No. _____

In the Supreme Court of the United States

RANDY LEE, Warden,

Petitioner,

v.

JASON CLINARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Jennifer L. Smith
Associate Solicitor General

Sarah K. Campbell
Special Assistant to the
Solicitor General
and the Attorney General
Counsel of Record

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Jason Clinard was fourteen years old when he shot and killed his school bus driver. The juvenile court held a hearing to determine whether Clinard should be transferred to criminal court. Before the hearing had concluded, Clinard agreed to the transfer. He was convicted of first-degree premeditated murder and sentenced to life imprisonment. In state post-conviction proceedings, the state court rejected Clinard's claim that his attorney rendered ineffective assistance of counsel by agreeing to the transfer. Although the state court agreed with Clinard that his attorney's performance was deficient, it held that Clinard was not prejudiced. On federal habeas review, the Sixth Circuit held that the state court's prejudice determination was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and, as a remedy, granted Clinard a new transfer hearing in the federal district court.

The questions presented are:

1. Whether the Sixth Circuit's holding that the state court's prejudice determination constituted an unreasonable application of *Strickland* contravened this Court's precedents instructing that federal habeas review of ineffective-assistance claims must be "'doubly deferential,'" *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)).

2. Whether the Sixth Circuit's decision to allow the federal district court to conduct a new transfer hearing on remand, instead of first allowing the state court an opportunity to remedy the alleged constitutional violation, conflicts with this Court's precedents.

PARTIES TO THE PROCEEDING

The petitioner is Randy Lee, the Warden of Northeast Correctional Complex. The respondent is Jason Clinard, an inmate in Warden Lee's custody.

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PETITION FOR A WRIT OF CERTIORARI

Randy Lee, Warden of Northeast Correctional Complex, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit, App. 1-30, is not reported but is available at 2018 WL 1057108. The opinion of the district court, App. 31-44, is not reported but is available at 2016 WL 5845901. The opinion of the Tennessee Court of Criminal Appeals affirming the state trial court's denial of Clinard's petition for post-conviction relief, App. 45-64, is not reported but is available at 2012 WL 6570893. The state trial court's opinion denying Clinard's petition for post-conviction relief, App. 65-129, is not reported.

JURISDICTION

The Sixth Circuit entered its opinion on February 27, 2018. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

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

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, 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; . . . .

Id. § 2254(d)(1).

INTRODUCTION

This Court has held that federal habeas review of ineffective-assistance claims must be "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (internal quotation marks omitted). Rather than adhere to this standard, the Sixth Circuit issued a decision that is a double affront to the Tennessee courts. First, the Sixth Circuit held that the Tennessee Court of Criminal Appeals had unreasonably applied the prejudice standard from *Strickland v. Washington*, 466 U.S. 668 (1984), but it did so without bothering to ask the critical question whether the state court's decision was at least reasonable. The Sixth Circuit then added insult to injury by instructing the *federal district court* to conduct a new proceeding on remand instead of allowing the State an opportunity to remedy the federal constitutional violation in its own courts.

Jason Clinard was convicted of first-degree premeditated murder and sentenced to life imprisonment for shooting his school bus driver when he was fourteen years old. The juvenile court held a hearing to determine whether Clinard should be transferred to criminal court. Before the hearing had concluded, but after considerable proof had been presented, Clinard's counsel agreed to the transfer.

In post-conviction proceedings, Clinard alleged that his trial counsel was ineffective in agreeing to the transfer. Although the state trial court and appellate court agreed with Clinard that his counsel's performance had been deficient, they rejected his ineffective-assistance claim because Clinard had not been prejudiced. Both courts concluded that, given the seriousness of Clinard's crime and the conflicting evidence regarding whether Clinard could be rehabilitated in the juvenile system by the age of nineteen, it was not reasonably probable that the juvenile court would have declined to transfer Clinard absent his counsel's agreement.

Clinard filed a federal habeas petition raising the same ineffective-assistance claim. The district court denied relief, but the Sixth Circuit reversed. In the Sixth Circuit's view, Clinard had established prejudice because the juvenile court judge had testified at the post-conviction hearing that, at the time Clinard's counsel agreed to the transfer, the judge had not yet decided how he would rule on the issue. After engaging in what was essentially a de novo analysis of the prejudice issue, the Sixth Circuit summarily concluded that the Tennessee Court of Criminal Appeals' contrary holding was an unreasonable application of *Strickland*.

And rather than allow the Tennessee courts an opportunity to remedy this federal constitutional violation, the Sixth Circuit held that Clinard was entitled to a new transfer hearing in the federal district court.

The Sixth Circuit's decision "illustrates a lack of deference to the state court's determination and an improper intervention in state criminal processes, contrary to the purpose and mandate of AEDPA" and this Court's precedents. *Harrington v. Richter*, 562 U.S. 86, 104 (2011). The Sixth Circuit failed to accord the Tennessee court's decision any deference, much less the double deference required for habeas review of ineffective-assistance claims. And it completely ignored the State's "weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). This Court should grant certiorari and summarily reverse the Sixth Circuit for failing to comply with AEDPA and the principles of comity and federalism on which that statute is based.

STATEMENT OF THE CASE

A. The Murder

When a school bus carrying over twenty children arrived at fourteen-year-old Jason Clinard's house on the morning of March 2, 2005, Clinard aimed a .45 caliber semi-automatic handgun at its driver, Joyce Gregory, and fired six hollow-point bullets. App. 46-47. Three of the bullets struck Gregory in the torso, and she died before the first officers arrived on the scene. App. 47-48.

According to Clinard's teenage nephews, who lived with Clinard and rode the bus with him, Clinard "'didn't like [Gregory] too much'" and thought she was "'picking on him.'" App. 47. Clinard had recently been suspended from the bus for fighting and had only returned to riding the bus about a week before the shooting. *Id.* And the day before the shooting, Gregory had reported Clinard for dipping snuff on the bus. *Id.*

After shooting Gregory, Clinard ran into the woods behind his house. App. 48. Clinard's father told the officers that Clinard shot Gregory and that he was hiding in the woods. *Id.* Clinard eventually emerged from the woods carrying the .45 caliber handgun in one hand and the empty magazine in the other and surrendered to authorities. *Id.*

B. State-Court Transfer Proceedings

Because Clinard was fourteen years old at the time of the shooting, proceedings against Clinard originated in juvenile court. *See* Tenn. Code Ann. § 37-1-103(a)(1). The State filed a motion to transfer Clinard "to be dealt with as an adult in the criminal court of competent jurisdiction." *Id.* § 37-1-134(a). Under Tennessee law, the juvenile court "shall" transfer a juvenile to criminal court if it "finds that there are reasonable grounds to believe that: (A) The child committed the delinquent act as alleged; (B) The child is not committable to an institution for the developmentally disabled or mentally ill; and (C) The interests of the community require that the child be put under legal restraint or

discipline." *Id.* § 37-1-134(a)(4) (2005).[1] If the juvenile court is unable to make these findings, "transfer from juvenile court to criminal court is subject to the juvenile court's discretion." *Howell v. State*, 185 S.W.3d 319, 329 (Tenn. 2006) (citing Tenn. Code Ann. § 37-1-134(a)). In making the determination whether to transfer a child to criminal court, the juvenile court "shall consider, among other matters":

> (1) The extent and nature of the child's prior delinquency records;
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> (2) The nature of past treatment efforts and the nature of the child's response thereto;
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> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

Tenn. Code Ann. § 37-1-134(b).

The juvenile court heard the State's transfer motion the same day it heard motions by Clinard to suppress a statement he gave to law enforcement officers and to disqualify the District Attorney's office. App. 73. To

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[1] The current version of Tenn. Code Ann. § 37-1-134(a)(4) requires transfer to criminal court if the juvenile court finds "that there is probable cause to believe" factors (A)-(C).

the extent that testimony on Clinard's motion to suppress was also relevant to the transfer motion, counsel apparently had agreed that the testimony would be considered for both motions. App. 73, 94.

Clinard was represented at the hearing by Worth Lovett, the attorney Clinard had retained to replace the public defender originally appointed to represent him. App. 71. Clinard presented expert testimony from a psychiatrist, William Bernet. Dr. Bernet diagnosed Clinard with three conditions: recurrent and severe major depression with psychotic features; intermittent explosive disorder; and attention deficit hyperactivity disorder. App. 74. In Dr. Bernet's opinion, Clinard could be appropriately treated for depression and intermittent explosive disorder in a residential structured setting, a kind of treatment that was available through the juvenile justice system. App. 75. Dr. Bernet believed that a treatment program lasting four or five years—until Clinard turned nineteen—would be long enough to effectively rehabilitate him. App. 75-76. Dr. Bernet clarified, however, that he was "'not saying that anybody ever . . . get[s] totally cured of everything that's wrong with them'" and acknowledged that Clinard was "'stuck with'" a genetic variation that made him more susceptible to depression in stressful situations. *Id.*

The State also presented expert testimony from a psychiatrist, Kimberly Stalford. Dr. Stalford believed that, to the extent Clinard was suffering from depression, it was less severe than indicated by Dr. Bernet. App. 76-77, 103. And while Dr. Stalford acknowledged that depression is treatable, she explained that a person's "'tendency to choose violent

options'" cannot necessarily be treated. App. 103. Dr. Stalford also opined that Clinard's shooting of his bus driver was not an intermittent explosive event, and that the best predictor for violence is a history of violence. App. 24, 77.

The parties stipulated to the admission of a psychological evaluation of Clinard prepared by the Middle Tennessee Mental Health Institute (MTMHI) for the purpose of making recommendations to the juvenile court regarding appropriate placement and treatment. App. 62, 74. The report concluded that Clinard was "not eligible for involuntary commitment" but that he had "mental health treatment needs that should be addressed in a residential facility." R. 41-17, at 4;[2] *see also* App. 63. In particular, the report diagnosed Clinard as having severe and recurrent major depressive disorder with psychotic features and recommended that he be placed in "an adolescent residential treatment program" with access to "individual and group therapy, family counseling, anger management training, and psychiatric monitoring of his medication." R. 41-17, at 13-14. The report also advised that Clinard receive "follow-up services" to "monitor any risk of violence toward himself or others." *Id.* at 14.

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[2] Record citations are to the district court record in Clinard's federal habeas proceedings. *See Clinard v. Lee*, No. 3:13-cv-01190 (M.D. Tenn.).

The State also presented testimony from two law enforcement officers who responded to the scene and from Clinard's twin sixteen-year-old nephews, who lived with Clinard and were with him on the morning of the shooting. App. 2-3, 78. These witnesses testified about the facts of the murder. App. 63, 78.

Before the hearing on the State's transfer motion had concluded, but "after a considerable amount of proof had been introduced," Lovett announced that Clinard had agreed to the transfer. App. 71. The juvenile court entered an agreed order stating that, "after hearing evidence and the agreement of the parties," the court had found "reasonable grounds to believe that" Clinard had committed first-degree murder, was not "committable to an institution for the mentally retarded or mentally ill," and that "the interest of the community requires that [Clinard] be placed under legal restraint or discipline." R. 41-18, at 3. The order further stated that, "based upon the evidence in this matter," the juvenile court was "of the opinion that . . . [Clinard] should be . . . transferred" to criminal court to be tried as an adult. *Id.*

After his transfer to criminal court, Clinard was tried and convicted of first-degree premeditated murder and sentenced to the mandatory minimum penalty of life imprisonment. App. 11.[3] The Tennessee Court of Criminal Appeals affirmed Clinard's conviction and sentence on direct appeal. *See State v. Clinard*, No. M2007-00406-CCA-R3-CD, 2008 WL 4170272 (Tenn. Crim. App. Sept. 9, 2008).

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[3] The State did not seek an enhanced sentence of life imprisonment without the possibility of parole. App. 11.

C. State-Court Post-Conviction Proceedings

Clinard filed a petition for post-conviction relief in which he raised numerous claims of ineffective assistance of counsel, among other claims. App. 78-85. As relevant here, Clinard contended that Lovett was ineffective in agreeing to the transfer from juvenile court to criminal court instead of actively contesting the matter and requiring the juvenile judge to rule on the transfer motion. App. 91.

1. Post-Conviction Hearing

The post-conviction trial court held an evidentiary hearing at which Clinard presented testimony from two witnesses: Jake Lockert, the public defender originally appointed to represent Clinard; and Andy Brigham, the juvenile court judge who presided over the transfer hearing.

Lockert testified that Clinard's best defense was to prevent the transfer to criminal court. App. 70. If Clinard remained in juvenile court, he would receive treatment and be released at age nineteen. App. 50. If he were transferred to criminal court, his only options to avoid a first-degree murder conviction would be to raise a "diminished capacity" defense or to argue for a conviction on a lesser-included offense. App. 50, 70. The only reason Lockert would have considered agreeing to the transfer is if, in exchange, the prosecution had allowed Clinard to plead guilty to a lesser-included offense. App. 50.

Lockert's office had spent over three hundred hours investigating Clinard's background and had identified several witnesses who could testify at the transfer hearing that Clinard's mental health problems could be

successfully treated through the juvenile justice system, including two physicians at MTMHI and administrators at secured juvenile facilities. App. 49-50, 69-70. Lockert had also identified witnesses who could testify that Clinard had no prior criminal history and was a successful student involved in extracurricular activities. App. 50. Lockert testified that, in his twenty-eight years of practicing criminal law, he had never had a case "as good as this one" to prevent a transfer to criminal court. App. 70. He acknowledged, however, that the facts of the crime were "'terrible'" and that the nature of the crime weighed in favor of transfer. App. 50-51.

Judge Brigham testified that he was "surprised" when Clinard agreed to the transfer, because at that point the defense had not presented any witnesses other than Dr. Bernet. App. 52. As far as Judge Brigham could recall, the only reason Lovett gave for the agreement was his concern that an unfavorable record was developing against Clinard. App. 52, 72.[4]

At the time Clinard consented to the transfer, Judge Brigham had not yet decided "how he would rule on the transfer." App. 52. He was "going to consider possible rehabilitation programs available to [Clinard] in juvenile court, [Clinard's] amenability to rehabilitation, and evidence showing the existence of premeditation." App. 52-53. Judge Brigham was "concerned about [Clinard] being released from custody at nineteen" because that was a "'relatively short period of time.'" App. 53 (internal quotation marks omitted). And he acknowledged that the defense "would have had to

[4] Lovett did not testify at the post-conviction hearing. App. 58-59.

present overwhelming proof that [Clinard] could be rehabilitated before he would have decided not to transfer the case." *Id.*

Judge Brigham stated that he "probably would not have signed the [transfer] order if he had not believed enough evidence existed to transfer [Clinard's] case to adult court." *Id.* But he also testified that, although he signed the transfer order, "he did not have to make a decision" regarding transfer because Clinard had agreed. *Id.*

The State presented one witness at the post-conviction hearing: Joe Craig, a Tennessee Bureau of Investigation agent. Craig had been prepared to testify at the transfer hearing as a fact witness, but Clinard consented to the transfer before he was called. App. 53-54.

2. Trial Court's Opinion

The trial court denied Clinard's motion for post-conviction relief in a written opinion. App. 65-129. Regarding the deficient-performance prong of *Strickland*, the trial court found that Clinard had "received no concessions from the State for his agreement to transfer" and that "the proof against [Clinard] concerning the actual commission of the crime was . . . overwhelming." App. 91, 93. The trial court concluded that "the failure of [his] trial counsel to at least attempt to prevent the transfer using mental health testimony" therefore constituted deficient performance. App. 93.

Turning to prejudice, the trial court found that Clinard's mental health witness "had already testified" at the transfer hearing and "no proof was adduced at

the post conviction hearing that any other mental health witnesses were available to testify." App. 94.[5] The trial court therefore "assume[d] . . . that the evidence contained in the" transfer hearing transcript plus the testimony of the State's additional witness, Agent Craig, "would have been the entire proof presented at the transfer hearing." *Id.*

The trial court held that there was "no reasonable probability that [Clinard] would not have been transferred to adult court had all of the evidence been presented to the juvenile court." App. 104. The trial court examined each of the findings necessary to trigger mandatory transfer under Tenn. Code Ann. § 37-1-134(a)(4) and concluded that it was not reasonably probable that the juvenile court would have lacked "reasonable grounds" to make these findings. App. 96-104. "The proof at the transfer hearing was more than sufficient" to establish that Clinard "'committed the delinquent act as alleged.'" App. 96 (quoting Tenn. Code Ann. § 37-1-134(a)(4)(A)). And there was "no direct or circumstantial evidence" that Clinard was "'committable to an institution for the developmentally disabled or mentally ill.'" App. 100 (quoting Tenn. Code Ann. § 37-1-134(a)(4)(B)).

As for whether "[t]he interests of the community require[d] that [Clinard] be put under legal restraint or discipline," Tenn. Code Ann. § 37-1-134(a)(4)(C), the

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[5] Under Tennessee law, an ineffective-assistance claim based on counsel's failure to present witnesses cannot succeed unless the petitioner presents the testimony of those witnesses at the post-conviction hearing. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990).

trial court explained that the juvenile court is required to examine the factors set out in Tenn. Code Ann. § 37-1-134(b) to determine whether reasonable grounds existed for that finding. App. 100-01. The trial court reasoned that, although Clinard "had no prior delinquency record," first-degree murder was the "most serious offense that can be committed against a person," and the "juvenile court is required to give greater weight in favor of transfer when the offense is against a person." App. 101. Moreover, "the proof introduced at the transfer hearing established without question that [Clinard] committed the murder of the victim in an aggressive and premeditated manner." App. 102.

The trial court found that the proof as to whether Clinard could be rehabilitated was "in equipoise, favoring neither retention in juvenile court nor transfer to adult court." App. 103. "The defense expert was of the opinion that [Clinard] could be successfully treated within the four years available to the juvenile court system," while "the State's expert was doubtful that [he] could be successfully treated at all." *Id.*

Considering "all of the . . . statutory factors" under Tenn. Code Ann. § 37-1-134(b) and observing that "[t]here is no requirement that all of the[] factors must be present before a transfer may be ordered," the trial court concluded that "there is no reasonable probability that [Clinard] would not have been transferred to adult court had all of the evidence been presented to the juvenile court." App. 104.

3. Court of Criminal Appeals' Opinion

The Tennessee Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. App. 45-64. In reviewing Clinard's claim that Lovett rendered ineffective assistance by agreeing to the transfer, the Court of Criminal Appeals correctly recited the *Strickland* standard. App. 56. The appellate court agreed with the trial court that Lovett's performance was deficient because Clinard had "received no benefit from agreeing to the transfer," and "the only viable strategy in this case was to prevent the transfer." App. 61. The appellate court also agreed with the trial court that Clinard had failed to establish that he was prejudiced by Lovett's deficient performance. *Id.*

The Court of Criminal Appeals noted that the trial court had "[c]onsider[ed] all the factors" set out in Tenn. Code Ann. § 37-1-134(b) in determining "whether the interests of the community required that [Clinard] be put under legal restraint or discipline" and had concluded that there "was no reasonable probability that [Clinard] would not have been transferred to adult court." App. 63-64 (internal quotation marks omitted). Clinard argued on appeal that "the testimony of . . . Lockert, who testified about the proof he developed for the transfer hearing" and Judge Brigham, who testified that the issue of transfer was very much in doubt when counsel agreed to waive the hearing, established that [Clinard] was prejudiced by counsel's deficient performance." App. 64. But the Court of Criminal Appeals rejected that argument, explaining that the "post-conviction court considered all of the evidence presented at the transfer hearing, considered all of the

evidence presented at the evidentiary hearing, and addressed all of the factors set out in the juvenile transfer statute" in ruling that Clinard had failed to establish prejudice. *Id.* The Tennessee Supreme Court denied further review. App. 16.

D. Federal Habeas Proceedings

Clinard filed a federal habeas petition in which he asserted four claims, including that Lovett had rendered ineffective assistance of counsel by "waiv[ing] the transfer hearing rather than allow[ing] the Juvenile Court judge to decide whether [Clinard] should be tried as an adult" and by "fail[ing] to call certain medical experts . . . to testify at the transfer hearing." App. 33. The district court explained that, because this ineffective-assistance claim had been adjudicated on the merits by the state court, its review of that claim under the Antiterrorism and Effective Death Penalty Act (AEDPA) must be "'doubly deferential.'" App. 36. The district court agreed with the state court that Lovett's performance was deficient, because there was "no legitimate reason for counsel to simply recommend waiving the transfer hearing when there was potential evidence available from which to make an argument against transfer." App. 39.

The district court also agreed with the state court that Clinard was not prejudiced. The district court noted that Judge Brigham was "not disposed one way or the other" when Clinard decided to consent to the transfer. App. 40. "That, coupled with the seriousness of the offense, that the offense was premeditated, that [Clinard] had already exhibited signs of aggressive behavior with other students, and that the medical experts seemed to agree that [Clinard] was not eligible

for involuntary commitment to a mental health facility, . . . foreclose[d] any finding that there was a substantial likelihood that [Clinard] would not have been transferred but for counsel's error." App. 40. Although the district court denied Clinard habeas relief, it granted a certificate of appealability on his ineffective-assistance claim. App. 42.

In the Sixth Circuit, the State did not dispute that Lovett's performance at the transfer hearing was deficient. App. 19. So the only issue on appeal was whether the state court's determination that Clinard was not prejudiced by counsel's deficient performance was contrary to or an unreasonable application of clearly established federal law. *Id.* And because Clinard had abandoned his claim that Lovett was ineffective in failing to call additional witnesses at the transfer hearing, the Sixth Circuit considered only the claim that Clinard was ineffective in agreeing to the transfer. App. 22.

The Sixth Circuit acknowledged that its review of the state court's prejudice determination was constrained by AEDPA and that it could grant habeas relief only if the state court's decision was contrary to, or an unreasonable application of, clearly established federal law, as determined by this Court. App. 17-18. And the Sixth Circuit also correctly stated the prejudice standard from *Strickland*— i.e., "[p]rejudice is established by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." App. 19-20 (citing *Strickland*, 466 U.S. at 694).

The Sixth Circuit rejected Clinard's argument that his ineffective-assistance claim should be reviewed de novo because, in concluding that Clinard had "'failed to establish that but for counsel's deficient performance, his case would have not have been transferred,'" the Tennessee Court of Criminal Appeals had applied the wrong prejudice standard. App. 20. The Sixth Circuit explained that "[o]mitting the words 'reasonable probability' when reciting the *Strickland* standard does not justify de novo review when the state court correctly stated and applied the standard in the 'central' portion of its opinion." App. 21.[6]

Turning to prejudice, the Sixth Circuit concluded—and Clinard conceded—that "the evidence presented at the transfer hearing clearly established reasonable grounds to believe that Clinard murdered Gregory and was not committable." App. 22. Thus, "the juvenile court was required to transfer Clinard if the 'interests of the community require[d] that [Clinard] be put

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[6] The Sixth Circuit found it a "closer question" whether "de novo review should apply because, as Clinard contend[ed], the state postconviction courts unreasonably failed to discuss [the MTMHI's] opinion that Clinard could likely be rehabilitated and mischaracterized Dr. Stalford's testimony—and thus their decisions are 'based on an unreasonable determination of the facts.'" App. 22 n.6 (quoting 28 U.S.C. § 2254(d)(2)). The Sixth Circuit did not reach that issue since it concluded that the state court's prejudice determination was an unreasonable application of *Strickland*. Clinard's argument fails, however, because the MTMHI's evaluation did not express an opinion on Clinard's likelihood of rehabilitation, but merely offered a recommendation as to the best treatment option. *See* R. 41-17. And both the post-conviction trial court and appellate court correctly described Dr. Stalford's testimony.

under legal restraint or discipline.'" *Id.* (alterations in original) (quoting Tenn. Code Ann. § 37-1-134(a)(4)(C)).

The Sixth Circuit also determined that, of the six factors the juvenile court must consider under Tenn. Code. Ann. § 37-1-134(b) in making the transfer determination, only one—whether Clinard could be rehabilitated—was in dispute at the transfer hearing. App. 23.[7] For Judge Brigham, the Sixth Circuit explained, the "focus of *that* question was whether Clinard could be rehabilitated before age nineteen such that he would not reoffend." *Id.* And "because Judge Brigham was uncertain about Clinard's potential for rehabilitation," he had not yet made up his mind about "whether to approve the transfer" at the time of Clinard's agreement. *Id.*

The Sixth Circuit found that "[t]here was ample evidence at the transfer hearing that could have led Judge Brigham to decide the rehabilitation issue in Clinard's favor," including the MTMHI evaluation and Dr. Bernet's testimony. *Id.* The Sixth Circuit considered it "[c]rucial" that Judge Brigham remained undecided about transfer at the time of Clinard's agreement and faulted the state court for "ignor[ing]" that fact. App. 24. According to the Sixth Circuit, "'evidence about the actual process of decision' must be considered 'when it is part of the record of the proceeding under review.'" *Id.* (quoting *Strickland*, 466 U.S. at 695). And when a "'reasonable, conscientious,

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[7] The Sixth Circuit noted that Clinard had not challenged the post-conviction trial court's finding that the "evidence 'established without question'" that Clinard had committed first-degree murder in a premeditated and aggressive manner. App. 23 n.7.

and impartial' judge says that had not made up his mind, and the evidence is in 'equipoise,' as observed by the postconviction trial court and apparently accepted by the appellate court, 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" App. 24-25 (alterations omitted) (quoting *Strickland*, 466 U.S. at 694-95).

The Sixth Circuit acknowledged that "the evidence that Clinard committed a premeditated murder was unassailable" and that, "given the seriousness of the crime, Judge Brigham might have granted the transfer motion despite the possibility that Clinard would be successfully rehabilitated by age nineteen." App. 26. But the court nevertheless found that Judge Brigham's testimony that he was undecided about transfer when the hearing ended "ma[de] clear that denying the motion was also a reasonable probability." *Id.*

The State argued on appeal that the agreed order entered by Judge Brigham, which stated that he had found the requirements of the transfer statute satisfied, further established that Clinard was not prejudiced. App. 27. The Sixth Circuit rejected this argument, first erroneously concluding that the State had waived the argument by mentioning the agreed order in its brief only "in passing" and waiting until oral argument to contend that it "had any particular significance," and in any event finding it "clear from Judge Brigham's testimony that he entered the [a]greed [o]rder because the parties asked him to." *Id.*

Without engaging in any further analysis to determine whether the state court's contrary holding regarding prejudice was nevertheless reasonable, the Sixth Circuit summarily concluded that "there is no reasonable argument that Clinard was not prejudiced by his counsel's deficient performance." App. 27.

Although Clinard had urged the Sixth Circuit to vacate his conviction if it found habeas relief appropriate, the Sixth Circuit decided instead to "remand the case to the district court" so that it could conduct a new transfer hearing. App. 28. As support for that remedy, the Sixth Circuit relied on this Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), and the Sixth Circuit's earlier decision in *White v. Sowders*, 644 F.2d 1177 (6th Cir. 1980). App. 28-29.

In *Kent*, which involved a direct appeal from a conviction in the District of Columbia, this Court held that the proper remedy for a due process violation that occurred during a waiver hearing in juvenile court was to remand "the case to the District Court for a hearing de novo on waiver," as the juvenile court no longer had jurisdiction to conduct the hearing. 383 U.S. at 564-65. In *White*, a federal habeas proceeding, the Sixth Circuit granted the same remedy for a *Kent* due process violation—i.e., remand to the federal district court for a new waiver hearing—after concluding that the state juvenile court no longer had jurisdiction to conduct the hearing. 644 F.2d at 1185. The Sixth Circuit concluded in this case that, "because an opportunity ha[d] already been accorded the state courts" to resolve the transfer issue, remand to the district court was appropriate. App. 29-30 (internal quotation marks omitted).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding that the Tennessee Court of Criminal Appeals unreasonably applied *Strickland*'s prejudice standard warrants summary reversal because it conflicts with this Court's repeated instruction that federal habeas courts must accord "'doubly deferential'" review to state-court decisions on ineffective-assistance claims. *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016) (per curiam) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). Summary reversal is also warranted because the remedy the Sixth Circuit granted—remand to the federal district court for a new transfer hearing—contravenes the rule that state courts should be given the opportunity to remedy constitutional errors identified on habeas review.

I. Certiorari Is Warranted Because the Sixth Circuit's Decision Conflicts with This Court's Precedents Regarding the Deference Federal Habeas Courts Owe to State Court Decisions on Ineffective-Assistance Claims.

Under AEDPA, a federal court may not grant habeas relief on a claim that was adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. § 2254(d)(1). Habeas relief is warranted only if the state court's decision is "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Etherton*, 136 S. Ct. at 1151 (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)). If

"'fairminded jurists could disagree on the correctness of the state court's decision,'" habeas relief is precluded. *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

In determining whether the state court unreasonably applied this Court's precedents, the question "is not whether a federal court believes the state court's determination . . . was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (internal quotation marks omitted). This standard is "highly deferential" and "demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (internal quotation marks omitted). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102.

When the claim at issue is one of ineffective assistance of counsel, moreover, a federal habeas court's review must be "doubly deferential." *Mirzayance*, 556 U.S. at 123; *see also Etherton*, 136 S. Ct. at 1151; *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam); *Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Cullen*, 563 U.S. at 190; *Richter*, 562 U.S. at 105; *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam). "Surmounting *Strickland*'s high bar is never an easy task," even under de novo review, and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Richter*, 562 U.S. at 105 (internal quotation marks omitted).

Greater deference is owed to a state court's resolution of ineffective-assistance claims because, among other reasons, "the *Strickland* standard is a general one." *Id.* The "range of reasonable applications" for a general standard is "substantial," *id.*, so the state court "has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Mirzayance*, 556 U.S. at 123; *see also Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Under *Strickland*'s general standard for assessing prejudice, the question is "whether it is 'reasonably likely' the result would have been different" if counsel's performance had not been deficient. *Richter*, 562 U.S. at 111 (quoting *Strickland*, 466 U.S. at 693). While "[t]his does not require a showing that counsel's actions 'more likely than not altered the outcome,' . . . the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. Merely showing that "a court can[not] be certain counsel's performance had no effect on the outcome" or that "it is possible a reasonable doubt might have been established if counsel acted differently" is insufficient. *Id.* at 111.

In holding that the Tennessee Court of Criminal Appeals unreasonably applied *Strickland*, the Sixth Circuit contravened this Court's precedents by failing to accord the state court's prejudice determination any deference, let alone the double deference required under AEDPA and *Strickland*. The Sixth Circuit

essentially considered the prejudice issue de novo and then granted habeas relief only because it would have reached a different conclusion than the state court. That is precisely the kind of "second-guess[ing]" that AEDPA proscribes. *Renico v. Lett*, 559 U.S. 766, 779 (2010).

While the Sixth Circuit "acknowledged that deference was required under AEDPA, it failed to ask the critical question" whether the Tennessee Court of Criminal Appeals' prejudice determination, even if incorrect, was objectively reasonable under this Court's precedents. *White v. Wheeler*, 136 S. Ct. 456, 461 (2015). Instead, after determining that, in its view, Clinard had established prejudice, the Sixth Circuit summarily concluded that "there is no reasonable argument that Clinard was not prejudiced by his counsel's deficient performance." App. 27. Here, as in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 562 U.S. at 101.

Had the Sixth Circuit engaged in the "doubly deferential" review required under AEDPA, it would have had no choice but to conclude that, even if the state court's prejudice determination was incorrect, it was certainly reasonable. The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief because the trial court had "considered all of the evidence presented at the transfer hearing" and the post-conviction hearing and "addressed all of the factors set out in the juvenile transfer statute." App. 64. The trial court had reasoned that "murder in the first degree is the most serious offense that can be committed against a person," that Clinard had

committed that crime "in an aggressive and premediated manner," and that the evidence regarding potential rehabilitation was conflicting and "in equipoise, favoring neither retention in juvenile court nor transfer to adult court." App. 101-03. "Considering all of the . . . statutory factors and the facts of the case," the trial court concluded that there was "no reasonable probability that [Clinard] would not have been transferred to adult court." App. 104. It was entirely reasonable for the state court to weigh the seriousness of the crime—first-degree premeditated murder—more heavily in its analysis than Clinard's potential for rehabilitation, given that the evidence on the latter factor was conflicting.

To reach its conclusion that Clinard had established prejudice, the Sixth Circuit focused myopically on Judge Brigham's testimony at the post-conviction hearing that he was undecided about the transfer motion when Clinard agreed to the transfer. App. 23-25. In the only part of its opinion that could plausibly be construed as an attempt to apply AEDPA's deferential standard, the Sixth Circuit asserted that the state court had "unreasonably applied *Strickland*" by ignoring Judge Brigham's testimony in its analysis. App. 24. The Sixth Circuit cited *Strickland* for the proposition that "'evidence about the actual process of decision' must be considered when it is 'part of the record of the proceeding under review,'" App. 24 (quoting *Strickland*, 466 U.S. at 695), and an apparently corollary rule that, when the "judge says that he had not made up his mind, and the evidence is in 'equipoise,' . . . 'there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different,'" App. 25 (quoting *Strickland*, 466 U.S. at 694-95).

But those legal principles appear nowhere in *Strickland* or any other of this Court's precedents. *Strickland* instead instructs that "the assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision" and that evidence "about the actual process of the decision, if not part of the record of the proceeding under review, . . . should not be considered in the prejudice determination." 466 U.S. at 695. Because this Court has never "squarely established" a specific rule regarding how testimony about the "actual process of the decision," when part of the record, should be weighed in the prejudice analysis, it was "not an unreasonable application of clearly established Federal law for [the] state court to decline to apply" that rule. *Richter*, 562 U.S. at 102 (alteration and internal quotation marks omitted).

The Sixth Circuit's view that testimony like Judge Brigham's conclusively establishes prejudice is in fact directly contrary to *Strickland*. Testimony establishing that a judge intended to "reasonably, conscientiously, and impartially apply[] the standards that govern the decision" to the evidence presented does not end the prejudice inquiry; it merely confirms an assumption on which "the prejudice assessment should proceed." *Strickland*, 466 U.S. at 695. To determine whether it is reasonably likely that an open-minded and impartial judge such as Judge Brigham would have ultimately ruled for the defendant, a court must actually apply the governing legal standard to the totality of the evidence

presented. The Sixth Circuit failed to engage in that crucial step of the prejudice analysis.

The Sixth Circuit considered Judge Brigham's testimony that he was undecided about the transfer in a vacuum, without taking into account his other testimony and the other evidence presented at the transfer hearing and post-conviction hearing. While Judge Brigham testified that he was undecided when the hearing ended abruptly before all the evidence had been presented, he also testified that "the defense would have had to present overwhelming proof that [Clinard] could be rehabilitated before he would have decided not to transfer the case." App. 53. The Sixth Circuit found that "[t]here was ample evidence at the transfer hearing that could have led Judge Brigham to decide the rehabilitation issue in Clinard's favor." App. 23. But none of the evidence the Sixth Circuit referenced overwhelmingly established, as would have been necessary for Judge Brigham to deny the transfer motion, that Clinard would not reoffend. The MTMHI evaluation recommended the kind of treatment that would be appropriate for Clinard, but it did not predict whether any treatment would ultimately be successful. *See* R. 41-17, at 12-13. And although Dr. Bernet was optimistic about Clinard's chances for rehabilitation, he acknowledged that no one ever "get[s] totally cured of everything that's wrong with them" and that Clinard's genetic disposition to depression could not be treated. App. 75-76.

Given that Judge Brigham was looking for "overwhelming" evidence of rehabilitation, it was not reasonably probable that the evidence presented at the hearing would have persuaded him to deny the transfer

motion. Indeed, Judge Brigham testified that "he probably would not have signed the [agreed] order if he had not believed enough existed to transfer [Clinard] to adult court." App. 53.

The Sixth Circuit's prejudice analysis also ignored the governing legal standard. As the Sixth Circuit acknowledged, the evidence at the transfer hearing had established "reasonable grounds" to believe that Clinard had committed premeditated first-degree murder and was not committable to an institution for the developmentally disabled or mentally ill—two of the three findings necessary to trigger mandatory transfer under Tenn. Code Ann. § 37-1-134(a)(4). App. 22-23. Thus, the juvenile court would have been required to transfer Clinard if it had "reasonable grounds to believe" that the "interests of the community require[d] that [he] be put under legal restraint or discipline." Tenn. Code Ann. § 37-1-134(a)(4)(C).

As the Sixth Circuit acknowledged, *see* App. 26, several of the factors the juvenile court was required to consider under Tenn. Code Ann. § 37-1-134(b) already weighed in favor of such a finding, including that Clinard had committed an offense "against [a] person," *id.* § 37-1-134(b)(3), and had done so "in an aggressive and premediated manner," *id.* § 37-1-134(b)(4). The seriousness of Clinard's offense alone provided the juvenile court with "reasonable grounds to believe" that Clinard needed to be imprisoned, *see State v. Strickland*, 532 S.W.2d 912, 920 (Tenn. 1975), and all the more so when considered in tandem with Dr. Stalford's testimony expressing doubt about Clinard's potential for rehabilitation.

Although the Sixth Circuit correctly observed that, "given the seriousness of the crime, Judge Brigham might have granted the transfer motion despite the possibility that Clinard would be successfully rehabilitated by age nineteen," it nevertheless found the prejudice standard satisfied because, in its view, "Judge Brigham's testimony ma[de] clear that denying the motion was also a reasonable probability." App. 26. But had Judge Brigham impartially applied the governing statute to the evidence presented at the hearing, he almost certainly would have found "reasonable grounds to believe" that the interests of the community required Clinard to be imprisoned rather than treated through the juvenile justice system and released at age nineteen.[8] At the very least, it was not objectively unreasonable for the Tennessee Court of Criminal Appeals to hold that there was no reasonable probability that Judge Brigham would have denied the transfer motion. And that is the only question that matters for purposes of AEDPA.

The Sixth Circuit's disregard of AEDPA's deferential standard is unfortunately not unusual. *See, e.g.*, *Etherton*, 136 S. Ct. at 1152 (reversing Sixth Circuit for failing to apply "the appropriate standard of review under AEDPA" in granting habeas relief on ineffective-assistance claim); *Wheeler*, 136 S. Ct. at 461 (reversing Sixth Circuit for "not properly apply[ing] the

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[8] The Sixth Circuit found it significant that the post-conviction trial court described the evidence as being in "equipoise," App. 25, but the trial court was referring only to the expert testimony regarding Clinard's potential for rehabilitation, not to the totality of the evidence presented at the transfer and post-conviction hearings, App. 103.

deference it was required to accord the state-court ruling"); *Donald*, 135 S. Ct. at 1376 (reversing Sixth Circuit for granting habeas relief on ineffective-assistance claim "[w]ithout identifying any decision from this Court directly in point"); *Woodall*, 134 S. Ct. at 1706 (reversing Sixth Circuit for deeming state-court decision unreasonable based on its failure to extend this Court's precedent to a new context); *Titlow*, 571 U.S. at 15 (reversing Sixth Circuit for failing to apply "doubly deferential standard" for habeas review of ineffective-assistance claims); *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam) (reversing Sixth Circuit for committing "plain and repetitive error" in "rely[ing] on its own precedents" to determine what is "clearly established Federal law"); *Lett*, 559 U.S. at 778-79 (reversing Sixth Circuit for relying on its own precedents to determine what is "clearly established Federal law"). The Sixth Circuit's decision in this case is of a piece with its past failures to apply AEDPA's deferential standard of review. Summary reversal is therefore warranted.

II. Certiorari Is Warranted Because the Sixth Circuit's Remedy of Remanding to the District Court for a New Transfer Hearing Conflicts with This Court's Precedents.

Certiorari is also warranted because, in granting Clinard a new transfer hearing in the *federal district court* rather than in the state court, the Sixth Circuit contravened the well-settled rule that "it is [the State], not the federal habeas corpus court, which should first provide [a habeas petitioner] with that which he has not yet had and to which he is constitutionally entitled." *Cabana v. Bullock*, 474 U.S. 376, 391 (1986)

(citing *Jackson v. Denno*, 378 U.S. 368, 393-94 (1964)). Although a federal habeas court has discretion in fashioning an appropriate remedy for a federal constitutional violation, *see* 28 U.S.C. § 2243, the remedy chosen must respect the State's "weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries." *Rogers v. Richmond*, 365 U.S. 534, 548 (1961). Accordingly, this Court has held that the proper remedy on federal habeas review for a constitutional defect that occurs during a state criminal proceeding is to allow the *state court* an opportunity to remedy the error. *See, e.g.*, *Cabana*, 474 U.S. at 391 (holding that the State should be given opportunity to make findings required by *Enmund v. Florida*, 458 U.S. 782 (1982)); *Jackson*, 378 U.S. at 393 (holding that habeas petitioner was "entitled to a determination of the voluntariness of his confession in the state courts in accordance with valid state procedures").

The same principles of "federalism and comity" that underlie the deferential review accorded to state-court rulings under AEDPA also require federal habeas courts to allow state courts an opportunity to correct a federal constitutional error. *Cabana*, 474 U.S. at 391 (noting the "ability of state courts to carry out their role as the primary protectors of the rights of criminal defendants"). This result ensures that any additional proceedings required to remedy a constitutional error are conducted "in accordance with valid state procedures" and that "'functions that belong to state machinery in the administration of state criminal law'" are not preempted. *Jackson*, 378 U.S. at 393 (quoting *Rogers*, 365 U.S. at 547-48); *see also Rogers*, 365 U.S. at 534 (noting that "large leeway . . . must be left to the

States in their administration of their own criminal justice"). It also ensures that, if the defendant challenges the result of the remedial proceedings in subsequent federal habeas proceedings, the federal habeas court's review of the state court's findings of fact and conclusions of law will be constrained by AEDPA's deferential standards. *See Cabana*, 474 U.S. at 390. The Sixth Circuit turned principles of federalism and comity on their head in holding that, "because 'an opportunity ha[d] already been accorded the state courts to resolve the issue,'" its "'discretion [was] better exercised by a remand to the district court for the purpose of holding a new transfer hearing in that court.'" App. 29-30 (some alterations omitted) (quoting *White v. Sowders*, 644 F.2d 1177, 1185 (6th Cir. 1980)).

The Sixth Circuit purported to find support for its remedy in this Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), but *Kent*'s remedial holding is wholly inapposite because that case was not a federal habeas proceeding. In *Kent*, which arose on direct review of a conviction in the United States District Court for the District of Columbia, this Court held that "constitutional principles relating to due process and the assistance of counsel" entitled a juvenile, before being transferred from juvenile court to criminal court, "to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision." 383 U.S. at 557. Because the District of Columbia juvenile court no longer had jurisdiction over the defendant, who was then past the age of twenty-one, this Court "remand[ed] the case to the District

Court"—the court that had tried and convicted the defendant—for "a hearing de novo" on whether the juvenile court should have waived its jurisdiction. *Id.* at 565. This Court recognized, however, that "[o]rdinarily [it] would . . . direct the District Court to remand the case to the Juvenile Court for a new determination of waiver." *Id.* at 564. Because *Kent* was not a federal habeas proceeding, it provides no support for allowing a federal district court to conduct a transfer hearing as a remedy for a constitutional error that occurred in a *state* criminal proceeding.

The remedy the Sixth Circuit granted in this case perpetuates the Sixth Circuit's error in *White v. Sowders*, which also mistakenly relied on *Kent*. In *White*, a federal habeas proceeding, the Sixth Circuit held that the petitioner was deprived of his rights under *Kent* when the Kentucky juvenile court transferred him to adult court after a hearing but without making specific findings to support the transfer. 644 F.2d at 1178-79. Although the juvenile court "no longer had jurisdiction" over the petitioner, the Kentucky criminal court could have held a similar hearing, and there had been "no showing that the [criminal court] judge who was conscientious enough to appoint counsel . . . [in the petitioner's first hearing] would not accord him a fair hearing" in a subsequent hearing. *Id.* at 1185. Nevertheless, the Sixth Circuit held, in reliance on *Kent*, that "since an opportunity ha[d] already been accorded the state courts to resolve the issue and since the[] proceedings ha[d] already been so protracted, . . . [its] discretion [was] better exercised by a remand to the district court for the purpose of holding such a hearing in that court." *Id.*

The Sixth Circuit asserted in *White* that "[d]ecisions after *Kent* ha[d] generally recognized that the proper remedy under the circumstance is to remand for a de novo hearing in the district court to probe the validity of the original transfer order." 644 F.2d at 1185 n.9. In fact, however, all but one of the decisions the Sixth Circuit cited to support that assertion had correctly held that any new hearing should be conducted in *state* court—either in the juvenile court, or, if the juvenile court no longer had jurisdiction, then in the state trial court.[9] *See Bromley v. Crisp*, 561 F.2d 1351, 1356 n.6 (10th Cir. 1977) (preferred remedy is for "district court [to] withhold judgment for a reasonable time to permit the determination to be made in the State courts"); *Brown v. Cox*, 481 F.2d 622, 627 (4th Cir. 1973) (holding that, ordinarily, the appropriate remedy is a "reconstructed *nunc pro tunc* hearing, in which the [state criminal court] would decide what the juvenile court judge would probably have done" (internal quotation marks omitted)); *Powell v. Hocker*, 453 F.2d 652, 656-57 & n.10 (9th Cir. 1971) (instructing that state juvenile court should hold hearing "to determine whether, at the time, . . . certification to the adult criminal court was . . . appropriate"); *United States ex rel. Turner v. Rundle*, 438 F.2d 839, 844 (3d Cir. 1971) (holding that "the writ shall issue unless a hearing de novo . . . be held in the Delaware County Criminal Court"). Only one of the decisions—*Geboy v. Gray*, 471 F.2d 575, 581 (7th Cir. 1973)—interpreted *Kent* in the

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[9] The Tennessee Supreme Court has held that, if the juvenile court no longer has jurisdiction over the defendant, the trial court may conduct a "*de novo* hearing to determine whether or not [the defendant] would have been transferred from juvenile to criminal court." *Sawyers v. State*, 814 S.W.2d 725, 729 (Tenn. 1991).

same erroneous manner as the Sixth Circuit, and the Seventh Circuit has not revisited that issue.

In the Sixth Circuit's view, a federal habeas court's remedial discretion is "better exercised," App. 29 (internal quotation marks omitted), by allowing a federal district court to conduct a state criminal proceeding than by allowing the state court to conduct that proceeding itself. Because that view flouts the federalism and comity principles that underlie AEDPA and contravenes the longstanding rule that state courts should be given the opportunity to remedy federal constitutional violations, summary reversal is warranted. *See, e.g.*, *Sigler v. Parker*, 396 U.S. 482, 484 (1970) (per curiam) (holding that "it was error for the Court of Appeals to pass judgment on the voluntariness of respondent's confessions without first permitting a Nebraska court to make such an evaluation").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Jennifer L. Smith
Associate Solicitor General

Sarah K. Campbell
Special Assistant to the Solicitor General
and the Attorney General
Counsel of Record

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Petitioner