No. _____

IN THE
Supreme Court of the United States

CHRISTOPHER E. BROWN,

Petitioner,

v.

STATE OF GEORGIA

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A major class of ineffectiveness claims concerns whether trial counsel failed to bring exculpatory information to light during trial. In those cases, the courts can either grant an evidentiary hearing to admit the missing information, or they can rule on the claim with an incomplete record.

Where the omitted evidence, if proven, would satisfy both prongs of *Strickland*, can a court deny the defendant's only chance to an evidentiary hearing?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Christopher E. Brown, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia of May 16, 2011 is reported at 710 S.E.2d 751 (Ga. 2011), reprinted at App. 1. The Supreme Court of Georgia denied reconsideration in an unpublished order dated June 13, 2011, reprinted at App. 8.

The trial court denied Petitioner's Motion for New Trial on July 6, 2010, reprinted at App. 9.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review a final judgment of the highest court of each state pursuant to 28 U.S.C. § 1257(a) (2006).

CONSTITUTIONAL PROVISION INVOLVED

This petition raises questions of interpretation regarding the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

This petition arises from a trial court's refusal to grant an evidentiary hearing on a motion for new trial that could only be properly considered with the benefit of new evidence. Petitioner was arrested and charged with two counts of murder. At trial, the state relied primarily on two pieces of evidence: a jailhouse confession and a pair of keys found in Petitioner's home that could access the victims' home. Although the inmate who testified to Petitioner's confession was impeached and otherwise discredited, Petitioner's trial counsel largely failed to react to the keys. Following a conviction, Petitioner filed a motion for new trial alleging, among other things, that trial counsel failed to properly cross-exam a crucial witness on a potentially serious misidentification of the keys – the only direct evidence linking Petitioner to the crime scene. The trial court denied the motion without holding an evidentiary hearing; the Supreme Court of Georgia affirmed. The trial court's misapplication of the standard for granting an evidentiary hearing is characteristic of a widespread misapplication of this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984).

1. The Murder of Irene Arp and Linda Buchanan

On June 24, 2000, Irene Arp, and sister, Linda Buchanan were found murdered in their home. On scene investigation subsequently determined that Mrs. Arp and Mrs. Buchanan had suffered from blunt force trauma to the head and face. Officers also noted that Mrs. Buchanan had been anally and vaginally penetrated

with an object, later determined to be a vase found near her deceased person. There was no indication of any sexual violence on Mrs. Arp.

While both victims' jewelry remained on their persons, officers discovered numerous bottles of prescription drugs strewn across the living room and master bedroom. They also found that Mrs. Arp's purse (believed to contain $150 in cash) was missing and that Mrs. Buchanan's Chevrolet Cavalier and green key ring were missing. The key ring contained seven keys, including those to her house and her car.

Officers descended upon the crime scene for the next 48 hours, bagging evidence, collecting hair samples, and lifting fingerprints. Investigators determined that the culprit entered the household through a bathroom window near the location of Ms. Arp's body. Investigators found partial shoe prints on a chart and bucket that were used to access the window, and on the bathtub. Among the litany of bagged evidence were several cigarette butts found near the chair.

Supplementing the crime scene investigation, officers scouted the neighborhood, asking locals if they had noticed anyone in the area. Several of Ms. Arps' neighbors related seeing an unknown white man walking near the home that evening. However, nobody could positively identify the man.

Mrs. Buchanan's Chevrolet Cavalier was discovered two days later, abandoned near a shack on Pea Ridge Road. Police officers obtained items from the car, including an old address book, two shirts, and a pair of shorts – none of which

were submitted to the Georgia Bureau of Investigation crime laboratory. The car also contained a change purse containing coins and jewelry.

Officers developed leads by questioning locals, including Demetrius Hames, a repeat felon detained at the jail on pending charges of aggravated assault. On June 26th, 2000, Hames identified Todd Williams, among others, as a suspect, describing him as a thief. Officers subsequently discovered that Williams had checked himself out of an Atlanta based inpatient drug program before the weekend of the murders. Officers also discovered that Williams checked himself back in the day immediately following the murders.

Still focusing on the car and its whereabouts as a link to the crimes, officers learned that Christopher Brown, a local youth who did not own a car, was seen driving a very similar vehicle on the night of the murders. Two witnesses placed him in that type of car between 3:30 A.M. and 4:00 A.M. that night.

2. Arrest

Officers eventually arrested Mr. Brown on a probation violation but soon charged him with the murders of Mrs. Arp and Mrs. Buchanan. Mr. Brown, over the course of several interviews, denied involvement in the murder or possession of the vehicle. However, on July 11, Mr. Brown admitted that he "rented" the car from a white man in his late twenties whom he knew as "Todd." (T. 3145-6, 3156-7). Mr. Brown admitted to renting the car from a trailer belonging to a certain "Geno" off of

Dever Street – the same place where those who placed him in the car saw him . Mr. Brown stated that he did not previously admit to possessing the car out of fear that it would link him to the murder. Mr. Brown denied any involvement in the murders of Ms. Arp and Mrs. Buchanan. (T. 3160, 3162).

Mr. Brown's ex-girlfriend confirmed that Mr. Brown had been in the car on the night of the murders. Ms. Baucom noted that Mr. Brown had a roll of money which included a $100 bill.

Once Mr. Brown admitted his presence in the car, police officers returned to ask more questions of Demetrius Hames. They aimed to develop him as a source. Hames was in jail under both pending charges and a parole violation. He gave no additional information to the police and did not identify Mr. Brown as a suspect.

After a grand jury returned a 12-count indictment against Mr. Brown, police officers once again visited Hames in an effort to make him a source. They informed him that any information he provided "would be made known to the district attorney's office." (T. 3141-2). Furthermore, they assured him that they would contact his parole officer to inquire on the status of his hold. As soon as these promises were made, Hames began providing information about a tearful jail confession that he claimed Mr. Brown had made to him while they shared a cell.

3. Evidence Collected

Although officers collected extensive physical evidence from the source of the crime, evidence linking Mr. Brown to the crime scene was paltry.

None of the 32 fingerprints from the Arp household matched those of Mr. Brown. These prints were not entered into the Criminal Justice Information Services or any other fingerprint repository because, as the Latent Fingerprint Lab supervisor explained, Mr. Brown had already been identified as the perpetrator. Thus, the police did not ask the GBI Lab to evaluate these prints.

None of the collected hair samples from the Arp household matched those of Mr. Brown. All of the collected hair samples matched those of Caucasian individuals. Mr. Brown was a 19-year-old Black Male. Todd Williams was a White Male.

None of the cigarette butts found outside, though tested for DNA, were a match to Mr. Brown.

The footprint collected from the bathroom, plastic chair, and plastic bucket did match the Nike Air Quest brand that Mr. Brown owned, but they did not match his specific shoes. In the year 2000, 492,000 of these same shoes were produced. None of the collected shoe prints matched the "little nicks and dings and cuts in the bottom" of Mr. Brown's specific Nike Air Quest. None of the prints fit his shoe size. (T. 3278-9). Finally, the laboratory found no glass particles in the grooves of Mr.

Brown's shoes even though the intruder entered through a broken window onto a bathroom floor replete with glass particles.

None of the personal items or clothing seized from Mr. Brown's house, including the outfit he was seen wearing on the night of the murders, revealed any blood, fiber, hair, or other forensic evidence linking him to either the Arp or Roberson households. (T. 3132). Similarly, not one shred of forensic or trace material in the Arp or Roberson homes was ever linked to Mr. Brown.

The only finger print matched to Mr. Brown existed in the Chevrolet Cavalier, which Mr. Brown had previously admitted to driving. Testing revealed Mr. Brown's thumbprint on the gear lever of the car that he admitted to driving.

On June 30, 2000, police officers conducted a consent search of the house he shared with his mother. Mr. Brown's mother, Mary Brown, rented the house. During this search, the officers' discovered a lanyard containing two unknown keys on a dresser table in a room believed to be his. (T. 3171). Officers then placed those keys into evidence where they remained unattended to for two years.

Search attempts in the surrounding yard six days after the murders failed due to overgrowth and the presence of a snake. The yard was searched only after Ms. Brown moved out the next month. Ms. Brown's landlady hired a handyman to clean the yard. While cutting the yard, the handyman discovered a green plastic key chain with one key. This was located on the left hand side of the house, within the yard. The handyman gave the key to the landlady who subsequently turned the

key over to the police. This key was tested with the Chevrolet Cavalier. It turned the car on.

The previously discovered keys from inside the house lay in evidence for two years until 2002 when an officer noticed these keys in lock up. These keys fit the original locks to Mrs. Buchanan's house. The remaining four keys purported to be on Ms. Buchanan's key ring are still missing and unaccounted for.

4. Trial and Motion for New Trial

During trial, the state rested much of its case on two pieces of evidence: the testimony of Hames and the discovery of keys in Mr. Brown's mother's house. Reliance on these two pieces of evidence was not a strategic decision; there was simply no other direct evidence linking Mr. Brown to the murders.

In particular, the keys, and their purported connections to Ms. Buchanan's house and vehicle, became key evidence for the district attorney's office in an attempt to link Mr. Brown to the murders. Before and during trial, Mr. Brown admitted to having temporary possession of the stolen car. The keys found inside his mother's home were the only thing linking him to anything other than a simple case of receiving stolen property. In closing arguments, the state's attorney called the keys the "most damning evidence," pleading with the jury to believe that the only reason Mr. Brown had those keys was because "he took them that night and he did these horrible deeds." (T. 3422).

A jury convicted Mr. Brown of the murders, and the same jury deliberated on the sentence but refused to grant the death penalty. Mr. Brown was eventually sentenced to two counts of life in prison without parole.

Mr. Brown filed and amended a Motion for New Trial. In the motion, Mr. Brown contended that he "was denied effective representation of counsel when his trial counsel failed to cross-examine GBI Agent Foster regarding the erroneous testimony as to the identification of keys found in Mr. Brown's home." The motion further stated that "Agent Foster's testimony improperly established the only link between Mr. Brown and the home of the victim, Ms. Arp." The Motion was heard on December 15, 2009. On July 6, 2010, the trial court denied his request for a subsequent hearing and the motion for new trial itself. (T. 3810.)

5. Appeal to the Supreme Court of Georgia

On appeal, the Supreme Court of Georgia affirmed the core holdings of the trial court.[1] *Brown v. Georgia*, 710 S.E.2d 751 (Ga. 2011). However, it notably discounted the importance of Hames' testimony and instead relied on the keys and the scanty forensic evidence. The court found that even "disregarding [Hames'] testimony, the evidence of Brown's guilt was overwhelming." This leaves the keys as the primary evidence with which the court connected Mr. Brown to the murders, as there was no other evidence. The court held that while evidentiary hearings might be necessary when referring to matters found only outside the record,

[1] Despite affirming the trial court on all substantive grounds, the Supreme Court of Georgia remanded the case with instructions to vacate three of the five life sentences. *Brown v. Georgia*, 710 S.E.2d 751, 756-57 (Ga. 2011).

ineffectiveness claims related to in-trial errors shown in the record are resolvable without a hearing where "the record speaks for itself." *Id.* at 755 (quoting *Wilson v. Georgia*, 586 S.E.2d 669, 672 (Ga. 2003)). After noting this rigid standard, the Supreme Court concluded that "[t]he record shows that Brown's attorney conducted a thorough cross-examination of the investigating officer." *Id.* at 756.

REASONS FOR GRANTING THE PETITION

This petition presents an unusual split of authority. Although States almost universally recite the correct standard for granting an evidentiary hearing on a motion for new trial, there is an irreconcilable inconsistency in the application of that standard. Without review from this Court, States will continue to twist the language of *Strickland* beyond its original meaning.

This Petition should be granted because the decision below is in direct conflict with important precedent originating in this Court, and that conflict is symptomatic of broader concerns over how to correctly apply those cases. Additionally, this case presents an ideal vehicle for resolving that conflict.

I. The decision below is in direct conflict with this Court's jurisprudence barring courts from ruling on certain claims for ineffective assistance of counsel without providing defendants with the opportunity to supplement the record.

The Supreme Court of Georgia erred in affirming the trial court's refusal to grant an evidentiary hearing. That decision fundamentally misconstrues this Court's jurisprudence and, unfortunately, it represents the trend among a growing minority of States.

The right to *effective* assistance of counsel has been recognized by this Court for at least the last 80 years. *See Powell v. Alabama*, 287 U.S. 45, 58 (1932) ("Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense"); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel."). In 1984, this Court significantly strengthened that right by endorsing a seemingly straightforward two-step test that both federal and state courts could use to measure whether counsel had provided ineffective assistance. *See Strickland*, 466 U.S. at 664. Over the next fifteen years, however, courts around the country struggled to apply this Court's standard for ineffective assistance. *See McFarland v. Scott*, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) (noting that *Strickland*'s "impotence" was evident from the long list of cases where truly appalling lawyering was not held to be ineffective). Courts were inundated with an avalanche of ineffective assistance claims and therefore had difficulty separating the wheat from the chaff; *Strickland* was slowly whittled down

to its core. *See Id.* (noting that "the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person who happens to be a lawyer" (internal quotation marks omitted)); *see also* Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 Marquette L. Rev. 515, 517 (2009) (noting that "the right to effective representation" was eventually replaced with "the considerably more modest right to be represented by counsel"). With *Strickland* effectively transformed into a ghost of its former self, this Court began to slowly reinforce the ailing standard.

In *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court rebuilt much of the harm that had been done to the *Strickland* standard in the fifteen years since its inception. *See* John H. Blume & Stacey D. Neumann, *It's Like Deja Vu all over again:* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 Am. J. Crim. L. 127, 142-47 (2007). Although each of those cases signaled to lower courts that the *Strickland* analysis was not as deferential as previously thought, *Strickland* still retains its largely deferential tone. *See, e.g.*, *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Premo v. Moore*, 131 S. Ct. 770 (2011). With this Court's aging standard for ineffective assistance undergoing a sudden return to its previous form, states have had to independently experiment with the best way to apply this slippery standard.

Georgia law requires the defendant to raise any issue of ineffective assistance of trial counsel "at the earliest practicable moment." *Garland v. State*, 657 S.E.2d 842, 844 (2008). If not, he is deemed to have waived the right to make this claim. *Id.* If the defendant has the opportunity to raise this claim before appeal, on motion for new trial, and does not, he will be procedurally barred from raising this claim in later proceedings. *Glover v. State*, 465 S.E.2d 659, 660 (1996). Because defendants in Georgia have only one chance to raise an ineffective assistance claim, it is imperative that the courts have a fully developed record when making their decision.

This Court has recognized that a procedural-default rule, such as the one imposed under Georgia law, would create the risk that a defendant would be forced to raise the issue prematurely before the claim's factual predicate is fully developed. *Massaro v. United States*, 538 U.S. 500, 501 (2003). Should the trial court deny an evidentiary hearing, the defendant has no further opportunity to develop the record in support of his claim of ineffective assistance.

The Court has long been aware of the inadequacy of reviewing a claim of ineffective assistance based on an incomplete trial court record. Justice Marshall stated in his dissent in *Strickland* that "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent," especially on cases of a "cold record" where "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer." *Strickland*, 466

U.S. at 711. He recognized that often these difficulties are exacerbated by the fact that it may be the very deficiency in the record that prevents the court from making a competent determination about prejudice. *Id.* One cannot rely on a review of the record to prove the existence of what is alleged absent.

The Court most recently recognized the weaknesses of a trial court's evidentiary record in *Massaro v. United States*, 538 U.S. 500 (2003). That case focused on whether collateral review of ineffective assistance was available when the same claim was not brought on direct appeal, but the Court also commented on the importance of developing a full record.

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose . . . . The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis.

Id. at 504-05. While the Court noted the availability of collateral review, it expressly "[did] not hold that ineffective-assistance claims must be reserved for collateral review." *U.S. v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004) (citation omitted).

The Court must set a clear standard for when an evidentiary hearing is required to supplement the record for trial court review. The deficiency of the record is aggravated by the prerogative of the trial court to rule upon the prejudice prong first. *Strickland*, 466 U.S. at 697. Under this standard, and in light of this Court's acknowledgement that the record is almost always insufficient to make this

determination, it is probable that valid claims will be summarily dismissed at the trial court level.

For Mr. Brown, the opportunity to cast even the slightest doubt upon the identity of the keys found in his home could have had a tremendous effect on the outcome of the trial. The trial focused primarily around a jailhouse confession and the keys and, after the inmate who testified to the confession was both impeached and otherwise discredited, the keys in question proved to be most damning evidence against Mr. Brown. An attorney's failure to bring up arguments discrediting the primary direct evidence linking his client to the crime scene presents a textbook case for prejudicial effect.

Here, the Supreme Court of Georgia cited the correct language and may have even cited to the right standard for denying an evidentiary hearing. However, by refusing to follow instructions outlined by this Court and contorting the *Strickland* standard into something substantively different, the Supreme Court of Georgia has joined a growing assembly of States that are increasingly cavalier about hastily denying Motions for New Trial. This Court should grant the present petition to review the appropriate standard for granting an evidentiary hearing when a claim is predicated on information outside of the record.

II. The states are currently in disagreement over whether a major class of claims for ineffective assistance of counsel can be determined without a hearing to supplement a deficient record.

In order to succeed on a claim for ineffective assistance of counsel, a defendant must satisfy both prongs of the test established in *Strickland* v. *Washington*, 466 U.S. 668, 690-94 (1984). First, he must identify acts or omissions outside of the range of professionally competent assistances. *Id.* at 690. Second, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 669. In order to evaluate the prejudicial effect of a particular error, a court must consider "the totality of the evidence before the judge or jury." *Id.* at 695.

Claims for ineffective assistance of counsel take many forms. Some rest on counsel's performance during a specific part of trial and can easily be disposed with a cursory glance at the trial transcript. For example, a trial or appellate court can cleanly evaluate counsel's failure to object to an improper, yet harmless, comment from the record. *See Diaz v. Commissioner*, 6 A.3d 213, 68-70 (Conn. App. 2010).

However, there is another class of ineffective assistance of counsel claims that rests on evidence and testimony that has not been presented to the trial court. These claims require a court to consider whether the record presented at trial is adequate to evaluate the claim in question, or whether an evidentiary hearing is required to supplement the record.

Although this Court has frequently reviewed cases in an effort to settle conflicting interpretations of *Strickland*, this Court has never clearly ruled on whether courts must grant defendants an evidentiary hearing to supplement the record with evidence meant to support their claims for ineffective assistance of counsel.

Courts around the country are in significant disagreement over how to evaluate cases that fall within this common category. Several courts have taken a seemingly logical approach: the record presented at trial will not provide a suitable basis for determining whether information *not* presented at trial could prove ineffective assistance. Other courts, however, have denied defendants' claims of ineffective assistance because the record – at that time – made a successful claim unlikely. A final group of states, in an abundance of caution, require evidentiary hearings where there is even a remote possibility that the *Strickland* claim could succeed.

A. Several jurisdictions around the country bar defendants from supplementing the record after trial even when the scope of the alleged deficiency cannot be determined from the record developed at trial.

It is a well-recited standard that an evidentiary hearing is required for an ineffective assistance of counsel claim unless the petition, files and record conclusively show that the petitioner is entitled to no relief. *See, e.g., Franqui v.*

State, 59 So.3d 82, 96 (Fla. 2011); *Fraser v. Com.*, 59 S.W.3d 448, 452-53 (Ky. 2001); *State v. Yos-Chiguil*, 798 N.W.2d 832, 841 (Neb. 2011).

Despite the apparent acceptance of a high threshold for denying an evidentiary hearing, the standard has been misapplied with regularity in a handful of States. Of particular concern is a growing minority that have reinterpreted this classic language to deny evidentiary hearings based on a myopic reading of the incomplete record created at trial.

For instance, in *Patterson v. State*, 670 N.W.2d 439 (Minn. 2003), the Supreme Court of Minnesota denied the defendant in a murder trial an evidentiary hearing concerning the testimony of an alibi witness. *Id.* at 442. The witness, defendant's chemical-abuse counselor – who had not been allowed to testify at the trial due to counsel's nondisclosure of the witness to the trial court – was expected to testify that he had been with the defendant some 7 to 8 hours before the estimated time for the murders. *Id.* at 441. The court concluded that the testimony "was not crucial to [the defendant's] defense," and would only have been cumulative and have impeached only the testimony of witnesses concerning the timeframe of events leading up to the murders. *Id.* at 442. This was in complete disregard to the fact that the alibi witness would have contradicted the testimony of the key witness used to implicate the defendant. *Id.* The court concluded, without ever hearing the testimony, that its preclusion "did not impede [the defendant's] ability to present a defense," and was therefore not prejudicial. *Id.* Under this bizarre formulation, the court can deny the evidentiary hearing – at which defendant should be given the

chance to prove that counsel's error was prejudicial – based on a decision arising from the very record that is alleged to be incomplete.

The Court of Appeals of Kentucky stated that a trial court "may only deny an evidentiary hearing if the allegations are actually refuted by the record, and are not simply unconvincing." *Fain v. Com.*, 2011 WL 3862264, *2 (Ky. Ct. App. Sept. 2, 2011) (unpublished). Despite reciting a seemingly lenient standard, it also denied the defendant an evidentiary hearing concerning claims that counsel did not investigate or consider a potentially important witness. *Id.* Even though the defendant had stated with specificity who the witness was, the substance of their expected testimony, and that it was reasonably probable that such testimony could have altered the outcome of the case, the court denied an evidentiary hearing on the matters. *Id.* Without even hearing the testimony, the court concluded that it would amount to nothing more than cumulative evidence, despite the fact that it met the threshold of not being "actually refuted" by the record.

This pattern of summarily denying evidentiary hearings violates the standard set out by the Court in *Strickland* and alluded to in *Massaro v. United States*, 538 U.S. 500 (2003). Interpreting *Strickland* to create such a high standard renders defendants vulnerable to the whims of the reviewing court, and fails to comprehend the very necessity of evidentiary hearings.

B. Another group of jurisdictions will grant an evidentiary hearing whenever there is a cognizable claim for ineffective assistance predicated on information outside the initial trial record.

In contrast to the approach taken by states such as Minnesota, Kentucky, and Georgia, several jurisdictions allow defendants to fully develop the record relating to allegations of ineffective assistance of counsel.

The District of Columbia Court of Appeals is one of the courts that has adopted this common-sense interpretation. In *Hardy v. United States*, 988 A.2d 950 (D.C. 2010), the Court of Appeals opted to remand a case back to the trial court due to an underdeveloped record. Upon review of the trial record, the court was "not satisfied that under no circumstances could [the defendant] establish facts warranting relief." *Id.* at 967 (quoting *Jones v. United States*, 918 A.2d 389, 403 (D.C. 2007). The court's decision in *Hardy* to require an evidentiary hearing was hardly an anomaly; the District of Columbia has long encouraged trial courts to fully develop an evidentiary hearing for ruling on ineffective assistance of counsel claims. In 1999, the Court of Appeals recognized that when a defendant brings a claim for ineffective assistance of counsel, "there is a presumption that the trial court should conduct a hearing." *Lane v. United States*, 737 A.2d 541 (D.C. 1999). The District of Columbia's presumption of a hearing stands in stark contrast to the largely discretionary standard established by states like Georgia.

Kansas follows a similarly even-handed standard. The Supreme Court of Kansas has not only recognized the importance of evidentiary hearings in developing records for appeal, *see, e.g.*, *Rowland v. State*, 289 P.3d 1212, 1218 (Kan.

2009) (noting that most claims for ineffective assistance of counsel will require an evidentiary hearing and that exceptions are "extremely rare"), it has created a specialized procedure for appellate courts to remand cases for an evidentiary hearing when claims of ineffective assistance are brought on direct review, *see State v. Van Cleave*, 716 P.2d 580 (Kan. 1986). These protections can be triggered by a defendant on appeal or by an appellate court *sua sponte*, "so that facts relevant to determination of the legal issue may be developed and an evidentiary record established." *Rowland*, 219 P.3d at 1218. Kansas' drive to protect the rights of defendants is hardly anomalous; other states have expressed a willingness to remand for evidentiary hearings where a record is poorly developed. *See, e.g.*, *Ardolino v. Colorado*, 69 P.3d 73, 77 (Colo. 2003) ("A motion for postconviction relief . . . may be denied without an evidentiary hearing only where the . . . record in the case clearly establish[s] that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief.") (citations omitted).

Like the District of Columbia and Kansas, the United States Court of Appeals for the Seventh Circuit in *Bruce v. United States*, 256 F.3d 592, 598 (7th Cir. 2001), required an evidentiary hearing when the record was unclear as to defense counsel's strategic rationale. Because the record was inadequate to permit the court to determine whether counsel acted using reasonable professional judgment, the court had "no basis" upon which to arrive at a conclusion concerning counsel's action without holding a hearing. *Id* at 559. This was supported by the Court's finding in *Strickland* that "strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations." 466 U.S. at 690-91.

The decision of these jurisdictions and many others to grant evidentiary hearings in a wide class of cases conflicts with the decision of other jurisdictions to grant hearings sparingly and instead rule on ineffective assistance with only a partially developed record.

III. This case is an ideal vehicle for settling the uncertainty between courts around the country over when to grant defendants the opportunity to introduce new evidence after trial.

The facts of the present case make it an ideal candidate for review because the case would have almost certainly turned out differently under the varying standards being used by different courts. Under the high standard imposed by Georgia, Mr. Brown's Motion for New Trial was evaluated without the benefit of an evidentiary hearing because the trial court felt as though it was equipped to make a prejudice determination on the basis of the allegedly deficient record. Of course, the lack of evidence was the focus of his ineffective assistance claims in the first instance.

Under the even-handed approach adopted by the District of Columbia and Kansas, and alluded to by this Court in *Mossaro*, Mr. Brown would have been

granted an evidentiary hearing in order to fully flesh out a discrepancy central to his case. Those courts have recognized that the only way to properly evaluate whether a lawyer properly approached a case or whether any potential error was prejudicial is to provide a defendant with the opportunity to submit evidence that was originally withheld from the trial court.

Both standards provide leeway for courts to make many decisions based on the record alone. A wide variety of claims for ineffective assistance of counsel can be handled by reviewing the trial transcript or existing evidence. Some claims predicated on an underdeveloped record can be disposed of if the omitted evidence would not possibly suffice to create prejudice or prove behavior below the appropriate professional standard.

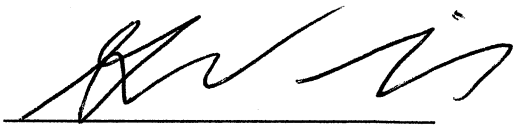
In a claim like the one here, however, courts have been treating claims for ineffective assistance of counsel differently. This Court now has an opportunity to settle uncertainty that has been percolating in lower courts over how to handle a significant number of cases raising serious constitutional questions.

CONCLUSION

The Supreme Court of Georgia clearly erred in applying such an impenetrable test to Mr. Brown's request to prove his ineffective assistance of counsel claim. Georgia is hardly alone in its use of such a test; much of the logic behind that standard comes from an outdated but still popular interpretation of this Court's ruling in *Strickland v. Washington*. This Petition is an ideal vehicle to use for dispelling lingering confusion over the scope of an important constitutional protection.

The petition should be granted.

Respectfully submitted,



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