No. 11-1011

In the Supreme Court of the United States

CAROL R. HOWES, WARDEN, PETITIONER

v.

REGINALD WALKER

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Court should grant the petition for three reasons: (1) to resolve the question left open by *Wood* v. *Allen*, 130 S. Ct. 841 (2010), regarding how 28 U.S.C. § 2254(d)(2) and (e)(1) interrelate; (2) to determine under AEDPA a federal court's power to rewrite state law; and (3) to clarify whether a defendant satisfies a *Strickland* prejudice analysis simply by proving that he "had a substantial defense," rather than proving a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Walker attempts to undermine the need for review by raising three counter-points. Each is spurious.

With respect to (d)(2) and (e)(1), Walker does not dispute the State's sensible construction of these sub-provisions: (e)(1) facts are steeled by the presumption of correctness and thus constrain a habeas court from conducting *de novo* factual review under (d)(2)—or even (d)(1), to the extent factual questions are involved in the application of the legal standard.[1] Instead, Walker says that facts had no relevance to the Sixth Circuit panel's decision. Not so. Pet. 13–17. That is why Judge Cook, in dissent, reached an entirely different conclusion by applying (e)(1). Walker's selective attempts to minimize the predicate factual findings relating to his consciousness of guilt and sanity proves the point: factual findings cannot be discarded to second-guess through *de novo* review a state court's ultimate prejudice decision under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

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[1] The State has also filed a petition on this issue in *White* v. *Rice*, No. 11-1262.

Likewise, Walker apparently agrees with Michigan, rather than the panel, that a defendant's post-crime conduct might be relevant to his consciousness of guilt. Br. in Opp. 17 (declining to endorse the panel's view of Michigan law regarding the insanity defense). This is a critical concession when analyzing the probability of a different outcome under *Strickland*, because mental illness short of insanity does not relieve a defendant from criminal responsibility under Michigan law. *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). Walker tries to downplay the panel's analysis, asserting that the panel was merely conducting a "commonplace review of state law" so as to correctly analyze prejudice. Br. in Opp. 1. But what a habeas court cannot do is rewrite state law and pronounce that a defendant's post-crime conduct is an irrelevant consideration. Such action is unprecedented and renders AEDPA, comity, and federalism empty shells by preordaining unreasonableness. It is an unrestricted gateway to second-guessing.

Third, although the *Strickland* probability-of-a-different-result test is the clearly settled law of this Court, the Sixth Circuit panel applied instead a "substantial defense" test. Walker does not have a good explanation for this departure, so he simply says that a circuit's reference to its own caselaw is "unremarkable." Br. in Opp. 1. But this Court has already cautioned the Sixth Circuit against using its own circuit test in habeas cases. *Renico* v. *Lett*, 130 S. Ct. 1855 (2010). And it is certainly remarkable that the panel applied a prejudice test in conflict with *Strickland*.

This Court should grant the writ of certiorari.

ARGUMENT

I. The relationship between § 2254(d)(2) and (e)(1) is an open question, the resolution of which makes a difference here.

Walker does not dispute that this Court left open in *Wood* the question of how 28 U.S.C. § 2254(d)(2) and (e)(1) interrelate. See 130 S. Ct. at 848–49. Nor does he dispute the circuit split or that the relationship can be determinative. Walker does not even contest the State's construction of the interrelationship. Rather, Walker says that the (d)(2)/(e)(1) relationship is not in play here. Walker is wrong.

The Sixth Circuit majority held that the Michigan Court of Appeals "*unreasonably determined the facts in light of the evidence*." Pet. App. 18a (emphasis added). In light of that unequivocal statement, it is strange indeed for Walker to claim that this case "implicates neither factual disputes nor the relationship between 28 U.S.C. § 2254(d)(2) and (e)(1)" and "the relationship between §2254(d)(2) and (e)(1) is nowhere to be found in this case." Br. in Opp. 9, 12.[2] And it is equally puzzling to suggest that the Sixth Circuit was so

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[2] It is true that the certificate of appealability from the district court addressed a (d)(1) claim. Pet. App. 33a. But the Sixth Circuit majority chose to reach out and address the (d)(2) holding. This action is not uncommon for the Sixth Circuit. E.g., *Mack* v. *Holt*, 62 Fed. App'x 577, 578 (6th Cir. 2003) (*sua sponte* expanding certificate of appealability to consider an additional issue). It is ironic that Walker, after receiving relief based on a flawed analysis, would suggest that he waived the issue on which he prevailed to portray a poor vehicle for review. At a minimum, Walker walks himself out of the proverbial grant frying pan and into the peremptory reversal fire.

careless that it only wandered upon the issue through "inadvertent[] reference" on its way to reversing the district court's denial of habeas relief and invalidating a Michigan murder conviction. Br. in Opp. 9.

Walker turns the majority's misapplication of (d)(2) and (e)(1) on its head by arguing the deficiencies of the opinion, i.e., it "never detailed which facts it contested, and never explained that it considered the state court's factual findings unreasonable," as a reason to avoid resolving the (d)(2) and (e)(1) interplay and to shield the opinion. Br. in Opp. 10. That is precisely the opinion's failure, as Judge Cook noted in her dissent, Pet. App. 26a, and it highlights why resolving the (d)(2) and (e)(1) relationship matters.

Wood has created an environment, present here, where federal courts ignore or second guess factual findings under (d)(2) and (d)(1). See Pet. 14 (prejudice component involves application of fact and law). As Judge Cook observed, the majority gave no consideration to (e)(1) whatsoever. Pet. App. 26a. And the majority's outright disregard for (e)(1) here deviates from past Sixth Circuit recognition of this Court's basic observations. See *Ayers* v. *Hudson*, 623 F.3d 301, 308 (6th Cir. 2010) (citing *Miller-El* v. *Cockrell (Miller-El I)*, 537 U.S. 322 (2003)).

Unlike in *Wood*, the Sixth Circuit's misapplication of (d)(2) and (e)(1) made a difference here. Contrary to Walker's assertion, the Michigan Court of Appeals did make discrete factual findings subject to (e)(1)'s presumption of correctness. The Michigan Court of Appeals made a number of crucial predicate factual findings that undergirded the ultimate finding of no *Strickland* factual prejudice:

- 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.

- 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.

Walker suggests that many of these factual findings were not findings or were undisputed. Br. in Opp. 11. But Walker then dedicates three pages of facts attempting to show Walker's mental illness and professed insanity. Br. in Opp. 3–5. And the petition appendix includes more than 150 pages of expert testimony from post-conviction proceedings of Dr. Fields and Dr. Miller, who reached different conclusions as to sanity. The Michigan Court of Appeals weighed this testimony and the other strong indicia of Walker's consciousness of guilt and made findings en route to rejecting prejudice. Pet. App. 63a–64a. That is precisely why the (d)(2)/(e)(1) interplay is presented and matters: factual findings cannot be outright disregarded, and without (e)(1)'s presumption that findings must be rebutted by clear and convincing

evidence, a habeas court can simply engage in *de novo* review by reweighing evidence as it chooses.

The state-court factual findings were necessary predicates to the ultimate factual decision that Walker suffered no prejudice under *Strickland*. 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 confidence in the outcome." *Strickland*, 466 U.S. at 694. The finding of consciousness of guilt, paired with other indicia that Walker was not insane, strikes at the heart of whether there was prejudice; these are not simply facts "evaluated by defense and prosecution experts and ultimately resolved by the jury." Br. in Opp. 11. Walker's argument implicitly recognizes this reality when he later charges that the Michigan Court of Appeals "focused exclusively on Mr. Walker's post-offense conduct to form its own 'unsupportable conclusion' . . . ." Br. in Opp. 16.

But the panel majority did much worse here when it reframed the inquiry, reweighed the evidence, and second-guessed the Michigan Court of Appeals' conclusion that Walker did not suffer 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.").[3]

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[3] The question was never whether Walker was mentally ill or whether evidence of mental illness would have had a reasonable probability of changing the outcome. In Michigan, mental illness short of legal insanity does not relieve a defendant of criminal

Ironically, Walker claims that the Michigan Court of Appeals substituted its judgment for the jury. Br. in Opp. 16. But it was the panel majority that substituted its judgment for the Michigan Court of Appeals—something AEDPA strictly forbids. See *Lett*, 130 S. Ct. at 1866 ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.").

II. The Sixth Circuit majority reached into Michigan law, rewrote it, and then used that rewrite to buttress its grant of habeas relief.

A plain reading of the majority's opinion speaks for itself. The majority refashioned State law by claiming that consciousness of guilt was not relevant in resolving the ineffectiveness question on insanity. Pet. App. 21a. Walker cannot disguise the majority's overreaching by claiming that it merely "commented" on state law that "informed" the majority's application of federal law. Br. in Opp. 13, 17. Purported "corrections" of state law can never form the basis for federal habeas relief. See *Estelle* v. *McGuire*, 502 U.S. 62, 67–68 (1991).

Judge Cook, writing in dissent, was quick to see the majority's error:

> [T]he majority appears to fault the state appellate court for misconstruing law other

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responsibility. See *People* v. *Carpenter*, 627 N.W.2d 276 (Mich. 2001). This appears to be another fundamental misapprehension of Michigan law, or the false assumption that all those who might have been mentally ill were necessarily insane.

> than "clearly established Federal law, as determined by the Supreme Court of the United States." See 28 U.S.C. § 2254(d)(1). For example, the majority questions the state court's interpretation and application of Michigan's insanity statute. This issue exceeds the scope of our review: *the Supreme Court "ha[s] repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." Bradshaw* v. *Richey*, 546 U.S. 74, 76 (2005).

Pet. App. 27a (emphasis added).

In Michigan, a defendant's actions surrounding the crime can be indicative of consciousness of guilt. Br. in Opp. 17–18. This Court has recognized the same common-sense principle. *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 behavior). Walker does not seem to dispute this.

But the panel majority used its own interpretation of Michigan law to preordain and buttress its conclusion of an unreasonable application of *Strickland* under (d)(1). By reaching into and rewriting state law, the majority was stacking the deck and avoiding the limitation that a habeas court may grant relief only when the state-court 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). The majority did not even follow the Sixth Circuit's own pronouncements

that a constitutional question in a state court's decision that is a "close call . . . militates against the conclusion that the state court's application of the relevant Supreme Court precedent was objectively unreasonable." *Lopez* v. *Wilson*, 426 F.3d 339, 358 n.1 (6th Cir. 2005) (en banc) (Cole, J., concurring) (internal quotation marks and citations omitted).

III. The Sixth Circuit majority applied its own prejudice standard to reinforce its grant of habeas relief.

The Sixth Circuit panel majority faults the Michigan Court of Appeals' standard of prejudice as falling short but it does so by measuring it against its own standard—something that it cannot do under AEDPA. The majority unequivocally applied a standard different from *Strickland*, i.e., Walker "*must only show that he had a substantial defense*." Pet. App. 22a (emphasis added). Walker again attempts to turn the tables. Walker tries to recast the majority's opinion to downplay its use of a different standard for prejudice as merely "serv[ing] to correct" the Michigan Court of Appeals' application of the *Strickland* prejudice standard. Br. in Opp. 18.

That argument fails for two reasons. First, the majority was applying a standard that this Court has not adopted. Second, even if imprecisely worded, the Michigan Court of Appeals' analysis cannot be judged against a circuit standard.

Walker has no effective response to the reality that the panel majority's "substantial defense" test is not the same as the *Strickland* prejudice standard. As noted in the petition, the majority's reliance on *Beasley*

v. *United States*, 491 F.2d 687 (6th Cir. 1974), is necessarily erroneous because *Beasley* is a pre-*Strickland* case. Moreover, *Beasley* articulated that counsel "must assert [all apparently substantial defenses] in a proper and timely manner." 491 F.2d at 696. Under this test, prejudice would be present even if the defense would not have changed the outcome. This Court has already cautioned the Sixth Circuit against adopting and using its own test to find a state-court decision objectively unreasonable. *Lett*, 130 S. Ct. at 1865–66.

Walker cannot rehabilitate the panel majority's misapplication of *Strickland* by citing to *Sears* v. *Upton*, 130 S. Ct. 3259 (2010). Br. in Opp. 14. In *Sears*, the state court said it was impossible to know what effect a different theory would have had, and because counsel presented a mitigation theory in the death-penalty case, the defendant failed to establish prejudice. 130 S. Ct. at 3264–65. The Court rejected the idea that presentation of a mitigation defense prohibited review of whether a deficient one might have prejudiced the defendant. *Id*. at 3266.

Walker also oversells any effect of *Rompilla* v. *Beard*, 545 U.S. 374 (2005). *Rompilla* rejected a *could-have*-reached-the-same-result standard for gauging prejudice. 545 U.S. at 393. But that is not what the Michigan Court of Appeals did here. Here, the Michigan Court of Appeals applied the *Strickland* prejudice standard that there was not a reasonable probability of a different outcome.

The Michigan Court of Appeals decision accurately captured and applied *Strickland* prejudice. The Michigan Court of Appeals made two statements

regarding prejudice: (1) a deprivation "of a reasonably likely chance of acquittal," paired with (2) "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). Walker solely focuses on the former, disconnecting it from the latter. Br. in Opp. 18.

But this Court has held that a federal habeas court must attempt to reconcile a state court's inexact phrasing of the *Strickland* standard with its use elsewhere of the correct language to state the *Strickland* standard. This approach is consistent with the presumption applied to § 2254 petitions that state courts know and follow the law. For example, in *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002), and *Holland* v. *Jackson*, 542 U.S. 649, 654–55 (2004), the state-court opinions, which had articulated the correct standard, thereafter contained ambiguous language, such as use of the word "probable" without the modifier "reasonably." The Court said that "§ 2254(d) requires that 'state-court decisions be given the benefit of the doubt' . . . '[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law,'" *Holland*, 542 U.S. at 655 (quoting *Visciotti*, 537 U.S. at 24), and "the unadorned word 'probably' is permissible shorthand when the complete *Strickland* standard is elsewhere recited." *Id*. It is no different here.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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