylvania, Missouri, and Georgia. They involve judgment calls, not stark, case-altering omissions. *See Jones v. State*, 740 S.E.2d 147, 154 (Ga. 2013) (holding that a decision not to object to bolstering testimony was consistent with a strategy to demonstrate that investigators "put too much faith in an unreliable witness"); *Dorsey v. State*, 448 S.W.3d 276, 295 & n.13 (Mo. 2014) (capital counsel's decision not to call two additional physicians to testify during the penalty phase was a reasonable strategy because their testimony would have been substantially cumulative); *Commonwealth v. Philistin*, 53 A.3d 1, 29 & n.23 (Pa. 2012) (a decision by capital counsel to not introduce defendant's lack of criminal history at the time of the crime was an "objectively reasonable strategy" because, in response, the Commonwealth could have noted that defendant had recently been convicted of drug possession and assault).

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In sum, courts within Petitioner's favored jurisdictions, in appropriate cases, engage in the sort of hypothetical reasoning to which Petitioner objects. And courts within Petitioner's disfavored jurisdictions, again in appropriate cases, decline to engage in this sort hypothetical reasoning. There is no clean jurisdictional split that requires this Court's intervention.

III. Under this Court's precedent, the Colorado Court of Appeals was correct to consider alternative justifications for the strategic decision that Petitioner's counsel made.

As a final matter, the court below did not err: its analysis was consistent with this Court's precedent. In rejecting *Strickland* claims, this Court has openly offered hypothetical justifications for counsel's conduct.

In *Darden v. Wainwright*, 477 U.S. 168, 185 (1986), a capital defendant claimed that his counsel's failure to introduce any evidence in mitigation was due to having wrongly interpreted a statutory list of mitigating factors as exclusive rather than suggestive. This Court surmised that the failure was the result of a conscious choice, as the trial court had informed the defense that they could present other factors, and thus "even if counsel previously believed the list to be exclusive, they knew they were free to offer nonstatutory mitigating evidence, and chose not to do so." *Id*. Then—to justify counsel's apparent decision not to offer mitigating evidence—this Court engaged in the sort of speculation that Petitioner here condemns, saying: "there are several reasons why counsel reasonably *could have* chosen to rely on a simple plea for mercy from petitioner himself." *Id*. at 186 (emphasis added).

This Court cited three hypothetical reasons. First, any attempt to portray the defendant as nonviolent would have opened the door to evidence of his prior convictions; such evidence had not previously been admitted, "and trial counsel reasonably *could have* viewed it as particularly

damaging." *Id*. (emphasis added). Second, if defense counsel had attempted to offer testimony that the defendant was incapable of committing the crime, the prosecution could have responded with a psychiatric report showing that the defendant was an impulsive sociopath—and the defense attorney had decided against using such psychiatric testimony after consultation with the defendant. *Id*. Third, if defense counsel had attempted to put on evidence that the defendant was a family man, "they would have been faced with his admission at trial that, although still married, he was spending [a] weekend furlough with a girlfriend." *Id*. While the second of these three reasons was based in part on counsel's explanation about why he had opted not to use the psychiatric report as mitigation evidence, this Court used that explanation to more broadly justify counsel's decision not to introduce any mitigation evidence at all. And the first and third reasons were untethered to any explanation actually offered by counsel.

Similarly, in *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), this Court used various hypothetical considerations to justify the way defense counsel had presented his closing argument. To justify counsel's failure to highlight certain points that "would unquestionably have supported the defense," the Court noted that "[f]ocusing on a small number of key points *may be* more persuasive than a shotgun approach." 540 U.S. at 7 (emphasis added). To justify counsel's decision to mention details that cast the defendant in a negative light, this Court observed that, "[b]y candidly acknowledging his client's shortcomings, counsel *might have* built credibility with the jury and persuaded it to focus on

the relevant issues in the case." *Id.* at 9 (emphasis added). To justify counsel's decision to make only a passive request that the jury reach some verdict, rather than making an express demand for acquittal, this Court noted that, "given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable." *Id.* at 10. And to justify counsel's decision to confess to the jury that he too could not be sure of the truth, this Court said that "there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle." *Id*. at 11. This Court did not cite any rationale actually offered by counsel for any of these points—the ineffective assistance claim was raised in the state courts on direct appeal, so there may not even have been a post-trial evidentiary hearing. Instead, this Court cited an assortment of treatises on advocacy to show that counsel's chosen approach was justifiable. *See id*. at 9–11.

Under this Court's precedent, therefore, the Colorado Court of Appeals correctly considered alternative, hypothetical justifications for the decision Petitioner's counsel made here. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. A court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. In applying that

presumption, courts are "required not simply to give [the] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did." *Pinholster*, 563 U.S. at 196 (alteration in original) (citation omitted). Here, regardless of counsel's mindset, it cannot be said that the decision not to ask for an instruction that would have contradicted a strategically chosen defense theory denied the defendant the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General

Office of the Colorado
Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Andrew.Cooper@coag.gov
(720) 508-6465

L. ANDREW COOPER
Deputy Attorney General
Counsel of Record

WILLIAM G. KOZELISKI
Assistant Attorney General

ABBIE J.N. CZIOK
Attorney, Attorney General's
Fellowship Program

Counsel for Respondent

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