No. 15-580

In the Supreme Court of the United States

BRIAN COOK, WARDEN,

Petitioner,

v.

THOMAS BARTON,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Brian Cook, Warden

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The state trial court's opinion rejecting Thomas Barton's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), provided reasons why the claim was *procedurally* barred and why it *substantively* failed. Pet. App. 135a-36a. The appellate court invoked the procedural bar, but was silent on the claim's substance. Pet. App. 132a. The Sixth Circuit held that the way in which these courts wrote their opinions permitted it to avoid the deferential standards that apply to claims "adjudicated on the merits in State court proceedings" under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254(d).

The Sixth Circuit's decision warrants review because it implicates two conflicts. *First*, circuit courts have adopted competing clear-statement rules to decide when a state court's substantive analysis counts as a decision "on the merits" under § 2254(d) if the court also invokes a procedural bar. Some, like the Sixth Circuit, narrowly apply § 2254(d)'s standards to only state-court decisions that "make[] clear" that they have "definitively" resolved the *substance*. Others broadly apply those standards to all state-court decisions that do not make clear that they have rested solely on *procedural* grounds. *Second*, circuit courts disagree over when they may ignore the first in a series of state-court decisions. Some, like the Sixth Circuit, hold an appellate court's silence against the State, ignoring a lower court's reasoning unless it is incorporated on appeal. Others apply § 2254(d) broadly, refusing to treat appellate silence as appellate rejection of an unaddressed ground.

In response, Barton argues that there is no conflict on the first issue and that this case does not implicate the conflict on the second. He is mistaken.

I. BARTON FAILS TO REBUT THE CONFLICT OVER WHEN § 2254(D) APPLIES TO A STATE COURT'S SUBSTANTIVE ANALYSIS IF THAT COURT ALSO INVOKES A PROCEDURAL BAR

As the Petition illustrated, the Court should grant review because circuit courts disagree over when they must apply § 2254(d)'s standards to a state court's substantive analysis of a claim if the state court also rejects the claim on procedural grounds. Pet. 17-22. While some treat any decision that does not explicitly rest on procedural grounds *alone* as a decision on the merits, others apply a contradictory rule requiring a clear statement that a decision invoking a procedural bar *also* rests on substantive grounds. *Compare Loggins v. Thomas*, 654 F.3d 1204, 1219-20 (11th Cir. 2011), *with Fulton v. Graham*, 802 F.3d 257, 265 (2d. Cir. 2015). Barton's responses to this conflict are mistaken.

A. Barton begins (Opp. 7-8) by discussing *Coleman v. Thompson*, 501 U.S. 722 (1991), a pre-AEDPA case that answered the opposite question: If a state-court decision predominately rests on the rejection of a constitutional claim's substance, when should a federal court hold that the decision also invoked an alternative procedural bar? *Id.* at 732-41. In that context, this Court adopted a clear-statement rule presuming the rejection of a claim's substance alone and requiring state courts to speak clearly if they intend to invoke a *procedural* bar. *Id.* at 734. Here, by contrast, the state court clearly invoked a procedural bar, and the question is whether its alternative *substantive* analysis qualifies as a decision on the merits under § 2254(d). *Coleman* says nothing on that.

Instead, that question is answered by *Harrington v. Richter*, 562 U.S. 86 (2011), and *Johnson v. Williams*, 133 S. Ct. 1088 (2013). As a dissenting judge from the Sixth Circuit's approach has noted, these cases tell courts to "presume that state courts adjudicate federal claims on their merits in ambiguous situations." *Frazier v. Jenkins*, 770 F.3d 485, 506 (6th Cir. 2014) (Sutton, J., concurring in part and concurring in the judgment). This case presents just such a situation. All agree that the trial court substantively analyzed Barton's *Brady* claim, Pet. App. 18a, but the Sixth Circuit held that § 2254(d) should not apply because the trial court did not state *unambiguously* that it had rejected the claim on its substance.

B. Barton next argues that there is no conflict because all circuit courts start with the merits presumption required by *Richter* and *Johnson*. Opp. 9-10. That starting point is true, but irrelevant. The circuit conflict does not involve whether a merits presumption *initially* applies. Nor does it involve whether "an alternative merits determination to a procedural bar ruling is entitled to AEDPA deference." *Stephens v. Branker*, 570 F.3d 198, 208 (4th Cir. 2009); *see Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989). Instead, a circuit conflict exists over *how* to determine whether a state court has, in fact, made alternative substantive and procedural rulings in *ambiguous* situations. By focusing on the wrong question, Barton fails to address the actual conflict.

Most notably, Barton largely ignores the Eleventh Circuit's decision in *Loggins*, a decision that presents the conflict's other side in clear terms. *Loggins* held that even if the state court had applied a procedural bar, a single sentence on the merits triggered

§ 2254(d). *See* 654 F.3d at 1215-18. It did so because of the Eleventh Circuit's rule that § 2254(d)'s standards apply unless a state court "*clearly* state[s] that its decision was based *solely* on a state procedural rule." *Id.* at 1220 (quoting *Childers v. Floyd*, 642 F.3d 953, 969 (11th Cir. 2011)) (emphases added). In other words, the Eleventh Circuit will always apply § 2254(d)'s standards to a state court's substantive analysis in the face of ambiguity over whether that analysis was meant to be an alternative ruling. *See also, e.g.*, *Douglas v. Workman*, 560 F.3d 1156, 1177-78 (10th Cir. 2009) (applying § 2254(d) when it was ambiguous whether a plain-error ruling rested on substantive analysis or on procedural grounds).

Barton cannot deny that the Sixth Circuit, among others, applies the opposite rule. The Sixth Circuit would disregard as "dicta" the same ambiguous language that the Eleventh Circuit would treat as a merits determination triggering § 2254(d). Pet. App. 18a. That is because the Sixth Circuit *rejects* § 2254(d)'s standards for a state court's substantive analysis in the absence of clear language stating that the state court intended to make a "definitive" holding on the merits. Accordingly, these cases cannot be reconciled as merely engaging in a fact-bound application of the *same* test. Opp. 10-11. The cases are applying two *different* tests—more specifically, two different "clear-statement rules." Some circuit courts say ambiguous substantive analysis triggers § 2254(d); others say it does not.

Finally, Barton's reliance on state law does not undermine this conflict. Opp. 9. His assertion that the Sixth Circuit invoked state-law standards for what qualifies as "dicta" finds no basis in the Sixth

Circuit's decision, which nowhere cites the relevant state-law standards. Pet. App. 17a-19a. That was for good reason. This case involves a federal question: What does § 2254(d)'s use of "on the merits" mean? It is unlikely that Congress meant to incorporate each State's individual "holding v. dicta" rules to resolve it. Instead, as this Court has noted, that phrase covers any state-court decision that addresses "the intrinsic right and wrong of the matter." *Johnson*, 133 S. Ct. at 1097. Regardless, Barton's argument that § 2254(d) incorporates a state-by-state approach for deciding what qualifies as "on the merits" itself goes to the merits of the question presented here; it does not provide a basis for denying review.

II. BARTON FAILS TO MINIMIZE THE CONFLICT OVER THE EFFECT OF A LATER STATE-COURT DECISION ON AN EARLIER ONE

The Petition highlighted a second circuit conflict over whether § 2254(d)'s deferential standards apply to a lower court's decision when a higher court affirms the opinion on separate grounds. Pet. 22-28. Citing Judge Easterbrook's concurrence in *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015), Barton concedes that a conflict exists. Opp. 18. But he claims that this case does not implicate that conflict. His claims are unpersuasive. The Warden is not the only one to think so. When acknowledging that this circuit conflict "belongs on [this] Court's plate," Judge Easterbrook identified *this very* case as part of the conflict. *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc).

A. The State-Law Preclusive Effect Of A Decision Is A Question For The Merits, Not A Basis For Denying Review

Before addressing the conflict, Barton addresses the merits. He argues that a state trial court's resolution of a claim based on one ground cannot be considered "on the merits" under § 2254(d) if this resolution would not be given preclusive effect in state court because an appellate court resolved the claim on a different ground. Opp. 12-16. This preclusion-stripping argument provides no basis for denying review, and is mistaken in any event.

To begin with, Barton's argument provides no basis for denying review. It is an argument that goes to the merits of the question presented: Does "on the merits" in § 2254(d) require a lower court's reasoning to have claim or issue preclusive effect? *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), suggested that it did. *Id.* at 115-16. But the courts on the other side of the split—those that have applied § 2254(d)'s standards to a lower court's analysis that was not discussed on appeal—have not even asked, let alone answered, whether the lower court's analysis would have been entitled to preclusive effect. *See, e.g.*, *Loden v. McCarty*, 778 F.3d 484 (5th Cir. 2015); *Collins v. Sec'y of Pa. Dep't of Corrs.*, 742 F.3d 528, 545-46 (3d Cir. 2014); *Loggins*, 654 F.3d at 1217-18; *Hammond v. Hall*, 586 F.3d 1289, 1330-31 (11th Cir. 2009). Barton's preclusion-stripping argument in no way reconciles the various cases that make up the split on this second question, and that split illustrates the need for this Court's review.

Regardless, Barton is mistaken. Contrary to his suggestion, "preclusive effect" and "on the merits" are

not synonymous. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) ("[I]t is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect."). His primary authority for that conclusion, the Third Circuit's *Horn* decision, does not demonstrate otherwise. While it cites *Semtek* as tying the definition of "on the merits" to the preclusive effect of a state-court decision, 570 F.3d at 114, *Horn* omits *Semtek*'s statement that that definition "is not necessarily valid." 531 U.S. at 501-02.

This Court's precedent confirms that a state court decision need not have preclusive effect to qualify as "on the merits." In *Richter* the Court held that a decision is on the merits even when it is "unaccompanied by explanation." 562 U.S. at 98. And in *Johnson* it extended that to a decision addressing some, but not all, of a petitioner's claims. 133 S. Ct. at 1091. Yet silence is not commonly given issue-preclusive effect in state court when a judgment could have rested on several independent grounds. 18 Wright & Miller et al., *Federal Practice and Procedure* § 4420 (2d ed. 2014) (issue preclusion is limited to issues that were actually decided). But, as *Richter* and *Johnson* hold, it *will* be treated as a merits determination under AEDPA.

Finally, the Sixth Circuit did not adopt Barton's view. Instead, it "rel[ied] entirely on [this] Court's decision in *Ylst* [*v. Nunnemaker*, 501 U.S. 797 (1991)]." Pet. App. 20a. It read *Ylst*'s "last-reasoned decision" rule to preclude consideration of the state trial court's rejection of the merits of Barton's claim. *Id.* That interpretation—not questions about preclusive effect—lies at the heart of the circuit conflict.

B. Barton Fails To Distinguish The Conflict Cases

"Whether the first in a sequence of state-court decisions should be ignored has divided the courts of appeals." *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc). While acknowledging that a conflict exists, Opp. 17, Barton says that this case does not implicate it. In particular, he argues that the conflict is limited to whether § 2254(d) should apply to a state trial court's substantive ground when an appellate court resolves the appeal on an alternative substantive ground. Here, by contrast, the appellate court resolved the appeal on an alternative *procedural* ground, not a *substantive* one.

This conflict, however, extends to both appellate postures. Barton's argument merely takes sides with the Third Circuit's *unexplained* middle approach to the conflict. Pet. 26-27. That court originally held that federal courts should not apply § 2254(d)'s standards to a lower court's substantive rationales when a higher court resolves the appeal on procedural grounds. *Horn*, 570 F.3d at 114-15. It then held that § 2254(d)'s standards should apply to a lower court's substantive analysis when the appellate court ruled on a different substantive ground. *Collins*, 742 F.3d at 545-46. *Collins*, however, made no effort to explain the reasons for these differing approaches. *Id.* Nor could this distinction be grounded in the preclusion principles on which *Horn* relied. As Barton's own sources suggest (Opp. 12), when a trial court resolves "two issues, either of which standing independently would be sufficient to support the result," but the appellate court "upholds one of these deter-

minations as sufficient and refuses to consider whether or not the other is sufficient," issue preclusion would not apply to the unaddressed appellate issue. Restatement (Second) of Judgments § 27 cmt. o. In the preclusion context, the application of that rule does not depend on whether the unaddressed issue could be characterized as "substantive" or "procedural."

Unsurprisingly, therefore, no other circuit has drawn this distinction. Their logic instead indicates that these circuits will either *always* consider a lower court's substantive analysis, Pet. 23-24, or *never* consider it, Pet. 24-26. Indeed, the Eleventh Circuit's *Loggins* decision already found this distinction irrelevant. That court held it would defer to a lower state court's substantive analysis, even if the ambiguous higher-court decision had affirmed on procedural grounds. 654 F.3d at 1218.

Barton responds that *Loggins* was narrowed by *Williams v. Alabama*, 791 F.3d 1267 (11th Cir. 2015). Opp. 13-14. Not so. *Williams* reaffirmed that "when state trial and appellate courts make alternative, but consistent merits determinations, we accord AEDPA deference to both decisions." *Id.* at 1274. But it held that when "a state trial court issues a decision that the state appellate court does not agree with, we consider only the state appellate court's decision." *Id.* It thus did not alter the Eleventh Circuit's basic rule that AEDPA deference is due "not only to the adjudications of state appellate courts but also to those of state trial courts that have not been overturned on appeal." *Loggins*, 654 F.3d at 1217. It merely found that the state appellate court in that case had overturned a lower court's decision on appeal by *explicitly*

signaling its disagreement with that decision. The lower court had reached the merits, but the higher court held that the state courts lacked jurisdiction (and so authority) to do so. *Williams*, 791 F.3d at 1273-74. *Williams* did not interpret mere *silence* as disagreement. *See id.* And unlike the question at issue there, most procedural defaults (like the one at issue here) do not implicate a court's jurisdiction.

If anything, that this case involves alternative procedural and substantive holdings makes it a *better* vehicle with which to address the split. Pet. 32-33. It provides the Court with a chance to address *both* whether a federal court may look to a lower court's reasoning if a higher court resolves the case on an alternative ground *and* whether it matters if the higher court's grounds were procedural.

III. BARTON'S VEHICLE FLAWS DO NOT EXIST

Barton's remaining arguments why the Court should deny review lack merit. He suggests that the state trial court's substantive analysis would flunk § 2254(d)'s deferential standards. Opp. 19-20. As the Petition noted, however, this case asks only whether § 2254(d)'s standards apply; it does not ask whether Barton can satisfy them. Pet. 33. If the Court finds § 2254(d) applicable, it should simply remand for the circuit court to apply its standards in the first instance (as it did in *Johnson*). 133 S. Ct. at 1099. Regardless, Barton is wrong. The magistrate judge, for example, would have rejected his claim *de novo*. Pet. App. 54a. That the magistrate judge would have denied the petition after an independent review is a strong signal that the state trial court's reasons for rejecting the claim were at least *reasonable*. *Id.*

Barton also unfairly criticizes the state courts' holding that res judicata barred his *Brady* claim because he could have raised the claim on direct appeal. Opp. 20. That conclusion was analogous to a finding that Barton's *Brady* claim failed on its merits. As the magistrate judge noted, Pet. App. 91a-94a, many courts hold that *Brady* does not require the government to "furnish a defendant with information which . . . with any reasonable diligence, he can obtain himself." *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977); *United States v. Steward*, 513 F.2d 957, 960 (2d Cir. 1975) ("The government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness. . . ."). By concluding that Barton could have brought the alleged *Brady* claim on direct appeal, the state courts were simply holding that Barton could have discovered the evidence at issue had he exercised reasonable diligence. That is the same conclusion that the magistrate judge reached. Pet. App. 94a.

Finally, this case does not represent "an exceptional failure from the Ohio courts." Opp. 20. Far from it. As the trial court noted when it denied Barton's motion for a new trial, the case "was fully and fairly tried to a jury that could not have been any more diligent or hard working." Doc.11-1, Ex.24, PageID#216. Barton's appeal and petition for post-conviction relief also both received careful consideration and were rejected only after a thorough analysis by the reviewing courts. *See* Pet App. 70a-75a, 125a-132a, 133a-136a.

CONCLUSION

The Court should grant the petition for certiorari.

MICHAEL DEWINE
Attorney General of Ohio

ERIC E. MURPHY*
State Solicitor
**Counsel of Record*
SAMUEL C. PETERSON
PETER T. REED
Deputy Solicitors
M. SCOTT CRISS
Assistant Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eric.murphy@
ohioattorneygeneral.gov

Counsel for Petitioner
Brian Cook, Warden

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