No. 12-843

In the Supreme Court of the United States

JAMES ALLEN GREGG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, assuming the performance of petitioner's counsel was deficient because he failed to offer two specific instances of the victim's violent character to bolster petitioner's self-defense claim, petitioner demonstrated prejudice and thus a violation of his Sixth Amendment right to effective assistance of counsel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 683 F.3d 941. The order of the district court (Pet. App. 25a-33a) is not reported in the Federal Supplement but is available at 2010 WL 3003235. The report and recommendation of the magistrate judge (Pet. App. 35a-83a) is not reported in the Federal Supplement but is available at 2009 WL 6700480.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2012. A petition for rehearing was denied on October 11, 2012 (Pet. App. 23a). The petition for a writ of certiorari was filed on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Dakota, petitioner was convicted of second-degree murder on an Indian reservation, in violation of 18 U.S.C. 1111 and 1152; and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 135 months of imprisonment on the murder count and 120 months of imprisonment (to be served consecutively) on the firearm count. Pet. App. 88a. The court of appeals affirmed. *Id.* at 85a-99a.

Petitioner filed a motion to vacate his sentence pursuant to 28 U.S.C. 2255. The district court denied the motion. Pet. App. 25a-33a. The court of appeals affirmed. *Id.* at 1a-10a.

1. In the late evening and early morning hours of July 3 and 4, 2004, a large group of friends, including petitioner, James Fallis (Fallis), Fallis's brother Jerrod, and Jacob Big Eagle, socialized and drank alcohol on the Crow Creek Reservation in South Dakota. Pet. App. 85a. Displeased that a woman had rejected his advances in favor of Jerrod's, petitioner drove away in his pickup truck, spraying gravel onto Fallis's new car. *Id.* at 86a; see Gov't C.A. Br. 7.

Fallis confronted petitioner about the incident later that night, rejected petitioner's offer to pay for any damage, and pushed petitioner. Pet. App. 86a. Fallis's friend, Francis Red Tomahawk, then punched petitioner and, after petitioner fell to the ground, kicked him in the head. As petitioner tried to stand up, Fallis hit him, causing petitioner to lose balance and again fall to the ground. The fight ended, and the group dispersed. *Ibid.*; Gov't C.A. Br. 8.

Petitioner regained consciousness and grabbed a rifle from his pickup truck, but Big Eagle intervened. Pet. App. 86a. When petitioner complained to Big Eagle that he had not joined the fight, Big Eagle responded, "[if] I didn't stand up for you then, I will now." *Id.* at 87a (brackets in original). The two men left the area separately. *Id.* at 2a-3a.

Petitioner later testified that he feared that Big Eagle would start a second confrontation with Fallis and went to search for him. Pet. App. 87a. Petitioner observed Fallis's car parked outside a mobile home and pulled his truck into the driveway. *Ibid.* Fallis exited the house, ripped off his jacket, and shouted, "You come back for more . . . . You want to fight?" *Id.* at 88a. Fallis tried to open petitioner's car door, but petitioner pulled it shut. Petitioner then grabbed a pistol in his truck, pointed it at Fallis, and directed him to back away. *Ibid.* Fallis responded, "You want to fuck with guns? I got guns," and ran in the other direction. *Ibid.* At this point, petitioner fired nine shots at Fallis, hitting him five times in the back. Fallis died from the wounds. *Ibid.*

2. A federal grand jury indicted petitioner on one count of first-degree murder on an Indian reservation, in violation of 18 U.S.C. 1111 and 1152; and one count of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 88a.

At trial, petitioner admitted to killing Fallis, but claimed self-defense. Pet. App. 94a. To show his state of mind, petitioner attempted to elicit testimony on Fallis's previous instances of violent conduct. *Id.* at 93a. When the district court questioned the admissibility of such evidence, petitioner's counsel explained that peti-

tioner "believed that James Fallis was tougher than he was, that he's not a person that he would want to have a fight with, that in his experience James Fallis could have beaten him up, and that he would not have wanted to have an ongoing feud with James Fallis." *Id.* at 94a. The district court deemed this offer of proof insufficient and declined to admit the testimony. *Ibid.* But "the jury heard in great detail how Fallis severely battered [petitioner] an hour before [petitioner] shot him." *Id.* at 7a. In addition, "the trial court allowed the jury to review evidence of Fallis's violent and aggressive nature through two witnesses who testified about his reputation." *Ibid.*

The jury acquitted petitioner of first-degree murder, but convicted him of second-degree murder and discharge of a firearm during a crime of violence. The district court sentenced petitioner to consecutive terms of 150 months of imprisonment on the murder charge and 120 months of imprisonment on the firearm charge. Pet. App. 88a.

3. The court of appeals affirmed. As relevant here, petitioner contended that "the district court erred by not permitting him to elicit testimony regarding specific acts of [Fallis's] violent conduct to establish [petitioner's] state of mind at the time of the shooting." Pet. App. 93a. The court observed that "specific acts evidence is not admissible to prove a victim acted in conformity with his character under [Federal] Rule [of Evidence] 405(b)" but noted that "such evidence may be admissible under Rule 404(b) to prove a defendant's state of mind." *Ibid.*; see Fed. R. Evid. 404(b)(1) & (2) (evidence of "a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance

with the character" but "may be admissible for another purpose, such as proving motive * * * [or] intent"); Fed. R. Evid. 405(b) ("When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may * * * be proved by relevant specific instances of the person's conduct."). The court explained, however, that such evidence "is only admissible to the extent a defendant establishes knowledge of such prior violent conduct at the time of the conduct underlying the offense charged." Pet. App. 93a-94a.

The court of appeals concluded that the district court did not abuse its discretion in declining to admit the proffered evidence because petitioner's "offer of proof [at trial] identifie[d] no specific instances of [Fallis's] prior conduct, let alone any such instances known by [petitioner] at the time of the shooting." Pet. App. 94a. The court further noted that, even if the district court had found the evidence admissible under Rule 405, the district court "may well have determined the evidence should have been excluded under Rule 403." *Id.* at 93a n.6; see Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). Finally, the court of appeals determined that "[a]ny error in denying the offer of proof regarding reputation or opinion evidence would in any event be harmless because the offer presented no facts not already before the jury." Pet. App. 94a n.7.

4. Petitioner moved to vacate his conviction under 28 U.S.C. 2255, alleging ineffective assistance of counsel. Pet. App. 37a. In particular, petitioner complained that

trial counsel failed to proffer specific evidence of Fallis's violent conduct. Petitioner argued that such evidence would have explained petitioner's state of mind at the time of the shooting, bolstering his claim of self-defense. *Ibid.*

a. At an evidentiary hearing before a magistrate judge, petitioner described two specific events—the 1999 "boat dock incident" where Fallis threatened a park ranger and a bystander with a tire iron and the "Longbranch Saloon incident" in 2003 or 2004 where Fallis tried to provoke a fight with a man, at one point jumping on the man's car and pounding his windshield. Pet. App. 72a-78. Petitioner contended that he was aware of both incidents at the time he shot Fallis and claimed the knowledge informed his perception of Fallis's violent tendencies. *Id.* at 75a-76a, 82a.

The magistrate judge concluded that the "boat dock incident is relevant to [petitioner's] state of mind under Rule 404(b) for purposes of his self defense argument" and would have been admissible under Rule 403. Pet. App. 77. On the other hand, the magistrate judge questioned whether "the Longbranch Saloon incident is * * * supported by enough evidence to support a finding by the jury that it actually occurred." *Ibid.* The magistrate judge also explained that petitioner had provided insufficient evidence about the saloon incident for a proper Rule 403 analysis to be conducted. *Id.* at 78a.

The magistrate judge acknowledged that "the law was unsettled and far from clear in the Eighth Circuit" at the time of trial whether such evidence was admissible under Rule 404(b) but nonetheless determined that it was "left with no alternative under *Strickland* * * * but to find that [petitioner]" had established that his

counsel's performance in not seeking to admit testimony about the incidents was deficient. Pet. App. 78a-79a (citing *Strickland* v. *Washington*, 466 U.S. 668 (1994)). The magistrate judge also concluded that petitioner was prejudiced by counsel's error because the omitted evidence would have corroborated petitioner's claim that "he needed to shoot James Fallis in order to defend himself." *Id.* at 81a. In light of these conclusions, the magistrate recommended a new trial. *Id.* at 83a.

b. The district court (Kornmann, J., who presided over petitioner's trial) rejected the magistrate judge's report and recommendation and denied petitioner's motion to set aside his conviction. Pet. App. 23a-33a.

As an initial matter, the district court stated that "it is simply unfair to [petitioner's] trial attorney to find that he breached a professional duty in not offering the evidence of specific prior acts of violence by the victim in connection with the claim of self defense by [petitioner]." Pet. App. 26a. The court observed that at the time of petitioner's trial, "there was no rule in the Eighth Circuit allowing any such evidence" and that the "law was, at best, very unsettled around the country." *Id.* at 26a-27a. Further, the court stated that petitioner's trial attorney "was and is a very accomplished litigator" and "did what he could in this case for his client and he did it in a professional manner." *Id.* at 27a. Nonetheless, the district court explained that, "for the purpose of deciding this case," it would adopt the portion of the magistrate judge's report and recommendation finding trial counsel's performance deficient. *Id.* at 26a-27a.

The district court concluded, however, that petitioner's claim of ineffective assistance of counsel failed *Strickland*'s prejudice prong because petitioner could not establish a reasonable probability that his trial

would have had a different outcome had counsel sought to introduce the evidence in question. Pet. App. 27a-32a. The court explained that it was "very familiar with the trial record" and stated that "[d]emonstrating prejudice resulting from the ineffective assistance would be impossible in this case * * * [g]iven the nature and the extent of the incriminating evidence presented at trial." *Id.* at 27a-28a; see *id.* at 30a ("I have great respect for the magistrate judge. He, however, heard only the evidence at a one day hearing. I heard all the evidence at trial and at a rather lengthy sentence hearing.").

The court explained that the incidents in question involving Fallis were "not particularly recent"; he had never been convicted (or even charged) with violent conduct; he "had no reputation for using firearms"; "[t]here was no evidence that the victim ever threatened any person with a firearm or even carried a firearm"; and that no firearm was found in his car on the night petitioner killed him. Pet. App. 28a-29a. The district court determined that if petitioner had sought to introduce evidence on these incidents at trial, the court would have excluded it under Rule 403. *Id.* at 29a; see *id.* at 32a. The incidents "were too remote in time, not similar in content, and would or could have resulted in mini trials that could have distracted the jury." *Id.* at 29a. "Any probative value of such evidence," the court held, "would have been substantially outweighed by dangers of unfair prejudice as to the government and the deceased victim." *Ibid.*

The district court also characterized as "not true" petitioner's testimony before the magistrate judge that, on the night of the shooting, petitioner "never went actively seeking for [Fallis]" and that he "tried to stay away from [Fallis]." Pet. App. 30a (internal quotation marks

omitted). The court recounted that "[t]he testimony at trial was that [petitioner] did specifically go looking for Mr. Fallis" and observed that petitioner "should have left in his running vehicle after Mr. Fallis was running away on foot." *Id.* at 30a-31a. The court stated that petitioner's testimony that he "couldn't back up" his car to escape Fallis was "nonsense." *Id.* at 31a. The court explained that petitioner was "parked in a driveway with plenty of room to retreat" and that petitioner "[i]n fact[] * * * did [retreat] moments after firing so many times and so accurately toward the fleeing Fallis." *Ibid.*

In sum, the district court found "no logical or possibly believable evidence of self defense" in the case, and the same would have been true "even with the jury being permitted to consider other claimed acts of violence by Mr. Fallis." Pet. App. 31a.

5. The court of appeals affirmed.[1] Pet. App. 1a-19a. The court "assume[d] without deciding that [petitioner] has satisfied" the first prong of the *Strickland* test, *id.* at 6a, but concluded that the district court had properly held that petitioner failed to establish prejudice, *id.* at 6a-10a.

The court of appeals first concluded that evidence of Fallis's past violent acts "does not establish 'a reasonable probability that . . . the result of the proceeding would have been different.'" Pet. App. 7a (quoting *Strickland*, 466 U.S. at 694). The court noted that "only the boat dock incident involves the threat of serious bodily injury" and, even then, "Fallis did not actually injure any person." *Ibid.* At most, the court reasoned,

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[1] The court issued an initial opinion on March 16, 2012 (see 674 F.3d 829), but granted petitioner's petition for rehearing, revised its analysis under Federal Rule of Evidence 404(b), and released an amended opinion on June 13, 2012.

the boat dock and Longbranch Saloon incidents "show that Fallis could be belligerent and aggressive." *Ibid.*

The court then observed that the jury already had "evidence to that effect" before it and that "[a]dditional evidence making that same point would have been cumulative." Pet. App. 7a. Two witnesses "testified about [Fallis's] reputation," including his "violent and aggressive nature." *Ibid.* Moreover, the jury heard details of "how Fallis severely battered [petitioner] an hour before [petitioner] shot him," and how Fallis responded when petitioner pulled into his driveway ("You come back for some more of this [expletive]? You want to fight?"). *Id.* at 7a-8a. Moreover, the court canvassed "[s]everal facts [that] militated against the jury finding [petitioner] acted in self-defense." *Id.* at 8a n.4.

In the alternative, the court of appeals determined that the "trial court likely would have excluded the evidence under Rule 403" had petitioner's trial counsel proffered it. Pet. App. 8a. "[T]he boat dock incident occurred five years prior to [petitioner's] encounter with Fallis" and, therefore, "was remote in time to the dispute between [petitioner] and Fallis." *Id.* at 9a. The Longbranch Saloon "incident, while closer in time, is prejudicial because [petitioner] could not provide enough details about the incident for the court to determine whether it was similar in kind." *Ibid.*

Judge Bye dissented. Pet. App. 10a-19a. He "believe[d] the two incidents were similar in kind and close enough in time that they should have been admitted." *Id.* at 18a. With such evidence, Judge Bye believed, the jury "may well have decided [petitioner] truly believed he needed to use deadly force to defend himself on the night of the shooting." *Id.* at 19a.

ARGUMENT

Petitioner renews his contention that he suffered prejudice from trial counsel's failure to present evidence about the victim's past altercations. The court of appeals correctly rejected that claim, and its factbound determinations do not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

Establishing ineffective assistance of counsel requires proof of both deficient attorney performance and prejudice. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is deficient when it falls below an "objective standard of reasonableness." *Id.* at 688. Deficient performance "prejudice[s] the defense" when a "reasonable probability" exists that, but for counsel's errors, "the result of the proceeding would have been different." *Id.* at 694. Assuming (without deciding) that deficient performance was established here, Pet. App. 6a, the court of appeals correctly concluded that petitioner failed to demonstrate prejudice for two independent reasons. Both conclusions turn entirely on application of settled legal principles to the particular circumstances of this case, and neither warrants this Court's review.

1. The court of appeals correctly concluded that even if petitioner's trial counsel had proffered the two incidents involving Fallis, the district court likely would have excluded testimony about them under Rule 403. See Pet. App. 8a.[2] Petitioner could not have been preju-

[2] The district court erroneously considered its own propensities with respect to Rule 403 during this inquiry. Pet. App. 29a; see *Strickland*, 466 U.S. at 695 ("[A] particular judge's * * * practices[] should not be considered in the prejudice determination."). The court of appeals, however, conducted its analysis from the perspective of "a

diced by the failure to proffer evidence that would not have been admitted.

The boat dock incident preceded Fallis's shooting by five years. Pet. App. 9a; see *id.* at 72a. Petitioner testified that, in the intervening period, he "had 'always gotten along great' with James Fallis and considered himself a friend." *Id.* at 39a. Given the lengthy period of time and the lack of evidence that the boat dock incident affected petitioner's relationship with Fallis, the court of appeals had good reason to doubt the incident's probative value. *Id.* at 9a; see, *e.g.*, *United States* v. *Milk*, 447 F.3d 593, 600-601 (8th Cir. 2006) (affirming district court's decision to exclude evidence of victim's prior assault because it "occurred five years [before the instant crime]" and because "[the defendant] and [the victim] had remained friends during the time between the assault * * * and the stabbing").

The court of appeals viewed the Longbranch Saloon altercation with similar skepticism because petitioner "could not provide enough details about the incident." Pet. App. 9a. Even the magistrate judge, who recommended a new trial for petitioner, questioned the incident's admissibility. *Id.* at 77a ("Without further information * * * , it is impossible to evaluate whether the Longbranch Saloon incident is similar enough in kind, and supported by enough evidence to support a finding by the jury that it actually occurred to justify allowing this evidence to go to the jury."). On this scant record, admission of the Longbranch Saloon evidence would have, as the court of appeals concluded, risked "mini-trials of the victim's character." *Id.* at 10a.

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reasonable, conscientious, and impartial decisionmaker," Pet. App. 8a n.5 (alteration omitted), and reached the same conclusion.

As the court of appeals concluded, it is thus likely that the district court would have concluded that the minimal probative value of evidence about these incidents would have been substantially outweighed by "confusing the issues," "undue delay," and "needlessly presenting cumulative evidence." Fed. R. Evid. 403.[3]

2. The court of appeals separately and correctly concluded that petitioner was not prejudiced because, even if testimony about the two incidents had been admitted, petitioner failed to demonstrate that the result at trial would have been different. Pet. App. 7a-8a. Only the boat dock incident "involve[d] the threat of serious bodily injury," but Fallis "did not actually injure" anyone even during that episode. *Id.* at 7a. "At most, the incidents * * * show that Fallis could be belligerent and aggressive," but ample evidence admitted at trial supported that conclusion and additional evidence to make the same point would have been "cumulative." *Ibid.* Most noteworthy was testimony that "the jury heard in great detail" that "Fallis severely battered [petitioner] an hour before [petitioner] shot him." *Ibid.* If evidence about that close-in-time encounter between petitioner

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[3] Petitioner briefly contends (Pet. 18) that exclusion of Fallis's prior acts would have violated his due process rights. That contention is without merit. Although a defendant has the constitutional right to present a defense to the jury, he does not have an "unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). Thus, evidence may be excluded "through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). Because petitioner's proffered evidence was subject to exclusion under a straightforward application of Rule 403, no due process concerns arise in this case.

and Fallis did not persuade the jury of petitioner's self-defense claim, then testimony about episodes not involving petitioner from years before would not have.

The court of appeals also noted that significant evidence before the jury supported the conclusion that petitioner did not act in self-defense when he fired at the unarmed Fallis nine times as Fallis ran away from him:

> First, [petitioner] stopped when he saw Fallis's car although he was searching for his friend Big Eagle to avoid further conflict with Fallis. Second, [petitioner] indicated he was unsure that Fallis ever hit him. Third, [petitioner] acknowledged that he was able to pull his car door shut against Fallis, but instead of locking it, he drew his firearm. Fourth, [petitioner] did not leave after he pulled his car door shut. Finally, [petitioner] fired nine shots at the unarmed Fallis while he had his back turned to [petitioner].

Pet. App. 8a n.4. In sum, "[t]he jury could have believed that [petitioner] intended to kill Fallis rather than just prevent him from getting a gun," *ibid.*, and evidence about old, factually distinguishable incidents involving Fallis (but not petitioner) would not have changed that belief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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