No. 12-420

In the Supreme Court of the United States

HUGH WOLFENBARGER, PETITIONER

v.

DEMETRIUS FOSTER

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

BRIEF FOR TEXAS AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

As a direct beneficiary of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the State of Texas has an interest in advancing "the principles of comity, finality, and federalism" that motivated Congress to enact the statute. *Michael Williams* v. *Taylor*, 529 U.S. 420, 436 (2000). AEDPA erected the "relitigation bar" of 28 U.S.C. 2254(d), *Harrington* v. *Richter*, 131 S. Ct. 770, 785 (2011), as a means of promoting those values. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003); *Terry Williams* v. *Taylor*, 529 U.S. 362, 404 (2000). The question presented in this case concerns the

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amicus curiae's intent to file this brief, and consented to it.

Harrington Court's interpretation of Section 2254(d), which represents the leading explication of "AEDPA's most important provision." Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1158 (6th ed. 2009). Because the stakes are high, Texas submits this amicus brief in support of petitioner.

DISCUSSION

The petition presents a significant question of federal habeas law:

> Whether a federal habeas court must grant AEDPA deference to both components of a state court's merits adjudication of a defendant's *Strickland* claim, when the state court addressed only one of the components in denying relief.

Pet. i. The Court already answered this question in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), sweeping aside an unreasoned assumption from *Wiggins* v. *Smith*, 539 U.S. 510 (2003), in the process. Texas respectfully submits that petitioner asks too little of the Court by declining to request summary reversal. See Sup. Ct. R. 16.1.

A. *Harrington* Answered The Question Presented

Petitioner's mention of "AEDPA deference" invokes the relitigation bar of Section 2254(d). Pet. i. This relitigation bar leaves federal courts powerless to grant habeas relief on the basis of "any *claim* that was adjudicated on the merits in State court proceedings," subject to three narrow exceptions. 28 U.S.C. 2254(d)(1)-(2) (emphasis added); see also *Harrington*, 131 S. Ct. at 784 (emphasizing

Congress's use of "claim"). In the AEDPA context, a "claim" is "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzales* v. *Crosby*, 545 U.S. 524, 530 (2005). When a state prisoner relies on *Strickland* to show that "he is in custody in violation of the Constitution * * * of the United States," 28 U.S.C. 2254(a), he presents a single "claim" (i.e., counsel's ineffective assistance invalidates his conviction under the Sixth Amendment) comprised of two "components" that he must establish to make out a constitutional violation (i.e., a performance prong and a prejudice prong), see *Strickland* v. *Washington*, 466 U.S. 668, 687, 697 (1984). Petitioner's question presented asks how Section 2254(d)'s relitigation bar works when a state court has rejected a *Strickland* claim on the basis of just one component. *Harrington* gives the answer.

In granting certiorari, the *Harrington* Court asked, "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under [*Strickland*]?" *Harrington* v. *Richter*, 130 S. Ct. 1506, 1506-1507 (2010). Acting with the benefit of full briefing from the parties and amici curiae, the Court resolved the question by holding that Section 2254(d)'s relitigation bar does apply when a state court's judgment is unaccompanied by an opinion explaining the reasons relief has been denied. See *Harrington*, 131 S. Ct. at 783-785.

The Court reached its conclusion by recognizing that Section 2254(d) "refers only to a 'decision' " of a state court and does not by its terms "requir[e] a statement of reasons." *Harrington*, 131 S. Ct. at 784. Having drawn attention to the statutory text, *Harrington* went on to explain why a federal habeas

court has no use for a state court's opinion when a prisoner invokes Section 2254(d)(1)'s "unreasonable application" exception to the relitigation bar. An opinion from the state court is not needed to determine whether there has been a relitigation-bar-triggering "adjudicat[ion] on the merits," thanks to a rebuttable presumption already reflected in habeas jurisprudence. See *Harrington*, 131 S. Ct. at 784-785 (citing *Harris* v. *Reed*, 489 U.S. 255, 265 (1989)). And "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* at 784. To avail himself of the "unreasonable application" exception, a prisoner bears the burden of "showing there was no reasonable basis for the state court to deny relief"—he must contend with what the state court *could have* said against his claim, rather than what it *did* say. *Ibid.*

By establishing that state court opinions are irrelevant to analysis under Section 2254(d)(1), *Harrington* resolves the question presented here. Suppose a state court rejects a *Strickland* claim and issues an opinion explaining that the sole ground for its decision is that the performance prong is not satisfied. Section 2254(d)'s relitigation bar will be triggered because, far from rebutting the presumption of merits adjudication, the state court's performance-prong opinion will actually confirm that it rejected the *Strickland* claim on the merits. See *Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim * * *

to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Meanwhile, the inquiry into whether the state court's decision to reject the *Strickland* claim "involved an unreasonable application of" this Court's precedent, 28 U.S.C. 2254(d)(1), will proceed independently of the state court's opinion. In deciding whether the "unreasonable application" exception obtains, the federal habeas court will be obliged to "determine what arguments or theories supported or * * * could have supported[] the state court's decision"—taking care not to "overlook[] arguments that would otherwise justify the state court's result"—and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington*, 131 S. Ct. at 784, 786. The search for a reasonable basis for the state court's decision will force the federal habeas court to consider both components of the *Strickland* claim before it can grant relief, including the prejudice prong not discussed in the state court's opinion. See *Premo* v. *Moore*, 131 S. Ct. 733, 740 (2011). "This is so *whether or not* the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Harrington*, 131 S. Ct. at 784 (emphasis added). If the prejudice prong offers a reasonable basis for the state court's decision, the federal court must deny habeas relief, even though the state court's opinion gave a different reason. See *Premo*, 131 S. Ct. at 744-745 (denying federal habeas relief under *Harrington* based on

what "[t]he state postconviction court reasonably could have concluded," even though the opinion of the state court gave different reasons for rejecting a claim); see also *Williams* v. *Roper*, 2012 WL 4069742, at *10-*11 (8th Cir. Sept. 18, 2012).

Harrington thus establishes that if a state court rejects a *Strickland* claim based on one component, and the other component would have provided a reasonable basis for the decision to reject the *Strickland* claim, then the "unreasonable application" exception will not keep Section 2254(d)'s relitigation bar from precluding federal habeas relief.[2] Or, in the parlance of petitioner's question presented, "a federal habeas court must grant AEDPA deference to both components of a state court's merits adjudication of a defendant's *Strickland* claim, when the state court addressed only one of the components in denying relief." Pet. i.

B. *Harrington* Swept Aside What Little There Was To *Wiggins*, *Rompilla*, And *Porter* On This Issue

As petitioner observes, Pet. 11-14, lower courts are ignoring *Harrington*'s binding interpretation of Section 2254(d) and clinging to a few sentences found in *Wiggins* v. *Smith*, 539 U.S. 510 (2003), *Rompilla* v. *Beard*, 545 U.S. 374 (2005), and *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (per curiam). The *Wiggins* Court wrote, "In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts

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[2] Unless, of course, the prisoner can satisfy the "contrary to" exception of Section 2254(d)(1) or the "unreasonable determination of the facts" exception of Section 2254(d)(2).

below reached this prong of the *Strickland* analysis." 539 U.S. at 534. The *Rompilla* Court followed along, writing, "Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo* * * * ." 545 U.S. at 390 (citing *Wiggins*). The *Porter* Court did the same, writing, "Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*." 130 S. Ct. at 452 (citing *Rompilla*).

The entirety of the Court's reasoning on this point does not extend beyond the three sentences just quoted. The Court can hardly be faulted for this analytical vacuum, however, because the State failed to urge the full force of Section 2254(d)'s relitigation bar in *Wiggins*, *Rompilla*, or *Porter*. It was not until *Harrington* that this important issue received the attention it deserved.

The prisoner in *Wiggins* did not acknowledge Section 2254(d) in arguing that he satisfied *Strickland*'s prejudice prong. See Br. for Pet'r 45-50, *Wiggins* v. *Smith*, 539 U.S. 510 (2003) (No. 02-311). He sought to establish only that the performance prong, which the state court had addressed, did not offer a reasonable basis for the state court's decision to reject his *Strickland* claim. See *id.* at 20-45. Instead of contesting this approach, the State unwisely embraced it—thereby neglecting the statutory text that would later prove crucial in *Harrington*. See Br. for Resp'ts 30, *Wiggins* v. *Smith*, 539 U.S. 510 (2003) (No. 02-311) ("Wiggins cannot prevail in this Court unless he establishes that the [state court] unreasonably applied

[*Strickland*] in concluding that sentencing counsel's performance was not deficient, and unless he establishes actual prejudice" (capitalization from argument heading omitted)); *id.* at 46-49 (arguing about prejudice prong without invoking Section 2254(d)(1)). As might be expected, the Court took the case as the parties had presented it, declining to inquire whether the state court reasonably could have rejected the *Strickland* claim on the prejudice prong. See *Wiggins*, 539 U.S. at 534-538. Regrettably, the State gave the Court no reason to doubt the following sentence: "In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." *Id.* at 534.[3]

The prisoner in *Rompilla* simply pointed to *Wiggins* and argued that "[h]abeas review of prejudice is *de novo* because the state court did not address it." See Br. for Pet'r 21, 37, *Rompilla* v. *Beard*, 545 U.S. 374 (2005) (No. 04-5462). The State said nothing about Section 2254(d) in response to this point—indeed, the State declined altogether to fight the prisoner on *Strickland*'s prejudice prong. See *Rompilla*, 545 U.S. at 390. Little wonder, then, that the Court cited *Wiggins* for the following

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[3] Even if the State had pressed *Harrington*'s interpretation of Section 2254(d)(1) in *Wiggins*, it appears the prisoner's *Strickland* claim still would have cleared the relitigation bar due to the "unreasonable determination of the facts" exception of Section 2254(d)(2). See *Wiggins*, 539 U.S. at 528; but see *id.* at 551-552 (Scalia, J., dissenting) (noting that the Court ignored the words "based on" in the text of Section 2254(d)(2)).

proposition, which no party had disputed: "Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim *de novo* * * * ." *Id.*

The prisoner in *Porter* likewise pointed to the quoted sentence from *Wiggins*. See Pet. for Writ of Cert. 37 n.17, *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (No. 08-10537). The State offered no response in its brief opposing certiorari, see generally Br. in Opp., *Porter* v. *McCollum*, 130 S. Ct. 447 (2009) (No. 08-10537), and the Court summarily reversed without entertaining merits briefing, see *Porter*, 130 S. Ct. at 456. The Court cited *Rompilla* for the following proposition, which had gone undisputed once again: "Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo*." *Id.* at 452.

Lower courts have assigned great weight to the quoted sentences from *Wiggins*, *Rompilla*, and *Porter*, and have recoiled at the notion that *Harrington* silently overruled that language. See, *e.g.*, *Rayner* v. *Mills*, 685 F.3d 631, 638-639 (6th Cir. 2012). This reading of the opinions fails to recognize that the quoted sentences were in no way binding upon the *Harrington* Court. As explained above, *Wiggins* reflected nothing more than a curious concession by the State; *Rompilla* looked back to *Wiggins* without any opposition from the State; *Porter* did the same with *Rompilla*; and none of these opinions analyzed the text of Section 2254(d). It should come as no surprise that *Harrington* silently swept aside this chain of uncontested, unsound, and

nonbinding assumptions. See *Brecht* v. *Abrahamson*, 507 U.S. 619, 630-631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [an answer], we are free to address the issue on the merits."); *Waters* v. *Churchill*, 511 U.S. 661, 678 (1994) (plurality opinion) ("These cases cannot be read as foreclosing an argument that they never dealt with."); *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

Courts and commentators have offered two arguments that attempt to fill the analytical gap in the generative sentence from the *Wiggins* opinion. These efforts do not justify the lower courts' refusal to heed *Harrington*'s authoritative interpretation of Section 2254(d).

First, it has been argued that if a state court rejects a *Strickland* claim based on only one prong, then there is no "adjudicat[ion] on the merits" of the other prong within the meaning of Section 2254(d). See *Ferrell* v. *Hall*, 640 F.3d 1199, 1224 (11th Cir. 2011); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 32.2, at 1752-1755 & n.7 (6th ed. 2011). This argument fails as a piece of statutory interpretation because it ignores the words enacted by Congress. As the *Harrington* Court took pains to emphasize, "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." 131 S. Ct. at 784. No sensible prisoner asks a state court to adjudicate just one of *Strickland*'s two prongs, for he cannot win relief that way. See *Strickland*, 466 U.S. at 687, 697.

When the prisoner presents a complete *Strickland* claim and the state court rejects it on the merits, Section 2254(d)'s relitigation bar is triggered as to the *claim*—the "asserted federal basis for relief from a state court's judgment of conviction," *Gonzales*, 545 U.S. at 530—rather than to its prongs.

Second, it has been argued that a federal court somehow intrudes upon the mind of the state court by determining that an unaddressed *Strickland* prong could have provided a reasonable basis for the state court's decision. See *Rayner*, 685 F.3d at 638 ("It would be inappropriate to presume the state court not only had a finding in mind as to the unexplained prong but that this finding was against the petitioner. Thus, in the situation where the state court adjudication relies upon only one prong, deference has no proper role in reviewing the remaining prong." (footnote and citation omitted)); *Sussman* v. *Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (opinion of Ripple, J., in chambers) ("Clearly, however, the state court cannot both assume deficient performance and hold that counsel's performance was not deficient."). But *Harrington*'s holding with respect to summary dispositions makes clear that Section 2254(d)(1) does not call for a subjective inquiry into what the state judges actually had in mind when they rejected a prisoner's claim on the merits. See *Harrington*, 131 S. Ct. at 784 ("[A] state court need not cite or even be aware of our cases under § 2254(d)." (citing *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam))); *Williams*, 2012 WL 4069742, at *11 ("As we understand [*Harrington*] and [*Premo*], the Court's opinions were premised on the text of § 2254(d) and the meaning of 'decision'

and 'unreasonable application,' not on speculation about whether the state court actually had in mind reasons that were 'reasonable' when it denied relief."). A prisoner's entitlement to federal habeas relief does not depend on the quality of the state court's reasoning process, but on the quality of his underlying claim.

C. Summary Reversal Is Warranted

The Sixth Circuit's decision in this case contravened *Harrington*'s controlling interpretation of Section 2254(d). Respondent's *Strickland* claim concerning an uncalled alibi witness was "adjudicated on the merits," 28 U.S.C. 2254(d), by the Michigan Court of Appeals, which denied the claim at the performance prong after concluding that not calling the witness was a matter of sound trial strategy. See Pet. App. 63a-65a. Respondent sought to avoid AEDPA's relitigation bar by invoking the "unreasonable application" exception of Section 2254(d)(1). See Pet. App. 11a-12a, 32a-38a. The Sixth Circuit should have rebuffed this attempt under *Harrington*,[4] because the state court's "decision" to reject the "claim," 28 U.S.C. 2254(d)(1),

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[4] See *Harrington*, 131 S. Ct. at 786 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. * * * If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops just short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.").

could have been placed upon the reasonable ground that respondent was not prejudiced by his lawyer's failure to call the witness. Indeed, both the U.S. district judge and the U.S. magistrate judge held that respondent did not satisfy *Strickland*'s prejudice requirement. See Pet. App. 18a-19a (recounting the case against respondent and concluding that, "when weighed against the substantial evidence presented against [him] at trial, there is no reasonable probability that presenting the alibi defense would have yielded a different outcome"); *id.* at 36a-38a (explaining same conclusion).

Without considering this reasonable basis for the state court's decision, see Pet. App. 12a-14a, the Sixth Circuit gave respondent the benefit of the "unreasonable application" exception to the relitigation bar, see *id.* at 11a-12a, 14a. Writing for the panel, Judge Cole explained that, "where the state court ruled on one prong of the *Strickland* test but not the other, we apply a de novo standard of review to the prong that the state court did not consider." *Id.* at 12a (citing a Sixth Circuit case that purports to distinguish *Harrington*).

Summary reversal of the Sixth Circuit's judgment is appropriate because the decision below is "flatly contrary to this Court's controlling precedent"—namely, *Harrington*'s authoritative interpretation of Section 2254(d). *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam); see also Sup. Ct. R. 16.1; Eugene Gressman et al., *Supreme Court Practice* § 5.12(a), (c) (9th ed. 2007). This would not be the first summary reversal of the Sixth Circuit in a case involving Section 2254(d)'s relitigation bar. See *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per

curiam); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011) (per curiam); cf. *Cash* v. *Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) ("It is a regrettable reality that some federal judges *like* to second-guess state courts. The only way this Court can ensure observance of Congress's abridgement of their habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law.").

It has been said that a summary reversal should not be used to "make[] new law." *Bunkley* v. *Florida*, 538 U.S. 835, 842 (2003) (Rehnquist, C.J., dissenting). The Court would make no new law in summarily reversing the judgment below, because the relevant law was already made in *Harrington*, but a summary reversal would be useful all the same. The courts of appeals seem afraid to acknowledge that *Harrington* overruled the oft-quoted sentences from *Wiggins*, *Rompilla*, and *Porter*. See *McBride* v. *Superintendent*, 687 F.3d 92, 101 n.10 (3d Cir. 2012); *Childers* v. *Floyd*, 642 F.3d 953, 970 n.18 (11th Cir. 2011) (en banc). Given that the lower courts are so intent on "leaving to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989), this Court should let them know that the overruling was already accomplished in *Harrington*.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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