No. 16-257

IN THE
Supreme Court of the United States

DAX HAWKINS,

Petitioner,

v.

JEFFREY WOODS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Rules

REPLY BRIEF FOR PETITIONER

The State does not dispute that both circuit splits are ripe for review. It argues only that this case is a poor vehicle for deciding AEDPA deference questions. The State is mistaken. And its recharacterizations of the state court decisions only highlight the serious dangers of using a deferential standard when there is nothing to which a federal court can properly defer. The petition should be granted.

Without Petitioner's detailed affidavit, his ineffective-assistance claim had the same chance of success as the two-guns-but-only-one-gunman defense that trial counsel adopted instead of investigating Petitioner's alibi: none. When the state appellate court denied his constitutional claim on its "merits," it did not consider the affidavit. Several statements in the opinion make clear that the court did not even realize there *was* a detailed affidavit. It was so clear, in fact, that the State *also* did not realize an affidavit had been submitted until the case was before the Sixth Circuit. State Answer, District Court D.E. 5, at 21, 24 ("Answer").

Thus, this case squarely presents both questions dividing the circuits: whether a state court decision is an adjudication "on the merits" under AEDPA when the court fails to consider critical evidence or to allow that evidence to be developed; and whether AEDPA allows federal courts to hypothesize alternative rationales for finding critical evidence unpersuasive where the state court's reasoned decision provides an insufficient basis for rejecting the claim.

It is telling the lengths the State goes in unsuccessfully evading both questions. The State asks this Court to skip past a reasoned decision considering and denying Petitioner's Sixth Amendment claim without mentioning his affidavit (the October 2006 "merits" ruling) and instead "focus on" a terse order issued six months earlier (in April 2006) denying him the chance to develop a record for that claim. Opp. 4. Never mind that the order merely said the state appellate court was unpersuaded of the need to remand "at this time," Pet. App. 82a—wording it uses to allow it to revisit a remand denial at the merits stage. And although there was only one *reasoned* decision that denied the claim on its "merits," the State insists *the same court* made "two merits rulings" on the *same claim*. Moreover, the State says to disregard the final decision—which the State admits was based solely on the trial record, not the affidavit. Opp. 11, 17.

The State prefers the April order as the "adjudication on the merits" because "a summary decision, unaccompanied by explanation" is "entitled to full AEDPA deference." Opp. 3-4; *see Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). But that rule has no application here. The reasoned October opinion considered and denied the ineffective-assistance claim, and the district court and the Sixth Circuit deferred to it.

Because that ruling was made without considering the claim's most important support, the two deference questions are front and center. As the State observes, anyone looking at just the trial record would be excused for believing trial counsel had good reason to abandon the alibi defense. After all, the witnesses were uncooperative and Petitioner acquiesced in counsel's decision. But Petitioner's offer of proof instead

points out that trial counsel's excuse was bogus; in reality, his investigator couldn't be bothered with interviewing the key witnesses one at a time. The affidavit also brings to light counsel's failure to gather or present video evidence and telephone records supporting the alibi. That vital information, which the state court missed, repudiates the notion that sound strategy led counsel to drop the alibi defense and instead place Petitioner at the scene as the second culprit where the shooting consisted of two gunmen firing two guns from two different locations at the two victims. The affidavit also refutes Petitioner's purported acquiescence: He learned of counsel's failures too late to change course.

Because the state appellate court failed to consider the only evidence directly supporting Petitioner's claim, the two questions challenging the propriety of AEDPA deference are squarely presented.

I. THE QUESTIONS PRESENTED UNDISPUTEDLY WARRANT THIS COURT'S REVIEW.

The State does not dispute that the courts of appeals are intractably divided on the questions presented. Opp. 3, 10; *see* Pet. 15-18. This Court should resolve those disagreements by clarifying AEDPA deference where a state court fails to consider critical evidence in rejecting a petitioner's claim. As explained below, this is the right case for doing so.

II. THE STATE'S VEHICLE ARGUMENT FOCUSES ON THE WRONG STATE COURT DECISION.

A. The State *admits* that the Michigan appellate court did not consider Petitioner's affidavit when it denied his Sixth Amendment claim on the "merits." Opp. 11 ("the state appellate court in its October 2006

opinion limited its review to the trial-court record, without the affidavit"); Opp. 17 (that ruling was a "reasoned opinion denying his ineffective-assistance claims based solely on the trial court record"). The state court's failure to consider the affidavit is the reason both questions are presented.

Seeking to avoid this point, the State argues that the denial of Petitioner's procedural motion in April 2006 was a *sub silentio* ruling on the merits. That would mean "two merits rulings by the state appellate court"—one considering only the affidavit, the other considering just the trial record. Opp. 17. And, so goes this argument, the remand denial is "the decision at issue" here. Opp. 15; *see also id.* at 3-4, 10-11, 16-17. But Michigan appellate courts do not split merits rulings up so artificially.

The first place to look for proof that Michigan appellate courts do not adjudicate a claim on the merits when they deny a remand motion is Michigan appellate court decisions. The same court that denied Petitioner's claim has emphasized, using nearly identical language, that an "order denying [a] remand motion . . . 'for failure to persuade the Court of the necessity for a remand at this time'" was "not . . . a decision on the merits of the issue." *People* v. *Bush*, No. 311543, 2015 WL 5442777, at *5 (Mich. Ct. App. Sept. 15, 2015) (per curiam); *cf.* Pet. App. 82a (remand denied "for failure to persuade the Court of the need to remand at this time").

As one would expect, the use of "at this time" does not even mean that the state court has conclusively decided against an evidentiary hearing. Merits briefing gives the court a better picture of the issue for

which remand is requested. *See*, *e.g.*, *People* v. *Parker*, No. 279246, 2008 WL 5197087, at *4 (Mich. Ct. App. Dec. 11, 2008) (per curiam) ("As noted previously, defendant's motion to remand for a *Ginther* hearing was denied by this Court 'for failure to persuade this Court of the need to remand at this time.' This Court *remains* unpersuaded of the need for a remand.") (emphasis added); *People* v. *Newman*, No. 165208, 1999 WL 33439648, at *3 (Mich. Ct. App. July 2, 1999) (per curiam) (merits decision states: "We have again reviewed defendant's motion" for remand that was previously denied "'for failure to persuade of the need for remand at this time.'").[1]

The State's reliance on *Nali* v. *Phillips*, 681 F.3d 837 (6th Cir. 2012), also misses the mark. *See* Opp. 13. *Nali* rejected the State's failure-to-exhaust argument, because if the "ineffective assistance of trial counsel claim was considered on the merits, notwithstanding the fact it was presented in a procedurally incorrect manner, there is no exhaustion problem." 681 F.3d at 851-52 (the claim "was adjudicated

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[1] The fact that remand requests in Michigan overlap with the merits does not make initial rulings irrevocable. *See* Opp. 13 (quoting *People* v. *Moore*, No. 303750, 2013 WL 1500886 (Mich. Ct. App. Apr. 11, 2013) (per curiam)). The salient point in *Moore* is that the bar for remand is quite low: whether "a factual record is required for appellate consideration of the issue." 2013 WL 1500886, at *1 (citing Mich. Ct. R. 7.211(C)(1)(a)). In *Moore*, the court remanded for a hearing on an ineffective-assistance claim (based, as here, on failure to meet with witnesses), because it could not "conclude with certainty that the jury would not have found a reasonable doubt" if testimony by a defendant's siblings were to match up with the offer of proof in his remand request. *Id.* at *4.

on the merits" because the Michigan Supreme Court denied discretionary review without invoking procedural default, even though the petitioner did not "raise[] the claim in the procedurally appropriate manner"). The issue here—whether reasoned state appellate decisions get deference if the court failed to consider critical evidence—simply didn't come up in *Nali*. And even if *Nali* is read to apply here, it merely confirms the Sixth Circuit's position on one side of each circuit split.[2]

The State's new theory also does not fit with how the Sixth Circuit decided this case. It evaluated "the last reasoned state-court decision"—not multiple decisions—"to address the [ineffective-assistance] claim." Pet. App. 6a; *see also* Pet. App. 7a ("[T]he *reasoned* state-court decision *expressly* rejecting Hawkins' claims that trial counsel performed deficiently was an adjudication on the merits for purposes of § 2254(d).") (emphasis added). This Court's decisions likewise apply AEDPA's text—"the adjudication of the claim" and "a decision" in the singular (28 U.S.C. § 2254(d))—by looking to "*the last* reasoned state-court decision to address" a claim. *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094 n.1 (2013) (emphasis added); *see also*, *e.g.*, *Greene* v. *Fisher*, 132 S. Ct. 38, 45 (2011) (same); *Barker* v. *Fleming*, 423 F.3d 1085,

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[2] The same is true for *Marion* v. *Woods*, 2016 WL 4698278 (6th Cir. Sept. 8, 2016). Additionally, *Marion* reinforces that Michigan appellate courts leave remand decisions to be finalized after a chance to consider the merits. The remand motion there was made "after the briefs were submitted." *Id.* at *1. That helps explain why the order denying remand for "failure to persuade" apparently *did not* include an "at this time" qualifier. *Id.* at *2.

1093 (9th Cir. 2005) ("the Supreme Court describes AEDPA review as applying to a single state court decision"). "Had Congress intended" instead for federal courts to "give deference to an amalgamation of adjudications" on the same claim, "'it could have used different language.'" *Thomas* v. *Clements*, 789 F.3d 760, 767 (7th Cir. 2015) (citation omitted).

B. The State does more than concede that the merits panel denied the ineffective-assistance claim after considering only the trial record. *See* Opp. 11, 17. It also does not dispute that the panel did this without even realizing there was an affidavit. The opinion itself leaves scarcely a doubt that this is why the affidavit went unmentioned.

For one thing, it would make no sense for the court to comment on the absence of "evidence in the lower court record" supporting Petitioner's ineffective-assistance claim, Pet. App. 78a, if it realized he had submitted an affidavit supporting a remand to develop that record. It made no sense to comment on the fact that "a *Ginther* hearing was never conducted," Pet. App. 77a (footnote omitted), without acknowledging that Petitioner was the only party who asked for one. And it made no sense to have said in April 2006 that the court was not persuaded "at this time" of the need for a remand without so much as mentioning the remand option in the October 2006 opinion—the only other time when the court might be persuaded differently.

That is not what Michigan courts do when they are aware of an offer of proof supporting remand. In *People* v. *Lawrence*, No. 299498, 2011 WL 5866928

(Mich. Ct. App. Nov. 22, 2011) (per curiam), for example, the merits opinion stated that the "[d]efendant's claim depends on matters asserted in his affidavit," which was not in the trial court record. *Id.* at *3. In rejecting the ineffective-assistance claim, the opinion stated that "[e]ven if the assertions in defendant's affidavit are true, they show that defense counsel made a strategic decision" on the relevant point. *Id.*; *see also*, *e.g.*, *People* v. *Brewer*, No. 242764, 2004 WL 315182, at *2 (Mich. Ct. App. Feb. 19, 2004) (per curiam) (reviewing affidavits submitted in support of *Ginther* hearing when deciding merits of ineffective-assistance claim).

Contrary to the State's suggestion, Michigan's court of appeals takes the sensible approach of "presum[ing] that all allegations contained in . . . [a defendant's] affidavit are true" "for purposes of [the] appeal." *People* v. *Cornwell*, No. 301660, 2012 WL 1521387, at *3 (Mich. Ct. App. May 1, 2012) (per curiam). Here, that would have meant discussing whether specific witnesses or exhibits from Petitioner's affidavit could have raised a reasonable doubt. *Cf. Moore*, 2013 WL 1500886, at *1-4. But the "merits" decision never once even mentioned the existence of Petitioner's affidavit, reinforcing that the court simply did not consider it in "the adjudication of" his ineffective-assistance claim. 28 U.S.C. § 2254(d).[3]

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[3] Although unnecessary to granting review, the State's brief misses the significance of the affidavit's absence from the Rule 5 record. The State says the federal district court, but not the state court, erred in thinking Petitioner didn't file an affidavit. Opp. 8. But the district court's error was possible only because *the State*

III. THE STATE'S MERITS ARGUMENTS CONFIRM THAT CERTIORARI IS APPROPRIATE.

The State's other vehicle argument is that Petitioner would lose "[e]ven if AEDPA deference did not apply." Opp. 18. That argument is premature because "when § 2254(d) does not bar relief," "federal habeas courts may 'take new evidence in an evidentiary hearing.'" *Brumfield* v. *Cain*, 135 S. Ct. 2269, 2276 (2015) (citation omitted). The State's own reasoning vividly illustrates why Petitioner's claim cannot be dismissed without giving him that opportunity.

This Court has recognized that the "trial record" "in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis," because the record will not reveal "the reasons for" counsel's actions at trial or because there will be "no evidence of alleged errors or omissions, much less the reasons underlying them." *Massaro* v. *United States*, 538 U.S. 500, 505 (2003). Rather than acknowledge that the purpose of the affidavit was to solve this problem, the State asks the Court to assume that all efforts to fill the record's void would have failed.

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had no idea there was one. Answer 21, 24. For reasons unexplained, "the state appellate court" did not even include the document in the Rule 5 materials transmitted for the habeas proceeding. Opp. 11-12 n.4. The State's attempted explanation—that the state court failed to send along "attachments to pleadings" (*id.*)—is unsupported by anything from a state court employee and contradicted by the fact that the Rule 5 record was missing more than just attachments. *See* Mot. to Remand 4-5, *Hawkins* v. *Rivard*, No. 11-1147 (6th Cir. filed Nov. 18, 2013). Thus, there is good reason to doubt that the affidavit was considered even in April 2006.

For example, the State argues it "is not deficient performance to refrain from calling witnesses who are uncooperative," Opp. 19, but that excuse fails if counsel did not even try to speak with the alibi witnesses, a fact Petitioner learned only after the first day of trial. Pet. App. 88a.[4]

The State also notes "the absence of any evidence showing deficiency" for failure to investigate phone records and surveillance video supporting the alibi. Opp. 20-21. But that is precisely the point—counsel's failure to investigate meant this evidence never surfaced in the trial record. The State also fails to note that the phone records were exculpatory only under an alibi defense, by showing that the victim (Taylor) stopped calling Petitioner after finding a different customer that evening.[5] When defense counsel abandoned the alibi defense by admitting that Petitioner took part in the drug sale, the value of those records vanished.

It is also a red herring that counsel could have "reasonably chose[n] to discredit" Taylor's testimony. Opp. 19 n.5. That strategy only made sense *in conjunction with* an alibi defense, where competent counsel tries to show that Taylor lied to avoid retaliation

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[4] The State also improperly asks this Court to make credibility determinations by arguing that Petitioner "had a change of heart" a year later, on "direct appeal," about counsel's decision to abandon the alibi defense. Opp. 6. That "fact" is wrong in any event. Petitioner identified counsel's failings on the record when he returned to court for sentencing. *See* Pet. App. 93a; District Court D.E. 6-10, at Page ID# 723-24.

[5] The petition mistakenly reverses the roles: Taylor and the other victim (Riley) were trying to sell drugs.

by the real shooter. There was no explaining, under the defense that *was* pursued, why Taylor would be truthful about selling drugs to Petitioner but untruthful about Petitioner being the second shooter, especially when the physical evidence showed that *both* drug buyers must have fired weapons.

The State had it right the first time when it told the federal court that ineffective-assistance claims can be reviewed based on more than the trial record if only a defendant requests a *Ginther* hearing. *See* Answer 21 (arguing that the state court limited review to the "trial record" "because Petitioner failed to properly preserve the issue by timely moving for a Ginther hearing"); *id.* at 8, 12. Petitioner's *pro se* offer of proof, drafted in prison, did not need to *prove* his claim; it merely had to show the need for "development of a factual record" so he *could* prove it. *See* Mich. Ct. R. 7.211(C)(1)(a)(ii); Pet. App. 83a-97a. Through no fault of Petitioner's, the state court rejected his claim as if he never made the request.

If either question is resolved in Petitioner's favor, the courts will finally be able to review his claim *de novo*, armed with significant facts that the state court failed to consider.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 30, 2016