No. _____

In the Supreme Court of the United States

CAROL R. HOWES, WARDEN, PETITIONER

v.

REGINALD WALKER

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an ineffective-assistance-of-counsel case based on counsel's failure to present an insanity defense at trial. Michigan concedes counsel's ineffectiveness; the only issue is prejudice. The Michigan Court of Appeals concluded there was no prejudice, because Respondent Walker's actions after murdering his victim showed that he recognized the consequences of his criminal behavior, and that his behavior was wrongful. The Sixth Circuit disagreed. There are three questions presented, the first of which involves the habeas issue granted review but ultimately not decided in *Wood* v. *Allen*, 130 S. Ct. 841 (2010):

1. How 28 U.S.C. § 2254(d)(2)'s invitation to decide the reasonableness of a state-court factual determination fits with 28 U.S.C. § 2254(e)(1)'s command that an underlying state-court fact determination must be presumed correct.

2. Whether the Sixth Circuit violated AEDPA § 2254(d)(1) by granting habeas relief on a purportedly unreasonable application of *state* law.

3. Whether the Sixth Circuit violated AEDPA § 2254(d)(1) by asserting its own prejudice standard—that a defendant "must only show that he had a substantial defense"—rather than this Court's clearly established law as set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984), that prejudice requires a showing that, but for counsel's error, there is a reasonable probability of a different outcome.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioner is Carol R. Howes, the warden of the prison where Respondent is serving his sentence.[1] Respondent is Reginald Walker, an inmate.

[1] At the time the Sixth Circuit issued its opinion, Walker's warden was Greg McQuiggan.

TABLE OF CONTENTS

PETITION APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals, App. 1a–30a, is reported at 656 F.3d 311. The opinion of the district court, App. 34a–43a, is not reported but is available at 2010 WL 200813. The opinion of the state court of appeals, App. 60a–64a, is not reported but is available at 2005 WL 657727.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2011. A petition for rehearing was denied on November 15, 2011, App. 76a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

INTRODUCTION

This is an appeal from a published, Sixth Circuit opinion that granted habeas relief and vacated a murder conviction. It raises three issues under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The first question is one that has vexed the lower courts and which this Court left unresolved when it decided *Wood* v. *Allen*, 130 S. Ct. 841 (2010): how 28 U.S.C. § 2254(d)(2)'s invitation to decide the reasonableness of a state-court factual determination fits with 28 U.S.C. § 2254(e)(1)'s command that an underlying state-court fact determination must be presumed correct. A proper interpretation of these two provisions requires a habeas court to first determine under (e)(1) whether a defendant has rebutted, "by clear and convincing evidence," the presumption that a state court's predicate factual findings are correct. Only then should the court proceed to determine under (d)(2) whether the ultimate determination of the facts was "unreasonable." Here, the Sixth Circuit panel majority skipped step one, thus circumventing (e)(1)'s presumption of correctness regarding the predicate facts of Respondent Walker's consciousness of guilt. It proceeded directly to the second step, determining (d)(2) reasonableness of the state court's decision finding no prejudice. The correct application of (d)(2) and (e)(1) requires a different result.

The second question is whether the Sixth Circuit panel majority erred in rewriting Michigan law regarding proof of legal insanity. Under AEDPA, the Sixth Circuit has no power to rewrite state law, unless

a state-court decision is "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). With respect to an insanity defense, Michigan law has long recognized that a defendant's actions surrounding a crime can be indicative of consciousness of guilt. E.g., *People* v. *Haxer*, 108 N.W. 90, 91 (Mich. 1906); *People* v. *Arnold*, 5 N.W. 385, 387 (Mich. 1880). But the Sixth Circuit held that while a defendant's actions immediately following a crime might be "informative," they are "not determinative of legal insanity" and therefore "not directly relevant to the question of Counsel's ineffectiveness." This is a strange rule, one that does not appear to have been adopted in any jurisdiction in the United States. It is also an unprecedented usurpation of state law in an AEDPA context.

The third question is whether the Sixth Circuit panel majority applied this Court's "clearly established" law in articulating the standard for prejudice. In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court articulated the well-known rule that proof of prejudice requires a showing that, but for counsel's error, there is a reasonable probability of a different outcome. The Sixth Circuit in this case used a pre-*Strickland* standard: the defendant "must only show that he had a substantial defense." Both grammatically, and in application, the Sixth Circuit's prejudice test is much weaker than the one this Court articulated in *Strickland*.

The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. History of 28 U.S.C. § 2254(e)(1) and (d)(2)

What is now (e)(1) began as 28 U.S.C. § 2254(d), a statute Congress created in 1966. The original (d) also created a presumption of correctness, tied to a three-step process. First, the state had to demonstrate the relevant factual issue was determined by a state court of competent jurisdiction, the determination followed a hearing on the merits, and the state court rendered a written finding. Wright, Miller, Cooper, and Amar, *Federal Practice and Procedure*, Jurisdiction 3d § 4265.1 at 339–40 (2007). Second, if the three precursor components of the first step were met, then (d) allowed a petitioner to rebut the presumption in one of eight ways. *Id.* at 340–47. If a habeas petitioner failed to meet one of the eight grounds, the presumption of correctness attached. *Id.* at 348. Third, a habeas petitioner could clear the presumption hurdle at an evidentiary hearing by "establish[ing] by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1994 ed.).

When Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), not only was the presumption "relettered as § 2254(e)(1), but [it] drastically changed in substance." Wright et al., *supra*, § 4265.2 at 354. The AEDPA untethered the presumption of correctness from other considerations and an evidentiary hearing. 28 U.S.C. § 2254(e)(1).

The new § 2254(d)'s plain language sets forth the deference for the ultimate state-court factual determination that is being challenged on habeas review:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> * * *
>
> (2) *resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings*.

28 U.S.C. § 2254(d)(2)(emphasis added). As for what is now (e)(1), its plain language indicates that it applies to all habeas cases, and that factual issues decided by a state court are presumed correct unless rebutted by the habeas petitioner by clear and convincing evidence:

> *In a proceeding instituted by an application for a writ of habeas corpus* by a person in custody pursuant to the judgment of a State court, *a determination of a factual issue made by a State court shall be presumed to be correct*. The applicant shall have the burden of *rebutting the presumption of correctness by clear and convincing evidence*.

28 U.S.C. § 2254(e)(1) (emphasis added). The first question presented here is how to reconcile (d)(2) and (e)(1).

B. Factual background

Following a jury trial, Reginald Walker was convicted of first-degree murder and possession of a firearm during the commission of a felony. Walker was in a drug store when two individuals entered to purchase beer and "bumped" Walker. The parties exchanged words, then Walker pulled out a handgun. He fired three or four shots and killed one of the men instantly. Neither of the other individuals was armed. Walker "picked up the clip that had fallen to the floor, put it in his pocket, and walked out the store." Pet. App. 65a–66a.

After leaving the scene of the crime, Walker fled to an abandoned house and hid the murder weapon in a hole in the wall. He then lied to police, giving them aliases on three different occasions. Pet. App. 63a–64a. Despite these thoughtful and deliberate actions, Walker claimed at trial that he acted in self-defense, that his gun discharged accidentally, and that he was intoxicated. Pet. App. 66a. He then claimed on appeal and habeas review that he was insane at the time of the murder.

C. State court proceedings

Walker was convicted of first-degree murder. On appeal, the Michigan Court of Appeals concluded that Walker's trial counsel was deficient. The court remanded the case for a *Ginther* hearing[2] to determine

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[2] Evidentiary hearings on allegations of ineffective assistance of counsel are referred to as *Ginther* hearings in Michigan, pursuant to *People* v. *Ginther*, 212 N.W.2d 922 (Mich. 1973).

whether Walker was prejudiced by the deficient performance. Pet. App. 65a.

At the *Ginther* hearing, Walker called psychologist Dr. Miller to testify that Walker was legally insane at the time of the incident. Pet. App. 97a, 107a–108a. Dr. Miller testified that he did not consider post-incident behavior, because he did not know how to give it weight, and he believed he could reconstruct a person's mental state solely from an evaluation of the person's cognitive processes, which rely on the person's statements, medical history, and clinical findings, not the person's actual behavior. Pet. App. 145a–147a, 161a–162a, 164a–165a. Upon the trial court's continued questioning, Dr. Miller admitted that he did not even know of Walker's deliberate, post-crime behavior. Pet. App. 161a–163a.

Walker's trial counsel testified that even with the independent evaluation, counsel would not have pursued the insanity defense, because he was afraid of evidence being admitted concerning Walker's assault with intent to murder that Walker committed around the same time as the incident; it was the defense's burden to establish insanity by a preponderance of the evidence; he was afraid of a compromise verdict;[3] and

[3] A defendant in Michigan may be found guilty but mentally ill when he properly raises an insanity defense, is found guilty beyond a reasonable doubt, has established mental illness under the Public Health Code's definition, but has not proven insanity by a preponderance of the evidence. Mich. Comp. Laws § 768.36. In fact, defendants have raised ineffective assistance of counsel claims where counsel has asserted an insanity defense, because a guilty-but-mentally ill conviction subjects the defendant to the same sentence as an ordinary guilty conviction. See *People* v. *Martinez*, No. 293562, 2010 WL 5129862, at *4 (Mich. Ct. App.

he believed the jury was less likely to accept the insanity theory as opposed to the self-defense theory. Pet. App. 189a–193a. Based on the evidence presented, the trial court held that Walker had not been prejudiced by his trial counsel's failure to investigate and pursue an insanity defense. *Ginther* hearing, June 4, 2003, pp 5–6, 28.

On appeal, the Michigan Court of Appeals concluded that Walker could not show *Strickland* prejudice, which the Court defined as a deprivation "of a reasonably likely chance of acquittal," or "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Pet. App. 61a–62a & n.6 (citations omitted). That was because Walker's counsel reasonably believed that although Walker "was mentally ill," Walker would not "be successful in proving his legal insanity." Pet. App. 63a. See *People* v. *Carpenter*, 627 N.W.2d 276 (2001) (in Michigan, mental illness short of legal insanity does not relieve a defendant from criminal responsibility).

The Michigan Court of Appeals relied on a number of factors in reaching this conclusion:

- Dr. Dexter Fields conducted a competency and criminal evaluation, concluding that Walker was competent to stand trial and was not mentally ill at the time of the offense.

Dec. 16, 2010) (defendant claiming that the insanity defense is "almost impossible for an attorney to prove," and "a reasonable attorney would have known that the likely outcome of such a defense was that of . . . guilty but mentally ill.").

- Nothing in the police investigator's report or Walker's own narrative suggested that he was confused.

- After shooting his victim, Walker picked up the clip.

- Walker then fled to an abandoned house to hide his murder weapon in a hole.

- Finally, Walker lied to police, giving them aliases on three different occasions.

Pet. App. 63a–64a. Thus, "[e]ven with Dr. Stephen Miller's testimony in favor of an insanity defense, in light of evidence that defendant had the consciousness of guilt, we conclude that there is not a reasonable probability that defendant had a likely chance of acquittal." Pet. App. 64a.

The Michigan Supreme Court denied Walker's application for leave to appeal. Pet. App. 59a.

D. Federal habeas corpus proceedings

Through counsel, Walker filed a petition for a writ of habeas corpus. The District Court denied the petition and adopted the Magistrate's Report and Recommendation, which reasoned that the state-court decision was not objectively unreasonable because of conflicting expert testimony and evidence of consciousness of guilt. Pet. App. 34a–43a. The District Court granted a certificate of appealability on the sole issue of whether the state court unreasonably applied clearly established United States Supreme Court precedent. Pet. App. 31a–33a.

The Sixth Circuit reversed for three basic reasons, all of which the State of Michigan challenges here. First, citing § 2254(d)(2), the panel majority said that the Michigan Court of Appeals "unreasonably determined facts in light of the evidence." Pet. App. 18a. Second, the panel majority held, as a matter of law, that Walker's actions in the immediate aftermath of the murder were "informative" but "not determinative of legal insanity." Pet. App. 21a. Third, the majority criticized the Michigan Court of Appeals' application of the *Strickland* standard, then proceeded to apply its own standard: a defendant "must only show that he had a substantial defense." Pet. App. 22a (citations omitted). Judge Cook filed a lengthy dissent, criticizing the majority for second-guessing the state-court factual findings, looking to law other than clearly established law of this Court, and overstating the extent to which the state court erred in applying *Strickland*. Pet. App. 24a–30a (Cook, J., dissenting).

On November 15, 2011, the Sixth Circuit denied rehearing and rehearing en banc. On December 2, 2011, the Sixth Circuit stayed the mandate to allow the State to file this petition.

REASONS FOR GRANTING THE PETITION

I. This Court's review is required to resolve how 28 U.S.C. § 2254(d)(2) and (e)(1) interrelate, the question reserved in *Wood*.

In *Wood*, this Court acknowledged that despite "statements [the Court has] made about the relationship between §§ 2254(d)(2) and (e)(1) in cases that did not squarely present the issue . . . , we have

explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2) . . . .” 130 S. Ct. at 848–49. Although the issue was squarely framed in *Wood*, the Court did not address it: “Because the resolution of this case does not turn on them, we leave for another day the questions of how and when § 2254(e)(1) applies in challenges to a state court's factual determinations under § 2254(d)(2).” *Id*. at 851. See also, *Rice* v. *Collins*, 546 U.S. 333, 339 (2006) (assuming for argument that only (d)(2) applied, then the state-court decision was not unreasonable). *Miller-El* v. *Dretke (Miller-El II)*, 545 U.S. 231, 265 (2005) (appearing to merge (e)(1) and (d)(2)). As this Court recognized, the question of (d)(2)'s and (e)(1)'s interplay “has divided the Courts of Appeals.” *Wood*, 130 S. Ct. at 848. And the Circuits have taken different approaches to the open question. *Id*. at 848 n.1.

The Sixth Circuit panel majority's approach in this case has no support in any case law. As Judge Cook's dissent recognizes, the majority gave no recognition or application to (e)(1) whatsoever. Pet. App. 26a. The majority simply ignored (e)(1) and held that the state-court determination was unreasonable under (d)(2). The panel majority's approach departed even from the Sixth Circuit's own precedent, which adhered to the basic observations made in *Miller-El* v. *Cockrell (Miller-El I)*, 537 U.S. 322 (2003). See *Ayers* v. *Hudson*, 623 F.3d 301, 308 (6th Cir. 2010).

Unlike in *Wood*, the Sixth Circuit's misapplication of (d)(2) and (e)(1) here made a difference. Properly construed, (d)(2) and (e)(1) together constitute a two-part inquiry, as demonstrated by a simple

hypothetical. Imagine that a state court makes the ultimate factual determination that a defendant was driving recklessly. The predicate factual determinations are that the defendant drove at a speed that exceeded the limit, swerved out of his lane, and used a car with broken headlights. On habeas review, a federal court should first determine under (e)(1) whether the defendant had successfully rebutted the presumed correctness of the three predicate findings by clear and convincing evidence. If not, the court would then use those predicate facts to determine whether the ultimate factual determination—that the defendant was driving reckless—was reasonable.

Here, the Sixth Circuit should have started by asking whether Walker had rebutted, through clear and convincing evidence, the presumptive correctness of the predicate factual findings that Walker (1) was competent to stand trial, (2) he was not mentally ill, (3) picked up the clip after shooting his victim in cold blood, (4) fled to an abandoned house to hide his weapon in a hole, (5) lied repeatedly to the police, and (6) had the consciousness of guilt. Because Walker did not rebut any of these predicate findings, the panel majority would have then had to ask if, in light of these predicate facts, the Michigan Court of Appeals reasonably determined the ultimate fact: the determination that Walker was not prejudiced by the deficient performance of his counsel.[4]

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[4] The Sixth Circuit panel majority opinion chided the state court by incorrectly stating that "while the court of appeals was only tasked with the issue of determining prejudice, its entire analysis focused on determining whether Counsel performed deficiently." Pet. App 18a. That is not a fair characterization of the Michigan

The Sixth Circuit panel majority found unreasonable the Michigan Court of Appeals' conclusion that Walker had suffered no factual prejudice from his trial counsel's decision not to pursue an insanity defense. Pet. App. 23a–24a. The correct application of (e)(1) and (d)(2) therefore directly impacts the Sixth Circuit majority's finding of an unreasonable factual determination in the context of Walker's ineffective-assistance-of-counsel claim. And here is how.

Ineffective assistance of counsel claims are analyzed under the test established in *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

"[B]oth the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law." *Kimmelman* v. *Morrison*, 477 U.S. 365, 388 (1986). To establish prejudice, "[t]he 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. A reasonable probability is a probability sufficient to undermine

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Court of Appeals' analysis. The Michigan Court of Appeals indicated it was bound by the law of the case on the deficiency question, and went on to analyze prejudice. Pet. App. 62a.

confidence in the outcome." *Strickland*, 466 U.S. at 694.

On habeas review under AEDPA, "[t]he question 'is not whether a federal court believes the state court's determination' under the *Strickland* standard 'was incorrect[,] but whether that determination was unreasonable-a substantially higher threshold.'" *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1420 (2009). "[B]ecause the Strickland standard is a general standard, a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.*

The Sixth Circuit majority simply disagreed with the state court. The majority reframed the inquiry, reweighed the evidence, and second-guessed the Michigan Court of Appeals' conclusion that Walker did not suffer *Strickland* prejudice. Pet. App. 23a ("There is an overwhelming probability that knowledge of Walker's history of severe mental illness would have shed a different light for the jury on witness testimony regarding the facts of the crime.").[5]

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[5] The Sixth Circuit panel majority incorrectly asserted that the Michigan Court of Appeals found the evidence of Walker's consciousness of guilt to outweigh evidence of "mental illness." Pet. App. 21a–22a. Rather, the Michigan Court of Appeals weighed opposing evidence and concluded that there was no reasonable probability that the outcome would have been different had the insanity defense been presented. Pet. App. 62a–64a. The majority incorrectly reframed the focus—challenging that the record established Walker's history of *mental illness* and that history would "have shed a different light for the jury on witness testimony regarding the facts of the crime." Pet. App. 23a.

But as Judge Cook noted in her dissent, (e)(1) requires something more:

> Under 28 U.S.C. § 2254(e)(1), we, the reviewing habeas court, must presume the correctness of the state court's factual determinations; the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." . . . Walker does not argue on appeal that the state court made unreasonable factual determinations. I thus conclude that we may not attack the Michigan court's factual findings *sua sponte*, and must instead limit our analysis to its application of Supreme Court precedent.

Pet. App. 26a.

Had the Sixth Circuit panel majority applied (e)(1) correctly, the majority would have had to show how the habeas petitioner proved, by clear and convincing evidence, that the Michigan Court of Appeals' individual (e)(1) findings were incorrect regarding Walker's post-crime conduct evincing a consciousness of guilt. That simply did not happen.

Holding a habeas petitioner to this rigorous analytic construct established by (e)(1)'s and (d)(2)'s complementary standards ensures that a habeas court grants relief only when the state court's decision is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

Harrington v. *Richter*, 131 S. Ct. 770, 786–87 (2011).[6] Otherwise, a habeas court would be free to reweigh the facts and arrive at a finding of unreasonableness by *de novo* review, which is exactly what the panel majority did. There was no "extreme malfunction[] in the state criminal justice system[]" here. *Id.*

II. The Sixth Circuit rewrote Michigan law regarding proof of insanity.

As noted above, a defendant claiming insanity in Michigan must show more than mental illness. Mental illness short of insanity does not relieve a defendant from criminal responsibility. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001).[7] That is why the Michigan Court of Appeals' conclusion regarding Walker's consciousness of guilt is so significant.

It has long been settled Michigan law that a defendant's actions *surrounding* the crime can be indicative of consciousness of guilt. See *People* v. *Haxer*, 108 N.W. 90, 91 (Mich. 1906) (resisting arrest,

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[6] Here, three judges on the Michigan Court of Appeals (on the merits), seven justices of the Michigan Supreme Court (denying Walker's application without dissent), one magistrate judge (in a report and recommendation), one district court judge (adopting that report and recommendation), and one judge on the Sixth Circuit panel (dissenting) would not grant relief on direct review or habeas relief. That, in and of itself, is indicative of fairminded disagreement and contradicts the majority's assertion otherwise.

[7] Michigan follows the *M'Naghten* rule. See *Clark* v. *Arizona*, 548 U.S. 735, 747 (2006) ("it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason . . . as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong").

like flight and concealment, is evidence of consciousness of guilt and intent); *People* v. *Arnold*, 5 N.W. 385, 387 (Mich. 1880) ("attempts to avoid a trial, to evade conviction by frauds upon the law, or to lead suspicion and investigation in some other direction by false or covert suggestions or insinuations, are so unlike the conduct of innocent men that they are justly regarded as giving some evidence of a consciousness of guilt"); *People* v. *Cutchall*, 504 N.W.2d 666 (Mich. Ct. App. 1993) overruled on other grounds by *People v. Edgett*, 560 N.W.2d 360 (Mich. Ct. App. 1996) (attempts to conceal involvement in a crime are probative of consciousness of guilt); *People* v. *Unger*, 749 N.W.2d 272 (Mich. Ct. App. 2008) (lying and deception can be demonstrative of consciousness of guilt); *People* v. *Casper*, 180 N.W.2d 906, 909 (Mich. Ct. App. (1970) ("Michigan authority appears uniform in holding that actions by the defendant such as flight to avoid lawful arrest, procuring perjured testimony and attempts to destroy evidence, while possibly as consistent with innocence as with guilt, may be considered by the jury as evidence of guilt."). Such a rule makes sense; voluntary, meditated actions taken immediately before or after a crime shed much light on a defendant's state of mind.

That is what makes the Sixth Circuit panel majority's ruling so exceedingly strange. Citing only to the Michigan statutory definition of legal insanity, and no cases whatsoever, the majority held that Walker's post-murder conduct was at best "informative," and was certainly "not determinative of legal insanity." Pet. App. 21a. The majority's holding violated AEDPA § 2254(d)(1), which allows relief only when a state-court ruling is contrary to, or involves an unreasonable

application of, this Court's clearly established law. See *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008).

First, according to the panel majority, the purported error was an error of *state* law, because federal law does not govern whether post-crime conduct bears on legal insanity in Michigan. But state law cannot form the basis for federal habeas relief under § 2254(d)(1). See *Estelle* v. *McGuire*, 502 U.S. 62, 67–68 (1991).

Second, even as a matter of state law, there is no support for the Sixth Circuit's conclusion. The Michigan Court of Appeals said that post-crime conduct matters, and the Michigan Supreme Court has apparently never said otherwise.

Third, even if state law could form the basis for habeas relief, and even if state-law rulings could be deemed "objectively unreasonable" under § 2254(d)(1), at the very least, the Michigan Court of Appeals was not objectively unreasonable when it held that post-crime conduct mattered. See *Renico* v. *Lett*, 130 S. Ct. 1855, 1866 (2010)("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.").

What does matter under (d)(1) is whether *this* Court has clearly established law on the issue. And even as a matter of substantive federal criminal law, this Court has never held that post-crime conduct cannot be taken into account. See *Jackson* v. *Virginia*, 443 U.S. 307, 325 (1979)(allowing a fact finder to infer a defendant's mental state from pre- and post-crime actions).

In sum, it is inexplicable that the Sixth Circuit panel majority would (1) determine for itself the meaning of Michigan law, (2) adopt a rule regarding evidence of insanity that has apparently not been adopted in any other jurisdiction, and (3) use that new rule to invalidate a murder conviction.

III. The Sixth Circuit failed to apply this Court's clearly established law for proving prejudice, as set forth in *Strickland*.

Finally, the Sixth Circuit panel majority stacked the deck in favor of finding factual prejudice and an unreasonable application of the prejudice standard under *Strickland* when it used its own prejudice standard, something it is prohibited from doing under AEDPA. See *Lett*, 130 S. Ct. 1865–66.

This Court's *Strickland* standard is well known and understood. To establish prejudice, a 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." *Strickland*, 466 U.S. at 694. As "clearly established law," this standard was the measuring stick for the Michigan Court of Appeals' conclusions. 28 U.S.C. § 2254(d)(1).

But the Sixth Circuit panel majority applied an entirely different standard. It said that Walker "must only show that he had a substantial defense." Pet. App. 22a.

The majority tried to justify its standard as not different than but supportive of *Strickland*'s "reasonable probability" language. Pet. App. 22a n.8. But that is not accurate. It is easy to imagine a

defendant who is able to show that ineffective assistance of counsel deprived him of a substantial defense, but deprivation of that defense did not make it reasonably probable that the jury would have reached a different result.

Any doubt about that fact is resolved by looking to the Sixth Circuit precedent on which the panel majority relied, *Beasley* v. *United States*, 491 F.2d 687 (6th Cir. 1974). To begin, *Beasley* is a pre-*Strickland* case that could not possibly have anticipated the *Strickland* holding and designed a standard to support it.

More important is how the *Beasley* opinion itself describes the "substantial defense" test. It requires counsel not only to "investigate all apparently substantial defenses available to the defendant," but says counsel "*must* assert them in a proper and timely manner." 491 F.2d at 696 (emphasis added). Again, if counsel fails to raise a substantial defense but it makes no difference to the outcome, *Strickland* holds that relief is not available. The Sixth Circuit says just the opposite.

Earlier this term, this Court summarily reversed the Sixth Circuit for granting habeas relief on the ground, among others, that the state court applied *Miranda* incorrectly. *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011) (per curiam). This Court noted that the Sixth Circuit's own reading of the rule was wrong. That is what happened here, compounded by the additional, fundamental error that it was state law that the Sixth Circuit rewrote. This Court should disavow the Sixth Circuit's rogue "substantial defense" test for evaluating *Strickland* prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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