No. 16-257

In the Supreme Court of the United States

DAX HAWKINS, PETITIONER

v.

JEFFREY WOODS, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Hawkins has rebutted the presumption that the state appellate court considered the merits of his ineffective-assistance claims when it denied his motion to remand, when his claims and affidavit were squarely before the court?

2. Whether the federal court of appeals could hypothesize reasons that the state appellate court could have had for discounting Hawkins' affidavit when the state court's decision was an unexplained, summary decision?

3. Whether on de novo review Hawkins could meet his heavy burden of establishing that his trial counsel was constitutionally ineffective, where the record either belies or fails to support or corroborate his claims?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Dax Hawkins, a Michigan prisoner. The named respondent is Jeffrey Woods, Hawkins' warden.

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OPINIONS BELOW

The opinion of the Sixth Circuit affirming the district court's denial of habeas relief, Pet. App. A, is reported at 651 F. App'x 305. The opinion and order of the district court denying habeas relief, Pet. App. B, is unreported but available at 2015 WL 348530. The decision of the Michigan Court of Appeals denying Hawkins' motion and amended motion to remand, Pet. App. G, is unreported. The decision of the Michigan Court of Appeals rejecting Hawkins' ineffective-assistance-of-trial-counsel claims, Pet. App. F, is unreported but available at 2006 WL 2987563.

JURISDICTION

The State of Michigan accepts Hawkins' statement of jurisdiction and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act, of 1996, Pub. L. 104-132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 et seq), (AEDPA) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the 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.

28 U.S.C. § 2254(d).

INTRODUCTION

Petitioner Dax Hawkins presents his case as an opportunity to resolve conflicts between the circuits on (1) whether a state-court decision that does not consider critical evidence is an adjudication on the merits under AEDPA, Pet. i, 18, and (2) whether AEDPA allows federal courts to hypothesize reasons that could have supported a state court's decision where a state court set forth actual, yet purportedly wrong, reasoning. Pet. i, 25. But this case is a poor vehicle to address either of those questions because Hawkins has not established the predicate facts for either of his reasons to grant certiorari.

First, this is *not* a case where the state appellate court did not consider critical evidence, namely, Hawkins' affidavit. Hawkins' repeated assertions to the contrary are mistaken. Hawkins' affidavit was before the state appellate court when it considered and denied his motion to remand. The state appellate court's failure to specifically reference the affidavit or explain its decision is of no consequence, and, under binding circuit precedent, the state-court decision denying remand was an adjudication on the merits entitled to full AEDPA deference. Moreover, the presumption that the state court considered the affidavit in the April 2006 decision denying remand, Pet. App. 82a, is not undermined by state court's comment in its October 2006 decision that there was "no evidence *in the lower court record*" to support Hawkins' ineffective-assistance claim, Pet. App. 78a (emphasis added), as the affidavit had been submitted only to the appellate court. In short, the factual premise of the first question presented—that the state courts failed to consider material evidence—is not present in this case.

Second, Hawkins looks at the wrong state-court decision when he asserts that the court of appeals erred in hypothesizing alternative rationales for the state-court decision. The proper focus should have been on the state appellate court's April 2006 decision denying his motion to remand, which was a summary decision, unaccompanied by explanation. Under this Court's precedent, a habeas court must determine what arguments supported or could have supported the unexplained state-court decision. There is no circuit split on that point. Hawkins' focus on the wrong state-court decision (the October 2006 one) is fatal to his second claim.

Finally, even if Hawkins were right and AEDPA deference would not apply to the state-court decisions, the result in this case would not change. Even on de novo review, Hawkins cannot establish his high burden of establishing ineffective assistance of counsel, where he cannot show deficient performance or prejudice, let alone both.

For any or all of these reasons, this Court should deny the petition.

STATEMENT OF THE CASE

A Michigan jury found Dax Hawkins' guilty of first-degree murder, assault with intent to commit murder, felon in possession of a firearm, and possession of a firearm during the commission of felony (felony firearm). Hawkins is currently serving prison terms of life for the murder conviction, 50-to-100 years for the assault conviction, 5-to-10 years for the felon-in-possession conviction, and 2 years for the felony firearm.

The case arose from the October 2003 shooting of Jason Taylor and Earl Riley after a drug transaction. Hawkins, while in Detroit and on supervised federal release after pleading to cocaine charges in Kentucky, set up a marijuana buy with Jason Taylor, whom he had bought marijuana from before. But rather than pay for the over 20 pounds of marijuana that Taylor had provided Hawkins and the purported "buyer," Hawkins and his accomplice repeatedly shot at Taylor and Riley, and then fled with the marijuana.[1] Riley died but Taylor—likely to Hawkins' surprise since he had been shot five times—survived and identified Hawkins, whom he had known since childhood, as one of the shooters.

Before trial, trial counsel filed a notice of alibi, listing four individuals: Nikia Brockington, Adan Knowles, Eric Gibson, and Hawkins' fiancé, Nyree Phillips. The notice also mentioned Clubdot.com—a bar—as where Hawkins claimed to be when the shootings occurred. But on the first day of trial, before jury selection, trial counsel said he was no longer planning to call the alibi witnesses because he "investigated it and saw that none of them were cooperative." Instead, trial counsel vigorously attacked Taylor's credibility and argued that the unknown buyer was the sole shooter. At the close of the prosecution's case, trial counsel stated "I already put on the record at the beginning of the case that I wasn't planning on calling [the alibi witnesses]." And I want to confirm with Mr. Hawkins his agreement that I'm not going to call

[1] In December 2003, Hawkins was located in federal custody where he was being held on a probation violation and extradited to Michigan.

them." Hawkins affirmatively agreed. Pet. App. 3a—4a.

But by direct appeal, Hawkins, convicted of murder and other charges, had a change of heart, and claimed in a pro per pleading that trial counsel was ineffective for not investigating and presenting an alibi defense and that there was a conflict between he and trial counsel concerning strategy. Hawkins also filed a motion to remand for an evidentiary hearing, and later an amended motion to remand, to which he appended his own "Affidavit and Offer of Proof" dated March 9, 2006—nearly a year after his trial. In brief, Hawkins in his affidavit (Pet. App. 83a–90a) claimed that:

- He was at the Locker Room Bar from about 7:45 p.m. to 8:30 p.m. with Charmaine Wright, a woman named "Maria," and a few other females who were with Wright.

- He then went to Baker's Lounge with the same group of women, and Baker's Lounge had a surveillance camera which could show that he arrived there before 8:30 p.m. and did not leave until approximately 9:00 p.m.

- He then went to pick up his fiancé, Nyree Phillips, and they went to Club dot.com, where he stayed until approximately 1:30 a.m., and met up with Eric Gibson and Adan Knowles.

- A woman named "Anessa" served him at Club dot.com.

- Wright and Nikia Brockington[2] were reluctant to testify on his behalf, and "Maria" had family ties to Jason Taylor.

- After the first day of trial, he learned from his fiancé that the defense investigator did not meet with his alibi witnesses because the investigator could not arrange a time to meet with them as a group.

- He told trial counsel that his Nextel phone records would show that he did not talk to Taylor on the night of the offense, as Taylor claimed.

- At trial, he would have testified that he saw Taylor on the day of shooting, but earlier in the day; that he last spoke to Taylor by phone at around 6 p.m. that evening and told Taylor that "Raphael Glover" was interested in the 25-to-30 pounds of marijuana that Taylor was trying to unload; and that Hawkins did not know if the two met up that night.

Significantly, Hawkins *never* submitted to the Michigan Court of Appeals or the Michigan Supreme Court affidavits from any of the individuals that he alleged were with him on the night of the murder, including his own fiancé, indicating that they would testify for him and the content of their testimony.[3] Haw-

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[2] Hawkins never specified when he was with Brockington that night; perhaps she was one of the other females at the Locker Room Bar or Baker's Lounge.

[3] Over two years after his trial, Hawkins obtained affidavits from Knowles and Gibson, and attached them to his habeas petition.

kins also did not present affidavits from his trial counsel or the defense investigator. Instead, he provided only his own, self-serving affidavit.

Given Hawkins' meager offer of proof, the Michigan Court of Appeals, not surprisingly, denied his motion and amended motion to remand, to which he had attached his affidavit, "for failure to persuade the Court of the need to remand at this time." Pet. App. 82a. Six months later, the Michigan Court of Appeals issued an unpublished decision denying relief on all of Hawkins' claims, including his ineffective-assistance-of-counsel claims, which the court denied based on the trial-court record before it. Pet. App. 77a—79a. The Michigan Supreme Court denied Hawkins' application for leave to appeal because it was not persuaded that the questions presented should be reviewed. Pet. App. 72a.

Hawkins then filed a habeas petition, where he raised the same claims as on direct appeal, and the respondent filed its answer and the Rule 5 material in its possession. The district court denied habeas relief on all of Hawkins' claims but granted a certificate of appealability on his claims of ineffective assistance of counsel. In denying relief, the district court in part noted that it appeared that Hawkins had not filed his March 9, 2006 affidavit in the state appellate courts. Pet. App. 53a, 70a. *But the district court was mistaken.* After appointing counsel to represent Hawkins, the court of appeals, at Hawkins' request, remanded

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The district court properly denied Hawkins' attempt to expand the record with these affidavits and did not consider them. Pet. App. 21a. As noted below, they are also inherently suspect.

for reconsideration "so that the district court may consider relevant evidence that *was in the state-court record*, but omitted from the [Habeas] Rule 5 material" because this "may have a bearing on the district court's resolution of Hawkins' ineffective-assistance claim." Pet. App. 29a (emphasis added.) After supplemental briefing by the parties, the district court reexamined the ineffective assistance claims and again denied habeas relief. Pet. App. 14a—27a.

The court of appeals affirmed the district court's denial of habeas relief. Pet. App. A. First, the court of appeals rejected Hawkins' argument that AEDPA deference should not apply; the court of appeals found both the denial of the motion to remand and the state appellate court's subsequent decision to be decisions on the merits for purposes of § 2254(d). Pet. App. 6a–7a. Second, the court of appeals rejected Hawkins' claim that he was entitled to a state-court evidentiary hearing, noting in part that Hawkins failed to "identif[y] any Supreme Court precedent specifically holding that due process requires an evidentiary hearing or establishing other procedural requirements for adjudicating a claim of ineffective assistance of counsel." Third, the court of appeals found that the state appellate court decisions were neither an unreasonable application of Supreme Court law nor an unreasonable determination of the facts. Pet. App. 6a—13a.

REASONS FOR DENYING THE PETITION

Because the questions that Hawkins presents are each predicated on a factual mistake, this case does not present any question of jurisprudential significance, and this Court should deny the petition. This Court should reject Hawkins' attempt to shoehorn the facts of his case into the two questions he presents because (1) the state court in his case did consider the "critical evidence" that he asserts it "overlooked," and (2) he fails to recognize that the order at issue—the state court's denial of his motion to remand—was the one addressed by the Sixth Circuit and was an unexplained merits adjudication. And, in any event, even if reviewed de novo, the ineffective-assistance-of-counsel claim is meritless.

I. Contrary to Hawkins' argument, the state court considered Hawkins' affidavit in denying a remand.

Hawkins first asserts that the petition should be granted because the courts of appeals have "disagreed sharply" on whether a presumption of an adjudication on the merits applies where a state court has issued a reasoned decision that "fails to consider critical available evidence." Pet. 19. But regardless whether such a split exists, this case is a poor vehicle to grant certiorari because the key premise underlying Hawkins' claim—that the state appellate court did not consider critical evidence, namely, his March 2006 affidavit—is mistaken. And this faulty premise underlies the entire petition. E.g., Pet. i (resting both questions on this premise), ii, 3, 4–5, 5, 6, 13, 14, 15, 16, 18, 19, 22, 24, 28, 32 (each asserting that the court failed to consider the affidavit).

The petition misapprehends the record and asserts that the Michigan Court of Appeals "overlooked" his affidavit. Pet. 3. But while the state appellate court in its October 2006 opinion limited its review to the trial-court record, without the affidavit, Pet. App. 77a—79a, that same court had previously considered the affidavit when it denied Hawkins' motion to remand based on his "failure to persuade the Court of the need to remand at this time." Pet. App. 82a. Because the document was before the court when it was deciding whether a remand was necessary, the only reasonable understanding of the order is that the state court evaluated the affidavit, found it lacking, and rightly determined that an evidentiary hearing was not necessary.

There is no reason to believe otherwise. It is undisputed that Hawkins presented his affidavit with his amended motion to remand to the state appellate court. In fact, in asking the court of appeals for a remand to the district court, Hawkins said that his affidavit was attached to his amended motion to remand to the state appellate court. And the court of appeals remanded the case so that the district court could consider "relevant evidence that *was in the state-court record*, but omitted from the Rule 5 material." Pet. App. 29a (emphasis added).[4]

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[4] Hawkins' suggestion that his affidavit was not considered because the state appellate court "failed to include [it] in the record for federal habeas review," Pet. 22, reflects a misunderstanding of the Rules Governing Section 2254 Cases. Under Habeas Rule 5, it is the respondent, not the state appellate courts, which provide the Rule 5 material to the district court. As previously explained, the respondent inadvertently did not file the affidavit as

When a federal claim has been presented to a state court and the state court has denied relief, there is a presumption that "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington* v. *Richter*, 562 U.S. 86, 99—100 (2011); *Johnson* v. *Williams*, 133 S. Ct. 1088, 1094 (2013). The state court's failure to reference the affidavit or provide an explanation for its decision is of no consequence, because AEDPA restricts habeas courts to reviewing the decision reached by the state courts, not their reasoning. *Richter*, 562 U.S. at 98. There is no requirement that a state court's decision be accompanied by an explanation in order for it to be entitled to deferential review under § 2254. *Id.* at 98—100 (§ 2254 "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'"); *Sumner* v. *Mata*, 449 U.S. 539, 548 (1981) (holding that "a court need not elaborate or give reasons for rejecting claims which it regards as frivolous or totally without merit").

Here, the state appellate court did not say that it was not considering the affidavit. And if Hawkins did not provide an affidavit or other offer of proof with his motion to remand, as required by the Michigan Court Rules, the state appellate court would have used different language in denying the motion to remand. When the Michigan Court of Appeals denies a motion to remand because the defendant fails to provide the court with an affidavit or other offer of proof, the court will typically deny remand on that specific basis. In

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Rule 5 material because the state appellate court in this case inadvertently provided the respondent with only pleadings, not with the attachments to pleadings. C.A. Br. 14-15.

Hawkins' case, the court did not deny remand for that reason, but instead, based on Hawkins' "failure to persuade the Court of the need to remand at the time." Whether to grant a motion to remand is within the discretion of the state appellate court, and the court considers "whether the moving party has demonstrated that the issue is meritorious." See *People* v. *Moore*, 2013 WL 1500886, at *1 (Mich. Ct. App. April 11, 2013) (citing *People* v. *Hernandez*, 443 Mich. 1 (1993), abrogated on other grounds *People* v. *Mitchell*, 454 Mich. 145 (1997).) In the present case, the state appellate court effectively found that Hawkins, via his affidavit, had not shown that his ineffective-assistance claims were meritorious.

Although the state appellate court's denial of his motion to remand was summary in nature, its disposition was unquestionably substantive. Notably, binding circuit precedent holds that an order denying remand in Michigan—based on the same language the state court used in Hawkins' case—constitutes a merits adjudication entitled to § 2254(d) deference. In *Nali* v. *Phillips*, 681 F.3d 837, 851–52 (6th Cir. 2012), the court of appeals found that the Michigan state appellate court's denial of a motion to remand based on the "failure to persuade the Court of the need to remand" was an adjudication on the merits. The court of appeals later extended that finding to the context of orders on collateral review in *Marion* v. *Woods*, ––– F. App'x –––, 2016 WL 4698278 (6th Cir. Sept. 8, 2016). In *Marion*, the petitioner on collateral review filed a motion to remand, asserting that trial counsel's failure to investigate and call alibi witnesses rendered his performance ineffective. The state appellate court de-

nied the motion without explanation in the same order as here. The court of appeals found that the state appellate court's denial of the motion to remand, even without explanation, constituted a merits decision and was entitled to AEDPA deference. *Id.* at *4.

Hawkins appears to have overlooked this line of precedent and erroneously assumed that the only merits determination was the October 2006 opinion in which the state appellate court stated that Hawkins presented " 'no evidence.' " Pet. 11 (quoting Pet. App. 77a–79a.) But this view rests on two separate errors. First, the quote noted—correctly—that there was "no evidence *in the lower court record*," Pet. App. 78a (emphasis added), and this accurate statement about the lower-court record does not establish that the Court of Appeals overlooked the affidavit that appeared only in the *appellate* filings. Second, the state appellate court's statement about "no evidence in the lower court record" in its *October* opinion does not rebut the presumption that the state court considered the affidavit attached to the amended motion to remand when it ruled on that motion in its *April* decision.

Hawkins' assumption ignores this circuit precedent and the court of appeals' finding in his case, based on *Nali*, that the state appellate court's denial of his motion to remand was "presumed to be a decision on the merits." Pet. App. 7a. For reasons set forth above, he has not rebutted that presumption. When that decision is accorded the high level of AEDPA deference that it is due, Hawkins cannot show there is "no reasonable dispute" that the state court was wrong. *Woods* v. *Donald*, 135 S. Ct. 1372 (2015).

("When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong."). In fact, as explained in Part III, it was the right decision.

And more significantly for this petition, the first question presented is premised on the existence of a situation where a state court did "[not] consider[ ] a material part of the record." Pet. i. This case does not present that situation, as there is no evidence that the state court failed to consider the affidavit when making its merits decision on the remand motion. An understanding of the relevant law in this circuit and Michigan and an application of the *Richter* presumption demonstrates that the state appellate court did consider the affidavit at issue.

II. Contrary to Hawkins, for the decision at issue the court of appeals correctly hypothesized reasons that the state court could have had for discounting Hawkins' affidavit where the state court's decision was unexplained.

Hawkins also chastises the court of appeals for hypothesizing "ways in which the state court might have found [Hawkins' affidavit] unpersuasive had the state court actually considered it." Pet. i. But as set forth above, the state appellate court *did* consider Hawkins' affidavit when it denied his motion to remand. Hawkins claims that the court of appeals never "suggest[ed] that the state court considered [Hawkins' affidavit]." Pet. 28. But that is a reasonable inference

from its opinion. The Sixth Circuit noted that Hawkins filed his affidavit with his amended motion to remand to the Michigan Court of Appeals, and what the affidavit detailed. Pet. App. 4a. And the federal court of appeals said that the state appellate court's "summary denial of [Hawkins'] motion to remand is presumed to be a decision on the merits," Pet. App. 7a, without finding that Hawkins ever rebutted that presumption. It reasonably may be inferred that the court of appeals believed the state court considered Hawkins' affidavit when it denied his motion to remand.

Hawkins asserts that court of appeals' decision deepens a circuit split on whether AEDPA allows federal courts to hypothesize reasons that could have supported a state court's decision where the state court set forth actual, but purportedly wrong, reasoning. Pet. 25. But Hawkins focuses on the wrong state-court decision (the October 2006 opinion)—an error that is fatal to his claim.

His focus should have been on the Michigan Court of Appeals' April 2006 denial of his motion to remand, which under circuit precedent, was a merits adjudication. Further, this ruling was a decision unaccompanied by explanation. When summary, unexplained decisions are involved, there is no split as Hawkins claims. In such circumstances, a habeas court must determine what arguments "could have supported" the state court's decision before evaluating the claim deferentially under § 2254(d)(1). *Richter*, 562 U.S. at 102.

In Hawkins' case, there were two merits rulings by the state appellate court: the summary, unexplained denial of his motion to remand based on his affidavit and the later reasoned opinion denying his ineffective-assistance claims based solely on the trial-court record. To the extent the court of appeals hypothesized ways in which the state appellate court found Hawkins' affidavit unpersuasive, this was not improper.

The court of appeals' ruling does not contravene *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015). There, this Court looked through the state supreme court's summary denial of the petitioner's petition for review and, after evaluating the state trial court's *reasoned* decision, found that the state trial court unreasonably determined the facts under § 2254(d)(2). *Id.* at 2276—77. In Hawkins' case, the state court's denial of his motion to remand was not a reasoned decision, but an unexplained one. With unexplained decisions, a habeas court may defer to hypothetical reasons a state court might have given for rejecting a federal claim. *Richter*, 562 U.S. at 102.

Most importantly, Hawkins' mistake in examining the wrong decision means the second question presented is also not joined. The predicate for the question is whether considering reasons is appropriate where the "state court's *reasoned* decision did not consider th[e] evidence." Pet. i (emphasis added). But as noted, the decision in which the state court presumably considered the evidence was *not* reasoned.

III. Even on de novo review Hawkins cannot meet his heavy burden of establishing that his trial counsel was constitutionally ineffective where the trial record either belies his claims or fails to support or corroborate them.

Even if AEDPA deference did not apply to the state appellate court's denial of remand, Hawkins' still cannot meet his high burden of establishing that his trial counsel was constitutionally ineffective. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the petitioner must show both that his "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id*. at 687. As to the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential," and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 689—90. Importantly, the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Burt* v. *Titlow*, 134 S. Ct. 10 (2013). As to the second prong, the petitioner must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. "Surmounting *Strickland's* high bar is never an easy task." *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010).

Hawkins cannot establish that trial counsel's performance was deficient with respect to the four individuals listed in the notice of alibi: Brockington,

Knowles, Gibson, and Phillips. Trial counsel expressly stated on the record that he investigated and that none of these individuals were cooperative, so they would not be called. At the close of the prosecution's case, trial counsel referred to these individuals again and stated, "I already put on the record at the beginning of the case that I wasn't planning on calling them. And I want to confirm with Mr. Hawkins that I'm not going to call them." Hawkins affirmatively agreed. Pet. App. 3a—4a.[5] Hawkins never challenged trial counsel's statements to the court, and the claim in his affidavit that he disagreed with counsel with respect to these individuals is belied by the record. It is not deficient performance to refrain from calling witnesses who are uncooperative and may not testify as the defense desires. *Knowles* v. *Mirzayance*, 556 U.S. 111, 125 (2009) (competent assistance does not require counsel to browbeat a reluctant witness into testifying); *Coe* v. *Bell*, 161 F.3d 320, 342 (6th Cir. 1998) (rejecting ineffective-assistance claim where most of the witnesses were unavailable or would not cooperate with counsel at the time of pre-trial preparation).

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[5] Trial counsel instead reasonably chose to discredit the prosecution witnesses by challenging their credibility and the strength of Taylor's identification of Hawkins as his assailant. This Court has stated that "[t]o support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Richter*, 562 U.S. at 109. Here, trial counsel pursued a course of strategy that conformed to the first option: he vigorously argued that the prosecution failed to meet its high burden and that Taylor's credibility was suspect for a number of reasons, including that he was a drug dealer, that he lied to police, that there were inconsistencies in his testimony, and that the prosecution gave him a deal.

Nor can Hawkins establish deficient performance with respect to Wright, "Maria," and "Anessa"— the other alleged alibi witnesses referenced in his affidavit. Even though these individuals were not listed in the notice of alibi, there is a presumption that trial counsel investigated them and made a strategic decision not to list or call them.[6] The same is true with respect to the purported surveillance camera footage from Baker's Lounge that Hawkins mentions in his affidavit. As this Court has said, the absence of evidence cannot overcome strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *Titlow*, 134 S. Ct. 17.

Hawkins in his affidavit claims that he learned from his fiancé after the first day of his trial that the defense investigator did not meet with the purported alibi witnesses because he could not arrange "to take everyone's statement at the same time." Pet. App. 88a.

But the record shows that trial counsel investigated Hawkins' fiancé and at least three others, and that they were all uncooperative. And Hawkins on the second day of trial made no mention to the trial court about his fiancé's comments regarding the odd reasoning that the investigator allegedly did not meet with the purported alibi witnesses. Nor did Hawkins say anything to the trial court on the third day of trial about this or his alleged disagreement with the way trial counsel was handling his case. Instead, Hawkins on the record confirmed that he agreed with his attorney's decision to not call any of the individuals in the

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[6] Hawkins in his affidavit acknowledged telling trial counsel that Wright was unwilling to testify and that "Maria" had familial ties to the victim. Pet. App. 86a.

notice of alibi, including his fiancé. Pet. App. 4a, 23a–24a. That assent belies the assertion he was adamant about calling these individuals and presenting an alibi defense.

Hawkins also has failed to rebut the strong presumption that trial counsel's performance with respect to his purported Nextel phone records was reasonable, given the absence of any evidence showing deficiency. Hawkins in his amended motion for remand noted that a representative from Nextel was listed on the prosecutor's witness list but was never called. Indeed, before the prosecution rested, trial counsel agreed to waive the prosecution's remaining endorsed witnesses, including the Nextel phone representative. That the representative was listed on the prosecution's witness list suggests that the representative would have provided testimony in favor of the prosecution, not the defense.[7] Trial counsel's agreement to waive production of that witness thus appears to have been a reasonable exercise of professional judgment—not constitutionally deficient performance.

In addition to not being able to show deficient performance, Hawkins also fails to "affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. As to the four individuals listed in the notice of alibi, the record shows they would have been uncooperative and thus unhelpful to the defense. Hawkins also never provided

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[7] If the prosecutor knew that the Nextel representative would have provided exculpatory information for Hawkins, the prosecutor would have had a duty to disclose that to the defense. *Brady* v. *Maryland*, 373 U.S. 83 (1963).

affidavits from Brockington or from his own fiancé indicating that they would have testified for him and what they would have testified to. And the affidavits from Knowles and Gibson that Hawkins obtained two years after his trial were inherently suspect: both were Hawkins' friends and gave no satisfactory reason for the delay in their statements; this undermined their credibility. See e.g., *Herrera* v. *Collins*, 506 U.S. 390, 417—18 (1993). Knowles' and Gibson's claims about being available to testify also conflict with the trial record, where trial counsel stated that they were uncooperative and would not be called—a decision that Hawkins himself assented to. Their affidavits also referenced a "Dion Combs"—someone Hawkins made no reference to in his affidavit.

Hawkins never submitted affidavits from Wright, "Maria," or "Anessa." And even assuming they would have testified on Hawkins' behalf, Wright and Maria could not testify about Hawkins' whereabouts at the time of the shooting, which took place after 11 p.m. There is also no reason to believe that any testimony from "Anessa" would have cast doubt on Taylor's identification of Hawkins. This was not a case of mistaken identity: Taylor had known Hawkins for sixteen years and he immediately and consistently identified Hawkins as one of the shooters. Taylor's testimony about the details of shooting was corroborated by other evidence, including testimony about the injuries inflicted and firearms used. Any surveillance camera footage from Baker's Lounge, assuming it existed, would not have pertained to Hawkins' presence at the time of the shooting. And while Hawkins asserts that his phone records would show that he did not talk to Taylor that night, Hawkins, as a drug dealer, could have used a

phone with a different number. As noted above, that the Nextel phone representative was on the prosecution's witness list suggests that any testimony from them would have been unfavorable to Hawkins.

In the end, even if AEDPA deference is not accorded and Hawkins' claims are reviewed de novo, he cannot meet his heavy burden of establishing that his trial counsel was constitutionally ineffective. The circuit splits cited by Hawkins simply do not matter in the context of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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