NO. 12-1452

In the
Supreme Court of the United States

COLIE L. LONG,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult legal and constitutional issues. It respectfully submits this brief as *amicus curiae* in support of petitioner.

The Constitution Project advances its goals through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. It often undertakes original research, publishes reports and statements, testifies before Congress, and holds regular briefings with legislative staff and other policymakers. Its work has been cited by numerous government agencies and by leading law and policy organizations. The Constitution Project also frequently appears as *amicus curiae* before this Court, the federal courts of appeals, and the highest state courts in support of the protection of citizens' constitutional rights.

The Constitution Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of the American justice system. The Committee was established in 2004 to examine whether criminal

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amicus* timely notified the parties of its intent to file this brief, and the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

defendants and juveniles charged with delinquency receive adequate legal representation. In 2009, the Committee issued a report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, that included findings on the ineffective assistance of counsel in the criminal justice system. (The report is available at www.constitutionproject.org/issues/criminal-justice-reform/right-to-effective-counsel/.) The Committee's report concluded that courts' application of the standards "for judging effective assistance of counsel has been unsuccessful in protecting the innocent, let alone ensuring that counsel has performed competently." *Justice Denied*, at 43.

The Constitution Project's commitment to safeguarding the constitutional right to effective assistance of counsel gives it a strong interest in this case. It is concerned that the District of Columbia Court of Appeals departed from this Court's controlling precedents and rewrote the test for determining whether defense counsel's performance is deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, the record is clear that defense counsel failed to introduce critical exculpatory testimony not because he exercised informed professional judgment, but because he was ignorant of basic evidentiary rules. Nonetheless, deepening a well-recognized split among the lower courts, the court below concluded that because counsel's unwitting omission could be justified in hindsight as having a "strategic" rationale, the decision was entitled to virtually insurmountable deference.

The Constitution Project is concerned that the lower court's decision is part of a broader trend of courts adopting the wrong standard for judging whether counsel's performance is deficient under the Sixth Amendment. Accordingly, in addition to addressing the contours of this Court's relevant jurisprudence, this brief underscores the practical importance of this case. It also explains the strong policy reasons for withholding the extraordinary deference accorded to "strategic choices" when confronted with evidence that defense counsel has not made an informed judgment because counsel is ignorant of applicable law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with a clean vehicle for resolving a well-established split in lower court authority over an important, recurring question of federal law: what level of scrutiny applies to an ineffective assistance claim challenging counsel's prejudicial failure to take actions in litigation due to counsel's ignorance of applicable law? In particular, it asks the Court to clarify whether the performance prong of the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), requires a court to apply a deferential standard of review to a litigation decision made by defense counsel when it is undisputed that counsel was unaware of applicable law and therefore did not make an informed decision, but where it is possible in hindsight to identify some "strategic" rationale for counsel's course of action.

The relevant facts are straightforward and appear undisputed: At petitioner's retrial for murder following a mistrial resulting from jury deadlock, a witness who at the first trial provided powerful exculpatory testimony supporting petitioner's claims of innocence invoked his Fifth Amendment privilege. *See* Pet. App. 91a; *see also, e.g.*, Pet. App. 51a–52a & n.10. At the second trial, petitioner's counsel failed to read to the jury the transcript of the witness's powerful exculpatory testimony because he was unaware that basic rules of evidence permit the admission of prior testimony from unavailable witnesses. After the jury convicted petitioner and sentenced him to life in prison without parole, petitioner appealed and raised an ineffective

assistance of counsel claim. In a divided decision, the court of appeals rejected that claim on the view that, even though counsel had not researched and was unaware of relevant evidentiary rules, his uniformed failure to introduce the testimony could be rationalized after the fact as a "strategic" choice and, therefore, his actions were shielded from review.

This Court should grant review to reverse the lower court's refashioning of the *Strickland* test. No rule of law or logic requires courts to apply the deferential standard appropriate for reviewing "strategic" decisions when counsel's actions resulted not from an actual strategic decision but from ignorance of the law. Treating counsel's admitted failure to understand the law as a strategic choice serves only to shelter ineffective performance through hypothetical, after-the-fact rationales for defense counsel's litigating decisions. The Sixth Amendment's guarantee of professional assistance demands more. Effective performance requires that defendants benefit at trial from the informed, reasonable advice of counsel. That right is denied when, as here, the record demonstrates that counsel was unaware that he could present powerful exculpatory evidence, and never even discussed the issue with his client.

This Court's review is also essential to restore uniformity to this important area of constitutional law. The lower courts are divided and need guidance on the level of deference that should be afforded to counsel's acts or omissions when assessing performance under *Strickland*. Such guidance will not open the floodgates to ineffective assistance of

counsel claims; at most, it will shift the inquiry in certain cases to where it properly belongs — namely, the prejudice caused by counsel's deficient performance.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the decision below cannot be squared with this Court's precedents requiring defense counsel to exercise reasonable professional judgment and precluding courts from indulging *post hoc* rationalizations for counsel's litigation decisions. The court of appeals' decision deepens an existing, well-developed split in lower court authority on an important, recurring question of federal law, and this case presents a suitable vehicle for its resolution. By granting review to resolve this question, the Court can eliminate confusion in the lower courts and help address the problem of wrongful convictions that undermine the legitimacy of our criminal justice system.

I. The Decision Below Conflicts With This Court's Controlling Authority.

Nearly 30 years ago, in *Strickland v. Washington*, this Court recognized that competent defense counsel "play[] a role that is critical to the ability of the adversarial system to produce just results." 466 U.S. at 685. Access to counsel's "skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275 (1942)). It is not enough that a "person who happens

to be a lawyer" advises the defendant at trial. *Id.* The Sixth Amendment right to counsel requires that a defense attorney provide *effective* assistance, as measured against an objective standard of reasonableness in light of prevailing professional norms. *Id.* at 690; *see also, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005).

Strickland sets out a two-part test for evaluating claims of ineffective assistance: a defense counsel is ineffective if (1) his "performance was deficient," and (2) "the deficient performance prejudiced the defense." 466 U.S. at 687. As the Court has recently observed, this test must be applied with "scrupulous care" to avoid undermining the integrity of the adversary process. *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). The test is not an invitation for courts to second-guess counsel's performance after a conviction or adverse sentence. *See id.* Accordingly, when counsel has made a "strategic" decision, "after" a "thorough investigation" of the relevant "law and facts," the decision is "virtually unchallengeable." *Id.* at 690. Such conduct is presumptively reasonable and "judicial scrutiny" is "highly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (quoting *Strickland*, 466 U.S. at 689).

But the *Strickland* test is also not an empty gesture. Defendants are entitled to counsel's professional advice and assistance at the time critical litigation decisions are made. The Court's effective assistance jurisprudence has thus tried to avoid having courts make difficult hindsight judgments about whether counsel's litigation decisions were right or wrong. Courts "may not indulge '*post hoc*

rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions." *Harrington*, 131 S. Ct. at 790 (quoting *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003)). Instead, they must "evaluate the conduct from counsel's perspective at the time" based on "the facts of the particular case." *Strickland*, 466 U.S. at 689–90. When the record discloses that a critical decision was not made for "tactical reasons" but "through sheer neglect," *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam), that decision cannot be presumed an "exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690; *see also, e.g.*, *Roe v. Flores–Ortega*, 528 U.S. 470 (2000) (performance deficient because counsel failed to consult with defendant before not filing notice of appeal). Accordingly, when counsel makes an uninformed judgment because counsel has not undertaken a reasonable investigation and is ignorant of the relevant law, the ordinary deferential standard does not and should not apply. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel's performance was deficient because they "incorrectly" understood state law); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel's performance was deficient because he failed to assert a timely objection as a result of a "startling ignorance of the law").

The court of appeals departed from these basic principles by deferring to a decision that defense counsel did not actually make, based on a "strategic" rationale constructed after the fact. At the second trial, defense counsel decided not to call a key defense witness from the first trial because the

witness invoked his Fifth Amendment privilege and because defense counsel was concerned that further cross-examination of the witness might harm the defense. But there was another option that should have been considered: Under basic principles of evidentiary law, because the witness invoked his Fifth Amendment privilege, his earlier exculpatory testimony could have been introduced and read to the jury. As the record below reflects, it is "undisputed, and indeed indisputable, that [petitioner] had the right to introduce" a transcript of the testimony from the first trial. Pet. App. 33a (Schwelb, J., dissenting); *see also Tomlin v. United States*, 680 A.2d 1020, 1022 (D.C. 1996) (noting that when witness invokes Fifth Amendment privilege, the witness is "unavailable" and prior testimony is "very likely" admissible"); Fed. R. Evid. 804(b)(1).

The record is clear that defense counsel did not consider this option and did not discuss it with his client because he was ignorant of the applicable rules of evidence. *See* Pet. App. 53a–54a (Schwelb, J., dissenting) ("counsel did not know . . . whether he had the right at the second trial to read [the witness'] first trial testimony to the jury, for he had evidently neither researched the issue nor discussed it with his client"). That cannot plausibly be described as an informed, strategic decision. To the contrary, as Judge Schwelb recognized in dissent, it is "surely self-evident that a lawyer cannot have declined to take a course of action for strategic or tactical reasons when he was, by his own admission, unaware that the course of action was available to him or that there was a decision on the matter to be made." Pet. App. 33a–34a. Indeed, it is objectively unreasonable

to think that an informed counsel would have made a "strategic" decision not to introduce exculpatory testimony that not only directly supported petitioner's innocence but also likely played a role in the jury's failure to convict at the first trial.

Nor was counsel's failure to investigate and admitted ignorance of the law consistent with prevailing professional norms. Basic norms of professional conduct require criminal defense counsel to understand applicable evidentiary rules. *See, e.g.*, National Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Defense Representation § 7.1(c) (1995) ("Counsel should be fully informed as to the rules of evidence, and the law relating to all stages of the trial process, and should be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial."); *id.* § 5.2(b)(3) (in an evidentiary hearing, counsel should have a "full understanding of . . . evidentiary principles and trial court procedures applying"); 3 Crim. Prac. Manual § 91:14 (2013) (criminal defense attorneys should research and consider common evidentiary issues, "especially those applicable to witnesses in the case at hand, e.g., admissions of coconspirator . . . [and] prior recorded testimony of absent witness"); 1-1A Criminal Defense Techniques § 1A.11 (2013) ("Counsel must review and understand the hearsay exceptions and be prepared to present an argument in court supporting the introduction of an out-of-court statement."). Similarly, defense counsel have a general obligation to "undertake whatever legal research is necessary to assure vindication of his or her client's rights." ABA, Standards for Criminal

Justice, Prosecution Function and Defense Function 4–3.6, commentary, p. 172 (3d ed. 1993).

Nevertheless, the court of appeals felt compelled to "respect[]" counsel's uninformed failure to introduce exculpatory testimony because it was able to discern a strategic reason why an informed attorney might have declined to introduce the same testimony. Pet. App. 24a–25a (citation omitted). In so doing, the court erroneously expanded *Strickland* deference, reserved by this Court for *actual* strategic decisions, to cover any unwitting omission resulting from counsel's ignorance of the law — so long as the error can be rationalized after the fact.

Because defense counsel's failure to research the law and provide advice to his client on the admission of exculpatory testimony fell below prevailing professional norms, the court of appeals should have recognized that counsel's performance was deficient under this Court's precedents. The lower court's decision to the contrary is wrong and should be reversed.

II. The Decision Below Deepens An Existing Split In Authority Among The Lower Courts.

The Court should also grant review because the decision below adds to confusion and conflict among the lower courts. There is a clear division in the lower courts over the proper approach to applying *Strickland*'s deficient performance prong in circumstances where defense counsel is ignorant of the relevant law.

Contrary to the decision below, most federal courts have concluded that it is inappropriate to defer to a decision of counsel as a "strategic" determination when the decision was made in ignorance of relevant law. The Second, Third, Fifth, Seventh, and Tenth Circuits have concluded that courts' "hesitation to challenge a lawyer's 'strategic' decisions has no place" when counsel failed to prepare a defense or call certain witnesses based on a plainly erroneous understanding of applicable law. *Pavel v. Hollins*, 261 F.3d 210, 218–19 (2d Cir. 2001); *see also Thomas v. Varner*, 428 F.3d 491, 500 (3d Cir. 2005) (counsel's actions were not "in fact part of a strategy" in part because counsel did not understand applicable law); *Harris v. Thompson*, 698 F.3d 609, 644 (7th Cir. 2012) (same).

As these courts have recognized, a court is "not required to . . . fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999). Nor is a defense counsel's uninformed decision entitled to deference. An "attorney's demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland*'s presumption that the decision was objectively reasonable because it might have been made for strategic purposes." *Bullock v. Carver*, 297 F.3d 1036, 1049 (10th Cir. 2002); *see also Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (decision is not "strategic" when it results from "confusion" about the law). Instead, the court must apply more searching review and determine "whether, in light of all the circumstances, the

attorney performed in an objectively reasonable manner." *Carver*, 297 F.3d at 1051.

In sharp conflict with these decisions, courts in the First, Sixth, and Eleventh Circuits have concluded, like the court below, that ignorance or unfamiliarity with relevant law is immaterial to the analysis required under *Strickland*. Under this approach, as long as a court in hindsight can imagine any strategic justification for counsel's decision, the fact that counsel did not actually make a strategic decision makes no difference.

In *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc), for example, the Eleventh Circuit held that because "[t]he reasonableness of a counsel's performance is an objective inquiry," trial counsel's actions are presumed effective as long as some hypothetical reasonable attorney could have undertaken them. *Id.* at 1315. Accordingly, to demonstrate that counsel's performance was deficient, a petitioner "must establish that no competent counsel would have taken the action that his counsel did take." *Id.*; *see also Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011).

Similarly, in *Cofske v. United States*, 290 F.3d 437 (1st Cir. 2002), the First Circuit held that it makes no difference that a defendant's attorney did not consider a strategy because the attorney was unfamiliar with relevant law. In the First Circuit's view, "as long as counsel performed as a competent lawyer would, his or her detailed subjective reasoning is beside the point." *Id.* at 444; *Dugas v. Coplan*, 428 F.3d 317, 328 n.10 (1st Cir. 2005); *see also United States v. Fortson*, 194 F.3d 730, 736 (6th

Cir. 1999) (no showing of ineffective assistance because court could "conceive of numerous reasonable strategic motives" for counsel's trial actions).

This difference in approaches is significant. In states in the First, Sixth, and Eleventh Circuits, and now in our Nation's Capital, defendants are not entitled to advice from counsel consistent with prevailing norms of professional conduct at the time litigation decisions are made. As long as, in hindsight, a defense counsel's conduct matches up to a hypothetical strategic decision that might have been made by a hypothetical competent counsel, then the defendant has received all the representation to which he is entitled. In contrast, in other states throughout the Nation, courts have held that the Sixth Amendment's guarantee requires that a defendant receive the benefit of strategic advice from his own counsel at the time a litigation decision is made. In these jurisdictions, *Strickland* requires heightened deference only to litigation decisions that are actually made by defendant's counsel for strategic reasons. When defense counsel makes an uninformed decision based on ignorance of applicable law, counsel's performance has fallen below prevailing professional norms and is constitutionally deficient.

III. The Question Presented Is Exceptionally Important.

Certiorari is also warranted because the question presented is a recurring one of exceptional, practical importance. As noted above, the issue of the correct standard to apply when counsel is ignorant of relevant law is an issue that arises frequently in the

lower courts. If left uncorrected, the lower court's decision threatens to undermine this Court's efforts to safeguard the fundamental fairness of the adversary process.

This case provides a good vehicle for addressing these important issues. The question presented is well crystalized and the relevant facts are undisputed. Both the majority and the dissent below recognized that petitioner's counsel failed to consider introducing the transcript of the earlier testimony from the unavailable witness. *See* Pet. App. 25a ("unlikely" petitioner's counsel considered this option); *see also* Pet. App. 33a–34a. Moreover, there is no dispute that petitioner "had the right to introduce into evidence a transcript of" the testimony given at his first trial. Pet. App. 33a. Instead, the issue that divided the judges on the lower court is a legal one and precisely the same issue that petitioner has presented for this Court's review — namely, whether counsel's failure to act due to ignorance of the law should be assessed under *Strickland*'s deferential standard for "strategic" or "tactical" decisions.

The answer to that question could make a real difference in the outcome of this case. As Judge Schwelb observed in his dissenting opinion, the never-admitted testimony "was critically important because it constituted the only direct proof of [petitioner's] theory of the case, namely, that" someone else "murdered the decedent" and that the prosecution's key witness "made a conscious decision to place the blame on [petitioner], who was innocent; and that [the prosecution's witness] had not only

admitted that this was so, but had boasted about it to . . . other prisoners." Pet. App. 51a. Moreover, as the court of appeals recognized, the government's principal witness "was of suspect credibility" because he gave contradictory statements about who shot the decedent and had been impeached with other prior inconsistent statements. Pet. App. 119a. As Judge Schwelb observed, the government's case against petitioner was "not overwhelming." Pet. App. 67a; Pet. App. 119a.

Finally, the Court's intervention would reaffirm the importance of the Sixth Amendment right to counsel. As The Constitution Project's reports have noted, defendants are represented all too often by "untrained and unskilled attorneys" who fail to "provide competent representation, as required by rules of professional conduct, and the effective assistance of counsel demanded by the Sixth Amendment." *Justice Denied*, at 91. Moreover, there is increasing evidence that "our criminal justice systems are not nearly as accurate as some have believed" and that wrongful convictions are not uncommon. *See Justice Denied*, at 44. In *Exonerations in the United States 1989 Through 2003*, for example, researchers from the University of Michigan documented 340 exonerations of innocent defendants from 38 states over a period of 14 years. *See Justice Denied*, at 44–46 (discussing Samuel L. Gross *et al.*, *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523 (2005)). A second study of 200 cases in which defendants were exonerated by DNA "explored how the cases were dealt with on appeal" and concluded that appellate courts were not effective in reviewing

convictions based on "unreliable and false evidence." *Id.* at 46 (discussing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008).

A national database of exonerations maintained jointly by the University of Michigan Law School and Northwestern University School of Law chronicles 1,169 cases over the past three decades in which an individual was wrongfully convicted of a crime and then later cleared of all charges. *See* The National Registry of Exonerations, available at https://www.law.umich.edu/special/exoneration/Pages/browse.aspx. Many of these exonerated individuals did not receive adequate assistance at trial, and in several cases it appears that the wrongful conviction would have been avoided altogether if counsel had satisfied their professional obligation to be familiar with basic rules of evidence. The recent exonerations of Donald Glassman and Stephen Schultz are two examples from the database that underscore the tragic failures that can occur when counsel are ignorant of relevant evidentiary rules and fail to provide effective assistance.

Because the potential for error in our criminal justice system is high, it is important to ensure that defendants receive effective representation. *See Justice Denied*, at 46–47 (suggesting that a substantial number of wrongfully convicted defendants were inadequately represented). Unfortunately, except in a limited number of cases, the *Strickland* test "has proved impossible to meet" even when counsel's performance falls far below prevailing professional norms. *Justice Denied*, at 41 (quoting David Cole, *No Equal Justice* 78–79 (1999)).

That will almost certainly continue to be the case if courts are allowed to defer not only to counsel's actual strategic decisions but also to any possible strategic basis for counsel's errors that might be imagined after the fact.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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