No. 07-102

In the Supreme Court of the United States

AUSTIN RANDOLPH, PETITIONER,

v.

CHRISTOPHER RAYGOZA, RESPONDENT.

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

REPLY IN SUPPORT OF THE PETITION

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MICHAEL M. GLICK*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2232

Counsel for Petitioner

*Counsel of Record

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Respondent does not dispute the weight of authority mandating deference by habeas courts to the clear, implicit factual findings made by a state trial court. Instead, he argues merely that this case does not provide an ideal vehicle to resolve the Seventh Circuit's clear departure from this Court's decisions and its incompatibility with the law of other circuits. As shown below, respondent's arguments ignore fundamental principles of certiorari practice and are otherwise meritless.

I. The State Did Not Forfeit The Question Presented.

Respondent's principle argument is forfeiture. See Opp. i, 3-5. According to respondent, the State forfeited the question presented by failing to raise it before the court of appeals. *Id.* at 3-5. Respondent's argument misunderstands this Court's certiorari practice and the principles of forfeiture law applicable to habeas corpus review.

Respondent does not distinguish between (i) a petitioner's *claim* and (ii) the *arguments* in support of that claim. This distinction is critical, for as this Court has made clear, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); accord, *e.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000); *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972). In this Court, in the lower federal courts, and in the state appellate courts, petitioner has consistently made the claim that trial counsel's representation did not violate the Sixth Amendment. And petitioner argued below that the state trial judge who heard the alibi witnesses' in-person testimony post-trial was "the same judge who presided at petitioner's trial" and that "[t]his judge was able to personally assess [the] credibility" of these

witnesses. Opp. App. Ex. A at 43-44. If anything, petitioner now merely puts a finer point on the argument — that counsel was not ineffective for failing to call alibi witnesses *that the state trial court implicitly found lacked credibility*. As the Court made clear in *Yee*, *Harris Trust & Sav. Bank*, and *Stanley*, this type of pleading is entirely consistent with certiorari practice. See also *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee*, 503 U.S. at 535 (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"); *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed.").

Even if, as respondent argues, the State's position on the deference owed to implicit fact finding by a state court were properly characterized as a "claim," rather than as an "argument" (Opp. 3-5), there still would be no forfeiture. Respondent fails to consider the procedural posture of this case — the collateral review of a state court judgment of conviction under 28 U.S.C. § 2254 — and the fact that the question presented did not arise until the court of appeals reversed the district court's judgment and granted habeas relief.

Respondent initiated this matter by filing a petition under 28 U.S.C. § 2254, challenging his state court convictions of murder and attempted murder. Pet. App. 50a. Thus, the instant case is unlike the situation presented in *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 533 U.S. 157 (2004), upon which petitioner relies. There, a complainant brought a civil action to recover environmental clean up costs under a particular statutory

provision. This Court declined to address in the first instance complainant's claim under another section of the statute — one that he had abandoned in the district court and never made to the court of appeals. In particular, this Court was unprepared to resolve the issue on the basis of its own dictum in light of the importance of the issue and the absence of briefing and decisions by the courts below. *Id.* at 168-169. In contrast, here, it is respondent who was the complainant below — he brought a petition seeking 28 U.S.C. § 2254 relief — and here the court of appeals, like the district court before it, decided the substantive Sixth Amendment question that respondent presented. See *Stevens v. Dep't of Treasury*, 500 U.S. 1, 8 (1991) (Timeliness issue in federal employee's age discrimination suit was properly before the Court where district court heard case on merits, and where court of appeals specifically referred to employee's notice of intention to file civil suit and answered timeliness question incorrectly).

The remaining cases respondent cites in support of his forfeiture argument are also inapposite. For example, *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001), and *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998), declined invitations by petitioners to assert new substantive claims attacking, rather than defending, the judgment when those claims were not pressed. Unlike the case at bar, *United Foods* and *Yeskey* involved new claims based upon new constitutional theories. In contrast, here the State has consistently argued that no Sixth Amendment violation occurred as a result of trial counsel's failure to call additional alibi witnesses. And it cannot be said that the question presented here was not "considered by" the lower courts. See *Yeskey*, 524 U.S. at 213. The state court's implicit finding could not have been clearer. The court rejected respondent's post-trial claim that his trial counsel was ineffective for failing to call additional alibi witnesses. App.17a, 50a. And the district court recognized this implicit finding, noting that "to assume

that the [alibi] witnesses's [sic] testimony was all true contradicts" the state trial court's findings. Pet. App.39a.

Respondent appears to suggest that the State was required to raise the question presented here in a petition for rehearing in the court of appeals before filing a petition for writ of certiorari in this Court. See Opp. 5. Respondent provides no authority to support his argument, nor can he. In fact, there is no need even to file a petition for rehearing before seeking certiorari review, as this Court's own rules make clear. See Sup. Ct. R. 13.3 (stating that the time to file a petition for writ of certiorari runs either from the date of the entry of the judgment or the subsequent entry of judgment following a petition for rehearing).

Accordingly, there has been no forfeiture for purposes of certiorari review. The question presented is properly before this Court.

II. Respondent's Argument That the Record Belies The State Trial Court's Implicit Factual Findings Is Meritless.

Respondent denies that the trial court made implicit credibility determinations regarding the seven additional alibi witnesses who testified at a post-trial hearing. Opp. 6-9. This is demonstrably false. See Pet. 11 (citing Pet. App. 39a) (district court noted that "to assume that the [alibi] witnesses's [sic] testimony was all true contradicts" the state trial court's findings).

At the post-trial hearing in this case, respondent argued that counsel was deficient for failing to call seven additional alibi witnesses. Pet. App. 55a. After these witnesses testified and were cross-examined, the State called respondent's counsel as a witness. *Id.* at 65a. Counsel testified that he interviewed all four of the adult alibi witnesses, several of them more than once. *Id.* at 65a-71a. He explained that he had identified problems with their testimony, including the fact that several were uncertain about the alibi and that they would be subject to extensive impeachment. *Ibid.* Counsel testified that he believed respondent's case would be better off without these witnesses, referring to their testimony as "clearly biased" and not helpful "in any way, shape, or form." *Id.* at 65a, 68a. The trial judge denied the motion for a new trial, holding that counsel made "a rational decision as a competent lawyer" not to call the additional witnesses, that certain witnesses "would [not] have detracted" from the State's case, *and that the court remained convinced that respondent was the shooter and was not at his family's house at the time of the shooting.* *Id.* at 71a.; R.15-6 at U14-U15, U24, U31, U40-U41 (emphasis added).

Respondent has no answer to the fact that the court could not remain convinced of respondent's guilt without finding testimony of his innocence incredible. In short, as was true in *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983), the state trial

court's "failure to grant relief was tantamount to an express finding against the credibility" of the habeas petitioner's witnesses. Respondent's additional arguments — that the trial court sometimes made express, rather than implied, credibility findings, and that if respondent was guilty then his girlfriend and his mother's employer must have been lying, Opp. 7-9 — are beside the point.

Finally, respondent implies that the credibility determination on which petitioner relies is the trial court's statement that "'all or most'" of the uncalled alibi witnesses "'were impeached or could have been impeached in various ways,'" Opp. 6, a finding that respondent then attempts to discredit. But this argument fails for at least two reasons.

First, respondent has mischaracterized petitioner's claim. Petitioner's claim is not that these witnesses would have been subject to impeachment, but rather that the trial court's determination that respondent was the murderer was based on the necessary (albeit implicit) factual finding that the additional alibi testimony was not credible, for it was not possible for the state court to believe their testimony and still conclude that respondent committed the murder. Pet. at 6.

Second, respondent misstates the record, arguing that the trial court was "using the term 'impeach' in the broadest sense" and that the witnesses could have been impeached "only by the fact that they have a familial bias." Opp. 6-7. This suggestion fails for two reasons. First, it cannot seriously be debated that the trial court understood the meaning of this term. See *Black's Law Dictionary*, 768 (8th ed. 2004) (defining "impeach" as "[t]o discredit the veracity of (a witness)"); see also *The American Heritage College Dictionary*, 694 (4th ed. 2004) (defining "impeach" as "[t]o challenge the validity of; try to discredit: impeach one's credibility"). And second, the witnesses, in fact, were impeachable for a multitude of reasons. Pet. App. 65a (respondent's mother Maria Raygoza made

potentially incriminating suppressing hearing statements); *id.* at 56a, 62a, 64a (Maria and her boss, attorney Wendy Morgan, may have prepared an alibi script); *id.* at 67a (Morgan's husband, Rodney Adams, questioned Morgan's recollection that respondent answered the phone at his mother's home on the night of the crime); *id.* at 65a-66a (Maria's friend, Noemi Cordova, equivocated as to the alibi and claimed that respondent shaved his distinctive blond ponytail shortly after the instant crimes); *id.* at 58a-59a (two of the children — Vincent Raygoza and Luis Paredes — could not recall when petitioner left the night of the crimes and thus provided an ineffectual alibi).

Accordingly, certiorari should be granted. Additionally, because the court of appeals's decision is fundamentally incompatible with *Lonberger* and *Uttech v. Brown*, 127 S.Ct. 2218, 2223 (2007) (deference to the trial court "is owed regardless of whether the trial court engages in explicit analysis regarding impairment, even the granting of a motion to excuse for cause constitutes an implicit finding of bias"), summary reversal may be appropriate. *See Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (granting summary reversal to "correct a clear misapprehension of" the controlling legal standard).

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be set for full briefing and argument. In the alternative, because the Seventh Circuit's opinion is fundamentally incompatible with the principles set forth in *Marshall v. Lonberger* and *Uttecht v. Brown*, this case calls for summary reversal.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO
Solicitor General
MICHAEL M. GLICK*
Assistant Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-2232

*Counsel of Record

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