No. 09-587

In The Supreme Court of the United States

KELLY HARRINGTON,

Petitioner,

v.

JOSHUA RICHTER,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is certiorari appropriate where the en banc court held that a defense lawyer violates the Sixth Amendment right to the effective assistance of counsel when he completely fails to investigate or present readily available forensic evidence directly supporting the theory of defense he himself selected and relied on throughout trial?

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STATEMENT OF THE CASE

The Case Presented At Trial.

In the early morning of December 20, 1994, a shooting occurred at 4620 Fair Oaks Boulevard in Sacramento, California. One person – Patrick Klein – was killed while another – Joshua Johnson – was injured. When police arrived, they found Klein lying on a sleeping bag on the living room couch and a large blood pool in the bedroom doorway. This blood pool would play a critical role in the case.

The state charged respondent Joshua Richter and co-defendant Christian Branscombe with murder and attempted murder. As the district court noted, the parties presented "divergent theories" of the shooting. Petitioner's Appendix ("Pet. App.") 27a.

According to the state, defendants went to Fair Oaks Boulevard to commit a robbery, shot Klein as he slept on the couch and shot Johnson when he awoke. There were three components essential to the state's theory: (1) Klein was shot while sleeping on the couch, (2) the blood pool police found in the doorway came from Johnson as he waited for police, and (3) Johnson did not initiate a gun battle by shooting at Branscombe. The state's case was based largely on the testimony of Johnson.

Johnson first told the 911 operator there were four or five assailants. RT 577, 686-87.[1] He then changed his story and said there were three to four assailants. RT 577, 686-87. Still later, he told police there was one assailant. RT 946. Finally, Johnson said it was Richter and Branscombe who shot Klein as he slept on the couch and then Johnson in the bedroom. RT 507, 510. Johnson never explained why he initially failed to identify the defendants, both of whom he knew well. And although Johnson admitted he had a .380 caliber gun that night by his bedside, he testified he did not fire it. RT 511, 590.

In an extensive opening statement defense counsel outlined the very different defense theory. According to counsel, defendants went to Fair Oaks Boulevard to return a gun Branscombe borrowed. Richter dropped Branscombe off and, moments later, heard shooting. Rushing into the house, Richter saw Klein on the floor in the bedroom doorway, while Branscombe yelled that Johnson tried to shoot him. There were three components essential to the defense theory: (1) Klein was *not* shot on the couch while sleeping but in the bedroom doorway during a gun battle, (2) the blood pool in the doorway was *not* from Johnson, but from Klein before Johnson carried him to the couch, and (3) Johnson fired a .380 caliber gun at Branscombe who returned fire in self-defense. The

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[1] "RT" refers to the Reporter's Transcript of Proceedings prepared in connection with the state court appeal. "ER" refers to the Excerpt of Record filed in the Court of Appeals.

defense case was based largely on the testimony of Richter himself. RT 1087-91.

Given these two inconsistent versions of events, the blood pool was a critical piece of evidence. The en banc court noted this precise point:

> If Klein was killed while lying on the couch in the living room, there was no possibility Richter's account was correct. If, in contrast, Klein was killed in the doorway to the bedroom, Johnson's account of the events in question could not possibly be true.

Pet. App. 125a.

Defense counsel noted the same point. In his opening statement he specifically focused the jury on the key evidence in the case. He promised the jurors the evidence would show "Patrick Klein was not shot there on the couch;" he focused their attention on "pools of blood" that were "inconsistent with the stories told by Gunner Johnson." ER 134-35. He told jurors the blood pool was "the evidence of great importance." ER 135. He promised the jury "the evidence will show that . . . Johnson after Patrick was shot moved him to the couch" and explained "[t]he evidence will show you that in the bedroom there is a pool of blood right in the entrance [to the bedroom]. . . . There is also a trail of blood from there to the couch." ER 138, 142. In his closing argument, defense counsel argued the same theory to the jury: the blood pool proved not only that Johnson was

lying, but that Klein had been caught in a cross-fire after Johnson fired at Branscombe. RT 1510-12.

It should have been easy to resolve this stark conflict as to who deposited the blood by testing a sample taken from the pool. Yet although police noted the "fair amount of blood" in the pool, they never collected any of it. RT 937. Thus, the genetic source of that blood could not be established by scientific tests. RT 937.

Instead, the state called a blood spatter expert. Prosecution witness Bob Bell looked at photographs of the crime scene which he admitted were "lacking" because they were "dark and not clear." RT 156. When asked if he saw "any spatter that would be consistent with Patrick Klein having been shot on the couch" Bell responded "[n]ot much, but there was some," particularly blood spatter near the couch which "may" have been caused by Klein being shot on the couch. RT 148, 150. Bell conceded there was no blood spatter on the sleeping bag or couch itself. RT 162, 183-84. In closing, the prosecutor argued Klein was shot on the couch; the blood pool was deposited by Johnson dripping blood as he stood in the bedroom doorway waiting for police to arrive. ER 178.

Although defense counsel recognized the importance of the blood pool evidence in opening statements, in contrast to the prosecutor he neither consulted with nor called a blood spatter expert. In closing argument, the prosecutor accurately noted that defense counsel had introduced no expert

testimony to support his theory that the blood pool proved Klein was shot in the bedroom:

> Bob Bell, he's 22 years as a blood spatter expert, all that stuff means nothing. Hey [defense counsel] says, the blood be here. Bob Bell, he's wrong, trust me. I am not going to go get an expert. I am not going to bring some-body in here to tell you because I don't need to do it. I will just do it in closing argument. I will just say it. If you are willing to believe me, hey, that will work.

Pet. App. 122a.

As important as the blood pool was, it was not the only key part of the defense case. As noted, the defense theory was that Branscombe fired only because Johnson had first fired a .380 caliber bullet at Branscombe. At trial, defense counsel introduced no physical evidence to show that there was a bullet hole at the crime scene consistent with a .380 caliber gun being fired that night. The prosecutor again ridiculed the defense for failing to present physical evidence to support its theory:

> [The defense theory is that] Johnson actually was the one who shot off the [.380 caliber] in the house. There is no bullet hole that can be found. . . .
>
> [I]t's reasonable with a guy with a [.380 caliber] semi automatic to get off at least one round if somebody is trying, if he's trying to shoot someone, and we never ever saw a bullet hole in this room consistent with the

> [.380 caliber] being fired at them. There is nothing, nothing over here, nothing. . . .

ER 171, 176.

Even on this record, the jury obviously viewed the case as close. Although the state presented testimony from an actual eyewitness, the jury had concerns, deliberating more than 14 hours over three days, twice returning with requests to have testimony re-read, and three times asking for further clarification on the law.

As post-conviction investigation revealed, however, the jury did not have the whole story, or anything close. Through a combination of false testimony and suppression of evidence by police, the failure to correct that testimony by the prosecutor, and a failure to investigate by defense counsel, there was significant – and now undisputed – physical evidence to support each part of the defense theory.

The New Evidence.

As noted, the defense theory was that Johnson fired a .380 caliber gun at Branscombe that night, starting the fight which caused Klein's death. The state powerfully relied on the fact that there was no physical evidence to support the notion that Johnson fired a .380 caliber bullet that night. ER 171, 176.

There is no longer any dispute the state's argument was false. It turns out investigating officer Maloney found a bullet hole in the floor of Johnson's

bedroom. ER 158. He cut a square of the floorboard around the bullet hole, then watched the square fall into the crawlspace beneath the house. ER 159. Under oath, Maloney testified (1) the crawlspace was inaccessible, (2) the floorboard was lost and (3) the bullet hole was not from a .380 caliber gun. ER 158-61. Johnson himself confirmed this testimony, explaining that the bullet hole was caused weeks earlier when he accidentally fired a .22 caliber gun into the floor. ER 153, 155.

Maloney's testimony was false, as was Johnson's. The uncontradicted evidence shows that the crawlspace was *not* inaccessible. The back of the house had a readily accessible opening to the crawlspace. ER 31-33, 46-48. After trial, the crawlspace was discovered, and the floorboard was recovered and provided to ballistics expert James Aiello. ER 32-33, 63. Aiello obtained a second piece of floorboard from the house to use as a control, test-fired five different caliber bullets into the floorboard (including a .380 caliber) and compared measurements from the control floorboard with measurements from the evidentiary floorboard. ER 63-64. His conclusion was stark; as the district court noted, "the bullet hole was made by a .380 caliber bullet." ER 14. In other words, this physical evidence directly supported the defense case and showed Johnson was lying. In district court the state did not cross-examine Aiello, nor did it even proffer any contrary testimony; instead, the state stipulated to his unrebutted expert testimony. ER 399.

But the .380 caliber bullet hole was not the only unrebutted expert testimony presented in post-conviction proceedings. As is now clear, the state's theory that the blood pool in the bedroom doorway came from Johnson is false. And the explanation is both logical and simple. According to blood spatter expert Ken Moses, a standing person dripping blood into blood (as the state theorized) would create a large number of round splash drops – known as satellite drops – surrounding the main pool of blood as blood dropped into the blood pool. ER 82-83. The lack of satellite drops here shows that the state's theory as to the source of the blood pool – that it was deposited by Johnson while standing in the doorway dripping into the blood pool – was false. ER 82-83. To the contrary, the absence of satellite drops establishes the blood pool was caused *not* by drops falling from an injured person standing in the doorway, but by the pooling of blood from a source close to or on the floor. ER 82-83. Moses's conclusion was straightforward:

> The lack of a large number of satellite dropletts (sic) surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

Again the state did not dispute this expert testimony. Thus, the state did not cross-examine Moses, nor did it offer any contrary testimony. Instead, the

state stipulated to this unrebutted expert testimony as well. ER 399.[2]

Because of Maloney's false testimony about the crawlspace, the jury never learned that, in fact, the physical evidence directly supported the defense theory that Johnson fired his .380 caliber that night. Nor did the jury learn that Johnson lied about how the bullet hole got in the floor. Moreover, because defense counsel did not consult a blood spatter expert, the jury did not hear uncontradicted forensic evidence that Johnson could *not* have been the source for the blood pool as the state claimed. Indeed, the district court itself noted that this evidence – never disputed by the state – proved that "the pool of blood . . . could not have been made by someone standing and dripping blood." Pet. App. 39a.

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[2] While it is certainly unusual for the state not to challenge defense experts in a habeas case, the state had good reason to stipulate to Moses's expert testimony here. At trial, Bob Bell (the state's own expert) – while testifying about some blood drops in the kitchen – himself recognized that when "[w]hen you have blood dripping into blood, you have small satellite spatter that occurs. . . ." RT 139. *Accord* RT 177 ("that may be satellite spatter from blood dripping into blood which gives you those smaller drops of blood."). In other words, Bell agreed with the scientific basis for Moses's testimony.

But even this is not all. The expert medical testimony of pathologist Dr. Paul Hermann, confirming Moses's conclusion, was also undisputed below. According to Dr. Hermann, given the nature of Johnson's wounds, and Johnson's own description of his frenetic activities in the six minutes before police arrived, it is "highly unlikely" Johnson deposited the amount of blood found in the blood pool. ER 71-72.

Defense Counsel's Explanations.

Based on his post-conviction investigation, Richter sought collateral relief in state court. He contended the state violated Due Process in presenting false evidence that the floorboard was lost and in failing to disclose the floorboard itself. He also contended that defense counsel rendered ineffective assistance of counsel in failing to uncover the floorboard on his own as well as in failing to investigate and present the other forensic evidence supporting the defense he himself had elected to present to the jury, including the blood spatter, pathology and ballistics experts. Richter presented his claims to the state supreme court in a state habeas petition, asking for an evidentiary hearing and discovery. The state court denied the petition in a one-line order which read, in its entirety, "Petition for writ of habeas corpus is DENIED."

Richter then sought habeas relief in federal court. The district court ordered a deposition of trial counsel. The parties stipulated the deposition would be submitted in lieu of live testimony. ER 399.

In light of the theory he elected to present, Richter's trial counsel recognized "[i]t was significant to try to show that [the blood pool] was at least partially the other gentleman's blood, meaning Klein's blood." ER 283. Had Klein's blood been in the doorway, "[i]t would have gone a long way to impeach the testimony of Mr. Johnson" and would have corroborated Richter's testimony. ER 283-84. But

counsel conceded he did not consult a blood spatter or pathology expert before or during trial. ER 245. Counsel was frank; he gave no tactical reason for his failure, he simply did not consider such experts and was unaware such testimony could be obtained. ER 289-92.

The Federal Court Proceedings.

The district court rejected Richter's Due Process claim based on the state's presentation of false evidence and argument as to the "lost" .380 caliber bullet hole, ruling that defense counsel could have disbelieved Maloney and "sen[t] someone out to the house to check to an entrance to the crawl space." ER 403. With respect to the claim that counsel erred in failing to investigate the bullet hole, the court found that counsel had "no reason to believe the hole was anything but what the investigators had found." Pet. App. 42a. Although the court recognized counsel was mistaken – because the bullet hole was really from a .380 caliber – it held the mistake reasonable. Pet. App. 43a.

Turning to the claim that defense counsel erred in failing to support his own theory by consulting blood spatter and pathology experts, the district court properly found that trial counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." Pet. App. 39a. Inexplicably, the court relied on this fact to find that counsel's failure to investigate and present blood

spatter and pathology testimony which directly supported the defense theory was reasonable. *Ibid.* The district court did not address the prejudice component of this issue. Pet. App. 44a.

A three-judge panel affirmed. As to the Due Process claim based on the state's suppression of evidence and presentation of false evidence, the panel noted (1) there was an easily accessible crawlspace beneath the house and (2) the floorboard was retrieved during post-conviction proceedings and a "firearms evidence expert . . . determined that the hole was probably caused by a .380 caliber firearm. . . ." Pet. App. 75a. The panel correctly recognized this evidence directly supported the defense theory, contradicted Johnson's testimony and had "exculpatory value." Pet. App. 76a, 77a.

Nevertheless, the panel rejected respondent's Due Process claim, refusing to consider the exculpatory value of the floorboard because police did not know about Aiello's testing when the evidence was suppressed. Pet. App. 77a. *But see United States v. Bagley*, 473 U.S. 667, 683 (1985) (in evaluating Due Process claims involving suppressed evidence, reviewing courts must consider not just the evidence suppressed itself, but "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case."). The panel also rejected Richter's alternative ineffective assistance of counsel claim because "Maloney testified under oath at trial that the floorboard was inaccessible, and [defense counsel] had no reason to

disbelieve him." Pet. App. 76a. In other words, it was reasonable for defense counsel not to investigate the floorboard because the state's investigating officer told him it would not help. *But see Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003) (unreasonable for criminal defense lawyer to forego investigation based on "the investigative work of the State.").

The panel also rejected Richter's claim that the failure to present blood spatter testimony regarding the blood pool was ineffective. Although "[c]ounsel highly experienced in trying capital cases involving bloodstain evidence might well have understood the value of such an expert" the "Sixth Amendment does not guarantee defendants a right to highly experienced counsel." Pet. App. 73a. Accordingly, counsel's failure to support the theory he himself relied on throughout his case was reasonable. *But see Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (in penalty phase, defense counsel promised jury evidence regarding defendant's difficult life but failed to investigate or present such a defense; held, *Strickland* violated.). Like the district court, the panel never addressed whether the failure to present this evidence was harmless. Pet. App. 73a.

The Circuit granted en banc review in connection with each of these holdings. In a 7-4 decision, the en banc court found defense counsel's failure to investigate the blood spatter evidence constituted ineffective assistance of counsel. With respect to the performance prong, the court eschewed a broad rule requiring defense counsel to consult an expert in

every case or on every issue. Pet. App. 104a, n.7. Instead, the court made clear this case involved an analysis of forensic evidence which was critical to support the theory counsel himself had affirmatively decided to present. *Id.* at 103a-104a. Because this case involved counsel's failure to "support the theory he had chosen," the state's decision to present expert blood spatter evidence in the middle of trial "has no bearing upon the relative importance of the source of the pool to the defense's theory of the case." *Id.* at 103a-104a and n.6. Counsel's obligation "to provide crucial – indeed potentially outcome-determinative – corroboration" for the defense theory did not depend on "whether or not the prosecution presented any expert testimony about the pool of blood. . . ." *Id.* at 112a. Relying on cases from throughout the country, the en banc panel squarely rejected the district court's view that the failure to investigate the defense theory of the case was somehow rendered reasonable "because counsel thought that the case was, at bottom, a credibility contest." *Id.* at 113a. Accurately noting that defense counsel himself offered no strategic reason for failing to consult with a blood spatter expert, the court refused to invent such a reason for him. *Id.* at 115a.

The court then turned to prejudice in connection with the blood spatter evidence. As noted above, neither the district court nor the panel ever addressed prejudice because both rejected defendant's claim by finding counsel's failure reasonable. The en banc court noted that if the blood pool was from Klein

the state's version of events could not possibly be true. *Id.* at 125a. Similarly, if the blood pool was from Johnson, Richter's version could not be true. *Id.* at 125a. Because the state had neither cross-examined Moses, nor presented any contrary evidence, Moses's conclusion "remains undisputed," "conclusively refuted the prosecution's theory" and would have impeached Johnson's credibility "on a central point." *Id.* at 126a-127a. The court also noted Johnson's shifting versions of events given to police. *Id.* at 128a. Finding counsel's failure to investigate the blood spatter evidence prejudicial, the en banc court did not reach the Due Process claims involving Maloney's lie about the crawlspace and suppression of the .380 caliber bullet hole or the alternative ineffective assistance of counsel claim based on counsel's failure to investigate and present the bullet hole in the "lost" floorboard.

The State's Petition for Certiorari.

In its Petition for Certiorari, the state mischaracterizes the panel and en banc decisions as they relate to the blood evidence at trial. Petition for Writ of Certiorari at 3, 8. The state presents the two decisions as having turned on defense counsel's separate failure to offer a serology expert to testify that blood typing of blood found on a molding near the blood pool could not have excluded Klein. However, both decisions recognized it was the blood spatter evidence, not the serology evidence, that was at the heart of the case.

The three-judge panel discussed separately the blood spatter evidence (*see* Pet. App. 72a-73a) – a discussion that is entirely ignored in the state's description of that decision. More important, the en banc court stated explicitly it was the blood spatter evidence that was "[m]ost significant, and most damaging to the prosecution" and acknowledged that "[t]aken by itself, the failure to present expert testimony on [serology] did not sufficiently prejudice the defense such that habeas relief would be warranted." Pet. App. 123a, 133a, n.20. The serology evidence was relevant simply because it reinforced the reasonable doubt created by the blood spatter evidence had both been presented at trial. As the en banc court explained, "[w]hile it would not have been unreasonable for the state court to conclude that, by itself, the failure to present serology evidence was not prejudicial, the absence of that expert testimony contributed to the prejudice that resulted from the failure to offer expert blood spatter testimony." *Id.* at 134a. In short, the blood spatter evidence should not be confused with the serology evidence; the issue here is whether certiorari is appropriate in connection with the en banc court's holding that counsel was ineffective for failing to investigate and present the blood spatter evidence, not the serology evidence.

REASONS FOR DENYING THE WRIT

I. THE EN BANC COURT'S UNREMARKABLE CONCLUSION THAT COUNSEL ACTS UNREASONABLY WHEN HE FAILS TO INVESTIGATE THE THEORY OF DEFENSE HE HIMSELF (1) SELECTS, (2) PROMISES TO THE JURY IN OPENING STATEMENT, (3) CALLS HIS CLIENT TO SUPPORT AND (4) RELIES ON IN CLOSING ARGUMENT DOES NOT MERIT CERTIORARI.

When a criminal defendant seeks relief because his counsel has provided inadequate representation, two elements must be proven: (1) counsel's performance fell below an "objective standard of reasonableness," and (2) but for counsel's errors there is a "reasonable probability" the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 693 (1984). Here, the en banc court held that defense counsel's failure to investigate and present unrebutted blood spatter evidence showing the blood pool was deposited by Klein fell below the *Strickland* standard.

The state urges this Court to grant certiorari for three reasons. First, the state expresses concern with the court's application of the performance prong of *Strickland*. According to the state, certiorari is appropriate because the decision "in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony" and "improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in

virtually every case in which the prosecution could conceivably offer expert relevant forensic testimony." Petition for Writ of Certiorari at 15-16. Second, the state suggests that the finding of deficient performance is "untenable" because it failed to recognize that counsel here believed his client was guilty, and therefore the normal duties of investigation did not apply. Petition for Writ of Certiorari at 17-20. Finally, the state argues that in any event, the decision was not suitably deferential to the state court's one-line order denying both a hearing and relief in state court because, after all, "the blood evidence was hardly crucial to the defense case." Petition for Writ of Certiorari at 22.

As more fully discussed below, the case for certiorari which the state describes ignores the record in this case almost entirely. This was not a decision involving a "per se rule" requiring experts in every case. This was a case where trial counsel selected a defense based on using the blood pool and physical evidence to prove Klein was shot in the bedroom, promised that defense to the jury in his opening statement, called his client to present that defense, relied on that defense in his closing argument, but completely failed to support that defense with readily available forensic evidence now undisputed by the state. The actual facts of this case bear no resemblance at all to either the case or issue on which the state seeks certiorari.

The state's request for certiorari on the question of whether counsel's investigative responsibilities

were lowered because he thought his client was guilty falters for an even more basic reason. Not only has the state never raised this issue before, but when the issue was raised *sua sponte* by the en banc panel at oral argument, the state *explicitly* conceded there was "no evidence" at all that defense counsel "thought his client was guilty." The en banc panel can hardly be faulted for accepting the state's explicit concession.

Finally, the state's concerns about the en banc panel's prejudice analysis – based on the state's view that "the blood evidence was hardly crucial to the defense case" – do not merit certiorari. This is plainly a case-specific application of the inherently fact-bound second prong of the *Strickland* test. As such, it seems uniquely inappropriate for certiorari. Equally important, the factual premise of the state's request – its assertion that the blood pool evidence was not important – is not only incorrect, and not only misses the entire point of the defense which counsel himself selected in this case, but ignores the state's own concession that if the blood pool was from Klein, the state's theory of the case was "palpably incorrect." Once again, the en banc court should not be faulted for taking this same view. Certiorari should be denied.

A. In Finding Counsel Unreasonable For Failing To Investigate The Defense He Himself Selected And Relied On Throughout Trial, The En Banc Panel Followed This Court's Precedents And The Case Law From Every Circuit That Has Ever Addressed This Issue.

The state argues certiorari is appropriate because the en banc decision "in effect laid down a per se rule requiring counsel to investigate and to produce expert-opinion testimony" and "improperly enlarged counsel's duty to investigate to include consultation with and presentation of an expert in virtually every case in which the prosecution could conceivably offer expert relevant forensic testimony." Petition for Writ of Certiorari at 15-16. As an initial matter, it is difficult to square the state's request for certiorari with the actual findings of the district court.

Although the state now ignores it almost entirely, the district court reached two conclusions which are undisputed and which control this case: (1) defense counsel selected a theory of defense, presented it to the jury in opening statement, called his client to support it and relied on it in closing argument and (2) defense counsel's "pretrial investigation and study led him to the belief that the trial would be primarily a credibility case." These two findings assume

importance in light of consistent case law from this Court and around the country.

Both this Court, and every circuit court to address the issue, have held that where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate readily available evidence supporting that theory is unreasonable. *See*, *e.g.*, *Wiggins*, 539 U.S. at 526 (in penalty phase, defense counsel promised jury evidence regarding defendant's difficult life but failed to follow through on this promise; held, *Strickland* violated); *Dugas v. Coplan*, 428 F.3d 317, 328-29 (1st Cir. 2005); *Clinkscale v. Carter*, 375 F.3d 430, 435 (6th Cir. 2004); *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004); *Eve v. Senkowski*, 321 F.3d 110, 126-30 (2d Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210, 219 (2d Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir. 1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990). Indeed, only days ago this Court itself found counsel's penalty phase representation deficient where counsel "told the jury that [defendant] . . . was not mentally healthy" but failed to investigate or present readily available evidence which would have proven this very fact. *Porter v. McCollum*, 130 S.Ct. 447, 449 (2009). Given the facts here – where defense counsel's theory in both opening and closing was that the physical evidence (including the blood pool) showed Klein was not killed on the

couch – requiring counsel to investigate the theory he was relying on is hardly "eccentric" as the state suggests, but simple common sense consistent with authority from this Court and the rest of the country.

But this is not the only authority which the en banc opinion here faithfully followed. The district court found that defense counsel believed "the trial would be primarily a credibility case." Pet. App. at 39a. Every circuit to address this issue has held that when trial counsel in a criminal case recognizes the case will come down to a credibility contest between the defendant and a state witness, counsel's failure to investigate readily available testimony directly supporting the defense is unreasonable. *Ramonez v. Berghius*, 490 F.3d 482, 488-90 (6th Cir. 2007) (failure to present evidence supporting defendant's testimony violated *Strickland* where the trial "boil[ed] down to a credibility contest"); *Clinkscale*, 375 F.3d at 445 (failure to present evidence supporting defendant's testimony violated *Strickland* where the "evidence boiled down to a credibility contest" between defendant and the state's only eyewitness); *Pavel*, 261 F.3d at 223-24; *Lindstadt v. Keane*, 239 F.3d 191, 203 (2d Cir. 2001) ("[i]n a credibility contest, the testimony of neutral disinterested witness is exceedingly important."); *Holsomback v. White*, 133 F.3d 1382, 1385-87 (11th Cir. 1998); *Williams v. Washington*, 59 F.3d 673, 681-82 (7th Cir. 1995); *Griffin v. Warden*, 970 F.3d 1355, 1359-60 (4th Cir. 1992); *Nealy v. Cabana*, 764 F.2d 1173, 1174 (5th Cir. 1985). *See also Bigelow v. Haviland*, 576 F.3d 284, 291 (6th Cir. 2009). As these

cases all recognize, it is neither unreasonable nor eccentric to require defense counsel in a serious criminal case to at least investigate the physical evidence when he knows the case will be a credibility contest which could be determined by the physical evidence.

The state ignores all this authority, as well as the district court's findings. Instead, the state expresses concern with the integrity of the decision-making process of criminal defense lawyers. The state notes that "[d]efense lawyers are not deficient when they carefully exercise their judgment 'about how best to marshal their time and serve their client'" and that counsel need not "scour the globe" or search for a "needle in a haystack." Petition for Writ of Certiorari at 13-14. The state argues counsel must be free to "use professional judgment in deciding which lead to pursue and which lines of attack will be a waste of investigation time" and counsel need not prepare for "evidence the prosecution *might* present *if* it happens to develop at some point in time." Petition for Writ of Certiorari at 14, 16, emphasis in original. The state adds repeatedly that counsel was entitled to challenge the state's case by cross-examination rather than calling his own expert. *Id.* at 11, 15, 21.

Respondent fully agrees with these general propositions. Once again, however, petitioner's argument cannot be squared with the actual facts of this case.

Defense counsel here did not offer any of these reasons for failing to consult a blood spatter expert, instead forthrightly conceding that he simply did not consider the issue and was unaware such testimony could be obtained. ER 289-92. It is, therefore, hard to imagine how the en banc opinion somehow interfered with a "careful[ ] exercise [of counsel's] judgment" in deciding "which leads to pursue and which lines of attack will be a waste of time." Moreover, defense counsel agreed that "even before" the state decided to call Bell as a witness, it was "always [his] intention" to argue that the blood pool proved "Mr. Klein had been shot [in the bedroom] . . . as opposed to being shot on the couch." ER 374. Thus, the en banc court's opinion has nothing at all to do with any "decision" by counsel to rely on cross-examination. No such decision was made; the state is seeking to protect tactical judgments defense counsel here admitted he did not make. *See Wiggins*, 539 U.S. at 526-27 (in the absence of a strategic reason offered by counsel for a particular choice, both courts and the state must avoid substituting a "*post hoc* rationalization of counsel's conduct."). *Accord Richards v. Quarterman*, 566 F.3d 533, 564 (5th Cir. 2009); *Keith v. Mitchell*, 466 F.3d 540, 543-44 (6th Cir. 2006); *Dugas*, 428 F.3d at 333-34; *Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004); *Brown v. Sternes*, 304 F.3d 677, 691 (7th Cir. 2002); *Griffin*, 970 F.2d at 1358.[3]

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[3] Defense counsel's refusal to rationalize his complete failure to investigate makes sense. After all, "strategic choices

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Similarly, the state's concern that defense counsel here was required to "scour the globe," look for a "needle in a haystack" or prepare for "evidence the prosecution *might* present" is also wholly unwarranted. Indeed, it is hard to imagine a less apt description of the facts of this case, which involve counsel's failure to investigate and present evidence which he recognized as crucial, told the jury in opening statement was crucial, called his own client to testify about at trial and relied on in closing argument. To use the state's own hyperbole, the en banc opinion did not require defense counsel to search for a needle in the haystack; it required him to simply look at the haystack itself. Certiorari should be denied.

B. The State May Not Seek Certiorari On A Point It Explicitly Conceded Below And Which – As The State's Concession Establishes – Is Entirely Unsupported By The Record.

Petitioner posits a second reason this Court should grant certiorari, also related to the performance prong of the *Strickland* test. Petitioner correctly notes that "when a defendant has given

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made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 691. But where counsel utterly ignores "pertinent avenues of investigation," the decision not to investigate is not a reasonable professional judgment. *Porter*, 130 S.Ct. at 453.

counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Petition for Writ of Certiorari at 17. In a detailed argument, petitioner assails the en banc decision – and urges the Court to grant certiorari – alleging that counsel here did not investigate because "counsel had good reason to believe respondent was a murderer and a liar" and "[b]ased on the information available to him, defense counsel reasonably could conclude that forensic investigation into the blood evidence . . . would be fruitless." Petition for Writ of Certiorari at 17-18.

This suggestion for certiorari need not long detain the Court. Notwithstanding the vigor of petitioner's attack, it is hard to fault the en banc court for its decision. Not only did petitioner never raise this argument below, but when the en banc court raised it *sua sponte*, petitioner explicitly conceded there was "no evidence" at all to support the argument:

> The Court: Well, the defense didn't bother to investigate at all, because one theory, they thought that their client was guilty.
>
> Attorney General: Uh, I – I have no way of, uh, knowing what, uh, [defense counsel] Mr. Axup –

> The Court: Well, the fact that the defense didn't investigate doesn't seem to prove very much in this case.
>
> Attorney General: I think that, uh, uh. Your honor, I – *I don't think that there's anything to support the assertion that Mr. Axup thought his client was guilty*, and therefore softballed the case, or didn't investigate for that reason or whatever.
>
> The Court: I thought that was one theory I heard, that, um, defense counsel was questioned about, that you don't look because you don't believe your client.
>
> Attorney General: Right. But there's *no evidence that that's what happened* in this case.

Richter v. Hickman, 06-15614, Oral Argument at 43:05-43:43, http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002585, emphasis added.

The state's request for certiorari to review an issue it never presented below, and then explicitly conceded when it was raised, is without merit. *See F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 628 (1992) (certiorari inappropriate as to an issue which was conceded in lower court); *Steagald v. United States*, 451 U.S. 204, 208-11 (1981) ("the Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below. . . .").

There was good reason for the state to concede "there's [nothing] to support the assertion that [defense counsel] thought his client was guilty." During his deposition, defense counsel made clear that defendant "maintained [his] innocence" throughout the process. ER 386. And not only had Johnson given starkly varying versions of the incident to police, but police found two different caliber shell casings in the corner of the living room, both fired from guns which – according to state witnesses – ejected to the right. Thus, to accept the state's theory, the jury would have to believe (1) two people shot at Klein from virtually the same location, (2) despite being shot from the same location, these two bullets entered opposite sides of Klein's body as he slept and (3) one shot was an "intermediate range wound" while the second was a "distant range wound." RT 272, 276, 282-83, 1576.

Despite its own concession below, petitioner now argues defense counsel believed his client guilty because (1) after he "successfully prevented the admission" of a conversation between respondent and Branscombe, respondent "of course" lied when "he denied making the statements" during cross-examination, (2) respondent's girlfriend Lauren Sullivan refused to tell police what respondent told her about the crime (suggesting the statements were inculpatory) and (3) respondent "tried to destroy the firearms evidence." Petition for Writ of Certiorari 5, 17, 18. The record tells quite a different story.

In fact, the trial court ruled the conversation between Richter and Branscombe admissible, when no such conversation was introduced at trial the state appellate court found "there was no evidence of any such statement," and respondent never denied the conversation at all, but simply said he "[did not] remember" what he said during the conversation nearly one year earlier. CT 184-86; RT 5-6; Pet. App. 13a; RT 1136. Equally important, though it takes a different tack now, on appeal in state court the state "vehemently disagree[d]" that any adverse implication about respondent's guilt could even be drawn from this conversation. *People v. Richter*, C023375, Respondent's Brief at 36.

In fact, Ms. Sullivan (Richter's girlfriend) did not refuse to talk to police. Detective Bell himself admitted that Sullivan told police she spoke with Richter on the night of the shooting. RT 1335. Sullivan, who was studying to become a police officer herself, told the jury that Richter said Johnson "went crazy" and "[t]here was a shooting." RT 977, 979, 1005-06. She agreed she told police "I don't think I should talk about it," because "it was more important" for police to get the details directly from respondent. RT 985, 1005, 1006. She repeatedly maintained that Richter had done nothing wrong. RT 979, 985, 995-96, 1009.

In fact, respondent never "tried to destroy the firearms evidence." To the contrary, co-defendant Branscombe threw the guns away and respondent actually helped police find them. After the shooting,

respondent drove Branscombe from the shooting scene. RT 1109. Branscombe threw the guns out of the truck. RT 1119. Immediately upon arrest, respondent cooperated with police and led detectives directly to the area where Branscombe threw the guns; one of the guns was located in this area. RT 454, 457.[4]

The state then shifts gears, noting that the en banc court observed in a footnote there was "no negative consequence" for counsel to investigate the blood spatter evidence. Petition for Writ of Certiorari at 19. Seizing on this footnoted phrase, the state argues certiorari is appropriate because it violated *Knowles v. Mirzayance*, 556 U.S. ___, 129 S.Ct. 1411 (2009). Petition for Writ of Certiorari at 17, 19. The argument misreads both the en banc opinion and, more importantly, *Knowles* itself.

In assessing whether a particular decision by counsel is reasonable, reviewing courts routinely consider whether there were adverse consequences to defendant which may have factored into counsel's decision-making process. Where a potential adverse

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[4] Even putting these inaccuracies aside, and as noted above, the fact remains that counsel here admitted he failed to consult a blood spatter expert not because he thought his client was guilty but because he simply did not consider it and did not know such evidence existed. ER 289-92. Given the state's affirmative concession below that there was no evidence at all to support the newly minted explanation it now gives this Court, it is hard to fault the en banc court for refusing to adopt that explanation *sua sponte*.

consequence exists, that is indisputably relevant to assessing the reasonableness of counsel's conduct *See, e.g.*, *Bell v. Cone*, 535 U.S. 685, 701-02 (2002); *Emmet v. Kelly*, 474 F.3d 154, 165-66 (4th Cir. 2007); *Greiner v. Wells*, 417 F.3d 305, 319 (2d Cir. 2005); *Cofske v. United States*, 290 F.3d 437, 444-45 (1st Cir. 2002); *Sacco v. Cooksey*, 214 F.3d 270, 275 (2d Cir. 2000). Similarly, where there is no potential adverse consequence, that too is relevant. *See, e.g.*, *Bell v. Miller*, 500 F.3d 149, 157 (2d Cir. 2007); *Stevens v. McBride*, 489 F.3d 883, 896 (7th Cir. 2007); *Clinkscale*, 375 F.3d at 443; *Conklin v. Schofield*, 366 F.3d 1191, 1213 n.5 (11th Cir. 2004); *Frazier v. Huffman*, 343 F.3d 780, 796 (6th Cir. 2003); *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999); *Holsomback*, 133 F.3d at 1387-88. Consistent with this authority, the en banc court here properly considered both the potential gains from investigating the blood evidence and the potential risks.

The state's suggestion that *Knowles* precludes reviewing courts from such an analysis fundamentally misreads *Knowles*. In *Knowles* defense counsel fully investigated a potential defense of insanity but elected not to present it because he concluded it had no chance of success. 129 S.Ct. at 1420-23. This Court held that the mere fact counsel had "nothing to lose" from presenting the defense did not mean his informed decision not to present that defense was somehow unreasonable. 129 S.Ct. at 1419 and n.3.

In contrast to *Knowles*, defense counsel here did not investigate the blood spatter evidence at all. And

the en banc court here did *not* find counsel's conduct unreasonable because he had nothing to lose from investigating. To the contrary, it found counsel's conduct unreasonable because he had a great deal to gain from investigating the theory he himself had decided to present to the jury, and he later conceded he had no tactical reason for failing to investigate. Counsel could have consulted an expert in blood spatter pretrial without the prosecution being aware of the consultation, and doing so entailed no risk to respondent. As the case law discussed above shows, in deciding whether counsel's conduct fell below the standard of care, it was entirely proper for the court to consider not just the potential gain to the defendant, but the potential risk. Indeed, precluding consideration of the potential risks to a defendant from counsel's inaction would not only constitute a sharp break from the case law discussed above, it would make nearly impossible this Court's sound admonition that reviewing courts "evaluate [counsel's] conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. at 689. Certiorari should be denied.[5]

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[5] The irony of petitioner's current position should not escape the Court. Only weeks ago the state sought certiorari in *Wong v. Belmontes*, ___ S.Ct. ___, 2009 WL 3805746 (2009). *Wong* was a capital case where defense counsel elected not to introduce certain mitigating evidence because it risked allowing the state to introduce rebuttal evidence showing defendant committed another murder. After a panel found ineffective assistance of counsel for failing to present this evidence, the

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C. The En Banc Court's Case-Specific Prejudice Analysis, Based On A Proper Understanding Of The Importance Of The Blood Pool Evidence To The Case, Does Not Merit A Grant Of Certiorari.

Finally, petitioner urges certiorari to review the en banc court's case-specific prejudice analysis. The state's thesis is that there was nothing "objectively unreasonable" about the state court's one-sentence denial of respondent's claim within the meaning of 28 U.S.C. § 2254(d) because, as a purely factual matter, (1) "the blood [pool] evidence was hardly crucial to the defense case" and (2) even if it was, respondent's habeas experts "could offer [no] more than speculation that Klein's blood might have been in the pool." Petition for Writ of Certiorari at 22.

Certiorari is inappropriate on this point because, although the facts of this case are complex, petitioner is seeking certiorari based on two fundamentally mistaken factual premises. The first is the suggestion that the blood pool evidence "was hardly crucial to the defense case." The suggestion is remarkable.

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state alleged certiorari was proper because the panel "failed to recognize [defense counsel's] grave concerns over doing anything to jeopardize the court's ruling to exclude evidence of the [other] murder." *Wong v. Belmontes*, 08-1263, Petition for Writ of Certiorari, 2009 WL 1009831 at * 15. In other words, under the state's view certiorari is appropriate where a panel (1) *fails* to consider the risk to a defendant from a particular action by trial counsel and (2) actually *does* consider the risk to a defendant. Nice work if you can get it.

The district court correctly concluded that two starkly different theories were presented to the jury: (1) the state's theory that "Klein was shot in cold-blood on the couch" and (2) the defense theory "Klein was shot not on the couch while asleep but during a struggle in the bedroom." Pet. App. 27a. Thus, the entire defense theory that Klein was shot during a struggle, rather than in cold-blood on the couch, depended on establishing where Klein was shot. In short, the entire case rested upon the source of the blood pool.

For his part, respondent concedes – as he has throughout this litigation – that if the blood pool is from Johnson, respondent's testimony that Klein was shot in the bedroom is false and the defense theory cannot be true. But what is sauce for the goose is sauce for the gander; the state must similarly concede that if the blood pool is from Klein, Johnson's testimony that Klein was shot on the couch is false and the state's theory cannot be true.

Indeed, given the state's own position in this case, the en banc panel's conclusion that the blood evidence was critical is hardly surprising. During discovery in district court, the state advised the district court it had to decide whether defense counsel was aware "Dr. Hermann and Mr. Moses . . . would have testified that the prosecution's theory, i.e., that the pool of blood deposited in the doorway between the bedroom and living room came from Mr. Johnson's wounds, was 'scientifically unreliable.'" *Richter v. Hickman*, CV-0643, People's Statement of

Preliminary Issues at 2. And at oral argument the state conceded the same point again:

> The Court: What I wanted to understand from you is at least to that one point, the State alleged that Mr. Klein was killed on the couch. He never – he was asleep. They shot him when he was asleep. He never could have been there. So if there was blood on the floor by the door in the blood pool from Mr. Klein, the state's theory, at least, would have been palpably incorrect. Isn't that right?
>
> Attorney General: Um, it – it may have been incorrect as to that particular point.

Richter v. Hickman, 06-15614, Oral Argument at 31:42-32:26, http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002585. The state later agreed that evidence proving Klein's blood was in the pool "tended to substantiate the self-defense [claim] – at least raises the issue for the jury." *Id.* at 48:00-48:30. Petitioner is once again assailing the en banc court for recognizing the consequences of petitioner's own concessions.

Petitioner's alternate suggestion that respondent's habeas experts "could offer [no] more than speculation that Klein's blood might have been in the pool" is puzzling at best. Moses specifically concluded that the state's theory Johnson was the source of the blood pool as he stood dripping into it could be "eliminated." As noted above, his conclusion was hardly "speculation":

> The lack of a large number of satellite dropletts (sic) surrounding the pool eliminates the prosecution's theory that Mr. Johnson was standing in[ ] the doorway dripping into the pool below.

During the discovery process in district court, the state conceded that in connection with the blood pool "[t]he evidence of record discloses that no 'satellite drops' were observed by the crime scene investigators." *Richter v. Hickman*, CV-01-0643, Respondent's Answer to Interrogatory 9. Equally important, the state's own forensic expert agreed that "[w]hen you have blood dripping into blood, you have small satellite spatter that occurs." RT 139.

In short, the state conceded (1) the factual basis for Moses's conclusion and (2) the forensic basis for that conclusion. And when given a chance in district court to cross-examine Moses or offer evidence of its own, the state did nothing, instead stipulating to Moses's expert testimony without cross-examination and without presenting any contrary testimony at all. Under these circumstances, the state's request for certiorari by alleging that Moses's opinion is "speculative" is made not by relying on the record, but by ignoring it almost completely. Certiorari should be denied.

CONCLUSION

In accord with every case to face this issue, the en banc court found defense counsel unreasonable for failing to even investigate the defense theory he selected and relied on throughout his case. In accord with every case to face this issue, the en banc court refused to invent tactical reasons which counsel did not offer, and instead relied on explicit concessions by the state. And when the state neither cross-examined nor rebutted defendant's expert testimony, but instead agreed that it rendered the state's central theory of the case "palpably incorrect," the court granted relief. Under these circumstances, the en banc court's finding of ineffective assistance follows existing law to the letter and is neither remarkable nor worthy of certiorari.

Respectfully submitted,

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