No. 12-420

IN THE

# Supreme Court of the United States

HUGH WOLFENBARGER,

*Petitioner,*

v.

DEMETRIUS FOSTER,

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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January 2013

## QUESTIONS PRESENTED

1. Did the warden waive the argument he now presses by failing to argue it in his briefing to the court of appeals and explicitly disclaiming it at oral argument below?
2. When a state court decides a claim exclusively on the basis of an unreasonable application of one part of the two-part test for ineffective assistance of counsel, should a federal habeas court speculate as to how the state court would have decided the other part had it reached the question, and then afford AEDPA deference to that hypothetical decision?

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## INTRODUCTION

In this case, the warden asks this Court to hold that *Harrington v. Richter*, 131 S. Ct. 770 (2011), silently overruled three recent decisions of this Court holding that where a state court has adjudicated only one prong of the two-prong ineffective-assistance-of-counsel test of *Strickland v. Washington*, 466 U.S. 668 (1984), and a federal habeas court concludes the state court's adjudication of the prong it considered was unreasonable, the federal court should apply de novo review to the prong of the test that the state court did not address. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (per curiam).

In the court below, however, the warden waived the issue he presents here by expressly conceding that de novo review is proper in these circumstances. Moreover, every federal court of appeals to decide the issue since *Richter* has agreed that de novo review remains appropriate when a state court does not address one prong of the *Strickland* test because the state court's decision rests exclusively on an unreasonable application of the other prong. *Richter*'s holding that a federal court must defer to an *unexplained* state-court conclusion does not suggest that a federal court should defer to a *non-existent* state-court conclusion — i.e., a conclusion that the state court itself declined to make. There is no reason for the Court to revisit its rule, which it unanimously reaffirmed as recently as 2009, that de novo review applies in these circumstances. The petition for a writ of certiorari should be denied.

## STATEMENT OF THE CASE

In February 2000, respondent Demetrius Foster was convicted of the second-degree murder of Bobby Morris after Foster's counsel failed to elicit testimony from or investigate fully an alibi witness who asserted that Foster was with him and not at the crime scene when the murder occurred. Pet. App. 2a.

On the night Morris was killed, Foster had sex with Morris's ex-girlfriend at her home. *Id.* at 2a-3a. Morris subsequently came to the home with three friends, assaulted his ex-girlfriend, smashed a window of Foster's truck, and then drove off with his friends. *Id.* at 3a. The ex-girlfriend called the police. *Id.* at 25a.

Later that night, around 2:45 a.m., Morris's friends were driving Morris home when a man approached the car and fatally shot Morris. *Id.* at 3a. The three friends fled, but one later identified the shooter as Foster. *Id.* The two other friends could not identify the shooter. *Id.* at 3a & n.1.[1]

Foster was charged with first-degree murder. *Id.* at 4a. Foster's defense at trial was mistaken identification. *Id.* In a letter to defense counsel sent before trial, a man named Arthur Daniels informed counsel that Foster was at Daniels' home from 2:15 to 6 a.m. on the day of the shooting. *Id.* Defense counsel spoke to Daniels over the telephone for

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[1] The warden notes that the friends testified that the shooter wore a green jacket, and that Foster had been seen in a green jacket earlier that night. Pet. 7. The value of this evidence is questionable because the one eyewitness who claimed to identify Foster testified at the preliminary hearing that the shooter wore a blue jacket. Pet. App. 13a.

roughly fifteen to twenty minutes, but did not call Daniels at trial. *Id.* The jury initially deadlocked, then after further instruction from the judge found Foster guilty of the lesser-included offense of second-degree murder. *Id.* at 4a, 13a.

On appeal, Foster claimed that trial counsel had been ineffective in failing to raise an alibi defense. *Id.* at 4a. The state appellate court remanded for a hearing on the claim. *Id.* After receiving testimony from trial counsel and Daniels, the trial court found that trial counsel performed deficiently and that this deficiency prejudiced Foster. *Id.* But the state appellate court disagreed and held that the decision not to call Daniels was a strategic choice and therefore not deficient performance. *Id.* The appellate court did not address the question of prejudice. *Id.* at 4a, 12a. The Michigan Supreme Court denied leave to appeal. *Id.* at 4a. Foster's state post-conviction petition was unsuccessful. *Id.*

On federal habeas, the district court held that trial counsel performed deficiently in failing to present an alibi defense. *Id.* at 5a. However, the court held that counsel's deficiency did not prejudice Foster. *Id.*

Foster appealed to the Sixth Circuit, arguing that the district court erred in finding no prejudice. The warden's brief did not respond to, let alone contest, Foster's contention that the prejudice issue was subject to de novo review because the state court had not reached it. And at oral argument, the warden explicitly agreed that de novo review was proper:

> [QUESTION:] But what about a situation where the [state] court of appeals does not address prejudice at all? I realize you say that

> that might be parsing here, but let's say it's clear that the court of appeals did not address prejudice and just said, "Deficient performance, ball game over with"? Do we review — do we give deference to a prejudice determination that has not been made by the [state] court of appeals? How do we do that?
>
> [ANSWER:] No — if — if the court of appeals did not address an issue, or in this case if this court decides that it can parse prejudice out from the deficiency, *then I believe it's a de novo review of prejudice* and the district court's decision should be affirmed because it found that — based on the same things that the district court found, that there was no prejudice.

Recording of Oral Arg. 22:42-23:28 (emphasis added), *quoted in* Pet. App. 72a-73a.

The Sixth Circuit agreed with the district court that trial counsel's performance was deficient in failing to investigate the alibi fully and that the state court's contrary holding was an unreasonable application of settled precedent. Pet. App. 8a-12a. Consistent with this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), and the warden's concession at oral argument, the court of appeals considered de novo the second prong of the *Strickland* test for ineffective assistance of counsel — prejudice. Pet. App. 12a. Because the standard of review was uncontested, the court did not treat it as an issue presented for decision, but merely noted that, a week earlier, it had reiterated that de novo review applied. *See id.* (citing *Rayner v. Mills*, 685

F.3d 631, 636-69 (6th Cir. 2012), *cert. denied*, 2013 WL 57428 (Jan. 7, 2013)).

The court held that Foster was prejudiced by the failure to pursue the alibi defense because the evidence at trial contained weaknesses that, with the addition of new doubts raised by the alibi defense, could have tipped the scales in favor of acquittal. *Id.* at 12a-14a. The one eyewitness who claimed Foster was the shooter had made statements to the police that called her account into question: she described the assailant as 5 feet, 7 inches tall and weighing 180 pounds, whereas Foster is 6 feet tall and weighs 240 pounds. *Id.* at 13a. She also testified at the preliminary hearing that the assailant's jacket was blue, whereas Foster had been seen earlier that night wearing a green jacket. *Id.* No forensic evidence linked Foster to the crime scene. *Id.* Additionally, the fact that the jury had initially deadlocked, then reached a verdict on a lesser-included offense only after further instruction from the judge, increased the likelihood that additional exculpatory evidence would have made a difference to the jury. *Id.* at 13a-14a. Accordingly, the court of appeals found a reasonable probability of a different result if not for counsel's deficient performance. *Id.* at 14a. The court of appeals therefore granted Foster conditional habeas relief, subject to retrial. *Id.*

The warden sought a stay of the mandate pending the filing and disposition of a petition for certiorari raising the question whether the Sixth Circuit had erred in deciding the prejudice issue de novo. *See id.* at 72a. The court of appeals denied the stay because the warden had forfeited that argument both by failing to contest the point in his brief and by

explicitly conceding it at argument. *See id.* at 72a-75a.[2]

## REASONS FOR DENYING THE WRIT

### I. Petitioner Has Waived The Issue He Asks The Court To Resolve.

The warden asks this Court to apply AEDPA deference to the prejudice inquiry in this case, but the warden's briefing in the court of appeals did not respond to Foster's argument that de novo review applies, and the warden himself took the position at oral argument that the correct standard is de novo. Therefore, the warden has waived the argument that AEDPA deference applies to the prejudice issue the state court never adjudicated.

This Court does not decide questions "not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). In particular, the Court has held that a petitioner failed to preserve an issue regarding the proper legal standard where that party did not object to the use of that standard, "and indeed proposed" the use of that standard itself. *Id.* at 258; *see also Morrison v. Olson*, 487 U.S. 654, 669-70 (1988); *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957).

Here, Foster argued in the court of appeals that de novo review applied to the prejudice issue, and the warden's brief never took issue with that premise — neither when discussing the standards of review

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[2] After the mandate issued, the State renewed its motion to stay the mandate mainly on the ground that it should not be required to retry Foster while this certiorari petition is pending. The court of appeals granted the motion.

generally nor when analyzing the issue of prejudice specifically. *See* Br. for Resp't-Appellee 10-12, 27-31 (6th Cir. filed May 31, 2011). Further, the warden explicitly conceded the question when asked directly at oral argument: "if the court of appeals did not address an issue, or in this case if this court decides that it can parse prejudice out from the deficiency, then I believe it's a de novo review of prejudice." Pet. App. 73a. By not disputing, and then expressly endorsing, the proposition that the court of appeals should review the prejudice issue de novo, the warden has waived the issue. Accordingly, this case does not properly present the issue on which the petition seeks review.

## II. There Is No Circuit Split Regarding The Question Presented.

As the warden acknowledges, the courts of appeals are of one mind regarding the application of the *Wiggins* de novo review rule in the wake of *Richter*. Pet. 12. The decision below is in accord with the unanimous view of the circuits that have considered the issue since *Richter* — all of which agree that de novo review applies to an issue that the state court did not reach because it relied on a separate prong of a multi-prong test. *See Gentry v. Sinclair*, ___ F.3d ___, 2013 WL 174441, at *13 (9th Cir. Jan. 15, 2013); *Woolley v. Rednour*, ___ F.3d ___, 2012 WL 6216931, at *7-*9 (7th Cir. Dec. 14, 2012); *Hooks v. Workman*, 689 F.3d 1148, 1188 (10th Cir. 2012); *Johnson v. Secretary*, 643 F.3d 907, 930 & n.9 (11th Cir. 2011); *cf. Williams v. Roper*, 695 F.3d 825, 830, 836 & n.2 (8th Cir. 2012) (holding that AEDPA deference applied to both *Strickland* prongs because state court explicitly addressed both prongs, but noting that de novo review would apply to a prong

that state court had not addressed). Several of these circuits have explicitly considered and distinguished *Richter*. *See Woolley*, 2012 WL 6216931, at *7-*9; *Johnson*, 643 F.3d at 930 & n.9; *accord Rayner v. Mills*, 685 F.3d 631, 636-69 (6th Cir. 2012), *cited in* Pet. App. 12a; *see also Salts v. Epps*, 676 F.3d 468, 480 n.46 (5th Cir. 2012) (distinguishing *Wiggins* from *Richter* in dicta). No circuit disagrees.

Two federal appellate decisions have noted the possibility that there may be some theoretical tension between *Wiggins* and *Richter* but did not resolve the issue. *See McBride v. Superint., SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012); *Childers v. Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011) (en banc). One of these decisions, moreover, is from the Eleventh Circuit, which subsequently held that de novo review of an unaddressed prong of *Strickland* remains appropriate when a state-court decision rests exclusively on an unreasonable application of the other prong. *Johnson*, 643 F.3d at 930 & n.9. One Seventh Circuit decision applied AEDPA deference to a prong of a multi-prong test that was not adjudicated by a state court, but that decision did not consider the question presented here or mention either *Wiggins* or *Richter*. *See Bland v. Hardy*, 672 F.3d 445, 447-48 (7th Cir. 2012). Since that time, the Seventh Circuit has held squarely, upon consideration of both *Wiggins* and *Richter*, that de novo review is appropriate in the circumstances presented here. *See Woolley*, 2012 WL 6216931, at *7-*9.

In sum, all courts of appeals to have addressed the issue have held that, where a state court bases its decision on an unreasonable application of one prong of *Strickland* (or another multi-prong test),

federal courts should not apply AEDPA deference to a non-existent conclusion about the prong the state court did not reach. There is no need for review by this Court of an issue on which the lower courts have reached an overwhelming consensus.

## III. The Appellate Court Consensus Applying *Wiggins* In Light Of *Richter* Is Faithful To Both Decisions And To AEDPA.

The decision below represents not only the consensus view but the correct one. Three times in the past decade, this Court has considered a case in which a state court denied a habeas claim based on one prong of the two-prong *Strickland* test; each time, after concluding that the state court had ruled unreasonably on the prong it considered, this Court reviewed the unadjudicated prong de novo. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (per curiam). In a somewhat analogous context, where a state court had unreasonably failed to apply the procedures this Court had set forth for adjudicating competency-to-be-executed under the Eighth Amendment, the Court held that no deference was due to the state court's resulting ruling on the merits of the claim. *See Panetti v. Quarterman*, 551 U.S. 930, 948 (2007). As the Court explained, "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires." *Id.* at 953.

When a state court has based its decision on an unreasonable application of one prong of a two-prong

test, there are good reasons for this Court's consistent practice of refusing to defer to hypothetical conclusions about the other prong that the state court did not reach. First, a central theme of AEDPA is respect for the rulings of state courts. When a state court has stated the basis for its decision, it does not respect that decision for a federal court to hypothesize that the decision instead rested on another ground — essentially ascribing a conclusion to the state court that the state court declined to make itself. Second, unlike the circumstance in which a state court rules in cursory fashion or without explanation (as in *Richter*), or the circumstance in which a state court does not address a federal claim at all, *see Williams v. Cavazos*, 646 F.3d 626, 636-37 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 1088 (2012), there is no need for a federal habeas court to engage in guesswork about what the state court might have been thinking where the state court has laid out its specific reasoning. The federal court's task is simply to apply the AEDPA standard to the state court's actual reasoning.

*Richter*, which held that a state court's conclusion is entitled to deference even where the court does not give reasons for that conclusion, does not counsel otherwise. Neither the textual nor the policy reasons for the Court's holding in *Richter* apply to a state-court decision that analyzes only one prong of a two-prong test. As a textual matter, this Court required deference in *Richter* because AEDPA prohibits the grant of habeas relief unless the state court's

> 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.

28 U.S.C. § 2254(d). A decision is presumptively "on the merits" unless another explanation appears more likely. *See Richter*, 131 S. Ct. at 785. Therefore, failing to defer to a state-court decision — even an unexplained one — could put the federal court in the position of granting a writ even though the state court adjudication did not contravene or unreasonably apply federal law as announced by this Court, nor render an unreasonable determination of the facts. Such a grant would violate § 2254(d). *See id.* at 784. This problem exists "whether or not the state court reveals which of the elements in a multipart claim it found insufficient"; for this reason, a federal court cannot grant a writ in the face of an unexplained state-court conclusion unless the federal court finds there was "no reasonable basis" for the state court's decision and thus that § 2254(d) is satisfied. *Id.*

Here, by contrast, the court of appeals granted relief only after finding that the state court's decision on the prong that the state court addressed (deficient performance) *did* unreasonably apply federal law as announced by this Court. *See* Pet. App. 8a-12a. Thus, de novo review of the unaddressed prong did not result in the granting of relief where neither of the § 2254(d) conditions was met. *See Panetti*, 551 U.S. at 953 ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable

application of federal law, the requirement set forth in § 2254(d)(1) is satisfied.").

As a policy matter, *Richter* expressed concern that withholding AEDPA deference from unexplained decisions would penalize states for less thorough opinions and thereby thwart state courts' ability to allocate their resources most effectively and preserve the integrity of the case-law tradition by producing full explanations for decisions only where necessary. *See Richter*, 131 S. Ct. at 784. But where, as here, the state court makes a decision to write a reasoned opinion explaining its decision, there is no risk that the lack of subsequent deference to a hypothetical conclusion would coerce a state court into writing an opinion where it believed none was warranted. A state court could, of course, choose to address both prongs of a two-prong test in order to express two different conclusions that would both be entitled to deference. *See, e.g.*, *Williams v. Roper*, 695 F.3d at 830-31 (addressing such a case and holding that the district court should have deferred to the state court's conclusions on both prongs). But this incentive has existed at least since this Court's decision in *Wiggins* in 2003, and there is no suggestion that state-court practices have been disrupted as a result. Moreover, "[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court." *Richter*, 131 S. Ct. at 784.

The warden's concern that the decision below yields the "bizarre result" that federal courts defer to "a state-court decision that contains no analysis whatsoever" but not to a "partially-reasoned state-court decision," Pet. 17, misapprehends the

difference between *Wiggins* and *Richter*. What distinguishes the two cases is not the amount of *analysis* provided by the state court but the degree of specificity of the state-court *conclusion* to which the federal court must defer. Where the state court considers only one prong of a two-prong test, there is only one conclusion to which a federal court can feasibly defer — the conclusion on the prong that the state court actually addressed. Where the state court does not specify which prong forms the basis for its decision, the federal court must defer to the overall conclusion that no constitutional violation occurred and therefore cannot grant a writ unless it would have been unreasonable not to find a violation of both prongs. What harmonizes these rules is the principle that the federal court must defer to whatever conclusion, at whatever level of generality, the state court reached. It is the warden's proposed rule that would introduce a "bizarre result" by requiring a federal court not just to defer to, but also to *invent*, a conclusion for a state court on an issue the state court declined to reach.

Finally, it is unlikely this Court in *Richter* meant to overrule, silently, its recent decisions in *Wiggins*, *Rompilla*, and *Porter*. *Richter* cited both *Wiggins* and *Rompilla* for other propositions without suggesting that any aspect of those decisions was in jeopardy. *See, e.g., Richter*, 131 S. Ct. at 789. And this Court's most recent application of de novo review, in *Porter*, occurred just four years ago, in a unanimous opinion. As every court of appeals to address the question has concluded, *Richter*'s rule that a federal court should afford AEDPA deference to the decision of a state court when the state court does not provide a reason does not cast doubt upon this Court's consistently

applied, common-sense rule that when a state court *does* supply a reason for its decision, a federal court should defer to the conclusion actually reached and not a hypothetical holding the state court *declined* to render.

## IV. This Case Is A Poor Vehicle For Reconsidering *Wiggins*.

### A. Respondent would prevail under the standard the warden advances.

Although here the state court expressed no view about prejudice, had it held that counsel's failure adequately to investigate Foster's alibi was not prejudicial, such a holding would have been unreasonable. The prejudice inquiry asks whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Even without the alibi witness, the prosecution's case was not overwhelming. The case lacked any physical evidence tying Foster to the crime and relied instead on one eyewitness who gave conflicting testimony about her fleeting, middle-of-the-night identification. Although the witness identified Foster as the perpetrator, she also described the shooter as half a foot taller and 60 pounds heavier than Foster is and testified that the shooter's jacket was blue (as opposed to green, the color of the jacket other witnesses had seen Foster wearing earlier that night). The jury's initial deadlock and ultimate verdict on a lesser-included charge reflects these weaknesses. In such circumstances, it is particularly likely that additional exculpatory evidence could have been enough to introduce reasonable doubt and tip the scales in

favor of acquittal. *See id.* at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

Here, the unpresented alibi — that Foster was at a friend's house with several other individuals at the time of the murder — would have been hard for the jury to ignore. No one can know for certain what verdict the jury would have reached had this additional evidence been offered, but prejudice requires "reasonable probability," not certainty. *See id.* at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). Under that standard, it would have been unreasonable had the state court ruled that Foster suffered no prejudice as a result of trial counsel's deficient performance in failing to pursue his alibi. Because Foster would prevail under either a deferential or de novo standard of review, this case presents a poor vehicle for deciding which standard should apply to a *Strickland* prong that the state court never addressed.

### B. This case does not present an issue about limits on federal evidentiary hearings.

The warden expresses concern that some appellate decisions have misapplied *Wiggins* to permit an evidentiary hearing where none is allowed under *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). See Pet. 15-16. Whether or not this characterization of *other* decisions is correct, it is irrelevant to the disposition of *this* case, which did not involve an evidentiary hearing in federal court, only an

evidentiary hearing in state court. *See* Pet. App. 4a-5a. All that this case has in common with the allegedly problematic decisions the warden cites is that they all cite *Wiggins*. This Court should not grant the petition to address a purported problem that is allegedly occurring in other cases but did not occur here.

## CONCLUSION

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

Respectfully submitted,

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