No. 12-594

In the
Supreme Court of the United States

KEITH BLAND, JR.,
PETITIONER,

v.

MICHAEL LEMKE, WARDEN,
RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant certiorari to decide whether, when a state court adjudicates the merits of a claim with multiple components, the bar on federal habeas relitigation, 28 U.S.C. § 2254(d), extends only to those components addressed by the state court, where (1) every circuit to decide the question—including the Seventh Circuit—has agreed with petitioner and held that it does, (2) the petition merely asks the Court to correct the Seventh Circuit's supposed failure to apply its own circuit precedent adopting petitioner's preferred rule, (3) this case does not raise the question presented in any event because the state court adjudicated all components of petitioner's federal constitutional claim, and (4) resolving the question in petitioner's favor would not affect the outcome because petitioner's underlying constitutional claim fails under any standard of review.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. Every circuit to decide the question, including the Seventh Circuit, has adopted the very rule that petitioner espouses—that when a state court adjudicates a multipronged claim, the relitigation bar in 28 U.S.C. § 2254(d) extends only to those prongs addressed by the state court. Because there is no circuit split on the question presented, and because the Seventh Circuit itself follows petitioner's favored rule, certiorari review is unwarranted.

In the end, petitioner seeks mere error correction based on the Seventh Circuit's supposedly silent refusal in this case to follow its own circuit precedent, precisely the relief that petitioner unsuccessfully sought in his petition for *en banc* rehearing below. Petitioner contends, Pet. 1, that the Seventh Circuit's decision "assumes" that *Wiggins v. Smith*, 539 U.S. 510 (2003)—which applied § 2254(d) deference only to those parts of a multipart claim that the state court decided—was overruled by *Harrington v. Richter*, 131 S. Ct. 770 (2011). But the Seventh Circuit's post-*Harrington* rule has been that *Wiggins* continues to control when a state court is silent on one prong of a multipronged claim. See *Woolley v. Rednour*, 702 F.3d 411, 421-422 (7th Cir. 2012); *Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2011). Because the Seventh Circuit follows the rule petitioner advocates here, the only issue presented by the petition is whether the panel opinion conflicts with the Seventh Circuit's own decisions in *Woolley* and *Sussman*.

Nor does this case implicate the question presented in any event, for the state appellate court in fact

adjudicated both prongs of petitioner's underlying constitutional claim, which alleges that the prosecutor failed to correct and took unfair advantage during closing argument of a misstatement petitioner made during his trial testimony. See *Napue v. Illinois*, 360 U.S. 264 (1959). The petition presumes that the state court never determined whether the prosecutor's closing argument violated the first prong of *Napue*. In fact, however, the state court held that *Napue* was inapplicable because here, unlike in that case, "it was [petitioner] himself" who offered false evidence, meaning that "the State did not produce a perjured statement" in the first place. Pet. App. 38a. Only then did the state court proceed to *Napue*'s second prong and hold that the challenged argument was immaterial to the verdict. Because the state court reached the merits of both prongs, the question of what standard to apply on federal habeas review to issues that a state court *fails* to reach is not presented here.

Even putting all of the foregoing to one side, certiorari review is unwarranted because a favorable ruling from this Court would have no effect on the outcome of petitioner's federal habeas petition. Relief could not be granted on petitioner's novel false-testimony claim without announcing a new rule of constitutional law in this case, in violation of the non-retroactivity rule in *Teague v. Lane*, 489 U.S. 288 (1989). Nor can petitioner satisfy the first *Napue* prong under *de novo* review, and if he could, his claim would fail under the second, materiality prong in any event.

Finally, there is no reason to hold the petition for a decision in *Johnson v. Williams*, No. 11-465, which

presents an entirely different question than the one raised here.

STATEMENT

A. Trial

Petitioner, his brother-in-law Ian Lockhart, and Lockhart's cousin Christopher Scott murdered petitioner's stepmother, Delores Bland, during an armed robbery of petitioner's father's home (the Bland home). Pet. App. 30a-35a; Tr. 768-769.[1] Petitioner was tried before a jury in the Circuit Court of Will County, Illinois, Pet. App. 12a, where the following evidence was presented.

On August 31, 2000, Delores Bland was found shot to death inside the Bland home. Pet. App. 12a. She had been "executed by a bullet to the back of her head." Pet. App. 1a. The home showed no signs of forced entry. Pet. App. 31a.

Patrick Scott testified that, in mid-August 2000, he traveled to Chicago to visit his brother Christopher. Pet. App. 32a; Tr. 765-766, 801-803. Christopher shared an apartment with Lockhart that petitioner sometimes visited. Pet. App. 32a. Patrick testified that, while staying at Christopher's apartment, he heard petitioner, Lockhart, and Christopher plan to rob the Bland home. Pet. App. 32a-33a.

Patrick testified that, one week before Delores's murder, he heard petitioner, Lockhart, and Christopher

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[1] "Tr. _" refers to the transcript of petitioner's trial, which was filed in the district court as Doc. 29, Exh. X. "Doc. _" refers to entries on the district court's docket.

talking about a drug dealer petitioner had robbed. Tr. 769-772, 813-815. The drug dealer, "Hot Sauce," had talked about killing people, had threatened Lockhart specifically, and had said that "folks going to come through and shoot this bitch up." Tr. 814-815. One of the men suggested stealing guns to obtain money, and petitioner said they could take guns from the Bland home. Pet. App. 32a-33a. Petitioner also suggested that they go to the Bland home, learn his family members' schedules, and pick an opportune time to steal the guns. Pet. App. 33a; Tr. 777.

Patrick subsequently heard petitioner, Lockhart, and Christopher say that they had, in fact, gone to the Bland home the day before Delores was killed in an attempt to determine when nobody would be there. Pet. App. 33a; Tr. 778-779. As they discussed returning to the Bland home to steal the guns, Lockhart said that "if there is any problem then we would have to kill the mother fuckers. That's just what we're going to do." Tr. 782. In response, petitioner said, "[C]ool, I ain't tripping." *Ibid*. Patrick explained that this meant that killing the Blands was "no big deal" to petitioner. *Ibid.*

Petitioner's father, Keith Bland, Sr. (Keith Sr.), testified that he kept four guns in his bedroom. Pet. App. 51a-52. He kept a 12-gauge shotgun in the closet and a .25 Beretta and a .38 Taurus under the pillows of the bed. *Ibid*. Keith Sr. ordinarily kept a .9 millimeter Beretta under the pillows, but he had put that gun underneath a dresser roughly one month before the events in question here. Tr. 172, 198-199. In 1999, Keith Sr. had kicked petitioner out of the Bland home for "talking to [Delores] in a hostile manner that was very disrespectful to her." Tr. 494.

Petitioner's stepbrother Kenneth Gordon testified that petitioner and two friends visited the Bland home on the afternoon of August 30, 2000. Pet. App. 31a; Tr. 465. At trial, Kenneth identified photos of Lockhart and Christopher as the friends who had accompanied petitioner. Tr. 214-215. Kenneth testified that petitioner questioned him about the family members' schedules. Pet. App. 31a.

Kory Bland, petitioner's half-brother, testified that petitioner, Lockhart, and Christopher visited the Bland home on the night of August 30, 2000. *Ibid.*; Tr. 146-147. Petitioner asked Kory about his, Delores's, and Keith Sr.'s schedules. Pet. App. 31a.

Police arrived at the Bland home late on August 31, 2000, after Kory found his mother unresponsive on the living room floor. Tr. 162, 184-185. Delores had been killed by a bullet from a .38 caliber gun. Pet. App. 31a. Keith Sr.'s shotgun and the two handguns he kept under the pillows were missing, but the .9 mm. Beretta remained under a dresser in his bedroom. Tr. 294-295. A VCR and TV antenna also were missing from the Bland home. Tr. 168-169, 204. Investigators later discovered a VCR and TV antenna at Lockhart's wife's home, Tr. 342-344; Keith Sr. and Kory identified the antenna as belonging to them, Tr. 168-169, 204. (When detectives interviewed Kenneth and Kory, neither mentioned that petitioner had asked about the family members' schedules during his visits to the Bland home on August 30. Tr. 404-405, 455.)

Patrick Scott testified that, several days after Delores's murder, he heard petitioner, Lockhart, and Christopher say that they had taken a "12-gauge and two handguns" from the Bland home. Tr. 782-784.

Patrick also heard petitioner and Lockhart say, in a joking manner, that Christopher was "crazy as hell." Tr. 785. According to Patrick, Christopher responded that "he had to pop her ass." Pet. App. 33a. Patrick also heard petitioner, Lockhart, and Christopher collaborate to craft alibis: petitioner and Christopher would say that they had been playing basketball, while Lockhart would say that he had been with his wife. Tr. 786-787. (Patrick spoke to police about this case in November 2000, and January 2001, Tr. 799-800; he later testified that, when speaking with police on the former occasion, he did not disclose everything he knew about the events in question, Pet. App. 33a.)

Detective Mike Guilfoyle testified that he interviewed petitioner twice. Pet. App. 32a. The day after the murder, petitioner told Guilfoyle that he, Lockhart, and Christopher went to the Bland home on August 30 to tell his family that he had been discharged from the Navy for taking unauthorized leave. *Ibid.*; Tr. 462. Petitioner said that he spent the night of August 30 at Lockhart and Christopher's apartment, and that he visited his wife on the morning of August 31. *Ibid.* Petitioner then told Guilfoyle that he and Christopher played basketball in the park until dusk. *Ibid.* According to petitioner, after he left the park, he "just walk[ed] around," "visiting and seeing people." Tr. 337. When Guilfoyle asked petitioner to name someone he had visited, petitioner became angry and named only Christopher. Tr. 337-338. Petitioner denied any involvement in Delores's murder. Tr. 348-349. Guilfoyle interviewed petitioner again on September 7, 2000. Pet. App. 32a. When asked about his whereabouts on August 31, petitioner became

"extremely angry" and said he could not remember. Tr. 340-341.

Investigator Fred Hunter also interviewed petitioner on September 7, 2000. Hunter testified that petitioner said that he and Christopher had been playing basketball on August 31. Tr. 502-504.

Victor McClendon testified that, in September 2000, petitioner and Lockhart tried to sell him a shotgun and automatic handguns. Pet. App. 34a; Tr. 859. McClendon had grown up with Lockhart and had known petitioner for a year. Tr. 857-859. At the time of trial, McClendon was facing trial on felony charges. Tr. 860.

Petitioner testified that he had no involvement in Delores's murder. Tr. 472-474. He denied having been threatened by Hot Sauce or conspiring with Lockhart and Christopher to steal his father's guns. Tr. 468-469. He stated that, during the afternoon on August 31, he left his wife's apartment and sold cocaine on the streets until 9:00 p.m. Tr. 470-471. Petitioner further testified that he never told Detective Guilfoyle that he had been playing basketball with Christopher. Tr. 473-474. Rather, he claimed he said nothing to Guilfoyle about his activities on August 31 because he did not want to admit to selling drugs. *Ibid.*

Petitioner also testified that he owned a .38 caliber Smith and Wesson around the time of his stepmother's murder. Pet. App. 55a. Petitioner was arrested for unlawful possession of that gun in January 2001, but he testified that the arrest occurred in January 2000. Pet. App. 35a, 55a.

During closing arguments, defense counsel relied on petitioner's testimony that he owned a gun to argue

that petitioner had no motive to rob the Bland home. Tr. 567-568. In rebuttal, the prosecutor reminded the jury of petitioner's conversation with Lockhart and Scott during which they discussed Hot Sauce's threats and their plan to steal guns to get money. Tr. 579-580. The prosecutor then said that petitioner:

> told you * * * 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.

Tr. 602.

The jury convicted petitioner of first degree murder and armed robbery, and the trial court sentenced him to seventy-one years of imprisonment. Pet. App. 30a.

B. Direct Appeal

On appeal, petitioner claimed that he was denied a fair trial because the prosecutor "failed to correct false testimony and took unfair advantage of it during remarks." Doc. 29, Exh. B at 26. The testimony at issue was petitioner's testimony that he had been arrested for unlawful possession of the .38 Smith and Wesson in January 2000, whereas the arrest had actually occurred in January 2001. *Id.* at 26-28. Petitioner argued that "the prosecutor cannot allow to go uncorrected testimony which she knows to be false," and that "the prosecutor struck a foul blow when she took advantage of [petitioner's] misstatement" during closing argument. *Id.* at 27-28.

The Illinois Appellate Court affirmed petitioner's conviction. Pet. App. 30a-46a. The court acknowledged that "the prosecutor cannot allow testimony which she knows to be false to go uncorrected," and that "the State's knowing use of perjured testimony to obtain a criminal conviction constitute[d] a violation of due process of law." Pet. App. 38a. But the court found those principles inapplicable because "[h]ere, it was [petitioner] himself who testified incorrectly as to the date of his arrest. The State did not produce a perjured statement." *Ibid*. "We can find no rule of law," the court continued, "to support [petitioner's] theory that the prosecutor has a duty to correct the defendant's direct examination testimony." Pet. App. 38a-39a. Finally, the appellate court "was unable to conclude that the prosecutor's reference to the 'January 2000' arrest in closing argument resulted in the denial of a fair trial" in any event. Pet. App. 39a. The court reasoned that, "[h]ad the correct arrest date been noted, the jury might have inferred that [petitioner's] gun was used in the shooting because he was found in possession of an identical gun four months later." *Ibid.* The Illinois Supreme Court denied leave to appeal. *People v. Bland*, 824 N.E.2d 286 (Ill. 2004) (Table).

C. Federal Habeas Proceedings

In 2008, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, alleging, among other things, that the prosecutor "fail[ed] to correct an obvious misstatement by [petitioner] and t[ook] unfair advantage of that misstatement in closing argument." Doc. 10 at 14.

The district court denied the petition. Pet. App. 12a-29a. Although the court concluded that the prosecutor's closing argument was improper under *Napue*, it found no reasonable likelihood that the argument affected the jury's verdict. Pet. App. 25a-26a. The district court recognized that "there was overwhelming evidence of guilt presented" at trial, and that "[e]vidence that petitioner needed a gun was only a small piece of the case brought against him." Pet. App. 26a.

The Seventh Circuit affirmed, but on different grounds. Pet. App. 1a-11a. The court held that petitioner's false-testimony claim failed under 28 U.S.C. § 2254(d)(1) because the claim "was adjudicated on the merits in state court, whose decision was neither contrary to, nor an unreasonable application of, *Napue* and similar decisions." Pet. App. 3a. The panel explained that "*Napue* and *Giglio*[*v. United States*, 405 U.S. 150 (1972)] hold that a prosecutor may not offer testimony that the prosecutor knows to be false. They do not hold that a prosecutor is forbidden to exploit errors in testimony adduced by the defense." *Ibid.*

After noting petitioner's concession at oral argument that "no decision of the Supreme Court holds that a prosecutor cannot make hay from a defendant's false testimony," the Seventh Circuit rejected petitioner's alternative "appeal[ ] to 'fundamental fairness.'" Pet. App. 4a. Not only did that argument operate at "too high a level of generality to satisfy § 2254(d)," the panel explained, but the prosecutor had not undermined "the principal role of the due process clause": "ensur[ing] a trial at which the truth can emerge through an adversarial presentation." Pet. App. 4a. Because "both

sides ha[d] equal access to the facts" surrounding petitioner's arrest—and defense counsel was therefore able to correct the mistake in petitioner's testimony "when it was made, or immediately after he left the stand, or even in closing argument"—there was "nothing 'fundamentally unfair' about leaving to the adversarial process the exchange of arguments about inferences to be drawn from the date of an arrest and a weapon's confiscation." Pet. App. 5a.

Having reached these conclusions, the Seventh Circuit had no need to decide whether the state court's determination that petitioner was not harmed by the prosecutor's argument was reasonable. Contrary to exaggerated statements in the petition, Pet. 6, 15, 19, nothing in the Seventh Circuit's opinion suggests that the court was "[o]bviously uncomfortable with the state court's finding on the prejudice issue," that it had "implicitly rejected the state court's finding of harmless error," or that it "was unwilling to affirm based on the state court's analysis of *Napue*'s materiality prong."

Petitioner sought rehearing *en banc*, arguing as relevant here that the panel's decision, in conflict with *Wiggins* and *Sussman*, applied § 2254(d) deference to a part of petitioner's *Napue* claim that the state court did not address, and that the prosecutor's closing argument, when reviewed *de novo*, violated *Napue*. Reh'g Pet. 6-7, 13, *Bland v. Hardy*, No. 10-1566 (7th Cir.). Respondent opposed rehearing on the ground that the state appellate court did in fact dispose of petitioner's claim that the prosecutor's closing argument violated the first prong of *Napue*; it did so by holding that "'it was [petitioner] himself'" who supplied the false evidence, and that "'the State did not produce a perjured

statement.'" Ans. to Reh'g Pet. 3, *Bland v. Hardy*, No. 10-1566 (7th Cir.) (quoting Pet. App. 38a). Respondent also contended that, because the state court had addressed *Napue*'s first prong—and that its decision was therefore entitled to deference under § 2254(d)—the question whether the prosecutor's argument would violate *Napue* when reviewed *de novo* was not presented by petitioner's appeal. *Id.* at 6-8. At no point did respondent ask the Seventh Circuit to ignore *Wiggins* in light of *Harrington*. *Id.* at 1-11.

The Seventh Circuit denied rehearing. Pet. App. 47a-48a. No judge requested a vote on the *en banc* petition, and the court added that panel rehearing was also denied, though petitioner had not specifically requested rehearing by the panel. *Ibid.*

REASONS FOR DENYING THE PETITION

The habeas corpus statute "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington*, 131 S. Ct. at 784; see 28 U.S.C. § 2254(d). This Court has long held that, when a state court adjudicates the merits of a multipart claim, the relitigation bar extends only to those elements of the claim actually addressed by the state court; the habeas court reviews the remainder of the claim *de novo*. See *Wiggins*, 539 U.S. at 534; *Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Porter v. McCollum*, 130 S. Ct. 447, 452 (2009). Petitioner asks this Court to reaffirm this rule from *Wiggins* in light of its later holding in *Harrington* that a state-court decision that is "unaccompanied by an explanation" qualifies under § 2254(d) as an adjudication on the merits. 131 S. Ct. at 784.

Certiorari should be denied for four independent reasons. First, there is no conflict among the circuits on the question presented. Every circuit to address the issue after *Harrington*—including the Seventh Circuit—has held that § 2254(d) applies only to those elements of a multipart claim that were actually decided by the state court. In other words, every court has followed the very rule that petitioner espouses. Second, because the Seventh Circuit has joined every other circuit to decide the issue in rejecting the argument that *Harrington* overruled *Wiggins*, the petition is nothing more than a request for this Court to correct the panel's supposed failure to apply circuit law in petitioner's case. Third, this case does not present the question presented in any event, for the state appellate court *did* address *Napue*'s first prong—whether the prosecutor engaged in improper conduct during closing argument—and therefore § 2254(d) deference was proper. Put simply, as respondent explained in successfully opposing petitioner's request for *en banc* review, the level of deference properly afforded issues left unaddressed by state courts is immaterial to this appeal, because the state appellate court in fact addressed both prongs of petitioner's *Napue* claim. Fourth, a decision in petitioner's favor on the question presented would not affect the outcome of his habeas petition because his *Napue* claim is *Teague*-barred and meritless under any standard of review.

Finally, there is no basis to hold this petition for a decision in *Johnson v. Williams*, No. 11-465. The question presented in *Johnson* has no bearing on the issue raised in this appeal.

I. The Question Presented Implicates No Split In Authority.

The Seventh Circuit has squarely rejected the argument that, after *Harrington*, section 2254(d)'s relitigation bar extends to those elements of a multipart claim that the state court did not address.

In *Woolley*, the Seventh Circuit concluded that the "theory that *Wiggins* has been overruled would stretch *Harrington*'s holding well beyond the scope of the decision." 702 F.3d at 422. Noting that "*Harrington* did not purport to disturb *Wiggins*[,]" the court ruled that where a state court "explicitly considered *Strickland*'s prejudice prong" and "deem[ed] it unnecessary to address" the performance prong, "*Wiggins* controls and we review attorney performance *de novo*." *Ibid.* In reaching this conclusion, the court also relied on an earlier, in-chambers opinion for the proposition that "'[w]e certainly cannot assume that the *Harrington* Court overruled *sub silentio* its holding in *Wiggins*[.]'" *Ibid.* (quoting *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (Ripple, J., in chambers)).

The Seventh Circuit's holding in *Woolley* is consistent with that of every other circuit to decide the question. See *Salts v. Epps*, 676 F.3d 468, 480 (5th Cir. 2012) ("where a state court does not apply a legal test, 'our review is not circumscribed by a state court decision'") (quoting *Wiggins*, 539 U.S. at 534); *Rayner v. Miller*, 685 F.3d 631, 639 (6th Cir. 2012) ("[W]e do not find *Harrington* and the Supreme Court's earlier decisions [in *Wiggins* and *Rompilla*] to be in conflict. * * * [W]hen a state court decision relies only on one prong, the cases mandate AEDPA deference to that prong and *de novo* consideration of the unadjudicated

prong."); *Gentry v. Sinclair*, No. 09-99021, 2013 WL 174441, at *13 (9th Cir. Jan. 15, 2013) ("AEDPA does not apply to our review of the materiality of Hicks's false testimony because * * * the Washington Supreme Court never reached an adjudication of the materiality prong of the *Napue* claim."); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 930 n.9 (11th Cir. 2011) ("because the Florida Supreme Court did provide an explanation of its decision which makes clear that it ruled on the deficiency prong but did not rule on the prejudice prong * * * we are still required to follow the Court's instructions from *Rompilla* and *Wiggins* and conduct a *de novo* review" of the deficiency prong).

In fact, petitioner cannot cite a single decision holding that *Harrington* overruled *Wiggins*. Rather, he cites footnotes in Third and Eleventh Circuit opinions that purportedly expressed doubts about *Wiggins*'s viability. Pet. 11. But as petitioner appears to concede, *ibid.*, neither the Third nor the Eleventh Circuit held that § 2254(d)'s relitigation bar extends to components of a multipart claim that the state court did not address. Instead, both courts found it unnecessary to decide that question. See *McBride v. Superintendent, MCI Houtzdale*, 687 F.3d 92, 100 n.10 (3d Cir. 2012) ("because McBride has affirmatively taken the position that AEDPA deference applies," court need not decide "what effect, if any, the Supreme Court's recent decision in *Harrington* * * * has had on the teachings from" *Wiggins*, *Rompilla*, and *Porter*); *Childers v. Floyd*, 642 F.3d 953, 969 n.18 (11th Cir.) (*en banc*) ("We need not further opine on [whether *Rompilla* survived *Harrington*] because the District Court of Appeal *did* rule on Childers's Confrontation Claim. *Rompilla*'s *de novo* review, if it remains good law, would not apply

here.") (emphasis in original), pet. for cert. filed, No. 11-42 (U.S. July 6, 2011).

Thus, the circuits that have decided the question have uniformly held that *Wiggins* remains good law after *Harrington*. Accordingly, there is no circuit split on petitioner's question, and certiorari review should be denied.

II. The Petition Asks The Court To Correct The Seventh Circuit's Alleged Misapplication Of Circuit Precedent.

Not only has the Seventh Circuit recently confirmed its agreement with petitioner's rule, but when that court decided petitioner's appeal, circuit law was already clear that § 2254(d) deference applies only to those parts of a multipart claim actually addressed by the state court. See *Sussman*, 636 F.3d at 350 ("if a state court does not reach either the issue of performance or prejudice on the merits, then 'federal review of this issue is not circumscribed by a state court decision,' and our review is *de novo*") (quoting *Toliver v. McCaughtry*, 539 F.3d 766, 775 (7th Cir. 2008)).

Although *Sussman* did not squarely decide whether *Harrington* overruled *Wiggins*, see 636 F.3d at 350, Judge Ripple—who authored the panel opinion in *Sussman*—confronted that issue head on when ruling on the warden's subsequent motion to stay the mandate. Judge Ripple concluded that "the Supreme Court in *Harrington* did not disturb its approach in *Wiggins*[.]" *Sussman*, 642 F.3d at 534 (Ripple, J., in chambers). And he therefore declined to "assume that the Court overruled *sub silentio* its holding in *Wiggins*." *Ibid.*

Accordingly, because circuit law already held that § 2254(d) applied only to those prongs of a multipronged claim decided by the state court, respondent never asked the Seventh Circuit to ignore *Wiggins* in this case; rather, respondent argued consistently that both elements of the *Napue* claim enjoy § 2254(d) deference on habeas review because the state court decided against petitioner on both elements. And, as discussed, the Seventh Circuit has now expressly rejected the argument that *Harrington* overruled *Wiggins*. See *Woolley*, 702 F.3d at 421-422.

At best, then, the petition is a request to correct the Seventh Circuit's supposed failure to adhere to its own decisions. But this Court has long recognized that "[i]t is primarily a task of a Court of Appeals"—rather than this Court—"to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*); see also *Davis v. United States*, 417 U.S. 333, 340 (1974). Nor is there any "internal difficulty" requiring reconciliation here in any event, for the Seventh Circuit has squarely adopted the rule petitioner urges, see *Woolley*, 702 F.3d at 421-422, and the court's decision in this case does not even address this issue—let alone hold that *Wiggins* is no longer good law.

Petitioner's failed effort at *en banc* rehearing makes this even clearer. As relevant here, petitioner sought rehearing on the ground that the panel decision conflicted with *Sussman* because it applied § 2254(d) deference to a prong of the *Napue* claim that the state court supposedly had not addressed. See Reh'g Pet. 1, 7, *Bland v. Hardy*, No. 10-1566 (7th Cir.). In opposing rehearing, respondent did not ask the Seventh Circuit

to ignore *Wiggins* in light of *Harrington*. On the contrary, respondent explained that the state court's ruling that "it was [petitioner] himself" who supplied the false evidence, and that "the State did not produce a perjured statement," was a decision on the merits of petitioner's claim that the prosecutor's closing argument violated the first prong of *Napue*, and that the state court's decision was therefore entitled to § 2254(d) deference. See Ans. to Reh'g Pet. 2-4, *Bland v. Hardy*, No. 10-1566 (7th Cir.). With this as respondent's argument for denying rehearing *en banc* on petitioner's *Napue* claim, the court denied the *en banc* petition.

In sum, certiorari is unwarranted to correct the Seventh Circuit's alleged misapplication of circuit precedent. If anything, this is a matter for panel or *en banc* rehearing, and the Seventh Circuit denied panel and *en banc* review on precisely this issue after respondent explained that *Wiggins* and *Sussman* do not apply here because the state court did in fact reach the merits of both prongs of petitioner's *Napue* claim.

III. This Case Does Not Implicate The Question Presented Because The State Court Adjudicated All Elements Of Petitioner's Underlying Constitutional Claim.

For the same reasons discussed at the end of Part II, this case does not implicate the petition's question presented. The certiorari petition proceeds (as it must) from the premise that the Illinois Appellate Court "did not discuss whether the prosecutor engaged in improper conduct when she urged the jury to believe [petitioner's] erroneous testimony during her closing argument." Pet. 5. The question presented arises only if the state court failed to adjudicate this element of petitioner's

Napue claim. But the state court's decision shows just the opposite—that the state court reached the merits of both *Napue* prongs.

The Illinois Appellate Court's determination that "the State did not produce a perjured statement," Pet. App. 38a, disposed of petitioner's contention that the prosecutor's closing argument violated the first element of *Napue*. Before that court, petitioner argued that the prosecutor violated his right to a fair trial when she "failed to correct false testimony and took unfair advantage of it in closing remarks." Doc. 29, Exh. B at 26. Petitioner maintained that the prosecutor was obligated to correct and refrain from commenting on petitioner's *own* false testimony that he was arrested on felon-in-possession charges in January 2000. *Id.* at 28. Petitioner's state-court brief framed the claim as follows:

> The prosecutor is a representative of the people, including the defendant, and is not at liberty to strike foul blows. *People v. Lyles*, 106 Ill. 2d 373, 478 N.E.2d 291 (1985). Moreover, the prosecutor cannot allow to go uncorrected testimony which she knows to be false. *People v. Torres*, 305 Ill. App. 3d 679, 712 N.E.2d 835, 839 (2nd Dist. 1999). In this case the prosecutor struck a foul blow when she took advantage of [petitioner's] misstatement.

Ibid.

In rejecting that claim, the state court looked to *People v. Torres*—on which petitioner had relied—and acknowledged that "the prosecutor cannot allow testimony which she knows to be false to go

uncorrected," and that "the State's knowing use of perjured testimony to obtain a criminal conviction constitute[s] a violation of due process of law." Pet. App. 38a. But the court found that those rules were inapplicable because "[h]ere, it was [petitioner] himself who testified incorrectly," and "[t]he State did not produce a perjured statement." *Ibid.* The state court then concluded that "no rule of law * * * support[s petitioner's] theory that the prosecutor has a duty to correct the defendant's direct examination testimony." Pet. App. 38a-39a.

This was an "adjudicat[ion] on the merits," 28 U.S.C. § 2254(d), of petitioner's false-testimony claim. *Napue* forbids prosecutors to introduce false evidence through prosecution witnesses and obligates them to correct such evidence when it appears, see 360 U.S. at 269; it does "not hold that the prosecutor is forbidden to exploit errors in testimony adduced by the defense," Pet. App. 3a. Accordingly, in holding that "it was [petitioner] himself" who offered false evidence, and that "the State did not produce a perjured statement," Pet. App. 38a, the state court necessarily determined that *Napue* was inapplicable.

If that were not plain enough, the state court's decision on *Napue*'s materiality element confirms that the court also resolved petitioner's contention on the first element. In setting forth its conclusion that the prosecutor's closing argument was not material, the court wrote that petitioner "was not prejudiced by the State's *failure to correct the date*." Pet. App. 39a (emphasis added). The court's finding that petitioner, rather than the prosecution, was the source of the false evidence disposed of both the failure-to-correct and

improper-argument elements of petitioner's claim. By thus linking the two aspects of petitioner's *Napue* claim, the state court demonstrated its understanding that both depended on whether the prosecutor had "produced a perjured statement." Pet. App. 38a.

Because the state court adjudicated the first element of petitioner's *Napue* claim—that the prosecutor used false testimony during closing argument—this case does not implicate the question presented. At a minimum, the fact-bound question of whether the state court adjudicated all components of petitioner's false-testimony claim is a threshold obstacle to reaching the petition's question. And the petition does not ask the Court to review the Seventh Circuit's determination that, if § 2254(d) does apply, petitioner is not entitled to habeas relief. Indeed, petitioner "concede[d]" below that "no decision of the Supreme Court clearly establishes that a prosecutor cannot make hay from a defendant's false testimony." Pet. App. 4a. For this reason, too, certiorari should be denied.

IV. Answering The Question Presented In Petitioner's Favor Would Not Affect The Disposition Of His Habeas Petition.

Certiorari is unwarranted on yet another independent ground, for federal habeas relief is unavailable to petitioner under any circumstances. First, his novel false-testimony claim is *Teague*-barred. Second, if petitioner's claim did not depend entirely on a new rule of constitutional law, the claim would fail even under the *de novo* review he seeks on *Napue*'s first element. Finally, even if petitioner could somehow prevail on that element, his *Napue* claim still would fail because he cannot satisfy the second, materiality

element (as the district court held[2]), which all agree the state court reached and decided.

To begin, habeas relief is available here only if the Court announces a new rule of constitutional law, in violation of *Teague*. Petitioner conceded below that "no decision of the Supreme Court clearly establishes that a prosecutor cannot make hay from a defendant's testimony," Pet. App. 4a, and he cites no case holding that a prosecutor violates the Due Process Clause when she comments on a defendant's mistaken testimony during closing argument, see Pet. 15-17. Petitioner's proposed rule therefore is not "dictated by precedent," *Teague*, 489 U.S. at 333, and may not be applied here.

Even setting aside the non-retroactivity bar, petitioner wrongly claims that this case "falls squarely under the rule" established in *Napue*. Pet. 15. *Napue* and related cases address a specific type of breakdown in the adversarial process: the prosecutor injects false evidence into the case, and defense counsel—who either does not suspect the falsity or lacks the information needed to expose it—is unable to mount a response. As a result, the trier-of-fact's ability to evaluate the evidence or a witness's credibility is impaired. See, *e.g.*, *Napue*, 360 U.S. at 270 ("Had the jury been apprised [that Hamer had been promised consideration for his testimony], however, it might well have concluded that Hamer had fabricated testimony in order to curry" the prosecutor's favor.); *Giglio*, 405 U.S. at 154-155

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[2] Indeed, the district court reached that conclusion under *de novo* review, Pet. App. 26a, although the court should have reviewed the state court's materiality decision under § 2254(d).

("Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution [against Taliento] would be relevant to his credibility and the jury was entitled to know of it."); *Miller v. Pate*, 386 U.S. 1, 6 (1967) (due to "prosecution's consistent and repeated misrepresentation that [key evidence] was, indeed, a garment heavily stained with blood," jury never learned that evidence was actually "stained with paint"); *Mooney v. Holohan*, 294 U.S. 103, 110 (1935) (due process violated where "authorities deliberately suppressed evidence which could have impeached and refuted" witness's "perjured testimony").

The prosecutor's closing argument here caused no such breakdown. As the Seventh Circuit pointed out, the date of petitioner's arrest was "well documented; his lawyer had the papers just as the prosecutor did." Pet. App. 4a. Therefore—unlike in *Napue*, *Giglio*, *Miller*, and *Mooney*—"[n]othing prevented Bland's defense team from correcting his testimony * * * when [the mistake] was made, immediately after [petitioner] left the stand, or even in closing argument[.]" Pet. App. 4a-5a. Moreover, petitioner testified that he owned a "Smith and Wesson .38" "around August 31, 2000," Pet. App. 55a, thereby providing a basis for the jurors to find—as defense counsel had urged them to find—that petitioner owned a gun and thus had no reason to rob his father's home. Accordingly, there was "nothing 'fundamentally unfair' about leaving to the adversarial process the exchange of arguments about inferences to be drawn from the date of an arrest and a weapon's confiscation, when both sides have equal access to the facts." Pet. App. 5a. Although the Seventh Circuit made that latter determination in the course of its

§ 2254(d) analysis, it is an equally sound basis for rejecting petitioner's claim under *de novo* review.

Finally, petitioner concedes, Pet 5, 19—and the Seventh Circuit recognized, Pet. App. 2a—that the state court adjudicated the materiality element of the *Napue* claim. There is no dispute that this part of the state court's decision is therefore subject to § 2254(d)'s relitigation bar, and petitioner cannot prevail without showing that the state court "erred so transparently that no fairminded jurist could agree with that court's decision." *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011). Petitioner has not come close to making that showing.

The state court's rationale—that focusing jurors on petitioner's correct arrest date could have been harmful to the defense, as it would have allowed the jury to infer that petitioner had a .38 caliber gun around the same time that his stepmother was murdered with a .38 caliber gun, Pet. App. 39a—squared with the evidence that petitioner and Lockhart had agreed to kill anyone who interfered with their robbery of the Bland home. Tr. 782. A jury could reasonably infer from that agreement that men bent on killing witnesses to a robbery would be armed when committing the robbery—perhaps even with petitioner's .38 Smith and Wesson revolver. To be sure, the prosecutor argued that Delores Bland was killed with Keith Sr.'s .38 Taurus. Tr. 597-598. But the evidence did not establish which .38 caliber gun—petitioner's or his father's—was the murder weapon. Tr. 400. The state court's decision was therefore consistent with the evidence and objectively reasonable. And although the Seventh Circuit did not reach the materiality question, nothing in its decision supports petitioner's statements that the

court was "unwilling to affirm" the denial of habeas relief on that ground, or that it "implicitly rejected" and was "obviously uncomfortable with," the state court's materiality decision. Pet. 6, 15, 19.

Moreover, the evidence overwhelmingly established that petitioner, Lockhart, and Christopher murdered Delores Bland during an armed robbery of the Bland home. The men went there to "steal[ ] some guns to get some money," Pet. App. 32a, after a drug dealer petitioner had robbed began talking about "killing people," threatened Lockhart, and said he would "shoot up" Lockhart and Christopher's apartment. Tr. 769, 771-772, 777, 813-815. The trio even had gone to the Bland home twice the day before Delores was killed and asked about the family members' daily schedules. Tr. 147, 151-152, 215-216.

The evidence further established that Christopher admitted shooting Delores and that the men stole a shotgun and two handguns from the Bland home. Tr. 257-258, 782-786. Indeed, three of Keith Sr.'s guns—a shotgun and two handguns—were missing after the murder. Tr. 198-199, 294. The only gun that had not been taken from the Bland home, a .9 millimeter Beretta, was the one whose hiding place Keith Sr. had moved a month before the shooting, long after petitioner was kicked out of the house. Tr. 172, 198-199, 494. And petitioner tried selling a shotgun and automatic handguns to an acquaintance shortly after the murder. Tr. 857-860.

Lastly, petitioner planned to tell police that he and Christopher had been playing basketball on the day of the murder, Tr. 786-787, and petitioner provided two police officers with that alibi, Tr. 336-337, 503-504. But

when a detective questioned him a second time, petitioner could not remember where he had been on the day of the murder. Tr. 340. At trial, he remembered that he had been selling cocaine. Tr. 470-472.

In short, the prosecutor's argument that petitioner's gun had been confiscated in January 2000 was not "critical" to the prosecution's case. Pet. 19. Rather, as the district court found, "[e]vidence that [p]etitioner needed a gun was only a small piece of the case against him." Pet. App. 26a. Moreover, petitioner was motivated to rob the Bland home, not by some abstract need for a gun, but by the threats from Hot Sauce, the drug dealer petitioner had robbed. Pet. App. 32a. These threats explained why the men would suggest "stealing some guns to get some money," *ibid.*, and why petitioner would suggest taking his father's guns, Pet. App. 33a. Thus, even if petitioner were correct that the evidence of his need for a gun was weak, Hot Sauce's threats explained why petitioner would conspire with Lockhart and Christopher. And regardless of motive—which the State was not required to prove—compelling evidence established that petitioner, Lockhart, and Christopher had carried out the robbery and murdered Delores Bland while doing so.

In the end, therefore, petitioner's claim is *Teague*-barred, the prosecutor's closing argument did not run afoul of *Napue*, and the state court's materiality decision was reasonable. For each of these three reasons, answering the question presented in petitioner's favor would have no effect on the disposition of his habeas petition. Certiorari review should be denied on this ground alone.

V. A Hold For *Johnson v. Williams* Is Unwarranted.

Finally, the petition should not be held for *Johnson v. Williams*. See Pet. 13-14. The question in *Johnson* is whether "a claim has been 'adjudicated on the merits' for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim." Pet. Br. i, *Johnson v. Williams*, No. 11-465. Here, in contrast, there is no question that the state court adjudicated a federal claim; the dispute concerns only how much of that claim is subject to § 2254(d)'s relitigation bar. Because *Johnson* does not ask the Court to address that question, petitioner's request for a hold should be denied.

Noting that the warden in *Johnson* argued that "*any* denial effectively adjudicates all claims presented," petitioner contends that, "[i]f 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*." Pet. 13. But as discussed, the state court disposed of petitioner's improper-argument claim on its merits, holding that "it was [petitioner] himself who testified incorrectly" and that "[t]he State did not produce a perjured statement." Pet. App. 38a. Therefore, even if *Johnson* rejects the theory that a silent denial operates as a merits adjudication of all fairly presented claims, that principle would not affect this case, where the state court addressed each element of a multipart claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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