No. 16-9282

IN THE
Supreme Court of the United States

MATTHEW REEVES,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY BRIEF OF PETITIONER

ROBERT N. HOCHMAN*
KELLY J. HUGGINS
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

JODI E. LOPEZ
ARIELLA THAL SIMONDS
COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth St., Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

*Counsel of Record

August 3, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Alabama court ruling under review held that a state habeas "petitioner *must*, at his evidentiary hearing, *question trial counsel* regarding his or her actions and reasoning." Pet. App. 79a-80a (some emphasis omitted) (quoting *Stallworth* v. *State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013)). Respondent relied upon that rule, recognized by prior Alabama decisions, and urged it on the Alabama courts when it opposed petitioner's ineffective assistance of counsel claim. Now, in response to Mr. Reeves's petition for certiorari, respondent asserts that the Alabama courts have adopted no such rule. Yet respondent does not bother to discuss the quote reproduced above, much less explain what it means. Respectfully, petitioner submits it means what it says: that, in Alabama, a post-conviction petitioner *must* present trial counsel testimony when asserting an ineffective assistance of counsel claim. That is the Alabama rule.

That rule is the only reason petitioner's ineffective assistance of counsel claim failed. The absence of testimony from trial counsel is the only reason the Alabama court provides for rejecting petitioner's ineffective assistance of counsel claim. Respondent argues that the lower courts discussed nothing else because there was *no* evidence at all to counter the presumption of reasonable conduct by trial counsel. BIO 16. The record belies that bald assertion. Like the Alabama courts, respondent ignores the fact that trial counsel put on a mitigation expert with whom he had not even spoken until the day she testified, see C. 609, and that the expert has admitted that she did not conduct a sentencing phase evaluation, see C. 609-10.

More importantly, relying on the rule requiring trial counsel testimony, the Alabama courts ignored the

fact that petitioner's trial counsel had requested funding to retain Dr. Goff from the trial court—because testimony from a neuropsychological expert like Dr. Goff was essential to putting on a mitigation defense—but then never contacted Dr. Goff nor engaged any other neuropsychological expert to evaluate petitioner. *E.g.*, T. 67, 68-69. Respondent tries to excuse this inexplicable failure by noting that *one* of petitioner's lawyers withdrew from the case shortly after the second urgent request for funding to retain Dr. Goff was granted. BIO 23-24. But *two* lawyers submitted the original and reconsideration requests seeking funding for Dr. Goff, and one of them remained petitioner's counsel throughout the trial. The only reason petitioner's ineffective assistance of counsel claim failed in the face of this evidence, and the only reason why the Alabama courts could ignore this evidence, is the Alabama rule requiring such a claim to be supported by testimony from trial counsel.

The Alabama rule is the minority view in a split among lower courts. Respondent pretends there is no split, but does not bother to discuss the clear statements of other courts evincing the split. The Seventh Circuit has acknowledged the existence of the split and taken sides against a state within its jurisdiction (Wisconsin), squarely holding that "[n]othing in *Strickland* or its progeny requires prisoners . . . to call the challenged counsel as a witness," and explicitly noting that its holding was contrary to that of "Wisconsin courts[, which] have chosen to mandate this procedure." *Pidgeon* v. *Smith*, 785 F.3d 1165, 1171-72 (7th Cir. 2015). In total, at least five federal circuit courts and one state supreme court are on petitioner's side, while Alabama is joined by Wisconsin, Texas, and the Eleventh Circuit. Respondent is simply wrong when it says that the

courts "have not said anything meaningfully different" on this issue. BIO 18. This Court should resolve the split of authority.

Finally, respondent distracts from the issue presented in the petition by devoting much of its opposition to supposed weaknesses in petitioner's intellectual disability claim. Petitioner's ineffective assistance of counsel claim does not depend on *Atkins* v. *Virginia*, 536 U.S. 304 (2002), or any rule prohibiting the execution of individuals with mental deficits. See Pet. 10 n.2. The ineffective assistance of counsel claim at issue here asserts that there is a reasonable probability that evidence of petitioner's intellectual disability would have influenced the jury's decision to choose death. That issue was squarely presented below, and the record is clear that no expert performed the examination of petitioner's intellectual ability that trial counsel and the trial court had agreed was essential. That fact alone establishes constitutionally deficient representation, without the need to put on testimony from counsel. And given that intellectual deficits was, at the time of petitioner's trial, a significant mitigating factor jurors were required to consider, the testimony we now know Dr. Goff would have offered is material to the outcome.

The petition should be granted.

ARGUMENT

I. RESPONDENT IGNORES THE HOLDING BELOW, APPLYING SETTLED ALABAMA LAW, THAT THE ABSENCE OF TRIAL COUNSEL'S TESTIMONY IS FATAL.

When respondent claims that "[i]t is not true . . . that Alabama takes the view that trial counsel's testimony is strictly required" to support an ineffective

assistance of counsel claim, BIO 16, it ignores the explicit language of the opinion below, as well as the line of Alabama decisions on which the court below relied. In a passage that respondent does not address, the court below held that a state habeas "petitioner *must*, at his evidentiary hearing, *question trial counsel* regarding his or her actions and reasoning." Pet. App. 79a-80a (some emphasis omitted) (quoting *Stallworth*, 171 So. 3d at 92).

This case shows how strictly that rule is applied in Alabama. Contrary to respondent's argument that petitioner failed to present "*any* evidence" of unsound strategy by trial counsel, BIO 16 (emphasis added), the record contains ample evidence that counsel's failure to contact Dr. Goff lacked any reasonable strategic basis. Trial counsel twice petitioned the trial court for funds for a "clinical neuropsychologist" that counsel then never contacted, despite characterizing evaluation by such an expert as "*the only avenue*" for making a persuasive mitigation case. T. 67, 68-69 (emphasis added). Instead, trial counsel presented a mitigation expert who had not conducted a sentencing stage evaluation and with whom trial counsel had not spoken until the day the of that expert's testimony. See C. 609-10. The Alabama courts never explained the reasonable strategic basis for these decisions because under the Alabama rule it had no reason to discuss those decisions. "Reeves's failure to call his attorneys to testify [wa]s *fatal* to his claims of ineffective assistance of counsel." Pet. App. 81a (emphasis added). The absence of testimony from trial counsel made everything else irrelevant. No further explanation was required or offered.

Respondent urged this rule on the courts and prevailed under it, and this Court should not permit respondent to pretend that the law in Alabama is

otherwise. Indeed, later in its opposition, respondent acknowledges that the court "properly rejected [petitioner's] claim because post-conviction *counsel did not call either of Reeves's attorneys to testify* at the evidentiary hearing." BIO 21 (emphasis added). That rule predates this case, was argued to the courts below by the State, and was applied here. If left unreviewed, future individuals in Alabama claiming ineffective assistance of counsel will face the same barrier.

II. ALABAMA IS ON THE WRONG SIDE OF A SPLIT AMONG THE COURTS.

Respondent tries to obscure the existence of a split of authority on the question presented. Respondent claims that the courts "have not said anything meaningfully different" from one another on the issue of whether trial counsel is required to testify to prove ineffective assistance of counsel. BIO 18 (citing cases). That argument ignores that the majority of courts do not consider the absence of counsel's testimony to be fatal, as the Alabama courts expressly do. See Pet. 17-20.

Remarkably, respondent maintains its view that there is no split without even acknowledging that the Seventh Circuit has expressly noted the existence of the split. The Seventh Circuit rejected a rule followed by "Wisconsin courts" that "mandate[s]" calling trial counsel and held instead that "[n]othing in *Strickland* or its progeny requires prisoners . . . to call the challenged counsel as a witness." *Pidgeon*, 785 F.3d at 1171-72. Like the Seventh Circuit, several other courts have ruled that claims of ineffective assistance of counsel can succeed on a record like the one here even where trial counsel did not testify regarding his or her strategy. See *State* v. *Bright*, 200 So. 3d 710, 731 (Fla. 2016) (rejecting argument that counsel's death before testifying in post-conviction proceedings barred

ineffective-assistance argument as a matter of law); *Wilson* v. *Mazzuca*, 119 F. App'x 336, 338 (2d Cir. 2005) (remanding to district court to afford trial counsel the opportunity to explain decisions, and declining to treat lack of testimony as bar to claim). See generally Pet. 18-20.

On the other side, several courts hold, like the Alabama courts here, that the absence of counsel's testimony defeats an ineffective assistance of counsel claim. In Wisconsin, for example, "[w]here an ineffective assistance of counsel claim is raised, trial counsel must be informed and his or her presence is required at any hearing in which counsel's conduct is challenged." *State* v. *Allen,* 682 N.W.2d 433, 437 n.3 (Wisc. 2004). That is consistent with the rule in the Eleventh Circuit and in Texas that courts cannot evaluate counsel's ineffectiveness without hearing evidence about counsel's actual mental state—which, short of a contemporaneously kept diary, requires actual testimony. See *Callahan* v. *Campbell*, 427 F.3d 897, 933 (11th Cir. 2005) ("Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty phase of [the petitioner's] trial. In a situation like this, we will presume the attorney did what he should have done, and that he exercised reasonable professional judgment." (footnote omitted)); *Howard* v. *State*, 239 S.W.3d 359, 367 (Tex. Ct. App. 2007) ("If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief" on an ineffective assistance of counsel claim). In those courts, as below, no amount of circumstantial evidence of unsound strategy can overcome the dispositive absence of testimony from trial counsel.

Only this Court can settle the disagreement between the lower courts. Moreover, given that the Eleventh

Circuit has the same rule as Alabama, it is particularly urgent that this Court review this issue now, to avoid the prospect that petitioner's ineffective assistance of counsel claim would be wrongfully denied in a federal habeas corpus proceeding. Certiorari is warranted to resolve the split.

III. RESPONDENT DOES NOT DISPUTE THAT THE ISSUE PRESENTED IS ONE OF NATIONAL IMPORTANCE.

Respondent does not dispute that claims for ineffective assistance of counsel are ubiquitous, that trial counsel often are unwilling to admit to their deficient representation, that the relationship between trial counsel and post-conviction counsel is often marred by friction, and that the petition raises a recurring question of national importance. Instead, respondent oddly claims that the importance of the issue was waived below. See BIO 20. Of course, the national importance of an issue was not relevant to its resolution below. It is a relevant consideration for this Court in deciding whether to grant the petition. Sup. Ct. R. 10(c). So it is entirely appropriate to present the reasons why the issue is of national importance for the first time in the petition. This Court can and should take into consideration the obvious awkwardness of calling an attorney to testify about his own failures in deciding whether to review the question presented, and ultimately whether to reject a strict rule requiring such testimony.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO REVIEW THE QUESTION.

Respondent claims this case is a poor vehicle to review the issue because it considers the claim weak on the merits. Not so. Respondent suggests, for instance, that because petitioner's trial occurred

before this Court's decision in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), his intellectual disability claim would have been unmeritorious. BIO 21-22. But petitioner's *Atkins* claim is distinct from his ineffective assistance of counsel claim. The ineffective assistance of counsel claim does not depend on the assertion that jurors would have been legally barred from choosing death if petitioner's trial counsel had retained Dr. Goff and presented his findings. Rather, the ineffective assistance of counsel claim requires that petitioner demonstrate a reasonable probability that expert testimony about petitioner's intellectual disability—a strong statutory mitigating factor under Alabama law at the time of petitioner's trial—would have dissuaded at least one juror from choosing death.

Respondent points to the fact that *other* mitigating evidence was presented. But that does not make it reasonable to have refused even to reach out to Dr. Goff after telling the court that his evaluation would be essential to petitioner's mitigation case. See BIO 22-27. Respondent erroneously suggests that Dr. Ronan's testimony was equivalent to the testimony that Dr. Goff would have given. BIO 26-27. In fact, Dr. Ronan had not evaluated petitioner for intellectual disability. Instead, she administered only the verbal portion of an IQ test as part of a limited examination of petitioner solely to assess his competency to stand trial and his mental state at the time of the offense. T.R. 1153, 1164-65; C. 608-10. Dr. Ronan had not conducted a sentencing-phase evaluation, which she later admitted would have differed in fundamental ways from the assessment she performed. C. 609-12. Most significantly, petitioner's counsel did not even speak with Dr. Ronan until the day of her testimony, and thus lacked any basis to know what her testimony might include if called to the stand or whether she was

even capable of offering sound opinion testimony regarding petitioner's intellectual disabilities. See C. 609. That decision was indefensible, but the absence of testimony from trial counsel permitted the court below to avoid ever having to defend it.

Respondent alternatively contends that the lawyer who demanded funding for Dr. Goff (McLeod) withdrew after obtaining the funding, and that petitioner's replacement counsel (Wiggins) simply did not know about the efforts to hire Dr. Goff or why his testimony would have been essential, making his failure one of benign ignorance. BIO 23-24. In fact, both McLeod and Wiggins were listed as petitioner's counsel in the original motion to appoint Dr. Goff, see T. 64-65, and also in the petitioner's application for reconsideration, see T. 68-71. Wiggins was thus fully aware of the need for Dr. Goff's testimony and that funding had been secured to hire him, yet never contacted him. So even if he was ignorant of the necessity of Dr. Goff's evaluation, that would only underscore the absence of any reasonable strategic explanation for his failure to contact Dr. Goff.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ROBERT N. HOCHMAN*
KELLY J. HUGGINS
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

JODI E. LOPEZ
ARIELLA THAL SIMONDS
COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth St., Suite 4000
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

*Counsel of Record

August 3, 2017