No. ____

In the Supreme Court of the United States

KEITH SMITH, Warden,

Petitioner,

v.

ROBERT S. VASQUEZ,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state court act "contrary to . . . clearly established Federal law" under 28 U.S.C. § 2254(d)(1) when it cites the appropriate standard of review for a specific issue in its opinion but later uses imprecise shorthand terms in referring to that standard?

2. Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim notwithstanding the state courts' contrary determination?

LIST OF PARTIES

The Petitioner is Keith Smith, the Warden of the Mansfield Correctional Institution. Smith is substituted for his predecessor, Margaret Bradshaw. See Fed. R. Civ. P. 25(d).

The Respondent is Robert S. Vasquez, an inmate at the Mansfield Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Keith Smith, the Warden of the Mansfield Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Vasquez v. Bradshaw*, 345 F. App'x 104 (6th Cir. 2009), is reproduced at App. 3a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is reproduced at App. 1a. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio, *Vasquez v. Bradshaw*, 522 F. Supp. 2d 900 (N.D. Ohio 2007), is reproduced at App. 66a. The state court of appeals' decision affirming the trial court's denial of Vasquez's petition for post-conviction relief and motion for leave to file a motion for new trial instanter, *State v. Vasquez*, 2004-Ohio-53 (Ohio Ct. App. 2004), is reproduced at App. 129a. The trial court's findings of fact and conclusions of law on these actions are reproduced at App. 149a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on January 28, 2010. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

This case presents an issue under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1214, on which this Court has twice spoken directly and clearly: whether a state court decision receives AEDPA deference when the state court initially recites the correct standard for ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), but then later uses an imprecise shorthand to refer to that standard. In both *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), and *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), the Court held that AEDPA deference applies to such decisions.

Despite the plain guidance of *Jackson* and *Visciotti*—and with barely an effort to distinguish those decisions—the Sixth Circuit here held the opposite. It declined to afford AEDPA deference to the state appeals court decision, even though the court correctly stated the *Strickland* test, because it later made imprecise shorthand references to that test. Then, with AEDPA (and the reasonable Ohio court decision) out of the way, the Sixth Circuit held that Respondent Robert S. Vasquez's trial counsel afforded constitutionally ineffective assistance.

The Sixth Circuit's decision warrants review and summary reversal on two levels. First, on the question of AEDPA deference, it flouts this Court's settled precedent and upends the presumption that state courts know and follow the law. The decision leaves the Sixth Circuit standing alone among the circuits in second-guessing state court decisions that recite the correct legal standard. Second, in its de novo application of *Strickland*, the Sixth Circuit used

hindsight to second-guess trial counsel's reasonable strategy and held that Vasquez was prejudiced by a lack of cumulative evidence.

STATEMENT OF THE CASE

A. Vasquez raped a nine-year-old girl in the basement of his sister-in-law's house.

Vasquez is serving a life sentence for the rape and related kidnapping of a nine-year-old girl. *State v. Vasquez*, No. 79319, 2001 Ohio App. Lexis 4910, *4 (Ohio Ct. App. Nov. 1, 2001). The crime featured an interrelated cast of players. At the time of the assault, Vasquez and his wife, Karra Vasquez, were living with their two infant children in the basement of the house where Don Shaffer and his fiancée, Becky Egbertson (now known as Becky Shaffer), lived. *Id.* at *2. Karra Vasquez—Respondent's wife—is Becky Shaffer's sister. *Id.* The victim's father is Don Shaffer's best friend and a police officer for the City of Cleveland. *Id.*

On the evening of July 23, 2000, the victim ("A.L.") and her father went to the Shaffers' house to eat and socialize. *Id.* They arrived late, after Don and Becky had gone to bed, but while Vasquez and Karra were still awake. *Id.* After eating, A.L.'s father and Karra went outside to talk. *Id.* Vasquez told A.L. to go with him to the basement to watch television with him and his children on a bunk bed. *Id.*

In the basement, Vasquez's children were on the bottom bunk, and A.L. climbed onto the top bunk. *Id.* at *2–3. Vasquez joined A.L. on the top bunk and removed the ladder. *Id.* at *3. He then pushed A.L. down, held his hand over her mouth,

pulled down her pants and underwear, and licked her vaginal area for several minutes. *Id.* He stopped only when A.L.'s father called for her from the top of the stairs. *Id.* A.L. then got dressed and left the house with her father. *Id.*

A.L. did not mention the assault to anyone at the time. *Id.* Several weeks later, her father dropped her off at the Shaffers' house for babysitting. *Id.* When Vasquez asked A.L. to accompany him to the basement on that day, she refused, and a short time later told Don Shaffer about the earlier assault. *Id.* Don then told A.L.'s father, who called his partner to help him investigate the matter. *Id.* at *4. They discussed the event with A.L. and eventually called 911. *Id.* A.L. rode in an ambulance to the hospital, where she met with a social worker and received a physical examination. *Id.*

B. A state court jury convicted Vasquez, and the trial court sentenced him to life in prison; his conviction was affirmed on direct appeal.

Vasquez was indicted on two counts—rape of a child under the age of thirteen and kidnapping. *Vasquez*, 2001 Ohio App. Lexis 4910, at *1. The State offered several witnesses at trial, including A.L., her father, a social worker who interviewed the victim and investigated the case for the local children services department, two police officers who also investigated the matter, and Don Shaffer. Sixth Circuit Joint Appendix ("J.A.") 635–891. Given that there were no witnesses to the act itself beyond Vasquez's infant children, Vasquez's attorney, Don Butler, introduced no evidence and called no defense witnesses. J.A. 901. Instead, he used his cross-

examination of the State's witnesses to cast doubt on the State's theory of the case and on the victim's honesty.

The jury found Vasquez guilty on both counts. *Vasquez*, 2001 Ohio App. Lexis 4910, at *4. The trial court then sentenced him to life imprisonment for the rape charge and nine years imprisonment for the kidnapping charge, with the two sentences to run concurrently. *Id.*

Vasquez raised three issues—including ineffective assistance of counsel—on a delayed direct appeal, but the state appeals court affirmed his conviction on all counts. *Id.* at *5–12. Vasquez did not appeal this decision to the Ohio Supreme Court.

C. The Ohio courts denied post-conviction relief.

While his direct appeal was pending, Vasquez sought post-conviction relief in the state trial court. J.A. 193. (In the same court, he also sought leave to file a motion for new trial; his claims there were substantially similar to those in his post-conviction petition. J.A. 70.) Vasquez argued that Butler failed to investigate certain witnesses with favorable information and to present their testimony at trial. App. 149a–150a. He also argued that Butler failed to examine fully two notations on the run sheet from the Emergency Medical Service ("EMS") vehicle that transported A.L. to the hospital after she reported the abuse: "pt. st. 'he put it in' her" and "pt. st. she took a shower later that day." App. 150a & 157a–158a. Vasquez claimed generally that these witnesses and the EMS run sheet would have cast further doubt on A.L.'s capacity for truthfulness.

The state trial court held a three-day hearing on both the motion and the petition. App. 150a; J.A. 1010–1450. Vasquez called various witnesses, only three of whom are relevant to Vasquez's current habeas claim: Becky Shaffer; a friend of the victim's family named Tammy Salopek; and Salopek's daughter, Ashley Snyder, who was friends with the victim. App. 23a–24a. Butler also testified. J.A. 1088–1146.

After hearing this evidence, the trial court entered various findings of fact and conclusions of law supporting its holding that Butler did not render ineffective assistance. Among other things, the court noted that the witnesses identified were largely uncooperative at the time of trial and that Butler did not have a continuing duty to seek out witnesses who refused to assist the defense. App. 175a–176a. The trial court also found that Butler exercised proper professional discretion in not calling Becky Shaffer for various reasons: her husband was a State witness; she and Karra Vasquez's mother had told Butler that no family members would cooperate with the defense; and her testimony did not discredit the victim's account of the events. App. 176a. And the court found that the EMS run sheet was actually consistent with the victim's trial testimony that the "it" was Vasquez's tongue, and that the notation that she took a shower did not contradict her testimony. App. 177a–178a.

The state appeals court affirmed. After correctly identifying the *Strickland* standard of review for claims of ineffective assistance of counsel, the court reviewed all of the trial court's findings of fact and conclusions of law. App. 134a–140a. The

court noted that the testimony of the various witnesses did "not demonstrate [Vasquez's] counsel was ineffective" or "that the outcome of his trial would have been different had they been witnesses during his trial." App. 141a. Indeed, the court noted that "none of the defendant's witnesses offered any testimony to support defendant's theory of innocence." *Id.* The court, like the trial court, also held that there was "no evidence that [Vasquez's] counsel failed to fully defend [Vasquez] at trial." *Id.*

The Ohio Supreme Court declined to accept Vasquez's appeal. *State v. Vasquez*, 809 N.E.2d 1158 (Ohio 2004).

D. The federal district court granted Vasquez's petition for habeas corpus relief.

Vasquez then sought federal habeas relief, again claiming ineffective assistance of trial counsel. App. 66a. The district court declined to defer to the state post-conviction court's findings and instead made its own findings of fact regarding all of the witnesses that Vasquez identified. App. 74a. The court also determined that the state appeals court unreasonably applied the *Strickland* standard. App. 105a–106a. Then, based on its independent review of the facts, the district court held that Butler afforded ineffective assistance by failing to (1) meet sufficiently with Vasquez before trial and (2) conduct an adequate investigation. App. 104a–128a.

E. A divided Sixth Circuit panel affirmed the district court's grant of the writ.

The Sixth Circuit affirmed. App. 4a. The court first declined to defer to the state courts' legal analysis because it determined that the Ohio courts erred in defining and applying the *Strickland* standard. App. 14a–19a. The Sixth Circuit noted that the state trial court identified the correct two-part ineffective-assistance test, but that it then erroneously said that prejudice occurs only when "'the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" App. 15a (emphasis added by the Sixth Circuit).

The Sixth Circuit explained that the trial court's "would have been different" language departs from the correct formulation of *Strickland*'s second step, which defines prejudice as a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." App. 14a–15a (quoting *Strickland*, 466 U.S. at 694) (emphasis added by the Sixth Circuit). The Sixth Circuit added that the Ohio appeals court repeated the error by reciting the correct *Strickland* test but then asking whether the outcome of Vasquez's trial "'*would have been different*'" without counsel's errors. App. 15a (emphasis added by the Sixth Circuit). Because it found that these state court recitations ran "contrary to clearly established federal law," the Sixth Circuit engaged in a de novo review of Vasquez's ineffective assistance claims. App. 19a.

The Sixth Circuit also held that the trial court unreasonably determined the facts regarding the

three witnesses discussed above and the EMS run sheet. App. 22a–23a. It determined that the trial court improperly blended legal conclusions with the facts regarding whether Butler should have further inquired into Becky Shaffer's information, and found that a deeper investigation would have led to the information presented by Tammy Salopek and Ashley Snyder. App. 22a. The court also held that the trial court improperly elevated one interpretation of the information in the EMS run sheet over another instead of finding that the jury should have been able to hear both interpretations. App. 22a–23a. The court accordingly engaged in a de novo review of this evidence. *Id.*

Taking all of these considerations into account, the Sixth Circuit held that Vasquez received ineffective assistance because Butler conducted a deficient investigation and that, had he performed an adequate one, he could have cast serious doubt on the victim's capacity for truthfulness. App. 23a–38a.

In dissent, Judge Griffin noted that this Court's decisions *Visciotti* and *Jackson* foreclosed the majority's decision to withhold AEDPA deference on the Ohio courts' *Strickland* analysis. App. 42a–52a. Judge Griffin would have applied AEDPA deference to hold that the state courts reasonably applied *Strickland* to the facts of this case. App. 52a–65a.

The Sixth Circuit denied the Warden's request for panel rehearing or rehearing en banc. App. 1a–2a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision rests on the badly misguided premise that the Ohio appeals court's decision denying Vasquez's ineffective assistance of counsel claim is not entitled to AEDPA deference. That premise is wrong because this Court has made clear that state court decisions are entitled to deference when they recite the full, correct standard and thereafter use shorthand in referring to it, even if the shorthand is imprecise. Then, building on its mistaken premise, the Sixth Circuit conducted a de novo assessment of Vasquez's claim that disregarded the deference inherent in *Strickland*'s performance prong and found prejudice where none could possibly exist.

The decision warrants this Court's attention because it defies two settled precedents—themselves both summary reversals of outlying lower court decisions—and distorts the *Strickland* analysis to invalidate a conviction that the Ohio courts had reasonably upheld.

A. The Sixth Circuit defied this Court's clear precedents in declining to afford AEDPA deference to the Ohio appeals court's denial of Vasquez's *Strickland* claim.

The Sixth Circuit first erred when it refused to afford AEDPA deference to the Ohio appeals court's decision even though the state court correctly recited the *Strickland* standard. The resulting decision is an outlier among the circuits in withholding AEDPA deference from state court decisions that invoke the correct legal standard.

In reviewing Vasquez's ineffective-assistance claim on state post-conviction review, the Ohio court of appeals correctly recited the two-part *Strickland* test: "A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances and that there exists a reasonable probability that, but for such deficiency, the outcome of the trial would have been different." App. 134a. Rather than citing *Strickland* itself, the Ohio court cited *State v. Bradley*, 538 N.E.2d 373 (Ohio 1989), an Ohio Supreme Court decision that adopts the *Strickland* standard and discusses it at length, *id.* at 379–81.

After invoking the correct test, the Ohio appeals court extensively examined the evidence and findings from the trial court's three-day hearing on Vasquez's ineffective-assistance claim. App. 136a. The state appeals court also recited the trial court's conclusions that Butler did not violate a professional duty guaranteed by the Sixth Amendment because his performance was not ineffective. App. 136a–140a. The appeals court then itself concluded that Vasquez had not demonstrated that "the outcome of his trial would have been different" had the witnesses called in the post-conviction hearing testified during his trial. App. 141a. "On the contrary, the record shows that none of defendant's witnesses offered any testimony to support defendant's theory of innocence." *Id.* Thus, the court said, "none of . . . the witnesses who testified at the post-conviction hearing . . . would have changed the outcome of his trial." *Id.*

Vasquez argues that the Ohio appeals court botched *Strickland*'s prejudice prong because it asked whether the trial outcome "would have been different" or "would have changed" with additional witnesses, rather than whether a "reasonable probability" exists that the trial would have ended differently. But settled precedent establishes that the Ohio appeals court's use of imprecise shorthand references after reciting the correct standard is not "contrary to . . . clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1).

To begin with, *Woodford v. Visciotti*, 537 U.S. 19 (2002) (per curiam), is on all fours with this case. There, Visciotti claimed ineffective assistance of counsel, and the California Supreme Court "began its analysis of the prejudice inquiry by setting forth the 'reasonable probability' criterion, with a citation of the relevant passage in *Strickland*." *Id.* at 22. The Ninth Circuit concluded, however, that the California court improperly held Visciotti to a higher prejudice standard because the state court later "used the term 'probable' without the modifier 'reasonably.'" *Id.* at 23. This Court summarily reversed, explaining that the California Supreme Court had "painstakingly describe[d] the *Strickland* standard," and that "[i]ts occasional shorthand reference to that standard by the use of the term 'probable' without the modifier may perhaps be imprecise," but could not "be considered a repudiation of the standard." *Id.* at 23–24. In fact, the Court noted, its own opinions on occasion have used similar shorthand in referring to the *Strickland* standard. *Id.* at 24 (citing examples).

The Court then explained that the Ninth Circuit's "readiness to attribute error [by the California Supreme Court] is inconsistent with the presumption that state courts know and follow the law." *Id.* (citations omitted). "It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' which demands that state court decisions be given the benefit of the doubt." *Id.* (citations omitted).

Two years after deciding *Visciotti*, this Court issued another summary reversal that is likewise on all fours with this case. In *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam), the question again was whether a state court had altered the *Strickland* prejudice prong. A Tennessee court "began by reciting the correct *Strickland* standard," but "[t]he Sixth Circuit nevertheless concluded that the state court had actually applied a preponderance standard, based on three subsequent passages from its opinion." *Id.* at 654. In reversing, this Court explained that none of the three disputed passages in the Tennessee court opinion improperly changed the *Strickland* analysis. *Id.* at 654–55. Instead, this Court faulted the Sixth Circuit's "'[r]eadiness to attribute error" and reiterated that AEDPA "requires that 'state-court decisions be given the benefit of the doubt.'" *Id.* at 655 (quoting *Visciotti*, 537 U.S. at 24).

Until the decision below, the lower courts—including the Sixth Circuit—had shown little difficulty following *Visciotti* and *Jackson*. For instance, in *Urban v. Ohio Adult Parole Authority*, 116 F. App'x 617, 627 (6th Cir. 2004), the habeas petitioner objected that an Ohio appeals court had imposed a higher measure of proof under *Strickland*

by requiring him to show that, but for counsel's errors, the "outcome probably would have been different." The Sixth Circuit rejected that argument on the authority of *Visciotti* and *Jackson*. *Id.* Similarly, the Eighth Circuit relied on *Visciotti* to reject the government's argument that the district court applied a too-lenient standard in granting the habeas writ when it once referred to a "reasonable *possibility*" (rather than probability) that the outcome would have differed. *White v. Roper*, 416 F.3d 728, 732 (8th Cir. 2005) (emphasis in original). The Eighth Circuit noted that the district court had elsewhere stated the correct standard, and it therefore concluded that the lower court's isolated use of "the wrong word" did not amount to a "repudiation" of *Strickland*. *Id.* at 732–33.

The Sixth Circuit gave no sound reason for departing from these precedents and holding that the Ohio appeals court's decision was "contrary to" this Court's precedents.[1] Although Judge Griffin's dissent carefully explained that *Visciotti* and *Jackson* control this case, App. 44a–52a, the majority

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[1] The Sixth Circuit suggested in a footnote that the Ohio trial court opinion, as opposed to the state appeals court decision, might be the decision to look to for purposes of AEDPA review, because the state appeals court had applied an abuse of discretion standard rather than a de novo *Strickland* analysis. App. 16a–17a n.1. This footnote is wrong for the reasons explained in Judge Griffin's dissent, App. 39a–42a, but it is also irrelevant. The majority did "not find it necessary to resolve" the issue because it determined that the Ohio trial and appeals courts had made the same mistake; both decisions "applied law contrary to the *Strickland* standard by asking whether the outcome would have been different." App. 16a n.1. The Sixth Circuit's footnote on this point is therefore sheer dicta that does not affect the analysis here.

distinguished those cases on the ground that the Ohio appeals court's "incorrect words cannot be regarded as anodyne 'shorthand,' because they actually describe and apply a different standard." App. 18a–19a.

But the state court did not describe and apply a different standard. It described one standard—*Strickland*—correctly, and then it reasonably applied that standard to the facts of this case. App. 134a. To be sure, its later references to the prejudice prong omitted the "reasonable probability" language. But having shown that it was aware of the correct law, the court did not need continually to incant magic words to receive deference. On the contrary, it is entitled to a presumption that it followed the law. *Visciotti*, 537 U.S. at 24.

More to the point, the content of the Ohio appeals court's analysis demonstrates that it was applying the correct standard. In assessing prejudice, the court observed that "none of defendant's witnesses offered any testimony to support defendant's theory of innocence," and "[n]one of their testimony challenges the victim's account of the events leading to defendant's convictions." App. 141a. This is a run-of-the-mill *Strickland* prejudice analysis. It cannot fairly be said that the state court in this passage "appl[ied] a different standard" from *Strickland*. App. 19a.

But even if the Sixth Circuit is correct (and it is not), at most it establishes that the Ohio appeals court erred on step *two* of the *Strickland* test—the prejudice inquiry. The Sixth Circuit did not suggest that the Ohio appeals court erred in describing or applying *Strickland*'s *first* step—the deficient

performance prong. Nor would such a suggestion be sound. The state appeals court correctly identified this inquiry: "A defendant must demonstrate that trial counsel's performance fell below the objective standard of reasonable competence under the circumstances . . . ." App. 134a. And it properly applied this standard, stating that the absence of certain witnesses did "not demonstrate [Vasquez's] counsel was ineffective," and "find[ing] no evidence that his counsel failed to fully defend defendant at trial." App. 141a.

Because the Ohio appeals court correctly described and applied *Strickland*'s first step, it is entitled to AEDPA deference on that prong, even if deference is withheld on the prejudice prong. The Fourth Circuit took this very approach in *Moody v. Polk*, 408 F.3d 141, 146–47 (4th Cir. 2005). In that case, the state court correctly identified the first step of *Strickland*, so the Fourth Circuit reviewed that portion of its decision "under the deferential AEDPA standard." *Id.* at 147. "Because the state court applied the wrong standard to evaluate prejudice," however, the Fourth Circuit "d[id] not defer to its analysis of that prong but instead review[ed] it *de novo*." *Id.*; see also *Gray v. Branker*, 529 F.3d 220, 228–38 (4th Cir. 2008) (finding that state court decision was "contrary to" step two, but not step one, of *Strickland*).

Vasquez's *Strickland* claim fails simply because the state court reasonably found that Butler's performance was not deficient. See *Strickland*, 466 U.S. at 697. There is no need to reach the prejudice prong, let alone to conduct a de novo prejudice inquiry. But on either prong of the

analysis—and with or without AEDPA deference—Vasquez's ineffective-assistance claim fails, as the below discussion demonstrates.

B. The state courts reasonably concluded that Vasquez did not receive ineffective assistance of counsel.

The Sixth Circuit's decision to grant Vasquez habeas relief hinged entirely on its ability to wriggle free of the constraints of AEDPA, and it falls apart once the freedom to engage in a de novo review of the cold record is removed. The state trial court reasonably determined the relevant facts at issue, and the state appeals court reasonably applied *Strickland* to those facts in finding no ineffective assistance of counsel here.

1. Vasquez's ineffective-assistance claim turns on the potential testimony of three witnesses and one piece of evidence.

The Sixth Circuit relied on the potential testimony of three witnesses (Becky Shaffer, Tammy Salopek, and Ashley Snyder) and one piece of evidence (the EMS run sheet) to support its conclusion that Vasquez's counsel was ineffective. The trial court made several findings of fact about Vasquez's arguments in this regard, and those findings are entitled to deference as long as they are not unreasonable in view of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(2). The potential testimony and evidence is as follows.

Becky Shaffer. The trial court reviewed the various points to which Becky Shaffer would have testified had she been called. Shaffer stated that

she was in bed on the night in question and did not directly witness the assault. App. 165a. She rode with A.L. and A.L.'s father in the ambulance to the hospital on the night the rape was reported. *Id.* She observed that A.L. was not crying, and that A.L. had asked if she was going to be on television. *Id.* Shaffer stated that A.L. was laughing in the ambulance, but admitted that the laughter was prompted by the medical attendants' joking with A.L. App. 165a–166a. Shaffer noted that A.L. craved attention. App. 165a. She also observed that, at the hospital, A.L.'s father prompted A.L. to tell officials what had happened, and about a light in the basement where the assault occurred. App. 165a–166a. Shaffer also testified that she took her own son to the hospital to be examined because of concerns that Vasquez may have sexually abused him as well. *Id.*

The trial court found that Butler may have decided not to call Shaffer because her husband was a State's witness. App. 176a. The trial court also noted that Shaffer did not give a statement to the police regarding the incident. App. 166a. The trial court further found that Shaffer (Vasquez's sister-in-law) and the rest of Vasquez's family had, in Vasquez's own words, abandoned him when he was in prison. App. 160a & 175a–176a (noting that counsel was told that no one in the family would talk with him, and that the witnesses corroborated this fact); J.A. 1372 ("Q: Did you feel like you had been abandoned by your family? Vasquez: I guess you could probably call it abandonment, yes."). The trial court characterized Shaffer and other family members as having "refused to cooperate." App. 175a.

Tammy Salopek and Ashley Snyder. The trial court observed that Butler only would have discovered Tammy Salopek and Ashley Snyder if he had spoken to Becky Shaffer, and thus he can only be responsible for the absence of Salopek and Snyder as witnesses if his decision not to investigate Becky Shaffer was unreasonable. App. 175a. Salopek, a friend of A.L.'s father, would have provided additional testimony that A.L. lied on a few occasions, that she exaggerates and is not extremely trustworthy, and that she is melodramatic and can manipulate her father. App. 167a–168a. Snyder, Salopek's daughter and a friend of A.L.'s, also would have testified that A.L. lies and that she did not appear upset when Snyder saw her over a month after the assault. App. 169a.

The Sixth Circuit also noted that Snyder would have contributed to a defense theory that "A.L. had fabricated the story because Ashley Snyder had, earlier in the summer of 2000, been the victim of sexual molestation and had shared her story with A.L." App. 10a & 33a. The trial court limited its findings of facts regarding Snyder to those set forth above, though, and ruled that Snyder's testimony regarding other sexual matters was inadmissible on the basis that Vasquez failed to provide a proper foundation to support it. App. 169a. Further, the state appeals court did not mention the other sexual matters in its discussion of Snyder. App. 139a. The Sixth Circuit never disputed this foundational flaw; it just ignored it. Its reliance on those facts was therefore improper under § 2254(d)(2), and they should not enter into the analysis here.

EMS Run Sheet. The trial court found that Vasquez's counsel had knowledge of the EMS run sheet, which included notations that A.L. stated that "he put it in her" and that "she took a shower later that day." App. 157a–158a; J.A. 210. Vasquez argues that these notations contradicted A.L.'s testimony that this assault involved only oral sex, and that the notations cast doubt on A.L.'s father's claim that A.L. was asleep when they returned home on the night of the incident. App. 157a. The trial court found, however, that this notation was consistent with A.L.'s trial testimony that Vasquez "was licking [her] private spot," identified later as her vaginal area, and that his tongue touched her both inside and outside. App. 158a–159a & 177a. The court also concluded that nothing in the record precludes the possibility of A.L.'s showering later in the evening, without her father's knowledge. App. 159a & 177a–178a.

2. The state appeals court reasonably concluded that Vasquez's counsel was not ineffective for failing to contact these witnesses and for failing to use the EMS run sheet.

The Ohio appeals court's conclusion that Vasquez's counsel was not ineffective must stand as long as it is not an unreasonable application of this Court's precedents. 28 U.S.C. § 2254(d)(1). "[A]n unreasonable application is different from an incorrect one," *Bell v. Cone*, 535 U.S. 685, 694 (2002), and a federal court may not grant a writ under AEDPA simply because the court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law

erroneously or incorrectly," *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

The applicable precedent in this context is well-established. To prove ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, plagued by errors so serious that the attorney did not meet the meaning of the term "counsel" in the Sixth Amendment, and (2) that this performance prejudiced the defense to the degree that defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687. Judicial review of counsel's performance must be highly deferential at the outset; courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and the burden is on the defendant to prove otherwise. *Id.* at 689.

Taking the facts as a whole, the state appeals court (and, for that matter, the state trial court) concluded that counsel was not ineffective, finding that this information did not in any way support Vasquez's claims of innocence or his theory of the case. App. 141a. This decision was reasonable, and thus entitled to AEDPA deference, on both prongs of the *Strickland* test.

a. Counsel's performance was not deficient.

Trial counsel was not deficient for failing to investigate and call additional witnesses and for not using the EMS run report.

Investigation of Witnesses. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. And, of course, reasonableness must be measured "from counsel's perspective at the time." *Id.* at 690.

With respect to Becky Shaffer, Vasquez's counsel, Butler, faced a number of obstacles. Vasquez admitted that his family—which included Shaffer—had abandoned him. J.A. 1371–72. Vasquez himself had tried but failed to contact Shaffer on multiple occasions. J.A. 1371. Shaffer's mother confirmed that no family members would cooperate when Butler tried to contact them at Vasquez's request. App. 175a. And the value of Shaffer's potential testimony was further diminished by the fact that she had been asleep when the crime occurred. App. 165a.

Additionally, Butler was appointed late in the process—six weeks after Vasquez's arraignment. App. 156a. Butler advised Vasquez at that time to waive his speedy trial rights so that Butler could have more time to prepare the defense. J.A. 1130. Vasquez refused this request based on a conversation he had with another inmate, who suggested that the State would potentially dismiss the case against him based on speedy trial laws. J.A. 1356–58. Butler strongly advised him to reconsider, and told him that the short period of time would make the investigation more difficult: "I was stressing to him that the case was not going to run out of time, the Court wasn't going to let it run out of time, but if he

signed the speedy trial waiver maybe his family or his wife, they would come around." J.A. 1131. Nonetheless, Vasquez remained firm in his decision.

This Court has been clear that counsel's performance must be viewed in the context of all of the facts in a particular case, and that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, 466 U.S. at 690–91.

Butler, faced with an uncooperative family and his client's refusal to waive his speedy trial rights to give Butler more time to persuade the family to aid the defense, chose to focus instead on investigating other matters in search of additional impeachment evidence. This Court has held that such a strategy is reasonable. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.* at 691. And Vasquez's decision not to waive his speedy trial rights must have some effect here; he chose to gamble on the possibility that the State might dismiss his case, and he must be held accountable for the consequences of that choice.

Hindsight—in the form of Shaffer's statements at the post-conviction proceeding—reveals that, had Butler pressed her individually, he might have gotten her to testify. But this Court has steadfastly refused to undermine counsel's decisions based on

the "distorting effects of hindsight." *Id.* at 689. And AEDPA amplifies the deference built into *Strickland.* The Sixth Circuit therefore had no basis for overturning the Ohio appeals court's reasonable conclusion that Butler's performance was not ineffective for failing to interview Shaffer. And, given the fact that Shaffer was the key to discovering Salopek and Snyder, Butler was not ineffective for failing to discover them.

EMS Run Sheet. The Sixth Circuit also found that counsel's performance was deficient because he failed to introduce the EMS report. The Sixth Circuit focused primarily on A.L.'s statement in the report that Vasquez "put it in her." App. 29a–30a. Counsel testified at the post-conviction proceeding that he read this statement as referring to Vasquez's tongue penetrating A.L.'s vagina:

> Q. Because you would have assumed, having received that particular EMS run sheet as part of the discovery from the prosecutor, that "he put it in her" referenced his tongue?
>
> A. Right. I had no information that it was referring to anything other than the tongue.

J.A. 1138. This understanding arose from A.L's consistent testimony throughout these proceedings that Vasquez performed oral sex on her. See, e.g., App. 158a–159a (A.L. testified that Vasquez performed oral sex on her, and that he touched both inside and outside her vagina with his tongue).

Yet the Sixth Circuit remained incredulous that Butler could have thought that the "it" in

question referred to Vasquez's tongue. The circuit court believed instead that the "more plausible" reading of the statement was that "it" referred to Vasquez's penis. App. 30a & 32a–33a n.3. Based primarily on this reasoning, the court found that counsel rendered deficient performance.

Nothing in the record indicates, however, that A.L. *at any point* suggested that Vasquez engaged in vaginal intercourse with her. Nor did any witness raise that possibility. It is therefore hard to fault counsel for reading the ambiguous term "it" in the only way supported by the facts of this case.

The state appeals court correctly recognized that counsel's reading of the EMS run sheet does not amount to deficient performance; the Sixth Circuit badly overreached by overturning that reasonable decision.

b. Vasquez was not prejudiced by any deficiency.

Even if counsel's performance was deficient (and it was not), Vasquez is entitled to relief only if the state appeals court unreasonably determined that he did not suffer any prejudice from this deficiency. The record reveals that no prejudice exists, for several reasons.

First, the main theme Vasquez seeks to highlight through the testimony of Shaffer, Salopek, and Snyder is that A.L. often lied, and that she did so to get attention. But Butler repeated that theme throughout the trial. A.L. admitted on cross examination that she had lied for attention before. See J.A. 665 ("Q. Have you ever done that [lie] before? A. Yes. Q. All right. Have you done that

often? A. Kind of.") & 666 ("Q. And when you tell them [others] something happened but you know it didn't happen, can you tell us why you do that? A. (Indicating). Q. I mean, is it your way of having fun? A. Yeah."). Further, Butler heavily underscored these admissions in closing argument. J.A. 921, 927. Any further evidence of A.L.'s failures to tell the truth would have been cumulative of evidence already before the jury. Introducing other witnesses to confirm what the victim herself has admitted would not have significantly strengthened the defense, and no prejudice inures from the omission of such cumulative evidence. See *Wong v. Belmontes*, 130 S. Ct. 383, 388–91 (2009).

Second, any non-cumulative evidence that Shaffer would have contributed has to be read with the knowledge that she would have admitted on cross examination, as she did in the post-conviction proceeding, that she took her own child to the hospital to determine whether Vasquez had sexually abused him as well. App. 165a–166a. Such a damning fact could have undercut Vasquez's entire case, and thus Shaffer would have had to offer extremely strong evidence to make up for the risk she posed. See *Darden v. Wainwright*, 477 U.S. 168, 185–86 (1986) (finding no ineffective assistance when counsel did not present evidence that would have opened the door to other, more damaging evidence).

Moreover, as both the state trial and appeals courts noted, none of the remaining evidence from these three witnesses or the EMS run sheet is particularly strong. Though Shaffer testified that A.L. was laughing in the back of the ambulance after she reported the assault, she later revealed that A.L.

did so in response to joking by the ambulance attendants designed to put her at ease. App. 165a–166a. Shaffer's claim that A.L.'s father prompted her to speak with various officials at the hospital, which the Sixth Circuit took to indicate that her story was untrue, App. 33a, was similarly revealed to be de minimis. In fact, A.L.'s father only prompted her to mention a detail about a light in the basement that she had omitted in her discussion, App. 166a; J.A. 1288, which is hardly out of the ordinary.

The only potentially valuable piece of evidence from Shaffer would be her statement that A.L. asked about being on TV in the ambulance. App. 165a. But the meager benefit from that shred of evidence would not have overcome the extreme prejudice that would have stemmed from Shaffer's admission that she worried that Vasquez had abused her son.

The potential testimony from the other two witnesses fares no better. Snyder would have added that A.L. did not appear upset over a month after the assault occurred, App. 169a, but that testimony is not particularly probative of any fact at issue. And the only other evidence Salopek would have contributed is that A.L. was often melodramatic and was able to manipulate her father. App. 167a. But these traits, which may fairly be applied to many adolescents, do not shed any serious light on the key issues in this case, and are at best further cumulative evidence of A.L.'s admitted tendency to lie or exaggerate.

As for the EMS run sheet, the Sixth Circuit suggested that it "demonstrates a specific and non-trivial difference in [A.L.'s] story over how the attack took place: the run-sheet implies [A.L.] reported that

there was penetration by Vasquez's penis in contradiction to the evidence at trial." App. 32a. But that "significant difference" exists only if the ambiguous statement is removed from the context of the allegations at trial—that Vasquez performed oral rape.

The only fact remaining is that the EMS run sheet states that A.L. said that she took a shower the night of the assault while her father testified at trial that she went to sleep when they got home. App. 158a–159a. These two statements, which are not mutually exclusive (she could have woken up later in the night and taken a shower), reflect a tangential difference that, at best, nibbles at the fringes of the State's case.

At bottom, then, Vasquez presents a variety of information, much of it cumulative, some of it only marginally relevant, and the rest outweighed by the prejudices that would have arisen had it been admitted. Such matters do not rise to the level of *Strickland* prejudice, and they certainly do not support a finding that the state courts unreasonably applied *Strickland*.

CONCLUSION

For the above reasons, the Court should grant the State's petition and summarily reverse the Sixth Circuit's decision.

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