No. 11-1011

In The

Supreme Court of the United States

CAROL R. HOWES, Warden,

Petitioner,

vs.

REGINALD WALKER,

Respondent.
_____/

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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BRIEF IN OPPOSITION

There are no compelling reasons to grant the petition for certiorari. In a case in which it is uncontested that counsel performed constitutionally deficiently by failing to assert the only valid defense available, the Sixth Circuit correctly held that the state court unreasonably applied U.S. Supreme Court law in determining no prejudice to Respondent. Petitioner is merely grasping at legal straws because it is unhappy with this outcome. The decision does not raise – and cannot raise because it was not the question in the Certificate of Appealability before the Sixth Circuit – an application of 28 U.S.C. § 2254(d)(2), or the interplay of 28 U.S.C. § 2254(d)(2) and (e)(1). Nor does the Sixth Circuit's decision in any way call into question an interpretation of state law – the federal court conducts a commonplace review of state law so that it may correctly analyze the question of prejudice. Finally, the Sixth Circuit's reference to its own caselaw as guidance in determining whether there is an unreasonable application of U.S. Supreme Court law by the state court is entirely unremarkable. In sum, the Petitioner merely disagrees with the Sixth Circuit's routine deferential determination of whether the state court made an unreasonable application of prejudice per *Strickland v. Washington*, 466 U.S. 668 (1984).

STATEMENT OF THE CASE

A. Trial

The evidence at trial established that on April 11, 2000, Reginald Walker shot and killed Larry Troup, a complete stranger, after Mr. Troup and his companion, Walter Gaiter, purchased beer at a store. When Mr. Gaiter leaned back into Mr. Walker, who stood behind him in line, the two men exchanged words. Mr. Walker then paid for his items and shot Mr. Troup multiple times with an automatic handgun. Pet. App. 65a – 66a.

After the shooting, Mr. Walker picked up the clip from the floor, placed it in his pocket and walked out of the store. Pet. App. 65a – 66a. Mr. Walker went to a semi-abandoned house, and placed the gun inside a hole he punched in the drywall in the bathroom. Pet. App. 4a. On three different occasions, he provided aliases to police officers.[1] Pet. App. 64a.

At trial, Mr. Walker offered a hybrid defense of accident and self-defense. He testified that he accidentally fired his gun after Mr. Gaiter shot him in the hand. Pet. App. 66a. All forensic evidence and eyewitness testimony contradicted this version of events. Pet. App. 4a-5a. Both the store clerk and Mr. Gaiter observed Mr. Walker shoot Mr. Troup after they bumped in line and exchanged words. Pet. App. 5a. Neither Mr. Gaiter nor Mr. Troup had any weapons. Pet. App. 4a, 66a.

On March 1, 2001, a Wayne County jury convicted Mr. Walker of first degree murder and possession of a firearm in the commission of a felony. Mich. Comp. Laws § § 750.316, 750.227b. On March 19, 2001, Judge Kym Worthy sentenced Mr. Walker to life imprisonment for first degree murder plus two years consecutive imprisonment for felony firearm. Pet. App. 60a.

B. Direct Appeal and Evidentiary Hearing on Remand

Mr. Walker appealed as of right, claiming ineffective assistance of counsel for counsel's failure to investigate and present the defense of insanity. Pet. App. 66a-67a.

On January 3, 2003, the Michigan Court of Appeals held that trial counsel made an objectively unreasonable, non-strategic mistake in failing to properly investigate and raise an insanity defense. The Court of Appeals held:

[1] Petitioner asserts without support in the record that Mr. Walker provided his aliases to police *after* the shooting. Pet. 7. The Michigan Court of Appeals merely stated that Mr. Walker had used an alias three different times, a finding consistent with the record at trial. Pet. App. 95a, 64a.

> Even though an indigent defendant in Michigan, such as defendant in this case, may request an independent psychiatric evaluation by a clinician of his choice pursuant to M.C.L. § 768.20a(3), defense counsel never sought an independent psychiatric evaluation for his client and did not pursue an insanity defense at trial. Instead, trial counsel, who was clearly aware of defendant's long history of mental illness, elected to forego the presentation of an insanity defense in order to argue the defenses of accident, self-defense and intoxication based on defendant's version of the events presented at trial.
>
> Here, trial counsel's decision not to pursue an insanity defense, but to present the conflicting defenses of accident and self-defense based on defendant's testimony, was objectively unreasonable.

Pet. App. 69a-70a. The Court of Appeals remanded for an evidentiary hearing on the remaining question of prejudice. Pet. App. 70a-71a.

At the subsequent evidentiary hearing, a forensic psychologist testified that Mr. Walker was legally insane at the time of the shooting. Pet. App. 17a-18a. Dr. Stephen Miller reported that Mr. Walker's first contact with mental health professionals was at the age of 16, at the time of his father's death, and lasted for three or four years. In 1983 he was diagnosed with severe depression and mental confusion, including hallucinations. According to Dr. Miller, "in every admission to the hospital from 1983 up through and including his admission to the Wayne County Jail and the records that I have obtained. . .indicate that he had a schizophrenic type of diagnosis." Pet. App. 102a-103a. Mr. Walker had been in at least ten hospitals or treatment facilities over the last thirty years and had received numerous diagnoses and treatment for schizophrenic type disorders. Pet. App. 103a-104a, 243a-248a.

At the time of the incident, Mr. Walker received Social Security benefits for his mental health problems, and his mother served as his guardian. Pet. App. 9a. Six months prior to the shooting, Mr. Walker's mother had him involuntarily committed for mental health treatment for symptoms that included talking to himself "all day and night." Pet. App. 9a, 107a, 247a.

Dr. Miller testified that Mr. Walker was mentally ill at the time of the offense, and his diagnosis was Schizo-affective Disorder with a bipolar component to it. Mr. Walker had first received that diagnosis in 1990. Pet. App. 104a-105a. The delusional side of this disorder consisted of hearing voices, including negative voices about other people's actions. His symptoms included a generalized paranoia, which Dr. Miller termed "ideas of reference": a sense that others were generally out to hurt him, as opposed to some fixed delusion. Pet. App. 106a-107a.

Mr. Walker would respond to these hallucinations, interacting with the voices. Res. App. 2.[2] He suffered from a disorder that significantly impaired his capacity to recognize reality and significantly impaired his judgment and behavior. Res. App. 2. As a result of that mental illness, Mr. Walker lacked the substantial capacity to appreciate the nature and quality of his acts, lacked the substantial capacity to appreciate the wrongfulness of his conduct, and lacked the substantial capacity to conform his conduct to the requirements of the law. Res. App. 3.

In Dr. Miller's opinion, Mr. Walker was legally insane at the time of the offense. Mr. Walker's extensive psychiatric history and his involuntary commitment months before the instant offense informed this diagnosis. Pet. App. 107a. Dr. Miller described Mr. Walker's trial testimony of self-defense and a shooting to his hand in the context of a possible confabulation. Mr. Walker had described an incident several months before the offense, where two people broke into his niece's house and shot him in the hand. He could well have confused the source of his hand injury, resulting in the "memory" here that he was shot in the hand by the decedent. Pet. App. 120a-122a.

[2] Petitioner's Appendix inadvertently omits pages 26 and 27 of the March 28, 2003 evidentiary hearing on remand, and numbers page 28 as 26. Respondent's appendix contains these pages.

The prosecution's expert witness, Dr. Dexter Fields was aware of Mr. Walker's prior mental health hospitalizations, but stated they did not have much effect on his opinion. 179a. Dr. Fields had observed Mr. Walker's "bizarre behavior" previously and found him mentally ill in a prior case when referred for a criminal responsibility evaluation. Pet. App. 248a. Dr. Fields acknowledged Mr. Walker's prescription for an antipsychotic medication at the time of the interview. Pet. App. 238a. Nevertheless, Dr. Fields diagnosed Mr. Walker as criminally responsible and not even mentally ill at the time of the offense. Pet. App. 174a, 250a-251a. He diagnosed an unspecified personality disorder with a history of substance abuse. Pet. App. 225a.

Dr. Miller based his evaluation on Mr. Walker's cognitive processes at the time of the shooting. Pet. App. 162a-163a. Mr. Walker's apparent goal directed behavior after the shooting had very little weight in the calculus, because such behavior could just be part of a patient's delusion, and not meaningful for a diagnosis. Pet. App. 116a. Behavior such as leaving the scene of the shooting needed to be evaluated based on the clinical findings and history of insanity. Pet. App. 146a-147a. Dr. Fields agreed that someone could engage in what appeared to be goal-directed behavior, such as fleeing police and hiding a gun, but still be suffering from delusions such that he lacked the substantial capacity to appreciate the nature and quality of his acts. Pet. App. 226a, 233a-237a.

Despite the Michigan Court of Appeals conclusion that counsel performed deficiently and remand only for a prejudice inquiry, the trial court nevertheless took testimony from trial counsel. Counsel knew of Mr. Walker's extensive history of mental illness and prior schizophrenia diagnosis. Pet. App. 186a-187a, 202a. Nevertheless, he did not request or review medical records, did not request the independent psychiatric evaluation to which he was entitled under Michigan law, per Mich. Comp. Laws § 768.20a(3), and did not investigate and raise an

insanity defense. Pet. App. 186a-187a, 192a, 202a. Although counsel provided a series of explanations for this decision, he admitted that he had no legitimate reason for failing to seek an independent evaluation. Pet. App. 186a, 189a-194a.

At the conclusion of the hearing, the trial court determined there was no prejudice to the defense. Although the court discussed prejudice, its ultimate conclusion was that trial counsel's error was not prejudicial because it was not an error at all, but a "sound, legal, strategic decision." *Ginther Hearing*, June 4, 2003, pp. 19-28.

C. Conclusion of Direct Appeal

Following the trial court ruling, Mr. Walker appealed and the Michigan Court of Appeals affirmed. In spite of the prior holding that counsel's representation fell below an objective standard of reasonableness, the state court determined that counsel was justified in failing to present an insanity defense. Pet. App. 62a-63a. The court acknowledged that the law of the case doctrine meant counsel performed deficiently, such that "the sole issue on appeal is whether defendant's claim of ineffective assistance of counsel satisfied the prejudice factor of the test." Pet. App. 62a. The court then made prejudice findings, focusing on Mr. Walker's actions after the shooting:

> Further, defendant's actions, such as picking up the clip after the shooting, leaving the scene of the crime, going into the abandoned house and hiding the gun in a hole, suggest that defendant recognized the consequences of his criminal behavior, and that his behavior was wrongful. The evidence further shows that defendant lied to police by giving them aliases on three different occasions. Even 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.
>
> Additionally, the evidence shows that defendant alleged self-defense to his counsel and, at trial, defendant testified clearly and consistently in his own behalf that he acted in self-defense. As such, we are unable to conclude that counsel's decision to advance

> defendant's self-defense claim deprived defendant of a substantial defense.

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

D. Federal Habeas Corpus Proceedings

Mr. Walker filed a petition for a writ of habeas corpus, on the grounds that the state court unreasonably applied federal law in finding no prejudice where counsel had performed deficiently by failing to raise an insanity defense. The District Court adopted the Magistrate's Report and Recommendation and denied the petition, holding that the state court's decision on prejudice was not an unreasonable application of federal law. Pet. App. 34a-43a.

The District Court granted a certificate of appealability on this single issue of "whether the state court's determination that Petitioner was not prejudiced by counsel's failure to raise the defense of insanity was an unreasonable application of federal law." Pet. App. 33a.

The Sixth Circuit reversed, holding that the Michigan Court of Appeals unreasonably applied federal law in concluding no prejudice to the defense from failure to raise an insanity defense. Pet. App. 1-24a. The Sixth Circuit held:

> On the contrary, the evidence that Walker suffered from chronic and severe mental illness is not only overwhelming, but it is uncontested. That the jury heard nothing about his mental illness and its effects clearly renders the result of the trial highly unreliable and fundamentally unfair.
>
> 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. That Walker shot and killed a complete stranger with minimal to no provocation, but then testified "clearly and consistently" that he believed that Gaiter and Troup were trying to kill him and actually shot him, might have been better understood by a jury with knowledge that Walker's longstanding mental condition included paranoia and delusions.

> Finally, Counsel's choice to forgo the meritorious defense of insanity in favor of a defense that he knew was contradicted by every piece of physical, circumstantial, and eyewitness testimonial evidence strongly supports the findings of deficient performance by counsel and prejudice. Counsel's defense required the jury to believe the word of Walker over that of Gaiter, Yaldo, and every police officer involved in the investigation. Presenting such a defense in lieu of insanity (or any other plausible defense), was an error that was "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." The Michigan Court of Appeals determination to the contrary, based almost completely on Counsel's own assessment that Walker was not prejudiced by his performance, was clearly unreasonable.

Pet. App. 22a-24a (internal citations omitted).

REASONS FOR DENYING THE PETITION

It is undisputed that Reginald Walker received constitutionally ineffective assistance at trial, where counsel failed to investigate and raise an insanity defense in spite of his extensive history of severe mental illness. This history included his commitment to ten hospitals or treatment facilities, and numerous diagnoses for schizophrenic type disorders. Mr. Walker had been involuntarily committed to a treatment facility just months before the shooting in the instant case.

There is no debate that trial counsel performed deficiently by offering a hybrid self–defense / accident defense instead of an insanity defense. Petitioner concedes this point. Pet. i. Trial counsel's defense contradicted the physical evidence, circumstantial evidence, and eyewitness testimony in the case. This case then presents the single question of whether the Michigan Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in finding no prejudice.

The state proffers three reasons for granting the petition, all of which amount to parsing words or phrases of a comprehensive opinion that held the state court unreasonably applied the

prejudice prong in *Strickland.* This § 2254(d)(1) decision on prejudice in an ineffectiveness of counsel claim implicates neither factual disputes nor the relationship between 28 U.S.C. § 2254(d)(2) and (e)(1). The federal court interpretation of state law, asserted to be improper, is simply an extraneous part of a comprehensive evaluation of prejudice. The supposed reliance on a "substantial defense" standard is likewise part of this larger and appropriate analysis of the unreasonable application of U.S. Supreme Court law.

In this case, the Sixth Circuit applied a case-specific analysis of the *Strickland* prejudice standard, holding the state court unreasonably applied federal law. There are no compelling reasons to review the decision of the Sixth Circuit Court of Appeals.

I. The relationship between 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) is not presented by this case.

The state asserts that the Sixth Circuit granted habeas relief in part by improperly determining that the state court factual findings were unreasonable under §2254(d)(2). Pet. 15. To the contrary, the Sixth Circuit based its grant of relief solely on the basis of the state court's unreasonable application of *Strickland*, so neither (d)(2) nor its relationship with (e)(1) plays any role in this case. Indeed, the reasonableness of the state court's factfinding was waived by Mr. Walker and never at issue.

This case presents the unusual situation where a party waived, without argument, an issue that the Sixth Circuit then happened to inadvertently reference, without discussion. Rather than recognize this obvious dynamic, the Petitioner tries to shoehorn it into evidence that the laxity of the (d)(2) unreasonableness standard licenses habeas courts to conduct de novo review of state court findings. Pet 17. This issue is not presented.

A. The Sixth Circuit based the grant of relief exclusively on 28 U.S.C. § 2254(d)(1).

This case does not implicate the relationship between 28 U.S.C. § 2254(d)(2) and (e)(1) because the Sixth Circuit based its grant of relief entirely on the state court's unreasonable application of federal law. In support of its claim that the Sixth Circuit conducted a (d)(2) analysis, Petitioner highlights the Sixth Circuit's statement that "the Michigan Court of Appeals both unreasonably applied clearly established federal law, and unreasonably determined facts in light of the evidence." (Pet. App. 18a). Read in a vacuum, this statement might support the state's argument, but an examination of the surrounding context proves that this is not what occurred.

First, neither party ever briefed or argued a (d)(2) issue in the Sixth Circuit. Second, the Sixth Circuit did not even cite 28 U.S.C. § 2254(d)(2) in support of this statement or otherwise indicate that relied on two independent bases of relief. In fact, the opinion never described any (d)(2) analysis, never detailed which facts it contested, and never explained that it considered the state court's factual findings unreasonable. Instead, the entire opinion provides an in-depth discussion of its (d)(1) unreasonable application analysis. Given the Sixth Circuit's willingness to detail its reasoning under (d)(1), there is no credible explanation for why it would refuse to do the same for a (d)(2) analysis. Finally, in the opinion's Summary, the court based the grant of relief exclusively on the state court's unreasonable application of *Strickland*. Pet. App. 24a.

A more plausible reading of this statement is that the referenced factual determination involves not an independent (d)(2) analysis but an aspect of the Sixth Circuit's (d)(1) analysis. Specifically, the Sixth Circuit held that the state appellate court misapplied *Strickland* when it focused its prejudice inquiry on its own belief that Mr. Walker was not insane:

> The state appeals court's determination, **based on its own assessment** that the "evidence that defendant had the consciousness of guilt" outweighed all evidence regarding Walker's mental illness, is a thinly veiled and **unsupportable conclusion** that it simply did not believe that Walker was legally insane. The **factual determination** of whether Walker was insane is not the question that the court was required to answer, or should have endeavored to answer, in order to determine prejudice under *Strickland.*

Pet. App. 21a-22a (emphasis added). Under *Strickland*, the state court was instead required to determine simply whether there existed "a reasonable probability that but for the counsel's unprofessional errors, the result of the outcome would have been different." *Strickland*, 466 U.S. at 694. By asking the wrong question in its prejudice inquiry, the state court misapplied *Strickland*. That the answer itself was "unsupportable" reinforced the Sixth Circuit's conclusion that the state court's application of *Strickland* was unreasonable under (d)(1); it did not supply an independent basis for relief under (d)(2).

The state describes six "predicate factual findings" to try to show that the decision implicates the relationship between 28 U.S.C. § 2254(d)(2) and (e)(1). Pet. 13. These "findings," though, are either not in dispute or not actually "predicate factual findings." First, Mr. Walker's competency is not an issue in counsel's failure to offer an insanity defense, and was never an issue of dispute at any point in this case. Second, the conclusion that Mr. Walker was not mentally ill is not a factual finding made by the state court. It was asserted only by Dr. Fields, the prosecution expert witness, and rebutted by both Dr. Miller and Mr. Walker's history. Third, fourth, and fifth, there is no dispute at all that Mr. Walker picked up the clip, fled to an abandoned house to hide his gun, and provided three different alibis to police. Finally, Mr. Walker's apparent "consciousness of guilt" is a fact evaluated by defense and prosecution experts and ultimately resolved by the jury. The state list of these "findings" only serves to

illustrate the real lack of any analysis under 28 U.S.C. § 2254(d)(2) or (e)(1) in the Sixth Circuit's decision. The issue is not presented.

B. The issue of the reasonableness of the state court's factual determinations is not cognizable on review.

Even if this Court believes the Sixth Circuit touched on an analysis under § 2254(d)(2), it is not at issue. Mr. Walker never contested the state court's determination of the facts in the Sixth Circuit, only the legal conclusion. Neither party briefed or argued the issue in the Sixth Circuit. By declining to argue the issue on appeal, Mr. Walker waived the issue. Fed. R. App. P. 28(a)(9)(A); *see also Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010); *Fairchild v. Workman*, 579 F.3d 1134, 1146 (10th Cir. 2009).

Indeed, Mr. Walker did not seek review of this issue, and no Certificate of Appealability (COA) for it was ever granted. Mr. Walker requested, and the District Court granted, a COA on a single issue: "whether the state court's determination that Petitioner was not prejudiced by counsel's failure to raise the defense of insanity was an unreasonable application of federal law." Pet. App. 33a. The Sixth Circuit's review of Mr. Walker's petition is restricted to the issue specified in the COA; issues not listed in the COA are not cognizable on review. 28 U.S.C. § 2253(c)(3); *see also Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010); *Hill v. Mitchell*, 400 F.3d 308, 329 (6th Cir. 2005).

Despite the state's claim, the relationship between §2254(d)(2) and (e)(1) is nowhere to be found in this case. The reasonableness of the state court's factual findings played no role in the grant of habeas relief, the issue was both waived by Mr. Walker and beyond the scope of permissible review, and the proposed procedural scheme is unnecessary to resolve this case.

II. The Sixth Circuit held that the state court unreasonably applied clearly established *federal* law. The reference to state law only informed this conclusion.

The Sixth Circuit properly determined that the state court unreasonably applied the *Strickland* prejudice standard. Despite the state's assertion to the contrary, the court correctly followed the mandates of §2254(d)(1) and granted habeas relief on an unreasonable application of federal law, not a disagreement with state law. Petitioner again gives a forced reading of one section of the opinion to shift focus from the sole issue in this case: the unreasonable application of federal law in determining there was no prejudice to the defense.

The familiar *Strickland* prejudice standard requires that "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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The Sixth Circuit held "unreasonable the state court's application of *Strickland*, which required both a virtual surety of acquittal and focused on what choices Walker's counsel attests he would have made had he known what he did not bother to find out." Pet. App. 24a.

First, despite the previous determination of deficient performance, the state court relied on counsel's justification that even with an independent forensic evaluation, he still would have rejected an insanity defense. Pet. App. 62a-63a. The state court opinion discussed at length counsel's strategy and decisions in making this analysis:

> Therefore, counsel believed that even if he could obtain an independent evaluation to support defendant's insanity defense, it would not have had much effect on the jury's decision. Counsel was concerned about a compromise verdict finding defendant guilty but mentally ill. Because mental illness short of legal insanity does not relieve a defendant from criminal responsibility, defendant failed to show that he had a meritorious insanity defense, and thus, failed to

> show that counsel was ineffective for failing to present such a defense.

Pet. App. 63a. This selection is typical of the state court's flawed legal analysis on prejudice. The state court analysis is an unreasonable application of federal law because it virtually neglects prejudice in favor of revisiting the already resolved deficient performance issue.

This Court has recognized just this sort of flawed prejudice inquiry and deemed it to be an unreasonable application of federal law. In *Sears v Upton*, __ U.S.__, 130 S. Ct. 3259 (2010), this Court criticized the state court for improperly basing a prejudice inquiry on counsel's reasonableness in the context of a mitigation theory:

> First, the court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory. The court's determination that counsel had conducted a constitutionally deficient mitigation investigation, should have, at the very least, called into question the reasonableness of this theory. And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The 'reasonableness' of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not. *Sears*, 130 S. Ct. at 3265 (internal citations omitted).

The Michigan Court of Appeals unreasonably applied federal law in determining there was no prejudice based on a misplaced focus on counsel's decisions in not presenting the insanity defense.

Second, the state court unreasonably applied *Strickland* in requiring proof that an insanity defense would have led to acquittal. Pet. App. 20a. Where the failure to even present a particular defense undermines confidence in the verdict, there is prejudice, regardless of some possibility of the identical result. In the death penalty context, this Court held:

> This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of … culpability, and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

Despite that counsel's decision had already been deemed unreasonable, most of the state court opinion focused on approval of *counsel's* decision not to present an insanity defense. Pet. App. 62a-63a. The only actual prejudice analysis examines Mr. Walker's actions after the shooting, such as concealing evidence, and concludes no probability of acquittal because of "consciousness of guilt." Pet. App. 63a-64a. In reaching this conclusion, the Michigan Court of Appeals engaged in the analysis discredited by *Rompilla*; that since a jury could still have convicted with an insanity defense, there is no prejudice. Instead, the proper analysis focuses on whether the unreasonable failure to offer a potentially successful defense undermines confidence in the outcome. *Strickland*, 466 U.S. at 694. By equating "acquittal" with "prejudice," the state court made an unreasonable application of *Strickland's* prejudice prong.

The undisputed record belies the state court's conclusion that evidence of Mr. Walker's consciousness of guilt meant no possibility of acquittal on an insanity defense. The state court focused on Mr. Walker's actions after the shooting rather than the actual offense, and made an "unsupportable conclusion" that it did not believe Mr. Walker to be legally insane. Pet. App. 22a. This conclusion is an unreasonable application of a requirement to find prejudice when confidence in the verdict is undermined. *Strickland*, *supra*. Dr. Miller explained that the insanity diagnosis stemmed from Mr. Walker's cognition during the shooting, not his behavior

after the shooting. Even Dr. Fields acknowledged that an individual suffering from insanity could exhibit goal-directed behavior.

The Sixth Circuit properly observed that "the evidence that Walker suffered from chronic and severe mental illness is not only overwhelming, but it is uncontested. That the jury heard *nothing* about his mental illness and its effects clearly renders the result of the trial highly unreliable and fundamentally unfair." Pet. App. 22a – 23a, emphasis in original. *Compare Knowles v. Mirzayance*, 556 U.S. 111 (2009) (holding there was no prejudice where counsel withdrew an insanity defense because the jury had *already* rejected testimony about defendant's mental condition when the state bore the burden of proof).

In addition to the standard applied, the Sixth Circuit also deemed the state court's prejudice analysis itself to be unreasonable. It is this portion of the opinion that the State dismisses as rewriting Michigan insanity law. Pet. at 18. To the contrary, the Sixth Circuit based its rejection of the state court decision not on state law grounds but on the state court's decision to substitute its own judgment for that of a jury. *Strickland* requires that the court determine, based on the whole record, whether confidence in the jury verdict is undermined. 466 U.S. at 694. Instead, the state court disregarded the "overwhelming" and "uncontested" evidence of Mr. Walker's history of severe mental illness and focused exclusively on Mr. Walker's post-offense conduct to form its own "unsupportable conclusion" that it did not believe Mr. Walker to be legally insane. Pet. App. 21a-22a. In other words, the state court's weighing of the evidence reflected its own opinion of Mr. Walker's sanity rather than an assessment of how the available evidence might influence the jury. The Sixth Circuit properly rejected the state court's conclusion as an unreasonable application of the *Strickland* prejudice inquiry.

To the extent that the Sixth Circuit commented on Michigan insanity law, it did so merely to evaluate the strength of the insanity defense within the context of the *Strickland* prejudice analysis. This is not a case where the Sixth Circuit disregarded a state court interpretation of a state statute. *See Bradshaw v. Richey*, 546 U.S. 74 (2005) (disregarding state law application of transferred intent to felony murder). In a prejudice inquiry, the federal habeas court must examine state statutes to determine whether a particular defense would have been sufficiently meritorious to undermine confidence in the verdict. For example, in *Wiggins v. Smith*, 539 U.S. 510, 536-37, 555-56 (2003), the majority and dissent argued over the correct interpretation of state evidentiary law in determining whether the petitioner suffered prejudice from his attorney's deficient performance. The dissent noted that the state circuit court determined that the relevant evidence would probably not be admissible, contradicting the majority's determination that it may have been. *Wiggins*, 539 U.S. at 555 (Scalia, J. dissenting).

Similarly, the Sixth Circuit in this case examined state law to gauge the strength of Mr. Walker's insanity defense. It ultimately rejected the state court opinion because the prejudice inquiry requires an analysis of the potential effect of the evidence on the jury's appraisal, not because the court incorrectly interpreted its own law.

III. The Sixth Circuit's "substantial defense" analysis is entirely consistent with *Strickland's* prejudice standard.

The state's third reason for granting the petition follows the identical pattern of the first two – a sentence or phrase of an entire opinion holding the state court unreasonably applied *Strickland* is depicted as presenting an independent issue rather than as part of the larger analysis. In a lengthy opinion holding that the state court made an unreasonable application of the prejudice prong of *Strickland*, the Sixth Circuit includes language from other Sixth Circuit cases explaining that Mr. Walker's insanity defense must be a "substantial" one. Pet. App. 22a.

Petitioner does not appreciate that these cases serve to correct the state court's improper prejudice requirement of a "likely chance of acquittal." Pet. App. 64a. A *Strickland* inquiry into prejudice evaluates whether "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 confidence in the outcome." *Strickland*, 466 U.S. at 694. Trial counsel's undermining combination of a self-defense claim and an accident defense at trial had no likelihood of success, while the insanity claim instead offered a *substantial* and potentially successful defense. The Sixth Circuit can and did cite non-binding circuit precedent in its determination that the state court made an unreasonable application of the *Strickland* prejudice standard. *See Rompilla*, *supra*, 545 U.S. at 393 (finding that counsel's failure to present evidence that provided actual mitigation constituted prejudice where instead the jury just heard a "few naked pleas for mercy").

Mr. Walker had a valid insanity defense based on decades of medical treatment and hospital admission for schizophrenia, most recently a few months before the offense. The Sixth Circuit's characterization of this defense as "substantial" does not alter the fact that counsel's failure to offer it is prejudicial. Here there is no dispute from either Petitioner or the state court of appeals that counsel performed deficiently. The state court unreasonably applied the *Strickland* prejudice prong in determining there was no prejudice when counsel's failure to offer the insanity defense "undermined confidence in the outcome." The Sixth Circuit properly granted habeas relief.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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