No. __-___

In the Supreme Court of the United States

KEITH BLAND, JR.,
PETITIONER
v.

MARCUS HARDY, WARDEN
RESPONDENT

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA"), when the state court has adjudicated just one prong of a multipronged standard, is AEDPA deference properly applied to the unadjudicated prongs (as the Seventh Circuit held below, and the Third and Eleventh Circuits have suggested), or are the unadjudicated prongs considered by the federal court de novo (as the Fifth, Sixth, Ninth, and Eleventh Circuits have held)?

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INTRODUCTION

This case presents a recurring and unresolved issue under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 ("AEDPA"). When a state court considers a multipronged legal standard and bases its decision on only one prong, must the federal habeas court apply AEDPA deference to the prong(s) that the state court did not adjudicate? The issue presented is thus closely related to the issue currently before the Court in *Johnson* v. *Williams*, No. 11-465 (cert. granted Jan. 13, 2012).

In this case, the Seventh Circuit applied AEDPA deference to the unadjudicated prong of a multipronged standard. This outcome violates *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003), which held that federal habeas review of an unadjudicated prong is "not circumscribed by a state court conclusion."

Recently, however, this Court threw *Wiggins* into question by stating in *Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011), that AEDPA applies "when a 'claim,' not a component of one, has been adjudicated." The Third Circuit, as well as an en banc panel of the Eleventh Circuit, have suggested that *Harrington* "arguably undermines" the holding of *Wiggins*. *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012); accord *Childers* v. *Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011) (en banc). The Seventh Circuit followed the same road to its conclusion in this case, making a holding that assumes *Wiggins* is no more. But this reading of *Harrington* is in direct conflict with decisions of the Fifth, Sixth, Ninth, and Eleventh

Circuits, all of which have continued to apply de novo review. These courts have recognized that 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." *Rayner* v. *Mills*, 685 F.3d 631, 638 (6th Cir. 2012).

Certiorari should be granted to resolve this split and clarify whether, after *Harrington*, AEDPA deference still applies to the unadjudicated prong of a multipronged standard. At a minimum, this petition should be held for *Johnson* v. *Williams*.

OPINIONS BELOW

The opinion of the Seventh Circuit (Pet. 1a-11a) is reported at 672 F.3d 445 (7th Cir. 2012). Its order denying rehearing (Pet. 47a-48a) is unreported. The district court's opinion (Pet. 12a-29a) is unreported, but available at 2010 WL 563074. The relevant state court opinion (Pet. 30a-46a) is unreported.

JURISDICTION

The Seventh Circuit's opinion was filed on February 13, 2012 (Pet. 1a), and rehearing was denied on August 14, 2012 (Pet. 47a-48a). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death

Penalty Act of 1996 (AEDPA), provides, in pertinent 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.

STATEMENT

According to the State, Keith Bland went to his family's home in August 2000 to steal a gun. *Ibid.* He allegedly was joined by two accomplices. While there, one of Mr. Bland's alleged accomplices allegedly used a gun they had stolen from the home to shoot and kill Mr. Bland's stepmother. Pet. 59a.

The State proceeded to trial without any physical evidence tying Mr. Bland to the crime. See Pet. 30a-35a. No weapon was ever recovered. No stolen goods were recovered from Mr. Bland. There was no eyewitness testimony. And neither of Mr. Bland's alleged accomplices testified.

To rebut the State's theory that the robbery was motivated by his need to secure a gun, Mr. Bland testified that he already owned a gun—and therefore had no need to steal one. But Mr. Bland made a mistake in stating a relevant date. After testifying that he had a gun at the time of the incident (and thus did not need to steal one), he mistakenly stated that the police had taken from him a .38 caliber Smith & Wesson in January *2000*. Pet. 2a, 55a. But that was several months *before* the incident. Pet. 2a. In fact, however, the gun had been confiscated in January *2001*—several months *after* the incident. *Ibid.* The State does not dispute that it knew, or at least should have known, that this was a mistake. See *id.*

Despite knowing the testimony was false, during closing argument the State seized upon Mr. Bland's error and urged the jury to believe it. Specifically, the prosecutor told the jury that Mr. Bland needed a gun in August 2000 because his own gun had been confiscated during an *earlier* arrest:

> Ladies and gentlemen, another thing that Mr. Bland told you which I thought was real interesting, I didn't have any reason to go and get a gun on that day because I had one. Remember? But he told you also from that stand that in January of the year 2000, some eight months before the murder, the police had taken that gun from him. Did he have a gun that day? Did he have money that day? Obviously not. Because he was out at that house to get those two things.

Pet. 24a-25a. This knowing use of false evidence supplied a motive in a case with no eyewitness, no

physical evidence, and no stolen items recovered from Mr. Bland.

Based on the prosecutor's decision to argue that the jury should convict based on a fact known to her to be false, Mr. Bland argued on appeal that his conviction must be reversed under *Napue* v. *Illinois*, 360 U.S. 264 (1959). To obtain relief under *Napue*, a defendant must prove two things: first, that the prosecutor knowingly used false evidence, and second, that there is a reasonable likelihood that such use affected the judgment of the jury. *Id.* at 269, 271; see also *United States* v. *Agurs*, 427 U.S. 97. 103 (1976). *Napue* therefore requires a two-pronged analysis before a new trial can be granted.

On direct appeal, the state court did not discuss whether the prosecutor engaged in improper conduct when she urged the jury to believe Mr. Bland's erroneous testimony during her closing argument. The court held only that the prosecutor had no duty to correct Mr. Bland's testimony. Pet. 38a-39a. As to the prosecutor's reliance on the testimony during closing argument, as the Seventh Circuit correctly explained, "the state judiciary assumed that the prosecutor violated a constitutional norm but found that Bland had not suffered any injury"—that is, the state courts relied on *Napue*'s second prong. Pet. 2a; see also Pet. 25a (district court stating that the "[state] appellate court did not decide whether [closing argument] was error by the prosecutor").

The federal district court denied habeas relief. See 28 U.S.C. § 2254. The court held that the prosecutor's conduct could not have affected the verdict. Pet. 26a. But the court agreed with Mr. Bland that the prosecutor "knowingly made use of

false testimony, in violation of *Napue*" when she argued Mr. Bland's incorrect testimony to the jury as though it were true. *Ibid.*

The Seventh Circuit affirmed, but on different grounds. Obviously uncomfortable with the state court's finding on the prejudice issue, the Seventh Circuit explicitly declined to consider whether the prosecutor's knowing use of false testimony had any effect on the verdict. Pet. 2a ("We need not decide whether [the state court's rationale on injury] is right . . . ."). Instead, the court held that it *would have been* reasonable under AEDPA for the state court to conclude that a prosecutor who knowingly urges the jury to believe false testimony does not implicate *Napue*, as long as the testimony is first introduced by the defense. Pet. 2a ("Bland's substantive argument does not get past the screen in 28 U.S.C. § 2254(d)"). But the state court never reached that conclusion. In other words, the Seventh Circuit deferred to a conclusion that it thought the state courts *could* have reached, not to the conclusion that they actually *did* reach.

On August 14, 2012—six months after the panel decision—the Seventh Circuit denied rehearing en banc. Pet. 47a-48a.

REASONS TO GRANT THE PETITION

The circuits are divided over whether, when a state court decides only one prong of a multipronged legal standard, a federal habeas court must apply AEDPA deference to the unadjudicated prong(s). For several years, it was well-settled that AEDPA deference did *not* apply, based on *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) (federal habeas review of

unadjudicated component is "not circumscribed by a state court conclusion"). But after this Court's decision in *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), the circuits have split over whether *Wiggins* remains good law.

The Fifth, Sixth, Ninth, and Eleventh Circuits "continue[] to rely on *Wiggins* and have reviewed the remaining prong de novo." *Rayner* v. *Mills*, 685 F.3d 631, 637 (6th Cir. 2012); accord *Gentry* v. *Sinclair*, 693 F.3d 867, 886 (9th Cir. 2012); *Salts* v. *Epps*, 676 F.3d 468, 480 & n.46 (5th Cir. 2012); *Johnson* v. *Secretary, DOC*, 643 F.3d 907, 930 n.9 (11th Cir. 2011). But the Seventh Circuit ignored *Wiggins* and applied AEDPA deference to the remaining prong. Pet. 2a-3a. Two other circuit decisions—one from the Third, and an en banc panel of the Eleventh—have explicitly flagged this issue and indicated that *Harrington* "arguably undermines" the rule of *Wiggins*. *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012); accord *Childers* v. *Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011) (en banc). This Court should resolve the conflict—which is mature and, in light of the Seventh Circuit's ruling challenged here, is not going away.

This case also presents an excellent vehicle with which to resolve this conflict. The Seventh Circuit left no doubt that it was applying AEDPA deference to an unadjudicated issue, stating that Mr. Bland's "substantive argument does not get past the screen in 28 U.S.C. §2254(d)," even though the "state judiciary assumed that the prosecutor violated a constitutional norm." Pet. 2a. Under the proper standard of review, the court could not have so held. Further, the Seventh Circuit explicitly declined to consider

whether the prosecutor's conduct could have affected the verdict. *Ibid.* Had it done so, it would have found a "substantial and injurious effect." *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993).

I. Review is warranted to resolve the circuit conflict over the applicability of AEDPA deference to an unadjudicated component of a multipart legal standard.

A. The decision below is in conflict with decisions in the Fifth, Sixth, Ninth, and Eleventh Circuits, although it also finds support in opinions issued in other circuits.

The Seventh Circuit's application of AEDPA deference is not only an expansive and incorrect reading of *Harrington*, but it is one at odds with the reading adopted by the Fifth, Sixth, Ninth, and Eleventh Circuits.

1. Under *Wiggins*, when a state court decides only one component of a multipart legal standard, federal habeas review of the other components is "not circumscribed by a state court conclusion." *Wiggins*, 539 U.S. at 534. For instance, standards such as *Napue* require inquiries into both the propriety of the conduct and the materiality of the conduct. *Wiggins* establishes that if the state court relies solely on materiality, the conduct issue is reviewed de novo. But the Seventh Circuit did not follow *Wiggins*; instead, it applied AEDPA deference to the conduct issue, even though the state court did not adjudicate it.

In *Harrington*, this Court held that even when "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must

be met by showing there was no reasonable basis for the state court to deny relief." 131 S. Ct. at 784. In other words, a federal habeas court must apply AEDPA deference to a state court summary order. This holding, as far as it goes, does not affect *Wiggins*. But the Court went on to say: "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*." *Ibid.* (emphasis added). Implicit in this language, some courts have suggested, is that when a state court decides only one component of a multipart standard, such as in *Napue*, *all* components receive AEDPA deference.

But the Fifth, Sixth, Ninth, and Eleventh Circuits have issued decisions that are in irreconcilable conflict with this expansive reading of *Harrington*. Even after *Harrington*, "where the state court adjudicated only one prong" of a multipart standard, the Sixth Circuit "ha[s] continued to rely on *Wiggins* and ha[s] reviewed the remaining prong de novo." *Rayner* v. *Mills*, 685 F.3d 631, 637 (6th Cir. 2012). Similarly, the Eleventh Circuit has continued to follow *Wiggins* because, in *Wiggins* (as here), the state court "did provide an explanation of its decision which makes clear that it ruled on" one prong but not the other. *Johnson* v. *Secretary, DOC*, 643 F.3d 907, 930 n.9 (11th Cir. 2011). The Fifth Circuit has reached the same result. *Salts* v. *Epps*, 676 F.3d 468, 480 & n.46 (5th Cir. 2012). So has the Ninth—in the context of a *Napue* claim. *Gentry* v. *Sinclair*, 693 F.3d 867, 886 (9th Cir. 2012) ("AEDPA does not apply to our review of the materiality of Hicks's false testimony because, as noted above, the Washington

Supreme Court never reached an adjudication of the materiality prong of the *Napue* claim.") (citing *Wiggins*).

Had the Seventh Circuit followed these decisions, it could not have held that Mr. Bland's "substantive argument does not get past the screen in 28 U.S.C. § 2254(d)," when "the state judiciary assumed that the prosecutor violated a constitutional norm." Pet. 2a. That is because, as the Seventh Circuit conceded, the state judiciary *did not adjudicate* this particular "substantive argument"—and therefore, under the holdings of the Fifth, Sixth, Ninth, and Eleventh Circuits, AEDPA deference does not apply.

The holdings of the Fifth, Sixth, Ninth, and Eleventh Circuits are also consistent with this Court's decision in *Harrington*. When the state court renders a decision based on only one prong of a multipronged standard, it makes the basis of its decision clear. By contrast, the summary order at issue in *Harrington* said nothing at all, a fact that compelled the federal court to presume that the state court adjudicated all issues that were fairly presented. Given that crucial difference, as one Seventh Circuit judge has elsewhere explained, "[w]e certainly cannot assume that the Court overruled *sub silentio* its holding in *Wiggins*." *Sussman* v. *Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (Ripple, J., in chambers, denying motion to stay the mandate); see also *Rayner*, 685 F.3d at 638 (similar analysis). And in any event, this Court has explained that the circuits should "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express*, 490 U.S. 477, 484 (1989).

2. Nevertheless, the issue is sufficiently challenging that different groups of judges on the Eleventh Circuit have expressed divergent views. Although the *Johnson* panel followed *Wiggins*, an en banc majority in *Childers* v. *Floyd* (issued just 12 days before *Johnson*) opined that "[l]anguage in *Harrington* . . . suggests that this portion of *Rompilla* [a *Wiggins* progeny] may no longer be good law." 642 F.3d 953, 969 n.18 (11th Cir. 2011). Because the *Wiggins* rule, even if good law, would not apply in that case, the court did not opine further. But Judge Wilson's concurrence "strongly disagree[d]" with the majority's skepticism of *Wiggins*. *Id.* at 986. According to Judge Wilson, *Wiggins* continues to teach that when the court "can discern from a written opinion that a state court did not actually reach the merits of a particular federal question, AEDPA does not command deference to a prior state-court decision on those merits that does not exist." *Ibid.*

Like the *Childers* majority, the Third Circuit has acknowledged the thorniness of the problem, noting that the issue "appear[ed] to be generating some conflict among our sister circuits," and stating that *Wiggins* was "arguably undermine[d]" by *Harrington*'s observation about AEDPA's application "when a claim, not a component of one, has been adjudicated." *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012) (internal quotation marks and citation omitted). But in the particular case before it, the Third Circuit was "spared the need to delve into the complicated question of what effect, if any, the Supreme Court's recent decision in [*Harrington*] has had on the teachings from [*Wiggins*]." *Ibid.*

In sum, several circuits have considered the relationship between *Wiggins* and *Harrington* and reached holdings that are in direct conflict with the decision below. Other circuit decisions have suggested potential agreement with the decision below. And in any event, the contrast between the Seventh Circuit's ruling here and the conflicting decisions of four other Circuits makes clear that the conflict will not be resolved absent this Court's intervention. This issue is therefore in clear need of this Court's authoritative resolution.

B. The proper scope of habeas review generally—and the scope of *Harrington* specifically—is an important and recurring issue, as indicated in this Court's grant of certiorari in *Johnson* v. *Williams*.

Moreover, the huge volume of habeas petitions presented to the state and federal courts each year makes the proper scope of habeas review a very important issue. Reviewing these petitions is "a commitment that entails substantial judicial resources." *Harrington*, 131 S. Ct. at 780. And any decision that provides guidance to reviewing courts will help streamline the process by eliminating the need to consider a threshold issue.

1. Indeed, this Court consistently chooses to hear cases that focus on important issues related to the AEDPA standard. See *Greene* v. *Fisher*, 132 S. Ct. 38, 42 (2011) ("We consider whether 'clearly established Federal law' includes decisions of this Court that are announced after the last adjudication of the merits in state court but before the defendant's conviction becomes final."); *Fry* v. *Pliler*, 551 U.S. 112, 120 (2007) ("We granted certiorari to decide a

question that has divided the Courts of Appeals—whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal court.").

2. This Court has already recognized the importance of the *Harrington* decision, having agreed to clarify it in a different respect. On October 3, 2012, this Court heard oral argument in *Johnson* v. *Williams* (No. 11-465). There, the state court wrote an opinion in which it did not decide the pertinent federal claim. *Williams* v. *Cavazos,* 646 F.3d 626, 638 (9th Cir. 2011). While *Harrington* held that a summary denial effectively adjudicates all claims presented, the petitioner in *Johnson* asks this Court to go one step further and hold that *any* denial effectively adjudicates all claims presented, absent a plain statement to the contrary. If this Court rejects that argument and limits *Harrington* to its facts, that conclusion will eliminate any justification for the Seventh Circuit's failure to apply *Wiggins*. In such a case, the decision below should, at a minimum, be vacated and remanded.

But even if this Court extends *Harrington* in the way advocated by the *Johnson* petitioner, the conflict between *Harrington* and *Wiggins* will not be resolved. In a *Wiggins* case such as this one, the state court's discussion of one component of a multicomponent test or standard makes clear that the court is *not* adjudicating any other component. Accordingly, there is no basis to presume that the state court actually decided any such component. Indeed, the *Johnson* petitioner argues that *Wiggins* is "inapposite" to the different kind of case there

presented, because "the state court would have believed it had fully adjudicated the claim by resolving one prong of the *Strickland* test adversely to the petitioner." Reply Br. in 11-465 at 18-19. So too for *any* multipronged standard.

3. The federal courts frequently confront the *Wiggins* issue and are therefore required to decide whether the court must defer on the unaddressed prong, or not. The choice has significant consequences. The deference exhibited by the Seventh Circuit serves the state's interest in the finality of its judgments and streamlines habeas litigation.

But *Wiggins*, as followed today in four circuits, permits the federal courts to vindicate federal rights without second-guessing state courts' resolution of federal issues—and thus is consistent with a principal purpose of AEDPA. *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."). No wonder then that Judge Ripple called *Wiggins* "so important to the daily work of the lower federal courts." *Sussman*, 642 F.3d at 534 (Ripple, J., in chambers, denying motion to stay the mandate). This Court should clearly decide whether *Wiggins* remains good law.

II. This case presents an excellent vehicle for this Court to resolve the issue.

The tension between *Wiggins* and *Harrington* is squarely presented by this case. Here the Seventh Circuit recognized that the "state judiciary assumed

that the prosecutor violated a constitutional norm but found that Bland had not suffered any injury." Pet. 2a. See also Pet. 25a (district court stating that the "appellate court did not decide whether [closing argument] was error by the prosecutor"). But the Seventh Circuit then implicitly rejected the state court's finding of harmless error, and instead proceeded to hold that Mr. Bland's "substantive argument does not get past the screen in 28 U.S.C. § 2254(d)." Pet. 2a. Had the court employed the proper standard of review, it would have concluded that the prosecutor knowingly used false testimony, and that Mr. Bland was entitled to habeas relief.

A. This case falls squarely under the rule, articulated in *Napue*, that a prosecutor may not urge the jury to believe a fact she knows to be false, even if that fact is first introduced by the defendant.

If the lead argument in Mr. Bland's petition were reviewed de novo, a court could reach only one conclusion: a prosecutor violates *Napue* when she urges the jury to believe testimony she knows to be false—regardless of whether such false or erroneous testimony was introduced by the defense. Prosecutors who have themselves knowingly urged false facts on the jury have been condemned by this Court. See *Giglio* v. *United States*, 405 U.S. 150, 151-152 (1972) (granting new trial where government witness testified falsely and prosecutor relied on the testimony in closing argument). What the prosecutor did here—seize on the defendant's obvious but innocent misstatement and tout it to the jury as true, knowing it to be false—is no different. Regardless of the source of the evidence, telling the jury to convict

based on a false fact does violence to "the special role played by the American prosecutor in the search for truth in criminal trials." *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004) (internal quotation marks and citations omitted).

This Court recognized long ago that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269. Indeed, "the basic tenet" of the *Napue* rule "does not depend on whether misleading information was given to the jury in the form of a closing argument by a prosecutor rather than through the testimony of a witness." *Armour* v. *Salisbury*, 492 F.2d 1032, 1037 (6th Cir. 1974). In *Armour*, no witness had given false testimony. But the prosecutor told the jury in closing that a (prosecution) witness had nothing to gain by testifying. *Id.* at 1036. The witness had never been asked about this, but the prosecutor knew it was not true. *Id.* at 1036-1037. The Sixth Circuit granted habeas relief. *Id.* at 1037. Here, just as in *Armour*, the prosecutor used "misleading information" in her closing argument, urging the jury to believe something she knew to be untrue.

Such behavior goes beyond the mere "exploit[ation of] errors in testimony adduced by the defense." Pet. 3a. For example, a prosecutor who tries to turn the defendant's alibi in her favor does not want the jury to believe the alibi. If the jury does believe the alibi, then it must acquit the defendant of the crime charged, because the defendant cannot be in two places at once. See *Black's Law Dictionary* (9th ed. 2009) (defining "alibi" as a "defense based on the *physical impossibility of a defendant's guilt* by

placing the defendant in a location other than the scene of the crime at the relevant time") (emphasis added). But here, the prosecutor *did* want the jury to believe Mr. Bland's mistaken testimony, even though she knew it was wrong. It is hard to imagine a clearer contravention of the search for truth.

The prosecutor's "special role . . . in the search for truth," *Banks*, 540 U.S. at 696, precludes her from simply relying on the adversarial process to correct her falsehoods. After all, a prosecutor "is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) (internal quotation marks and citation omitted).

Because of the unique role of the prosecutor, a "rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks*, 540 U.S. at 696. As one circuit has said, "the government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false." *United States* v. *LaPage*, 231 F.3d 488, 492 (9th Cir. 2000). After all, jurors may distrust defense counsel. If defense counsel disputes the prosecutor's assertion, it may not matter that defense counsel is right. The jury may still believe the prosecutor. Accordingly, the prosecutor is bound not to knowingly mislead the jury.

Even the court below could not help but recognize "something unsettling about a prosecutor using a defendant's testimony to contradict a known fact." Pet. 4a. Although the State cannot ensure that a defendant does not give incorrect testimony, it *can*—and must—ensure that its prosecutors do not knowingly *use* the incorrect testimony in contravention of the search for truth. Such is the result when the prosecutor argues the testimony to the jury as though it were true, urging the jury to base its verdict on a mistake.

Accordingly, had the Seventh Circuit employed the proper standard of review—de novo—it would have concluded that the prosecutor violated *Napue* when she urged the jury to believe Mr. Bland's mistaken testimony.

B. The prosecution's knowing use of false evidence was material to the outcome of Mr. Bland's trial.

Had the Seventh Circuit applied the proper standard of review and properly adjudicated the "conduct" prong of the *Napue* standard, the court very likely would have gone on to conclude that the use of false testimony had a "substantial and injurious effect" on the verdict. *Brecht* v. *Abrahamson*, 507 U.S. 619, 637-638 (1993). This standard does not require that the verdict surely would have been different; it requires only that the error had more than a "very slight effect" on the jury. *Kotteakos* v. *United States*, 328 U.S. 750, 764 (1946). Further, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.* at 765. See also *Fry* v. *Pliler*, 551 U.S. 112, 117 (2007) (stating that

Kotteakos is equivalent to *Brecht*). These standards explain why the Seventh Circuit was unwilling to affirm based on the state court's analysis of *Napue*'s materiality prong.

Indeed, Mr. Bland's mistaken testimony gave the State something critical: an *admission* to support its theory of motive. The prosecution contended that Mr. Bland needed a gun. Pet. 1a. That motive tied together the prosecution's case into a coherent whole that prompted the jury to convict. Without the mistake, the jury would have been left with only circumstantial evidence and out-of-court statements. With the mistake, these pieces could be seen in a new light, as the jury had a reason why Mr. Bland would have committed the crime. But the state court failed to view the prosecutor's error in this way.

To the extent the state court considered the impact of the error at all, it held that "[h]ad the correct arrest date been noted, the jury might have inferred that the defendant's gun was used in the shooting because he was found in possession of an identical gun four months later." Pet. 39a. But the jury could not have drawn this inference, given the prosecution's theory of the case. The prosecution asked the jury to convict on the premise that the victim "was shot with her own gun." Pet. 59a. And the gun confiscated from Mr. Bland months later could not have been the victim's "own gun." The gun confiscated from Mr. Bland was a .38 caliber Smith & Wesson, Pet. 55a, but the .38 stolen from the Bland home was a Taurus, Pet. 51a. The guns were not identical. Thus the court's analysis on this issue—to the extent there was any analysis at all—was clearly unreasonable under the circumstances.

CONCLUSION

There is no doubt that an important and recurring AEDPA issue is squarely presented by this case. Eschewing the state court's erroneous analysis of *Napue*'s materiality prong, the Seventh Circuit relied on "the screen of § 2254(d)" to reject the "substantive" portion of Mr. Bland's *Napue* argument and thus obviated the need to consider the materiality of the prosecutor's error. Pet. 2a. In applying AEDPA deference to a prong not adjudicated by the state court, the Seventh Circuit assumed that this Court's decision in *Harrington* v. *Richter* overruled its earlier decision in *Wiggins* v. *Smith*.

This case, therefore, squarely presents that very question. And as previously explained, the Seventh Circuit's conclusion that *Harrington* overruled *Wiggins* is in conflict with the decisions of four other circuits, and that conflict will surely persist absent this Court's intervention. This Court can and should use this case to resolve the conflict.

For the foregoing reasons, the petition for a writ of certiorari should be granted. At a minimum, the petition should be held for *Johnson* v. *Williams*.

Respectfully submitted.

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