No. 15-580

In The
Supreme Court of the United States

BRIAN COOK, WARDEN,

Petitioner,

v.

THOMAS J. BARTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit properly overcome the merits presumption where the state-trial decision plainly invoked res judicata as a bar and further stated in dicta that it would not resolve *Brady* materiality?

2. Did the Ohio Court of Appeals' decision that was limited to res judicata strip the trial court's ambiguous merits discussion of its preclusive effect, rendering it unadjudicated under § 2254(d)?

3. Did the Ohio Court of Appeals' decision that was limited to res judicata indicate a rejection of the ambiguous merits discussion on a state-law basis, precluding AEDPA deference to that rejected merits discussion?

4. Did the Ohio Supreme Court's unexplained denial of jurisdiction trigger the last-reasoned-decision rule, requiring the Sixth Circuit to look through to the Ohio Court of Appeals' default decision and to presume the Ohio Supreme Court's affirmance rested on default only?

5. Did the Ohio Court of Appeals' default decision, as the last-reasoned one, indicate a rejection of the ambiguous merits discussion on a state-law basis and preclude AEDPA deference to that rejected merits discussion?

6. Was the trial court's merits discussion contrary to *Brady* where (*i*) it expressly declined to speculate whether the suppressed evidence affected the trial outcome, and (*ii*) injected the *Strickland* performance prong into the *Brady* test?

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INTRODUCTION

The Petition should be denied because the Sixth Circuit applied the settled merits presumption to determine whether the state trial court issued an alternative-merits decision – finding that the presumption was overcome because the state decision itself indicated default only. Even assuming an alternative-merits decision by the trial court, the Ohio Court of Appeals' decision, which was exclusive to procedural bar, eliminated the lower merits decision under preclusion stripping and because Ohio law precludes dicta from forming a judgment. Moreover, the Sixth Circuit properly applied the last-reasoned-decision rule. The Ohio Supreme Court denied jurisdiction by an unexplained order, requiring the Sixth Circuit to look through to the Ohio Court of Appeals' default decision and to presume that the Supreme Court rested its denial on default as well.

In his Petition, the Warden argues the Petition should be granted due to circuit conflicts. His first alleged conflict is whether a state court "has made an alternative-merits holding" subject to 28 U.S.C. § 2254(d) deference. There is no conflict. To the contrary, the circuits uniformly apply a merits presumption that can be overcome if the record and state decision indicate that a default was more likely. No circuit has identified the Warden's alleged conflict.

His second conflict regards § 2254(d) deference when a higher court decides a claim on different grounds than a lower court. But there is no conflict

involving our case. The Ohio Court of Appeals and trial court decided the claim on the same ground – res judicata. Also, Ohio law does not recognize dicta as a judgment – which eliminated the trial court's merits discussion as a different ground. Also, the law of judgments removes a lower decision as a valid ground when the higher decision relies on a different ground. Applied here, the trial court's merits discussion was removed from the final judgment by the Ohio Court of Appeals' default-only decision. Thus, this case is beyond the conflict because there was a single, res-judicata decision – and not a higher court deciding on different grounds than the lower court.

COUNTERSTATEMENT OF THE CASE

Respondent, Thomas "Jim" Barton, does not dispute the accuracy of the Statement of the Case presented by Petitioner. Nevertheless, Petitioner's Statement of the Case omits several key facts that are crucial for a complete understanding of the issues raised in his Petition.

A. ***Gary Henson provided the sole substantive evidence of Respondent's guilt.*** The only witness to provide substantive testimony of Barton's guilt was elicited through career criminal Gary Henson. But Henson did not have first-hand knowledge of the events leading to Vickie Barton's death. Everything he learned about the plot and the killing itself was through conversations that he had with his

half-brother, William Phelps. Doc. 18-1, Page ID #1374-76, 1394. Phelps committed suicide a few months after Vickie's death. Doc. 18-1, Page ID #1667. Phelps supposedly told Henson about being hired by Barton to burglarize the Barton home and to shoot a gun over Vickie's head in order to frighten her. Doc. 18-1, Page ID #1375-76. The State theorized that Vickie would be so scared that she would insist on relocating from her farm on the outskirts of Springboro, Ohio, and into the city itself, in order to render Barton eligible to become the chief of police. But no ordinance required the police chief to reside in the city, and the chief who was hired a few years after the murder, in 1997, did not live within the city. Doc. 18-1, Page ID #1159, 1166.

Although there was marginal circumstantial evidence that Barton and Phelps knew each other – the two had been seen at the same time at the same restaurant 18 to 20 years ago, Doc. 18-1, Page ID #1330; the disputed 911 recording, Doc. 18-1, Page ID #1098, 1779, 1996 – there was no direct evidence of Barton's involvement other than through the statements made by Henson in court regarding what his brother had told him. There was no admission by Barton, no forensic evidence tying him to the murder, and no other witness testified about any incriminating conversation with Barton. The entirety of Henson's testimony implicating Barton consisted of hearsay, although the trial court had ruled that the hearsay statements were admissible because they were a statement against penal interest. Ohio R. Evid. 804(B)(3).

Doc. 11-1, Ex. 14. Although trial counsel raised the hearsay issue prior to trial, Doc. 11-1, Ex. 5, he failed to again challenge the hearsay at trial, as mandated under Ohio law. Doc. 11-2, Page ID #30.

B. ***The quality of Henson's testimony was questionable.*** Henson was an admitted career criminal who had been convicted of a plethora of felonies, including falsification, receiving stolen property, burglary, robbery, and theft. These convictions both preceded and post-dated Vickie's murder. Doc. 18-1, Page ID #1367-68, 1402.

Between the years of Vickie's murder and Henson's trial testimony, his version of events regarding his knowledge of the murder was fluid. Despite numerous police contacts after the murder, he mentioned nothing about his knowledge of the murder or of a police officer's so-called involvement in that murder. Two years later, he told the police that Phelps had been involved in the murder but left out any mention of his own involvement and said nothing about Barton. It was not until 2003 that he mentioned, for the first time, that Barton may have been involved. Doc. 18-1, Page ID #1445-51, 1656-57.

Omitted from Petitioner's Petition is the fact that Henson's memory was hypnotically refreshed prior to his testimony. Pet. App. D, 60a, 99a-101a; Pet. App. G, 129a-130a. Trial counsel did not raise any issue regarding this, even though Ohio law allows a hearing in order to challenge the methodology and reliability

of the hypnosis. *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1988).

Also omitted from Petitioner's Petition is that, after Vickie's death, when Phelps told Henson what happened, they spoke in a boyhood code that only they could understand. Doc. 18-1, Page ID #1460. Henson had not been able to accompany Phelps to the burglary because he had been arrested on unrelated charges and was incarcerated at the time of the conversation between him and Phelps. Doc. 18-1, Page ID #1442.

C. ***Lack of forensic evidence.*** None of Phelps' statements to Henson could be corroborated. There was no proof that Phelps was ever inside the Barton home. There were no fingerprints from Phelps, fibers, DNA, or any other substance that could link Phelps to the Barton household. DNA was taken from Vickie's breast, where she had been bitten, but it came back to an unknown individual. Doc. 18-1, Page ID #1037, 1040-42.

A search of Phelps' home similarly revealed no link. No effects or evidence from the Barton household was found inside Phelps' home. Doc. 18-1, Page ID #1350. Phelps' wife testified for the State, but she did not say that Phelps had told her anything about the Barton break-in or murder. Doc. 18-1, Page ID #1336-57.

D. ***Post-trial evidence raising further doubt about Barton's guilt.*** Shortly after the trial, two cell mates of Henson contacted Barton's attorney and

ultimately testified in a Motion for New Trial that, while the trial was pending, Henson had told them that Henson had no information that Barton had anything to do with the rape and murder of Vickie, that Barton was innocent, and that the authorities had pressured him into falsely testifying. Doc. 11-1, Ex. 16 (Affidavit of Danny Ray Clark); Doc. 11-1, Ex. 18 (Affidavit of James Hodge). The jury did not hear this evidence because the state courts, relying on Ohio R. Crim. P. 33(A)(6), held that this evidence did not disclose a "strong probability" that a new trial would change the result, and that this evidence was merely cumulative to the trial evidence. Doc. 11-1, Ex. 24, Page ID #214; Doc. 11-1, Ex. 34, Page ID #398.

E. ***Postconviction proceedings.*** Pending trial, the State purported to turn over all *Brady* evidence to Barton. (*Brady v. Maryland*, 373 U.S. 83 (1963)). Included among this material was one police report from 1993, documenting a burglary committed at the residence of a James and Ann Kelly. Doc. 11-2, Ex. 39, Page ID #561. As in the Barton case, the Warren County Cold Case Squad reinvestigated this break-in in 2004, and learned of Henson's alleged connection to that break-in. Henson had told a story to the police that was remarkably similar to his claim about the Barton break-in, which was that Jim Kelly had hired Henson and Phelps to stage a burglary in order to scare his family into moving into the city. Despite the repeated denials of the entire Kelly family, the police threatened Jim Kelly with obstruction of justice if he would not admit his involvement and testify against Barton. Kelly refused. Page ID #581. Ultimately, the

police dropped the matter. But the disclosed *Brady* material consisted only of the 1993 burglary report. The State suppressed Henson's confession to burglarizing the Kelly home, that Henson claimed he was hired by James Kelly to stage the burglary to scare his wife into moving, and the Kelly family's adamant denials of this conspiracy.

Neither state court that reviewed Barton's post-conviction *Brady* claim resolved the merits, opting to invoke res judicata.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit applied settled law in holding that the trial court did not issue a merits decision.

As this court has observed, it is tricky to discern if a state court decided a federal claim on procedural default or the merits.

> It is not always easy for a federal court to apply the independent and adequate state ground doctrine. State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly. In such cases, it is often difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference.

Coleman v. Thompson, 501 U.S. 722, 732 (1991). Yet there is nothing *new* about this task. Over two

decades ago, the *Coleman* court announced the governing test. In *Coleman*, the Court evaluated whether the Virginia Supreme Court had denied a federal claim on a default or the merits. *Id.* at 727-29. It held that the plain-statement rule applied to this issue. Thus, a habeas court will presume a merits determination if the state decision fairly appears to rely on federal law or is interwoven with it. *Id.* at 734-35. But that presumption is inapplicable if the state decision contains a plain statement of its reliance on procedural bar. *Id.*

Since *Coleman*, this court has continued to apply a plain-statement analysis in habeas cases to ambiguous default decisions. *See*, *e.g.*, *Ylst v. Nunnemaker*, 501 U.S. 797, 802-03 (1991); *Walker v. Martin*, 562 U.S. 307 (2011) (finding no merits presumption because the California Supreme Court plainly indicated a default by its citations). In this way, the court has affirmed that the plain-statement analysis best accommodates state autonomy over procedural rules for their courts, the opportunity for state courts to correct their own errors regarding federal claims, and for vindicating federal rights. Moreover, this court extended the *Coleman* rebuttable presumption to state summary orders and decisions that address fewer than all federal claims. *Harrington v. Richter*, 562 U.S. 86 (2011) (summary orders); *Johnson v. Williams*, 133 S.Ct. 1088, 1091 (2013) (fewer than all claims). This extension shows that the *Coleman* presumption survived AEDPA's enactment and

applies today. *Jimenez v. Walker*, 458 F.3d 130, 146 (2d Cir. 2006).

In this case, the Sixth Circuit used a plain-statement analysis. It first acknowledged the presumption that the state trial court adjudicated the *Brady* claim on the merits. Pet. App. 15a-16a. But it declined to invoke the presumption because the decision included a plain statement of res judicata as an adequate and independent bar, and because the ambiguous merits discussion supported the view that the state trial court had refused to resolve the merits. Pet. App. 16a-19a.

Specifically, the Sixth Circuit observed that the trial court began its analysis with res judicata, invoked it, and deemed by the *Brady* claim "barred" by Ohio law. Pet. App. 16a. Regarding the incidental merits discussion, it observed that the state court indicated its "reservations" about *Brady* admissibility, but expressly declined to decide admissibility or *Brady* materiality. Pet. App. 18a. And by characterizing these additional musings as dicta at Pet. App. 18a – rather than an alternative-merits holding – the Sixth Circuit was acknowledging an Ohio rule that forbids "incidental comments" from creating an alternative-merits judgment. *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505-06, 83 N.E.2d 393 (1948). Therefore, the Sixth Circuit overcame the merits presumption because the state-trial decision and Ohio law supplied reasons to believe that the holding was most likely limited to default. *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011).

In his Petition, however, the Warden argues that the circuits are in conflict regarding whether a state court "has made an alternative-merits holding" subject to § 2254(d) deference. Pet. 17. But there is no conflict. To the contrary, each circuit identified by the Warden as part of the conflict uses the same merits presumption that the Sixth Circuit did. *See Childers v. Floyd*, 736 F.3d 1331, 1334 (11th Cir. 2013) (en banc); *Douglas v. Workman*, 560 F.3d 1156, 1177-78 (10th Cir. 2009); *Clark v. Perez*, 510 F.3d 382, 394 (2d Cir. 2008) (applying *Jimenez v. Walker*, 458 F.3d 130, 145 (2d Cir. 2006) for the *Coleman* merits presumption and plain-statement rule); and *Robinson v. Louisiana*, 606 F. App'x 199, 203 (5th Cir. 2015). And each circuit likewise holds that the presumption is overcome if the record and state decision indicate that a merits adjudication was unlikely. *See Childers*, 736 F.3d at 1334-35; *Douglas*, 560 F.3d at 1178-79; *Clark*, 510 F.3d at 394; and *Robinson*, 606 F. App'x at 205-06.

This uniform test produces fact-specific holdings that cannot be generalized, as the Warden has done, into a habeas conflict. For example, *Childers* sustained the merits presumption for a Confrontation Clause claim because the Florida evidentiary rule was coextensive with the Sixth Amendment, so resolving the state claim resolved both claims on the merits. 736 F.3d at 1334-35. *Douglas* sustained the merits presumption for a prosecutorial-misconduct claim because the state-court decision failed to invoke default with a plain statement. 560 F.3d at 1178.

However, *Clark* overcame the merits presumption for a right-to-counsel claim because the state-court decision clearly invoked default and signaled against an alternative-merits adjudication by stating "*were the court to consider* defendant's claim. . . ." 510 F.3d at 394 (emphasis added). And *Robinson* overcame the merits presumption for a right-to-counsel claim because Louisiana courts historically applied waiver to postconviction claims not raised on direct appeal, the record indicated a waiver, and the state decision invoked default but was unclear about addressing the merits. 606 F. App'x at 204-06.

Viewed properly, the Warden's cases show a circuit-wide fidelity to the merits presumption and the method for overcoming it – where the conclusions vary only because the courts sometimes disagree about how to interpret the record, state decision, or state law. *See*, *e.g.*, *Robinson v. Louisiana*, 606 F. App'x 199, 203 (5th Cir. 2015) (dispute over the record and interpretation of the state decision); and *Childers v. Floyd*, 736 F.3d 1331, 1334 (11th Cir. 2013) (en banc) (dispute over the scope of a Florida evidentiary rule).

Finally, none of the Warden's cases have recognized his alleged conflict, and the Warden never suggested a conflict until after the Sixth Circuit's decision granting the writ.

II. Even if the trial court decided the *Brady* claim on procedural bar with an alternative-merits holding, the Sixth Circuit correctly found no merits adjudication because the Ohio Court of Appeals' later res-judicata decision: (*i*) stripped the alternative-merits decision of preclusive effect and (*ii*) barred AEDPA review of the trial decision because the Ohio Court of Appeals' state-law decision indicated disagreement with the trial court under Ohio law.

A federal claim is adjudicated on the merits under § 2254(d) when the state decision resolves that claim with res-judicata effect. *See Robinson v. Beard*, 762 F.3d 316, 324 (3d Cir. 2013); and *Junta v. Thompson*, 615 F.3d 67, 72 (1st Cir. 2010). An important aspect of the instant case is that the Ohio Court of Appeals denied the *Brady* claim under res judicata without addressing the merits at all. Pet. App. 12a. This implicated preclusion stripping. Under the law of judgments, a higher court's decision that is limited to default strips a lower court's alternative-merits decision of its res-judicata effect. *See* Restatement (Second) of Judgments § 27 cmt. o (1982). Again, without res-judicata effect, a claim has not been adjudicated on the merits under § 2254(d).

The leading AEDPA case on preclusion stripping is *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009). There, the state trial court denied two federal claims on the merits, and dismissed one for procedural bar.

Id. at 114. But the Pennsylvania Supreme Court deemed all of the claims defaulted. In habeas, the parties disputed if AEDPA deference applied to the claims. *Id. Thomas* held that the Pennsylvania Supreme Court's procedural-bar holding stripped the trial court's merits decision of any preclusive effect, rendering it unadjudicated under § 2254(d). *Id.* at 115.

The preclusion-stripping doctrine existed as a common-law backdrop to Congress' enactment of the phrase "adjudicated on the merits" in § 2254(d). No circuit has rejected it to create a conflict. And the habeas treatise writers have adopted it. Brian R. Means, *Federal Habeas Manual: A Guide To Federal Habeas Corpus Litigation* (2012 Ed.), § 3:19.

For his part, the Warden attempts to place preclusion stripping within a broad conflict regarding § 2254(d) deference when a higher court decides a claim on different grounds than a lower court. Pet. 22 and 26-28. But the Warden's general framing obscures a finer, second point. The specific grounds of the decisions matter. Thus, a habeas court is barred by federalism from deferring to a lower court's merits adjudication if the higher court rejects the claim on state-law grounds indicating disagreement with the trial court.

Williams v. Alabama, 791 F.3d 1267 (11th Cir. 2015) was decided on this point, and distinguished the Warden's conflict cases along with it. There, the Alabama trial court rejected an ineffective-assistance

claim on the merits, but the Alabama Court of Appeals invoked issue preclusion – a different state ground – and dismissed for want of jurisdiction. *Id.* at 1271. In habeas, Alabama argued, inter alia, that the trial court's merits decision required deference. But the Eleventh Circuit disagreed. Noting that the Alabama Court of Appeals limited its decision to a state default that indicated disagreement with the trial court's merits treatment, it held that federalism precluded deference. *Id.* at 1273-74. The lower decision was rejected on state-law default, which the federal habeas court could not undo by resurrecting the lower decision for AEDPA purposes.

Williams then distinguished the Warden's conflict cases, stating that both *Loggins v. Thomas*, 654 F.3d 1204 (11th Cir. 2011) and *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009) " * * * simply hold that when state trial and appellate courts make alternative, but consistent, merits determinations, we accord AEDPA deference to both decisions." 791 F.3d at 1274.

As such, the Warden errs in suggesting a conflict that includes this case. His conflict cases all required trial-court deference where the appellate court issued an *alternative, but consistent, merits decision* – which did not happen here. *See Hammond v. Hall*, 586 F.3d 1289, 1330 (11th Cir. 2009) (extending AEDPA deference to trial court's *Strickland*-performance decision and the alternative, but consistent, Georgia Supreme Court prejudice decision); *Loggins v. Thomas*, 654 F.3d 1204, 1218-20 (11th Cir. 2011) (extending deference to trial court's merits decision and the consistent

merits decision from the Alabama Court of Appeals on the same claim); and *Loden v. McCarty*, 778 F.3d 484, 494-95 (5th Cir. 2015) (extending deference to trial court's presumed-merits decision on both *Strickland* prongs and the alternative, but consistent, Mississippi Supreme Court performance decision). On the other side, his cases all rejected trial-court deference and confined their review to the *last-reasoned merits decision* – likewise absent here. *See Thomas v. Clements*, 797 F.3d 445, 446 (7th Cir. 2015) (confining AEDPA review to the last-reasoned merits decision on *Strickland* performance, although the trial court addressed both prongs); and *Barker v. Fleming*, 423 F.3d 1085 (9th Cir. 2005) (confining AEDPA review to the last-reasoned merits decision from the Washington Supreme Court on a *Brady* claim, with an unknown treatment below).

To include this case in the proposed conflict is to ignore the fact that the Ohio Court of Appeals limited its decision to a state-law default indicating disagreement with the trial court. Pet. App. 12a. The disagreement was the dicta doctrine, as the Sixth Circuit correctly suggested. Pet. App. 18a. Recall that the trial court began its analysis with res judicata, invoked it, and deemed the *Brady* claim "barred" by Ohio law. Pet. App. 11a. Regarding the balance of the merits discussion: Ohio law forbids dicta from becoming a judgment, *Katz v. Enzer*, 29 Ohio App.3d 118, 122, 504 N.E.2d 427 (1985), forbids an appeal from dicta, *Walther v. Central Trust Co., N.A.*, 70 Ohio App.3d 26, 33-34, 590 N.E.2d 375 (1990), and defines

dicta as incidental remarks and commentary beyond the holding. *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 505-06, 83 N.E.2d 393 (1948). So the Ohio Court of Appeals indicated its disagreement with the trial court by ignoring the irrelevant merits discussion, in keeping with Ohio's dicta law.

Deference was therefore unwarranted to the trial court's ambiguous merits discussion because the Sixth Circuit could not disregard the Ohio Court of Appeals' *state-law rejection of it*. *Williams v. Alabama*, 791 F.3d 1267, 1274 (11th Cir. 2015); *cf. Porter v. McCollum*, 130 S.Ct. 447 fn. 6 (2009) (no AEDPA deference to the state trial court's stray comment on *Strickland* performance because it was dicta).

III. Even if the trial court decided the *Brady* claim on procedural bar with an alternative-merits holding, the Sixth Circuit correctly applied the last-reasoned-decision rule (*i*) to confirm that the Ohio Supreme Court's unexplained denial rested on default only, and (*ii*) to confirm that the Ohio Court of Appeals' default decision rejected the alternative-merits holding on a state-law basis.

In *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), this court first applied the last-reasoned-decision rule to determine if an unexplained state decision rested on default or the merits. Later that same term, this court explained the rule's rationale for default cases: "State procedural bars are not

immortal, however; *they may expire because of later actions by state courts*. If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might have otherwise been available." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (emphasis added). This rationale applies equally to a lower merits discussion that expires when a higher court rejects the merits on a state-law basis. *See Williams v. Alabama*, 791 F.3d 1267, 1274 (11th Cir. 2015). In each of these circumstances, the last-reasoned-decision illuminates how the state courts finally resolved a claim.

The Warden again attempts to place the last-reasoned-decision rule within a broad conflict regarding § 2254(d) deference when a higher court decides a claim on different grounds than a lower court. Pet. 24-26. And, again, his argument fails due to its high level of generality. The Warden correctly notes that the circuits are in conflict about extending the last-reasoned-decision to rule to *explained* decisions *beyond procedural bar*. Thus, he cites to a line of cases that apply the rule to explained decisions, without use of the look-through presumption, where the appellate and trial courts both addressed the merits. *Thomas v. Clements*, 789 F.3d 760, 766-67 (7th Cir. 2015); and *Barker v. Fleming*, 423 F.3d 1085, 1092-93 (9th Cir. 2005) (explained merits decisions from Washington Supreme Court and intermediate court). And he identifies a contrary line that ignores the rule for explained decisions where the appellate

and trial courts both addressed the merits. *Hammond v. Hall*, 586 F.3d 1289, 1330 (11th Cir. 2009) (explained merits decisions from Georgia Supreme Court and trial court); and *Loden v. McCarty*, 778 F.3d 484, 494-95 (5th Cir 2015) (explained merits decisions from Mississippi Supreme Court and trial court). The Warden and Judge Easterbrook are right that this court should eventually address the rule's extended application to explained decisions beyond procedural bar. *See Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015) (suggesting the rule's inapplicability to explained merits decisions that address different components of a claim).

But that is not our case. Here, we have an *unexplained* decision from the Ohio Supreme Court denying discretionary review, Pet. App. 124a, where the look-through to the Ohio Court of Appeals' last-reasoned-decision required the Sixth Circuit to presume the Supreme Court's denial was limited to default. *Ylst*, 501 U.S. at 716-17. This is the traditional use of the rule, not implicating its extension to explained decisions beyond procedural bar from the Warden's conflict cases.

IV. Even if the Sixth Circuit erred regarding the merits presumption, preclusion stripping, the higher court's rejection of the lower merits discussion under state law, and the last-reasoned-decision rule, habeas relief was warranted because the trial court's alternative-merits decision was contrary to established *Brady* law.

"A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). In this case, after holding the *Brady* claim barred by res judicata, the state trial court described Barton's impeachment evidence and stated, "[a]gain, the defense invites the Court to speculate that a different result might have occurred had this information been presented. . . ." Pet. App. 11a. It then declined to speculate on the trial outcome. *Id.* This is contrary to *Brady*, which specifically requires a court to handicap whether the undisclosed evidence affected the trial outcome. *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

Also, a state-court decision is contrary to clearly established law when it identifies and applies the wrong constitutional standard. For example, a state decision that applied the test for the voluntary waiver of trial rights in the context of an ineffective-assistance claim was contrary to established law. *Lafler v. Cooper*, 182 L.Ed.2d 398, 413 (2012). In this

case, the state trial court similarly conflated its *Brady* analysis with an ineffective-assistance claim, stating that, " * * * [t]rial counsel was faced with myriad options as to how to proceed in impeaching Gary Henson's testimony. To the extent that some strategies were pursued while others were ignored or rejected, the Court has no way of knowing and will not speculate on." Pet. App. 12a. Injecting trial counsel's performance was contrary to *Brady* under § 2254(d).

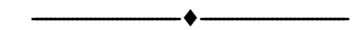
V. This case represents a poor vehicle: its facts are unique and Ohio's failure to adjudicate the *Brady* claim on the merits represents an exceptional failure that AEDPA remedies.

This case involved the trial court's res-judicata bar coupled with an ambiguous merits discussion, followed by the appellate decision limited to default and an unexplained denial of jurisdiction from the Ohio Supreme Court. Not even one of the Warden's cases fits this fact-pattern, proving the case to be too unusual to justify this court's attention.

Also, this case represents an exceptional failure from the Ohio courts. By invoking res judicata for the postconviction *Brady* claim, the Ohio courts held that Barton had to present on direct appeal the very impeachment evidence the State suppressed from him. This was so untenable that the Warden declined to argue default in his Sixth Circuit brief and at oral argument. Doc. 43.

The Warden lists numerous reasons why a jury could have disbelieved Henson's testimony, listing both internal and external inconsistencies, thereby implying that the Kelly evidence would not have made an appreciable difference. But the enumerated instances of less than credible behavior – lengthy prison record, inconsistent statements about the Barton break-in, less than forthright conversations with the police – are common impeachment arguments that exist in many criminal trials. The impeachment of Henson regarding the Kelly break-in, however, applies to the very heart of the State's theory in *this* case. Not only did Henson claim to have orchestrated a break-in to the Barton household in order to scare the wife into moving from the country into the city, but he made the identical claims regarding the Kelly household. The entire Kelly family adamantly denied any such collusion, even in light of police pressure, and ultimately the police dropped the case. Pet. App. B, 10a-11a. If Henson could be discredited involving his involvement in the Kelly break-in, it would be that much more likely for him to be discredited regarding the Barton break-in. But the jury never had the opportunity to hear about the Kelly break-in because of the suppressed *Brady* evidence.

In the end, though, these arguments are fact-specific and not worthy of this court's attention.



CONCLUSION

For the foregoing reasons, Thomas Barton opposes the Petition for Writ of Certiorari.

Respectfully submitted, this the 18th day of December, 2015.

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