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

REPLY BRIEF FOR THE PETITIONER

LINDA T. COBERLY
Counsel of Record
TYLER G. JOHANNES
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

Counsel for Petitioner

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This case presents an important and recurring issue of federal habeas law. Indeed, it has come to our attention that the very same issue arises in another petition currently pending before the Court. In *Wolfenbarger* v. *Foster* (No. 12-420), two States—the State of Michigan as petitioner, and the State of Texas as *amicus curiae*—have both urged this Court to grant review and resolve the current uncertainty about the application of AEDPA deference in cases where the state court resolved only one prong of a multipronged legal analysis.

Moreover, just days ago, this Court decided an issue of habeas law merely one step removed from the issue now presented. By statute, AEDPA deference applies when a "claim" has been "adjudicated on the merits in State court." 28 U.S.C. § 2254(d). In *Johnson* v. *Williams*, No. 11-465, at 1-2, 568 U.S. __ (2013) (slip op.), this Court "ascertain[ed] the meaning of the adjudication-on-the-merits requirement." "[T]he answer to this question follow[ed] logically from [the Court's] decision in *Harrington* v. *Richter*." *Id.* at 2. This petition presents the next logical question: how does *Harrington* impact the meaning of "claim?"

On that critical question, the Courts of Appeals remain divided. The Seventh Circuit's decision in this case stands for the proposition that AEDPA deference applies to an entire, multipronged standard—even with respect to a prong of the legal analysis that the state court did not adjudicate. But numerous other courts have correctly held that under *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003), each prong is treated independently, so review of the

unadjudicated prong is "not circumscribed by a state court conclusion."

In attempt to downplay the issue, Respondent ignores the decision below in favor of other decisions by the same court. But the fact that other Seventh Circuit decisions have still followed *Wiggins* does not erase the conflict in precedent between the decision below and decisions of the other circuits. If anything, the tension between this decision and other Seventh Circuit decisions actually *supports* review, demonstrating the extent to which this issue has vexed the federal judiciary. Accordingly, the petition should be granted—or, at a minimum, it should be held for or decided alongside the petition in *Wolfenbarger*.

I. Review is warranted to resolve an important, recurring issue that has divided the Courts of Appeals.

In *Wiggins*, this Court held that when a state court adjudicates only one prong of a multipronged standard, federal habeas review of the unadjudicated prong is "not circumscribed by a state court conclusion." 539 U.S. at 534. But in *Harrington*, this Court threw *Wiggins* into question by saying that AEDPA applies "when a 'claim,' not a component of one, has been adjudicated." 131 S. Ct. 770, 784. This conflict is not going away. This Court's intervention is needed to resolve it.

A. The issue presented is important and recurring, as demonstrated by the petition in *Wolfenbarger* v. *Foster*, the decision in *Johnson* v. *Williams*, and Respondent's own arguments in other cases.

1. The importance and persistence of this issue is beyond any doubt, as two States are currently urging this Court to resolve it, and Respondent itself recently preserved the same argument for further review.

In *Wolfenbarger*, the State of Michigan (with *amicus* support from the State of Texas) seeks review on the very same question presented here. See Petition at i, *Wolfenbarger* v. *Foster* (No. 12-420). This Court, apparently intrigued by the issue, called for a response to the *Wolfenbarger* petition, which was distributed for conference on February 22, 2013. (The Court's docket now shows March 1, 2013, as the conference date.)

Only a very important issue would attract the attention and resources of multiple States. What is more, the *Wolfenbarger* petition and this petition ask this Court to answer the question presented in opposite ways—confirming that the issue is in dire need of this Court's resolution.

Further, in another recent case, Respondent itself sought to exploit the uncertainty, arguing that there remains a "need for the Court to reexamine *Wiggins*" in light of *Harrington*, and "preserv[ing] for further review" the argument that "the state appellate court's decision on [the standard] should receive full deference, whether it discussed neither, one, or both prongs of [the relevant test]." Brief of Appellee at 33,

Woolley v. *Rednour*, 702 F.3d 411 (7th Cir. 2012) (No. 10-3550), 2011 WL 2452296 at *33 (citing *Harrington* and *Wiggins*). To be sure, the *Woolley* decision—handed down after this petition was filed—rejected Respondent's argument and applied AEDPA deference only to the prong actually addressed by the state court. But the decision in *Woolley* did not discuss or deal with the decision below. Indeed, the parties in *Woolley* apparently never brought the decision below to the *Woolley* panel's attention, as they submitted their final briefs nearly a year before this case was decided. And while Respondent lost the deference issue in *Woolley*, it won the case, so it will not have the opportunity to seek further review on the deference issue it expressly "preserve[d]." Thus, in that case at least, Illinois will not be able to do what Michigan has done in *Wolfenbarger*—ask this Court to revisit *Wiggins*.

2. This Court's recent decision in *Johnson* further underscores the importance of the issue now presented. In *Johnson*, this Court reiterated the importance of "whether a federal claim was 'adjudicated on the merits in State court.'" No. 11-465, at 1-2 (slip op.). The Court then proceeded "to ascertain the meaning of the adjudication-on-the-merits requirement." *Ibid.* The Court found that meaning in *Harrington*. *Id.* at 2, 7. This case asks the next logical question: what is the impact of *Harrington* on the meaning of "claim?" See *Harrington*, 131 S. Ct. at 784 (suggesting that AEDPA applies "when a 'claim,' not a component of one, has been adjudicated"). For years now, a single prong of a multipronged standard has been treated as a separate claim for AEDPA purposes. But the court

below held differently. This Court should settle the issue.

B. This issue has divided the Courts of Appeals.

As explained in the petition, the circuits are divided on whether *Wiggins* remains good law after *Harrington*. But Respondent argues that there is no circuit split, and this case presents nothing more than a conflict within the Seventh Circuit. Respondent is wrong.

1. The premise of the first argument is clear: the decision below does not count. In its two-page discussion, Respondent ignores the decision below. See Opp. 14-15. But the court below 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. Respondent does not attempt to explain away this statement. Nor could it.

And there is no denying that this holding is in direct conflict with the decisions of several sister circuits. See Pet. 8-12. This Court has not hesitated to review decisions that created, rather than deepened, a circuit conflict. See, *e.g.*, *Dean* v. *United States*, 556 U.S. 568, 571 (2009) (granting certiorari on decision that "created a conflict among the Circuits").

2. Respondent's second argument, that the petition implicates nothing more than an intra-circuit conflict, ignores those numerous sister circuit decisions. See Opp. 16-18. Indeed, in Respondent's

cited cases, there were intra-circuit conflicts but *no* sister circuit decisions. But that is not this case. And this Court has made clear that the mere presence of an intra-circuit conflict is no bar to review. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 734 (1985) (granting certiorari where the decision below "arguably departed from precedent within the Circuit, and in any event created a direct conflict with the holdings of two other Circuits").

II. This case presents an excellent vehicle for resolving the issue.

The court below applied AEDPA deference to the question whether the prosecutor "used" false evidence in violation of *Napue* v. *Illinois*, 360 U.S. 264 (1959). But the state court did not decide that question. Rather, the "state judiciary assumed that the prosecutor violated a constitutional norm but found that Bland had not suffered any injury." Pet. 2a. In other words, the state court had relied only on *Napue*'s second prong, but the court below applied AEDPA deference to the first prong. Accordingly, the question presented is squarely implicated by this case.

A. The state court did *not* adjudicate the first prong of *Napue*.

In discussing the state court's opinion in this case, Respondent advances an interpretation that was rejected by the district court and Seventh Circuit alike. He argues that the state court did, in fact, adjudicate the first prong of *Napue*. That is simply wrong.

1. As the district court put it, the state "appellate court did not decide whether [closing argument] was

error by the prosecutor." Pet. 25a. And the Seventh Circuit agreed, stating unequivocally that the "state judiciary assumed that the prosecutor violated a constitutional norm but found that Bland had not suffered any injury." Pet. 2a.

Respondent's argument that the en banc court believed differently (see Opp. 17-18) is baseless. The Seventh Circuit has made clear that "a summary denial of a petition for rehearing * * * is 'insufficient to confer any implication or inference regarding a court's opinion relative to the merits of the case.'" *Moore* v. *Anderson*, 222 F.3d 280, 284 (7th Cir. 2000) (citation omitted).

2. In any event, the panel's reading of the state court decision was correct. Respondent fails to distinguish between two different arguments: *failure to correct* mistaken testimony and *affirmative use* of mistaken testimony.

The state court held that the prosecutor did not have a duty to correct Mr. Bland's mistaken testimony. Pet. 38a. But the court did not address whether the prosecutor violated *Napue*'s first prong by *affirmatively urging the jury to believe* the mistaken testimony.

In this respect, the state court could hardly have been clearer about what it was—and was not—deciding. It began by noting that "[t]he defendant argue[d] that the prosecutor had a duty to correct the defendant's false testimony * * * *." *Ibid.* And it ended the same way, concluding that it could "find no rule of law to support the defendant's theory that the prosecution has a duty to correct the defendant's direct examination testimony." *Id.* at 38a-39a. Thus,

the state court's discussion did not consider the prosecutor's *affirmative use* of the testimony at all. Further, at no point in its very brief materiality discussion did the state court *ever* pass upon the prosecutor's affirmative use. See Opp. 20-21 (contrary argument). In light of the state court's clarity—and Respondent's failure to argue procedural default—Respondent's citations to Mr. Bland's state court brief are a red herring.

In sum, whether the state court adjudicated *Napue*'s first prong is not a "fact-bound question." See *id.* at 21. The federal courts have had no trouble resolving it, because the state court opinion is clear on its face.

B. Under de novo review, the prosecutor's conduct violated *Napue*'s first prong.

The prosecutor urged the jury to believe facts she knew to be false. Seen under the proper standard of review, this conduct violated *Napue*'s first prong. For that reason, there can be no doubt that the Seventh Circuit's application of AEDPA deference made a significant difference in this case.

1. To begin, *Napue* and its progeny are grounded in the principle that 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.'" Pet. 17; see also *id.* at 15-18.

Respondent's interpretation of *Napue* cannot be squared with this principle. Respondent argues that,

even under de novo review, *Napue* does not prohibit a prosecutor from urging the jury to believe false facts, provided the defense is able "to mount a response." Opp. 22. In doing so, Respondent limits the cases to their facts, treating the *Napue* rule as a mere means to an end. But this Court has never so limited the prohibition on knowing use of false evidence. Rather, it has treated the rule as one of prosecutorial integrity, condemning prosecutors who "deliberately misrepresented the truth." *Miller* v. *Pate*, 386 U.S. 1, 6 (1967).

Simply put: had the Seventh Circuit engaged in de novo review, it would have held that the prosecutor's conduct violated *Napue*'s first prong.

2. Respondent makes two additional arguments that rely on a cramped view of *Napue* to prevent the federal courts from deciding what *Napue* means. These circular arguments should be rejected.

First, Respondent argues that the state court actually resolved *Napue*'s first prong "in holding that 'it was [petitioner] himself' who offered false evidence." Opp. 20. Because *Napue* does not apply to such cases, Respondent argues, the federal courts are barred by AEDPA from reviewing de novo whether *Napue* applies to such cases. To state this logic is to refute it.

Second, Respondent submits that "habeas relief is available here only if the Court announces a new rule of constitutional law, in violation of *Teague*." Opp. 22. But this Court held over 50 years 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. As for the alleged "conce[ssion]" (Opp. 22), counsel conceded only that no decision of this Court was factually identical. But "when all [the Court does] is apply a general standard to the kind of factual circumstances it was meant to address, [that] will rarely state a new rule for *Teague* purposes." *Chaidez* v. *United States*, No. 11-820, at 4-5, 568 U.S. ___ (2013) (slip op.). Essentially, Respondent is arguing that because *Napue* does not apply to this case, the argument is *Teague*-barred, and the federal court need not go on to consider whether *Napue* applies. This is hopelessly circular and may be disregarded.

C. The prosecutor's knowing use of false testimony was material to the verdict.

The Seventh Circuit did not consider whether the prosecutor's conduct affected the verdict. If it had, it very likely would have concluded that the use of false testimony had a "substantial and injurious effect" on the verdict. See Pet. 18. The prosecutor's emphasis on the mistaken testimony supplied an *admission* to support to the prosecution's theory of motive—a theory that tied the circumstantial evidence together, and "had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Strickland* v. *Washington*, 466 U.S. 668, 695-696 (1984).

1. Respondent's prejudice argument requires it to abandon its winning theory at trial. See Opp. 24. At trial, Mr. Bland and his alleged accomplices were portrayed as men who needed guns for protection. Pet. 1a; Opp. 26 (referencing threats from Hot Sauce). Now, Mr. Bland is portrayed as a "m[a]n bent on killing witnesses." Opp. 24. By reframing the case,

Respondent tacitly admits that its trial theory is indefensible in light of the prosecutor's falsehood.

Indeed, as Respondent argued the case at trial, the gun confiscated from Mr. Bland *could not* have been the murder weapon. See Pet. 19, Opp. 24. True, "the evidence did not establish which .38 caliber gun—petitioner's or his father's—was the murder weapon." Opp. 24. The reason is simple: *the State did not produce a murder weapon*. Respondent cannot now exploit this gap in its case. The verdict must be evaluated based on the theory at trial: the victim "was shot with her own gun." Pet. 59a.

2. Respondent's other attempt to minimize the prosecutor's improper conduct actually has the opposite effect. Respondent now contends that it was "Hot Sauce's threats"—not "some abstract need for a gun"—that explained why Mr. Bland "would conspire with Lockhart and Christopher." Opp. 26. But at trial, Respondent contended that it was these threats that *created* the need for a gun. If Mr. Bland *already* had a gun (and he did), then he was *already* protected from Hot Sauce and had no motive to conspire with others to obtain one.

3. Under the governing standard of materiality, "[t]he inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." Pet. 18. Rather, the court must "ponder[] all that happened *without* stripping the erroneous action from the whole." *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (emphasis added).

Even if the State *could* ignore the error and simply point to its other evidence, habeas relief would

still be warranted. The State had a highly circumstantial case. There was no eyewitness, no physical evidence tying Mr. Bland to the crime, and no murder weapon. No stolen goods were recovered from Mr. Bland. And neither of Mr. Bland's alleged accomplices testified.

Respondent implies the contrary, stating that Christopher—one of the alleged accomplices—admitted to committing the crimes. Opp. 25. But Christopher never testified. The only source of this "admission" was the testimony of a third party—Patrick Scott. And while Patrick Scott did testify at trial about alleged hearsay conversations involving Mr. Bland and his alleged accomplices, his credibility was highly suspect. He fled the State shortly after the murder and had to be arrested in Colorado and brought back to Illinois to testify. Pet. App. 33a. And he admitted that he had told different stories on different occasions. *Ibid.*

All told, had the Seventh Circuit considered materiality, it no doubt would have granted habeas relief.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held for, or decided alongside, the petition in *Wolfenbarger*.

Respectfully submitted.

LINDA T. COBERLY
Counsel of Record
TYLER G. JOHANNES
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000

Counsel for Petitioner

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