No. 12-420

In the Supreme Court of the United States

HUGH WOLFENBARGER, PETITIONER

v.

DEMETRIUS FOSTER, RESPONDENT

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Foster's arguments against granting review in this case are unpersuasive.

First, Foster alleges that Michigan waived its primary argument: that *Harrington* v. *Richter*, 131 S. Ct. 770 (2011), mandates deference to both components of a state court's merits adjudication of a defendant's ineffective-assistance-of-counsel "claim" under *Strickland* v. *Washington*, 466 U.S. 668 (1984), even when the state court addressed only one of the claim's components in denying relief. Br. in Opp. 6–7. Not so. As the petition explains, the State argued below that "the *entire* resolution of the claim is to be given deference and it's *not* to be parsed out word by word to find out which parts of that claim are given deference." Pet. 21 (emphasis added). The State's counsel said that only "*if* [the Sixth Court panel] decides that it can parse prejudice out from the deficiency, *then* I believe it's a de novo review of prejudice." Br. in Opp. 4 (emphasis added). Moreover, this Court will review even an unpreserved issue where, as here, the lower courts actually addressed it. *Verizon Commc'ns* v. *F.C.C.*, 535 U.S. 467, 473 (2002); Pet. App. 12a.

Second, Foster says the petition should be denied because there is no circuit split. Br. in Opp. 7–9. There is no split, and the State has not said otherwise. But in the circumstances here, the lack of a split counsels in favor of a grant, because it demonstrates that the circuit courts are (understandably) reluctant to conclude that *Harrington* silently overruled *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003). Only this Court can reconcile its own conflicting precedents.

Third, Foster believes review should be denied because those appellate courts that have considered the issue have determined that *Harrington* did not overrule *Wiggins*. Br. in Opp. 9–14. But Foster cannot avoid AEDPA's plain language, which makes clear that federal-court deference is "claim" based, not element based, as the Court took pains to emphasize in *Harrington*. It is not possible to reconcile that approach with *Wiggins*. Again, only this Court—not the appellate courts—can speak to whether *Harrington* overruled *Wiggins*.

Finally, Foster contends this case would be a poor vehicle for reconsidering the *Wiggins* rule because he would prevail even if AEDPA deference were granted to both components of his *Strickland* claim. Br. in Opp. 14–15. But that contention is wrong. Applying AEDPA deference is dispositive here where both the federal district judge and the federal magistrate judge held that Foster did not satisfy *Strickland*'s prejudice requirement. The state-court decision was not so clearly incorrect that it would not be debatable among reasonable jurists. In other words, Foster is not entitled to habeas relief if the federal courts give the state-court decision proper AEDPA deference.

In sum, the issue presented is significant and ripe for review. Foster cannot legitimately deny that fact, so he takes the tack of any litigant propounding a position in conflict with the law: criticism of the vehicle. But that criticism is unjustified and unsupported here. Certiorari is warranted.

ARGUMENT

I. The State specifically preserved the question presented.

Foster's primary argument is that the State waived the issue presented at oral argument before the Sixth Circuit. Br. in Opp. 6–7. To the contrary, the State specifically argued to the panel that pursuant to *Harrington*, a reviewing court was "*not* to parse out" the two *Strickland* components:

> The Supreme Court [has] made it clear that the court is *not* to parse out, and they did this in *Harrington* versus *Richter*, the entire resolution of the claim is to be given deference and it's *not* to be parsed out word by word to find out which parts of that claim are given deference. So under *Richter* the entire analysis of the claim, the rejection of the ineffective assistance of counsel claim, is to be given that extreme deference under AEDPA. [Oral Argument, March 1, 2012 (emphasis added).]

Even in the oral-argument passage on which Foster relies, the State's counsel said, conditionally, that only "*if* this court decides it can parse prejudice out from the deficiency," then *de novo* review would apply.[1] Br. in Opp. 4 (emphasis added). Making an

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[1] Under Sixth Circuit case law, raising an argument for the first time at oral argument is not a forfeiture of the issue. *See United States* v. *Huntington Nat'l Bank*, 574 F. 3d 329, 333 (6th Cir. 2009). See also *Worth* v. *Tyler*, 276 F.3d 249, 262 n. 4 (7th Cir. 2001) ("[T]he court, not the parties, must determine the standard of review, and therefore, it cannot be waived.")

argument in the alternative does not constitute a waiver under any standard.

Equally important, the Sixth Circuit expressly addressed the question presented in its opinion. Pet. App. 12a ("We have recently reiterated 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 did not consider.") (citations omitted). As this Court has held, the waiver doctrine is inapplicable where the lower court "passes on" the issue below. *Verizon Commc'ns* v. *F.C.C.*, 535 U.S. 467, 473 (2002) ("Any issue pressed or passed upon by a federal court is subject to this Court's broad discretion on certiorari.").

Tellingly, the Sixth Circuit panel initially denied the State's request to stay the mandate on the basis that the State had waived the deference issue at oral argument. But the State then filed a renewed motion to stay, explaining that the panel had misconstrued counsel's statements at oral argument. On December 13, 2012, the Sixth Circuit as much as recognized its mistake, reversed course, and granted the motion.[2] If the Sixth Circuit continued to believe that the State had waived the issue presented, it would not have found "a reasonable probability that four Justices [of

[2] Foster asserts that the Sixth Circuit granted the renewed motion based on the State's request that the State not be forced to retry Foster while this certiorari petition was pending. Br. in Opp. 6 n.2. But the State made that same argument in its first motion to stay. What had changed was the State's rebuttal of the unfounded waiver assertion, a notion that appeared for the very first time in the Sixth Circuit's initial order denying the State's motion to stay.

this Court] would vote to grant certiorari," the well-established standard for a circuit-court grant of a stay. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers); *South Park Indep. School Dist.* v. *United States*, 453 U.S. 1301, 1303 (1981) (Powell, J., in chambers). The State did not waive the issue.

II. The lack of a circuit split counsels in favor of this Court's review, as it shows the circuits' understandable reluctance to conclude that the Court silently overruled an opinion.

Next, Foster asserts that the petition should be denied because there is no circuit split. Br. in Opp. 7–9. Foster has it exactly backwards. It is true that a circuit split is a well-recognized ground that supports granting a petition. But the lack of a split here evidences the circuits' unsurprising reluctance to hold that this Court silently overruled one of its earlier cases. See, e.g., *Sussman* v. *Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) ("[w]e certainly cannot assume that the Court overruled *sub silentio* its holding in *Wiggins*—a precedent so important to the daily work of the lower federal courts."); *McBride* v. *Superintendent, SCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012) ("We are thus spared the need to delve into the complicated question of what effect, if any, the Supreme Courts recent decision in *Harrington* v. *Richter*, 131 S. Ct. 770, has had on the teachings from *Wiggins*"); *Childers* v. *Floyd*, 642 F.3d 953, 969 n.18 (11th Cir. 2011) (en banc) (suggesting in *dicta* that *Harrington* "may" have overruled *Wiggins*' progeny, *Rompilla*).

In the absence of a circuit split, this Court will often allow an issue to "percolate" to see if a split will develop. But further percolation will be of no assistance here. The numerous circuit courts that have already held that *Harrington* did not overrule *Wiggins sub silentio* demonstrate that the courts of appeal will not act until this Court provides more explicit instruction about AEDPA deference in the context of *Strickland* claims.

Moreover, "[s]ome situations do call for the Court's immediate intervention even though the issues have not been fully percolated—in such situations, the desirability of percolation is overridden by the need for a quick, definitive resolution." Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 720 n.310 (1984). This is just such a situation. As the State explained in its petition, two circuit courts have recently cited *Wiggins* as a basis to avoid this Court's holding in *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011), that AEDPA forbids evidentiary hearings for claims that were adjudicated on their merits. See *Toliver* v. *Pollard*, 688 F.3d. 853, 859 (7th Cir. 2012), and *Plummer* v. *Jackson*, No. 09-2258, 2012 WL 3216779 (6th Cir. Aug. 8, 2012). Foster's sole response to this point is that his case does not present an issue about the limits on a federal evidentiary hearing. That is no answer to the alarming development that lower courts are circumventing *Pinholster*'s bar on federal evidentiary hearings by citing *Wiggins*.

In sum, state courts continue to rely on this Court's statement in *Strickland* that "there 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." 466 U.S. at 697. Yet, under circuit cases such as *Rayner* v. *Mills*, 685 F.3d 631, 636–39 (6th Cir. 2012), and *Wooley* v. *Rednour*, 702 F.3d 411, 421–22 (7th Cir. 2012), a state court that accepts this Court's suggestion and analyzes only one prong of the ineffective-assistance analysis is punished on habeas review when the federal courts (1) refuse to defer, and (2) use evidentiary hearings to supplement *de novo* review.

As Texas stated in its *amicus* brief supporting Michigan's petition:

> 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*. [Br. for Texas as *Amicus Curiae* Supporting Pet. 14.]

The significant question of whether the *Wiggins* component-by-component approach has survived *Harrington*'s "claim" analysis requires prompt resolution, an outcome that only this Court is in a position to resolve.

III. The circuit courts have failed to give effect to *Harrington*'s holding that AEDPA deference applies to a state court order resolving a habeas "claim," rather than "a component of a claim."

Foster argues that the circuit courts are correct to ignore this Court's holding in *Harrington* because *Harrington* did not impliedly overrule *Wiggins*. Br. in Opp. 9–14. He is wrong. *Harrington* recognized that "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated," "*whether or not* the state court reveals which of the elements in a multipart claim it found insufficient." 131 S. Ct. at 784 (emphasis added). *Wiggins* rejects "claim" deference in favor of component deference. Until this Court acts, *Harrington's* reach is being unduly restricted.

Foster also argues that Michigan asks federal courts to "invent" a conclusion for a state court on an issue the state court declined to reach. Br. in Opp. 13. Foster overlooks this Court's admonition in *Harrington* that 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." 131 S. Ct. at 786 (emphasis added).

The conflict between *Harrington* and *Wiggins* is real, the issue is ripe, and it requires resolution. If Michigan is right that *Harrington* requires "claim" deference when a state court issues a partially reasoned decision, then the federal courts are

erroneously refusing to apply congressionally dictated AEDPA deference and improperly vacating state-court convictions. If Foster is right that *Harrington* did not displace *Wiggins*, then the Court should clarify that point for the state courts who continue to rely on *Strickland*'s invitation to issue partially reasoned ineffective-assistance opinions. Either way, the Court's immediate intervention is appropriate and necessary.

IV. This case is an ideal vehicle to resolve the conflict between *Harrington* and *Wiggins*.

Finally, Foster contends that this case would be a poor vehicle for reconsidering the *Wiggins* rule because Foster would prevail even if AEDPA deference applies to the prejudice component of his *Strickland* claim. Br. in Opp. 14–15. Foster is wrong again, this time overlooking the fact that both the federal district judge and the federal magistrate judge held that Foster failed to satisfy *Strickland's* prejudice requirement.

The Magistrate Judge's report and recommendation concluded that the evidence against Foster "while not overwhelming was substantial." App. 37a. One witness, "only a few feet away from the shooter," "solidly identified" the shooter as Foster. *Id.* And the District Court agreed: "when weighed against the substantial evidence presented against Petitioner at trial, there is no reasonable probability that presenting the alibi defense would have yielded a different outcome." App. 19a.

The Sixth Circuit panel should have carefully explored whether the state-court decision could be supported by a reasonable argument. *Harrington*, 131 S. Ct. at 784; *Lockyer* v. *Andrade*, 538 U.S. 63, 75 (2003). And the panel should have asked itself whether arguments could be made against a finding of prejudice. Had the panel done these things, it would have recognized that the state court's decision did not constitute an error so "well understood and comprehended in existing law" that it was "beyond any possibility for fairminded disagreement." *Harrington*, 131 S. Ct. at 786–87.

This is especially the case where the uncalled alibi witness that Foster now trumpets was a long-time friend who visited Foster in jail, a witness whom defense counsel found vague and lacking necessary details. "[C]onfidence in the writ and the law it vindicates [is] undermined [ ] if there is judicial disregard for the sound and established principles that inform its proper issuance." *Harrington*, 131 S. Ct. at 780.

Standards of review are not advisory. Yet the Sixth Circuit panel never came to grips with the determinative § 2254 question: whether, in all events, the state-court reasonably rejected Foster's claim. The Sixth Circuit failed to afford the state appellate court rejection of Foster's *Strickland* claim the "doubly deferential" review required under AEDPA. The Sixth Circuit did not say it would have reached the same decision even if it had applied full AEDPA deference to the prejudice prong. The panel made no attempt to show why the state appellate court's conclusion was unreasonable, rather than merely incorrect, if it even was that.

Of course, if this Court applies *Harrington* and holds that the state appellate court's rejection of Foster's *Strickland* claim was entitled to full AEDPA deference, it can always vacate and remand to the Sixth Circuit with instructions to review Foster's "claim" with AEDPA deference.[3] What should not continue is the confusion that *Harrington* and *Wiggins* are causing. Because only this Court is in a position to resolve the conflict within its own precedents, the petition for certiorari should be granted and the Sixth Circuit's habeas ruling reversed.

[3] See e.g., *Lovell* v. *Duffey*, 132 S. Ct. 1790 (2012) (vacating and remanding *Lovell* v. *Duffey*, 629 F.3d 587, 596 (6th Cir. 2011), *Sheets* v. *Simpson*, 132 S. Ct. 1632 (2012) (vacating and remanding *Simpson* v. *Jackson*, 615 F.3d 421 (6th Cir. 2010), *Stovall* v. *Miller*, 132 S. Ct. 573 (2011) (vacating and remanding *Miller* v. *Stovall*, 608 F.3d 913 (6th Cir. 2010).

CONCLUSION

The petition for writ of certiorari should be granted.

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