No. 13-897

IN THE
Supreme Court of the United States

RICHARD BROWN, Superintendent,
Wabash Valley Correctional Facility,

Petitioner,

v.

TROY R. SHAW,

Respondent.

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

REPLY IN SUPPORT OF THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases [Cont'd]

REPLY IN SUPPORT OF THE PETITION

In his Brief in Opposition, Shaw makes little attempt to refute the arguments raised by the Petition. Instead, he bases his entire brief on the same error made by the Seventh Circuit in this case—*i.e.*, that under AEDPA, federal courts may reevaluate State court determinations of State law. Because the Brief in Opposition offers no analysis other than defense of the Seventh Circuit opinion, it proves why the Court should grant certiorari here—State courts are owed deference on their interpretations of State law and the Seventh Circuit did not give that deference here.

I. State Courts Determined that Shaw's Claim Had No Support in State Law at the Time of His Appeal

Shaw argues that "no state court has decided whether the amendment of the information here violated Indiana law[,]" and that, instead, the Indiana courts merely applied *Strickland*, which is a federal-law standard. Br. in Opp. at 11. This overly simplistic argument ignores the fact that in order to decide whether Shaw's appellate counsel was ineffective under *Strickland*, the Indiana courts *had* to evaluate Indiana law.

Under *Strickland*, Shaw can win an ineffective assistance of counsel claim only if (1) the attorney's "performance was deficient" and (2) Shaw can prove that he was prejudiced, meaning that there is "a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 11A (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)). Whether Shaw's counsel was deficient and whether Shaw was prejudiced both depend entirely on whether Indiana law permitted the State to amend the charge against Shaw from aggravated battery to murder.

The Petition does *not* claim that the Seventh Circuit could not review the State court's *Strickland* analysis (as Shaw suggests, *see* Br. in Opp. at 2); it argues instead that the court was obliged to base that review on the Indiana courts' interpretation of what Indiana law means. If a State law question controls the outcome of a *Strickland* claim, the federal habeas court does not acquire the ability to make its own determination of State law. *See, e.g.*, *Alvord v. Wainwright,* 725 F.2d 1282, 1291 (11th Cir. 1984) ("On the one hand, the issue of ineffective assistance-even when based on the failure of counsel to raise a state law claim-is one of constitutional dimension. . . . On the other hand, the validity of the claim that Alvord's appellate counsel failed to assert is clearly a question of state law, and we must defer to the state's construction of its own law.") (internal citations omitted)). If State courts have already decided the issue, as they have here, the federal court must respect that decision and apply it consistently.

Shaw's brief says that "the Indiana appellate court did not address the merits of Shaw's argument[.]" Br. in Opp. at 12. This is plainly false. *See* Pet. App. 47A-50A. The Indiana Court of Appeals laid out Shaw's arguments on the merits, which claimed that "case law regarding amendment of indictments or informations was in a state of flux[.]" Pet. App. 48A. The court observed, however, that "at the time of Shaw's appeal, there appeared to be no case law in which a court had invalidated any amendment." Pet. App. 49A. Therefore, the Indiana Court of Appeals agreed with the post-conviction trial court that Indiana law was consistent on this issue and that Shaw's claim had no merit. Pet. App. 49A, 50A.

The district court, also, acknowledged that the Indiana Court of Appeals had "reviewed Shaw's claim regarding appellate counsel's failure to challenge the trial court's decision to allow the State to amend the charging information and the state of Indiana law on the subject." Pet. App. 33A. It concluded that the analysis and decision undertaken by the Indiana Court of Appeals on the merits was reasonable. Pet. App. 34A.

Further, the Indiana Court of Appeals, the post-conviction trial court, and the district court all agreed that "appellate counsel was not ineffective for failing to foresee future decisions." Pet. App. 50A, 34A; *see also Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir. 1996) ("Genuinely strategic decisions that were

arguably appropriate at the time, but, with the benefit of 'hindsight', appear less than brilliant will not be second-guessed.") (internal quotation omitted); *Sullivan v. Wainwright*, 695 F.2d 1306, 1309 (11th Cir. 1983) ("The failure of counsel . . . to advance certain points on appeal which subsequently gained judicial recognition does not render counsel ineffective.").

Thus, except for the Seventh Circuit, every court to review this case found that Shaw's claim had no support in State law. It cannot be, therefore, that his appellate counsel was deficient for failing to raise a meritless claim or that he was in any way prejudiced by the fact that the claim was not raised. Even if Shaw's counsel had argued that changing his charge from aggravated battery to murder was untimely, there can be no "reasonable probability" that the result of his direct appeal "would have been different." Pet. App. 11A (citing *Strickland*, 466 U.S. at 688, 694).

In spite of a plain determination of State law on the merits by Indiana courts, the Seventh Circuit refused to defer to that decision. Thus, it is in conflict with this Court's jurisprudence and at least two other lower courts. *See* Pet. at 13-15 (discussing *Paredes v. Quarterman*, No. SA-05-CA-870-FB, 2007 WL 760230, at *6 (W.D. Tex. Mar. 8, 2007) and *Callahan v. Campbell*, 427 F.3d 897, 931-32 (11th Cir. 2005)). Shaw claims that there is no conflict because "[t]he federal courts in both cases refused to

find deficient performance based on state-law grounds that the state courts had rejected on the merits[.]" Br. in Opp. at 15. Just so. Here the Seventh Circuit found deficient performance *in spite of* State law grounds that the State courts explicitly rejected on the merits. This is a conflict.

Under Indiana law as interpreted by Indiana courts, Shaw was not prejudiced by his counsel's decision to forego a meritless claim on appeal. The Court should grant the petition to clarify the importance of deference to State court determinations of State law in the course of applying *Strickland*.

II. The Meritless Argument Preferred by Shaw Was Not "Clearly Stronger" than the Argument Raised by His Counsel

Shaw argues that "[w]hen the arguments advanced by the appellate lawyer are significantly weaker than the arguments omitted, counsel's performance is constitutionally deficient." Br. in Opp. at 19. That is *not* the test set forth by this Court. *Smith v. Robbins*, 528 U.S. 259, 288 (2000), held that appellate counsel is constitutionally deficient only if the plaintiff can prove that an omitted issue was "clearly stronger" than issues raised on appeal. To satisfy the prejudice standard, "a challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been*

different." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (emphasis added) (internal quotation and citation omitted)).

Yet the Seventh Circuit did *not* find that the result would have been different for Shaw if his appellate counsel had raised the timeliness issue. Instead the court based its prejudice determination on its independent conclusion that a timeliness challenge would have been "stronger" than a sufficiency-of-the-evidence challenge. Pet. App. 22A ("Shaw's theory does not turn on the *ultimate outcome in the state courts*; it depends only on the relative strength of this argument over the one counsel chose.") (emphasis added)). And again, in making this finding, the Seventh Circuit ignored the determination by Indiana's courts that Shaw's challenge to the amendment had no chance of success—a State court determination of State law that should have precluded the Seventh Circuit's "significantly stronger" finding. Pet. App. 50A, 34A.

Shaw and the Seventh Circuit conclude to the contrary because a timeliness argument "was ultimately successful in *Fajardo*[,]" a case decided four years after Shaw's trial. Br. in Opp. at 21. But the decision in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007), does not imply success for Shaw, and regardless "an attorney's failure to anticipate changes in existing law does not rise to the level of constitutional ineffectiveness." Pet. App. 34A (citing *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993)).

Unlike in *Fajardo*, the amendment here was one of form, not substance, Pet. App. 42A, a distinction that matters to Indiana courts. *See, e.g.*, *Roush v. State*, 875 N.E.2d 801, 807 (Ind. Ct. App. 2007) (rejecting claim post *Fajardo* because "Roush's substantial rights were not prejudiced by the amendment because, under either version of the information, Roush's evidence and defense that she lacked the intent necessary for the alleged crime were equally available."). The amendment in Shaw's case did not charge any additional criminal conduct, Shaw was given two additional months to prepare his case, and no part of Shaw's defense changed in response to the new charge. Pet. App. 42A, 49A. *Cf. Jones v. State*, 863 N.E.2d 333, 339 (Ind. Ct. App. 2007) (rejecting claim post *Fajardo* because "[o]n the facts and circumstances before us, we conclude that Jones did have a reasonable opportunity to prepare for and defend against the charge against him.").

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"Failure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel." *Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996); *see also Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005); *Aparicio v. Artuz*, 269 F.3d 78, 100 (2d Cir. 2001). Shaw's timeliness-of-amendment argument was a loser, as Indiana's courts have held. No federal habeas court may reevaluate that decision.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: May 16, 2014