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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents the question whether a court faced with a *Strickland* claim can hold, based on an invented rationale, that defense counsel's performance was reasonable even when the actual basis for counsel's acts or omissions is objectively indefensible. The State's attempt to reconcile the split among the lower courts is unavailing. Its vehicle arguments are mistaken. And on the merits, the State has no answer for this Court's most salient precedents. Certiorari should be granted to resolve this important question.

I. The Conflict Among The Courts Below Is Real.

The State admits that "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" over the question presented. BIO 17; *see also* Pet. App, 29a n.9; Pet. 9-15. But the State tries to paper over this conflict. It claims that courts across the board invent rationales only in cases where lawyers have made "judgment calls that can be justified by trial strategy," BIO 22, while refusing to do so in cases where "lawyers make mindless errors," BIO 17.

The State cannot point to a single decision of any court that adopts its formulation. To the contrary, courts on both sides of the split have expressly rejected it. And the cases the State cites do not support its attempted reconciliation.

1. The State claims that courts in petitioner's "disfavored jurisdictions" refuse to hypothesize justifications in cases involving "[n]on-[s]trategic [e]rrors," BIO 21. Not so. The Eleventh Circuit, for

example, could not be clearer that "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight"; in either case, courts are justified in inventing *post hoc* rationalizations, *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008).

Furthermore, the cases the State cites for its proposition show nothing more than that in jurisdictions that permit judicial speculation, some cases will involve actions or omissions by defense counsel for which judges cannot invent a rationalization. That does not diminish the split with respect to the cases where those courts *can* invent a reason, and have done so.

In *United States v. Marquez-Perez*, 835 F.3d 153 (1st Cir. 2016), BIO 21, for example, the First Circuit never addressed whether speculation is impermissible. Rather, it simply remanded an ineffective assistance claim for an evidentiary hearing. *Id.* at 165. The First Circuit identified reasons why the attorney's failure to review key prosecution evidence "appear[ed] to fall below *Rompilla*'s standard." *Id.* at 166 (citing *Rompilla v. Beard*, 545 U.S. 374 (2005)). But it nowhere suggested that if on remand the district court were to identify a strategic reason why competent counsel might have declined to review that evidence, the district court could not uphold counsel's performance on that basis. Indeed, as petitioner has already explained, the First Circuit permits speculation even when defense counsel's conduct is the product of ignorance of the law. Pet. 14.

Nor in *Commonwealth v. Daniels*, 104 A.3d 267 (Pa. 2014), did the state court refuse to entertain "the Commonwealth's efforts to justify [defense counsel's]

failures," BIO 22. It simply found those efforts unavailing.

2. The State is likewise mistaken with respect to its claim that in petitioner's "favored jurisdictions" courts "entertain hypothetical rationales for a lawyer's conduct where the alleged deficiency was not obviously non-strategic." BIO 22. None of the cases the State cites, *see* BIO 22-25, involved a court inventing a rationale contradicted by the record. Instead, each simply involved a federal court of appeals explaining why a state court's findings of competence was not unreasonable under AEDPA standards.

In *Leonard-Bey v. Conroy*, 39 Fed. Appx. 805 (4th Cir. 2002),[1] BIO 22, the state post-conviction court had suggested after an evidentiary hearing that the challenged omission might "have been a deliberate tactical choice made by Petitioner's counsel." Appellants' Brief at 28, *Leonard-Bey v. Conroy* (quoting the state court opinion), available at 2001 WL 34386483. The Fourth Circuit's decision that "the state court was correct in concluding that counsel was not ineffective," 39 Fed. Appx. at 808, therefore did not "conjure up tactical decisions an attorney could have made, but plainly did not" – the practice Fourth Circuit law forbids, Pet. 10, and that courts on the other side of the split demand, *see* Pet. 13-15. Nor did the Fourth Circuit substitute a hypothetical justification for an unreasonable actual rationale shown in the record.

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[1] The State cites to an opinion in this unpublished, nonprecedential case that was subsequently amended and superseded.

Similarly, in *O'Neal v. Burt*, 582 Fed. Appx. 566 (6th Cir. 2014), BIO 24-25, the state post-conviction court had found that "the record plainly indicates that [defense counsel] intentionally agreed to relinquish any right in regard to the federal report," *People v. O'Neal*, 2008 WL 3851219, at *5 (Mich. Ct. App. 2008). The Sixth Circuit opinion cited in the BIO did nothing more than uphold the Michigan court's decision "that failing to use the Report for impeachment purposes – whether by choice or otherwise" fell within the acceptable range of attorney conduct. 582 Fed. Appx. at 574. It thus overreads *O'Neil* to claim it qualifies the Sixth's Circuit's rule that courts cannot "fabricate" justifications for counsel's performance that contradict the record, *Caldwell v. Lewis*, 414 Fed. Appx. 809, 816 (6th Cir. 2011).

So, too, for *McAfee v. Thurmer*, 589 F.3d 353 (7th Cir. 2009), BIO 25. The Wisconsin post-conviction court had found that trial counsel's choice of defense was strategic and not constitutionally ineffective. All the Seventh Circuit did was explain why the state court had not "unreasonably applied the *Strickland* standard," 589 F.3d at 356. Nothing in *McAfee* retreats from the Seventh Circuit's insistence that, in conducting in the first instance the performance assessment demanded by *Strickland*, courts cannot "construct strategic defenses which counsel does not offer." *Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990).

In short, the State's novel taxonomy fails to explain away the acknowledged conflict among the lower courts.

II. The State's Vehicle Arguments Are Meritless.

The State's barrage of vehicle arguments ignore both the gravamen of petitioner's ineffectiveness claim and the record below.

1. The State asserts that this case does not implicate the Question Presented because trial counsel's failure to seek a voluntary intoxication instruction was "reasonable as a matter of law," BIO 12.

This argument misunderstands petitioner's claim. Trial counsel's ineffectiveness stemmed from their failure to ensure that the jury was properly instructed with respect to the *prosecution*'s theory of the case, not with respect to any defense theory. Much of the State's discussion, focused on the need to avoid inconsistent defenses, is therefore a red herring.

Petitioner's trial counsel knew that the State's theory was that petitioner had killed Ms. Vernon while "crazed on methamphetamine," Pet. App. 3a. And at the post-conviction evidentiary hearing, petitioner's trial counsel acknowledged that she and the prosecutor had "mutually agree[d]" that the jury would be given instructions on second-degree murder and manslaughter. Tr. at 178 (Jan, 23, 2012). That agreement enabled the prosecution to gain a conviction even if the jury were to determine that petitioner was too "crazed" to form the premeditation necessary for first-degree murder.

Under those circumstances, it was incumbent on trial counsel to ensure that the jury was instructed *accurately* on a particularly salient difference between first-degree murder and these lesser-included offenses: the availability of a voluntary intoxication

defense for the former. Counsel surely knew that under Colorado law, voluntary intoxication can preclude a conviction for first-degree murder. Pet. 5. Accordingly, even if the jury were to reject petitioner's theory of the case, it was still possible that the jury could conclude that petitioner lacked the mens rea to support a conviction on the most serious charge. Yet the jury was never told that voluntary intoxication was a potential defense to the charge on which petitioner was convicted. Trial counsel were ineffective in failing to make sure the jury was charged properly respecting the prosecution's burden.

The State acknowledges, as it must, that the Colorado Court of Appeals "rejected [trial] counsel's explanation" for the decision not to object, BIO 12; *see* Pet. App. 26a-27a. But instead of grappling with the court's reasoning, the State points to other cases in which a court accepted similar explanations, BIO 12-14. Those cases, however, differ from petitioner's in a critical way. The Colorado court was certainly aware that *sometimes* not seeking a voluntary intoxication instruction can be a reasonable strategic decision; indeed, in addition to one of its own prior decisions to that effect, it cited one of the cases offered by the State, *compare* Pet App. 26a (citing *Jackson v. Shanks*, 143 F.3d 1313 (10th Cir. 1998) *with* BIO 13 n.2. But the Colorado court explained persuasively why those cases were inapposite; at petitioner's trial, "the subject of intoxication had already been injected into the case," Pet. App. 27a – indeed, it lay at the heart of the prosecution's theory.

That leaves the State's assertion that forgoing an objection was reasonable here because "the prosecution could easily have made clear, either

implicitly or explicitly," that the defense had requested the instruction. BIO 13-14. The Colorado court rejected that assertion outright, and the State offers no response. *See* Pet. App. 27a (citing *People v. Welsh*, 176 P.3d 781 (Colo. App. 2007)).

2. The Colorado Court of Appeals' opinion likewise refutes the State's startling assertion that this case does not raise the Question Presented because the Court of Appeals did not "'invent[]' a counterfactual rationale," BIO 11. With admirable candor, that court canvassed at some length the conflict over whether it is permissible under *Strickland* to "conjure up tactical decisions an attorney could have made but plainly did not," Pet. App. 29a n.9 (quoting *Tice v. Johnson*, 647 F.3d 87, 105 (4th Cir. 2011)), before siding with those courts that rely on such inventions. It then advanced its own grounds on which a hypothetical attorney might have declined to object here. *Id.* at 29a-31a. The State points to nothing in the record suggesting that trial counsel acted for the reasons hypothesized by the Court of Appeals.

Indeed, the State's assertion that "[t]he rationale posited by the appellate court" did not contradict the record "because [trial] counsel were never asked about the subject," BIO 15, actually highlights why it is important for this Court to grant review: How could post-conviction counsel have asked at the evidentiary hearing about an alternative rationale posited, *for the very first time*, in the decision of the appellate court? Allowing invented rationales, particularly when those rationales are invented on appeal after the record has closed and the briefing has been completed, is unfair and improper. Pet. 22-25.

3. The State blinks reality when it asserts that this case is a bad vehicle because petitioner failed to "support his ineffectiveness claim with evidence or argument below," BIO 10.

The first pleading petitioner filed in his Rule 35(c) proceeding after counsel was appointed squarely addressed why trial counsel's failure to object to the incomplete intoxication instructions could not be a reasonable strategy even in light of petitioner's innocence defense. *See* Def's Supp. to Motion for Post-Conviction Relief and Request for Evidentiary Hearing at 2-3 (filed on or about Nov. 6, 2009). The decision of the Colorado District Court rejecting petitioner's claim discussed petitioner's argument in detail. Pet. App. 35a-40a. Petitioner's briefing to the Colorado Court of Appeals reiterated his argument and pointed to supporting evidence in the trial and Rule 35(c) records. *See* Opening Brief of Defendant-Appellant, People v. Garner, at 14-18 (Case 12CA575); Reply Brief of Defendant-Appellant at 1-3, People v. Garner (Case 12CA575).

To be sure, the state courts faulted petitioner for not also providing expert testimony critiquing trial counsel's decision to remain silent in the face of the prosecution's incomplete instruction. BIO 11. But such testimony was unnecessary. All of the information necessary to rule on this issue was in the record: the jury instructions and trial counsel's reason for declining to request a voluntary intoxication instruction on the first-degree murder charge. Based on that information, the appellate court itself found trial counsel's explanation for the silence unreasonable. *See* Pet. App. 26a-27a, and it should

have stopped there, rather than inventing an alternative, and unpersuasive rationale of its own.

4. As for the State's arguments about prejudice, BIO 15-17, petitioner has already explained why he has a strong argument that he was prejudiced by counsel's failure to ensure that the jury received a complete and accurate instruction on voluntary intoxication. Pet. 33-34. The State does not meaningfully engage with that explanation. In any event, the Court can answer the question presented without resolving that issue, so it poses no vehicle problem, *see id.* at 33 n.3.

III. The State Ignores, or Misreads, This Court's Precedents.

It is telling that in its merits argument, the Brief in Opposition does not cite, let alone grapple with, the most relevant decisions of this Court supporting petitioner: *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Hinton v. Alabama*, 134 S. Ct. 1081 (2014). *See* Pet. 16-21. These cases make clear that "courts may not indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions," *Harrington v. Richter*, 562 U.S. 86, 109 (2011) (quoting *Wiggins*, 539 U.S. at 526-27).

Instead, the State offers two cases in which it claims that this Court "openly offered hypothetical justifications for counsel's conduct." BIO 28. The State is wrong both times.

1. The State errs in claiming that in *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court "engaged in the sort of speculation that Petitioner here

condemns." BIO 28. The central issue in *Darden* was whether defense counsel performed ineffectively when they chose, at the penalty phase of Darden's capital trial, "to rely on a simple plea for mercy from petitioner himself," 477 U.S. at 186, rather than presenting certain mitigating evidence. Contrary to the State's characterization, this Court rooted all three of its reasons for concluding that defense counsel chose "reasonably," *id.*, in quotations from and citations to the record. For example, immediately after stating that trial counsel "*could have* viewed" introduction of evidence of Darden's prior convictions in response to any mitigation evidence suggesting his nonviolent nature "as particularly damaging," BIO 28-29 (emphasis added by the State), the Court cited testimony from the habeas hearing to support the conclusion that defense counsel were actually concerned about this risk. 477 U.S. at 186 (quoting Tr. of Habeas Corpus Proceedings 209).

The State is therefore wrong to charge that this Court's analysis was "untethered to any explanation actually offered by counsel," BIO 29. "[C]ould have," especially given that the phrase was preceded by the word "reasonably" suggests this Court was stating that defense counsel had taken a permissible view, not this Court was guessing as to why a hypothetical lawyer might have behaved as Darden's counsel did. Nothing in *Darden* suggests that if the courts below had determined that defense counsel's actual reasons for relying only on a mercy defense were objectively unreasonable, the Court would nonetheless have invented a reason for finding their performance adequate.

2. Nor does the summary reversal in *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), support the State's position. *Gentry* was a post-AEDPA habeas case. So the question was not whether defense counsel's conduct could be justified. Rather, the relevant inquiry turned on whether the California Court of Appeal was "objectively unreasonable" when that court "concluded that counsel's performance was not ineffective," 540 U.S. at 6.

The conditional language the State cites does not come from the single paragraph of this Court's decision that explained why the California Court of Appeal's conclusion "was supported by the record," *Gentry*, 540 U.S. at 6. This Court used no "hypothetical considerations," BIO 29, there. To the contrary: That paragraph tracks closely the actual points on which the California Court of Appeal had relied in its opinion.[2]

Instead, all of the language to which the State points appears in a part of this Court's opinion directed to an entirely different question: whether the Ninth Circuit had erred in "giv[ing] too little deference to the state courts," *Gentry*, 540 U.S. at 11. *Gentry* is thus only an example of how this Court looks at counsel's performance using the "doubly deferential. . . lens of federal habeas," *id.* at 6, in cases where a state court has rejected a defendant's claim of ineffective

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[2] While the California Court of Appeal's analysis of this issue in *People v. Gentry,* No. B094949 (Cal. Ct. App. Jan. 9, 1997), is unpublished, it is quoted extensively both in Judge Silverman's dissent in the Ninth Circuit, *see Gentry v. Roe*, 320 F.3d 891 (9th Cir. 2002), and on pages 20-21 of Appellee's Answering Brief to Appellant's Supplemental Opening Brief before the Ninth Circuit, available at 2002 WL 32107172.

assistance, *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). It provides no support for the State's claim that this Court has ever suggested that if a court, like the Colorado court here, is assessing counsel's adequacy in the first instance, that court should rely on "alternative, hypothetical justifications" when the record shows that the actual basis for "counsel's chosen approach," BIO 30, was unreasonable.

3. Finally, it speaks volumes that although the State argues in favor of permitting "alternative, hypothetical justifications for the decision Petitioner's counsel made here," BIO 30, the State offers no defense whatsoever of the hypothetical justifications supplied by the Colorado Court of Appeals. As petitioner has already explained, those justifications are indefensible. Pet. 28-30.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 5, 2017