No. 17-1627

IN THE

Supreme Court of the United States

RANDY LEE, Warden,

Petitioner,

v.

JASON CLINARD,

Respondent.

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

BRIEF IN OPPOSITION

Michael Clark Holley
OFFICE OF THE FEDERAL
PUBLIC DEFENDER
810 Broadway
Suite 200
Nashville, TN 37203

Eric F. Citron
Counsel of Record
GOLDSTEIN &
RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

QUESTIONS PRESENTED

1. Should this Court summarily reverse a factbound application of the prejudice requirement from *Strickland v. Washington*, 466 U.S. 668 (1984), where petitioner concedes that the court of appeals correctly identified and then applied the deferential governing standards from both *Strickland* and this Court's precedents under the Antiterrorism and Effective Death Penalty Act of 1996, like *Cullen v. Pinholster*, 563 U.S. 170 (2011)?

2. As a matter of first view on a previously unbriefed issue, should this Court summarily reverse the court of appeals' discretionary decision to remand to the district court for a new transfer hearing, where the state juvenile court admittedly lacks jurisdiction and the petitioner requested no other alternative remedy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

INTRODUCTION

Petitioner admittedly seeks error correction on a factbound question presented in a unanimous, unpublished opinion. He does not argue that there is any disagreement among the courts of appeals, nor purport to identify a situation where this Court or any other has reached a different conclusion on similar facts. Indeed, petitioner acknowledges (at 17) that the court below identified and purported to follow the correct standard, and argues merely that it was misapplied. Moreover, the case is in an interlocutory posture: There is no guarantee the district court hearing to which petitioner now belatedly objects will afford respondent any ultimate relief. Accordingly, petitioner has identified no reason for this Court to intervene in this case at all (let alone intervene now), whether by a grant of plenary review or the even-more-extraordinary step of summary reversal. *See* Pet. 31, 36 (seeking only summary reversal on both questions).

In fact, even if this Court were in the business of simple error correction, there is no error below to correct. Petitioner and his own state courts agreed that respondent's attorney rendered grossly ineffective assistance of counsel when he inexplicably waived away respondent's only meaningful defense against life imprisonment for a crime respondent committed at only fourteen years old. And petitioner acknowledges that—in this case and no other that petitioner has identified—the juvenile court judge appeared at post-conviction proceedings and explicitly testified that respondent's transfer to adult court was "very much in doubt" when his counsel mystifyingly agreed to that transfer without obtaining any government concession

in return. Pet. App. 64. Although respondent's attorney had failed to put on any meaningful case for remaining in juvenile court before laying down on the question entirely, the state courts still found that the evidence on the critical question was "in equipoise." *Id.* at 103. Under the circumstances, the only reasonable answer to the prejudice question under *Strickland v. Washington*, 466 U.S. 668, 695 (1984)—whether there is a "reasonable probability" that the outcome would have been different absent the ineffective representation—is yes.

As the court of appeals unanimously explained, the state courts unreasonably applied *Strickland*'s prejudice standard because they largely ignored the testimony of respondent's juvenile court judge, who directly testified that it was "reasonably probab[le]" or "reasonably likely" that the attorney's deficient performance prejudiced respondent. Pet. App. 2; *Strickland*, 466 U.S. at 695-96. Indeed, there can be no other meaning to the finding—which petitioner does not contest—that the outcome of the hearing that respondent's attorney walked away from was "very much in doubt," Pet. App. 64, with the evidence on the critical issue in "equipoise," *id.* at 103. In any event, all respondent will now receive is the new transfer hearing at which the State submits that there is no "reasonable probability" of a different outcome. If the State is right, this Court's extraordinary intervention is necessarily unnecessary.

Finally, petitioner's second question presented—whether remand should have been ordered to the state courts or the district court—is not well presented. Petitioner failed to argue that remand to the state courts was necessary below, and did not even seek rehearing

on that question once the Sixth Circuit remanded to the district court. Petitioner now concedes that this outcome was consistent with existing Sixth Circuit precedent, *see* Pet. 34, but he did not argue to the Sixth Circuit panel that these precedents were inconsistent with subsequent cases from this Court (as petitioner now contends), nor ask the full court of appeals to reconsider that precedent. This is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), which perhaps explains why petitioner seeks only summary reversal rather than plenary review on this question as well. *See* Pet. 36. But that request is particularly extraordinary where, even on petitioner's own best version of the case, this is an issue on which multiple courts of appeals have disagreed for decades. *See* Pet. 35-36 (identifying apparent 45-year-old circuit conflict on question).

Putting aside rhetorical criticism of the court of appeals, *see* Pet. 30-31, the petition contains nothing indicating that this case is an appropriate candidate for an exercise of this Court's certiorari jurisdiction. The unanimous decision below is not only a factbound application of a correctly stated and highly generalized standard, it is also interlocutory, unpublished, and correct on its face. It does not even approach the extraordinarily high bar that applies to summary reversal. Certiorari should be denied.

STATEMENT OF THE CASE

1. Respondent Jason Clinard was a fourteen-year-old boy when, in 2005, he shot and killed his bus driver. Pet. App. 2. His apparent motives for the homicide were juvenile: According to his nephews (who, incidentally, were two years older than him, *id.* at 3),

he "believed that the victim was picking on him and he didn't like [her] too much." *Ibid.* The victim had also reported him to his high school vice-principal for "dipping snuff on the bus." *Id.* at 2. Although he fled into the woods behind his house after the shooting, police officers reached him on his cellphone, and he agreed to come out, lay his weapons on the ground, and voluntarily surrender. *Id.* at 4. He eventually confessed to the crime, and given the circumstances, he lacked any material merits defense to a homicide charge.

2. As Tennessee law required because of his very young age, a transfer hearing was convened in Tennessee juvenile court. Tennessee law provides for juveniles to be transferred to adult criminal court for trial if they (1) "committed the delinquent act as alleged," (2) are "not committable to an institution for the developmentally disabled or mentally ill," and (3) "the interests of the community require that the child be put under legal restraint or discipline." Pet. App. 5 (internal quotation marks and alteration omitted).

The key issue in respondent Clinard's case (as often) was the third inquiry, which turns on six enumerated sub-factors. Pet. App. 5-6. Some clearly weighed in his favor or were neutral: Clinard had no prior delinquency record (factor 1), there had been no previous, unsuccessful efforts at rehabilitation (factor 2), and his crime was not a gang offense (factor 6). Conversely, some factors plainly weighed against him: His was an offense against the person (factor 3), carried out in an aggressive and/or premeditated manner (factor 4). *Ibid.* The critical inquiry at respondent's transfer hearing was accordingly the fifth factor—"the possible rehabilitation of the child by use of procedures,

services and facilities currently available to the court in this state." *Id.* at 6.

Because the transfer hearing was respondent's best (and really, only) chance to avoid a minimum sentence of life imprisonment, his public defender (Jake Lockert) began an intense preparation effort.

> Lockert retained Dr. William Bernet, the Director of Forensic Psychiatry at Vanderbilt University, to conduct a forensic psychiatric evaluation of Clinard. Lockert also contacted two of the doctors—Drs. Craddock and Farooque—who were treating Clinard at [the Middle Tennessee Mental Health Institute], as well as administrators from that facility, all of whom Lockert came to believe would testify that Clinard could be successfully treated as a juvenile. Lockert also identified witnesses who would testify that Clinard had "no prior criminal behavior," "was a model student involved in extracurricular activities," and "had shown signs of extreme honesty." Lockert and his staff spent approximately 300 hours working on Clinard's case. Lockert's case file totaled "somewhere between six hundred and a thousand pages."

Pet. App. 7 (footnote and citations omitted). As Lockert would later testify:

> In my twenty-eight years I've never dealt with a juvenile that had so much evidence in his favor to keep him and be treated as a juvenile. The only factor I found that would weigh against him was just the crime itself.

Id. at 50.

Unfortunately, Lockert and his staff did not represent Clinard at his transfer hearing. Respondent's family was ultimately persuaded to switch to an attorney (Worth Lovett) who had experience in guardian ad litem and general juvenile disputes, but had never litigated a case like Clinard's. Pet. App. 7. The juvenile court judge would later express serious concerns about Lovett's experience and performance, *id.* at 71; Lovett never even met with Lockert or his team, and never bothered to obtain respondent's (voluminous) case file. *See id*. at 7-8, 12.

As a result of Lovett's lack of preparation and experience, respondent's transfer hearing proceeded in an unusual and ultimately inexplicable fashion. Only two pieces of favorable evidence were presented on Clinard's behalf. First, in order to accommodate his schedule, Dr. Bernet testified out of order about his conclusion that Clinard could be successfully rehabilitated through the juvenile system. Pet. App. 9-10. The parties also stipulated to the admission of a court-ordered psychological evaluation by another psychologist, which had resulted in a diagnosis of (among other things) "Major Depressive Disorder, Recurrent, Severe, With Psychotic Features." *Id.* at 8. This court-ordered evaluation likewise concluded that Clinard's depression could be treated and that he should be placed in a residential treatment center.

Next, the State put on its own psychological witness who testified that although depression is "a treatable medical problem," respondent's "genetic predisposition to depression could not be treated," and that "the best predictor for violence is a previous history of violence." Pet. App. 10 (citations and alteration omitted). Even she declined to offer an opinion, however, on the

likelihood that respondent would reoffend. *Ibid.* Thereafter, witnesses called by the State began to testify about the crime. *Id.* at 10-11. But during a recess, and *before the State had even rested on its own presentation*, respondent's lawyer apparently convinced respondent and his guardian ad litem that they should end the transfer hearing and simply agree to the adult-court transfer, receiving nothing from the government in return. *Id.* at 11. The judge signed an order to that effect because it had been agreed to by the parties. *Ibid.*

After being transferred to adult-court jurisdiction, Clinard was promptly convicted and sentenced to life in prison. Pet. App. 11.

3. On state post-conviction review, respondent argued that he received ineffective assistance of counsel when his lawyer waived the transfer hearing before the State had rested its case. Both respondent's original public defender (Lockett) and the juvenile-court judge who heard his case (Judge Brigham) testified. Pet. App. 12. Judge Brigham explained his surprise at the decision to waive the transfer hearing, especially because he remained undecided as to the outcome at the time that respondent's counsel waived the remaining proceedings. *Id.* at 11-13. Moreover, although Tennessee courts strongly encourage it, the State did not produce any testimony from respondent's original attorney attempting to explain his actions. *See id.* at 59.

The state courts found that the outcome of the juvenile-court proceedings was "very much in doubt" at the time of counsel's decision, Pet. App. 64, that good reasons for waiving the transfer decision before the State had even rested were impossible to discern,

see id. at 39, and that the evidence on the critical issue of respondent's potential rehabilitation in the juvenile system was "in equipoise," *id.* at 103. And that, recall, was the evidence actually presented at the time of the waiver—not the evidence a competent attorney like Lockert had already prepared to present regarding Clinard's amenability to rehabilitation—a file of over 600 pages that Lockert described as one of the strongest cases he had ever seen.

4. The state trial court denied post-conviction relief. On the first prong of *Strickland*, the court found that respondent's attorney had in fact provided constitutionally ineffective counsel at the transfer hearing, because there was no conceivable reason to waive respondent's best chance at avoiding a life sentence in exchange for nothing in return. Pet. App. 93. But under the prejudice prong of *Strickland*, the trial court determined that respondent was not prejudiced because there was sufficient evidence to have allowed the transfer to go forward anyway. *Id.* at 104. The trial court made that finding despite noting that the evidence on rehabilitation prospects was "in equipoise," *id.* at 103, and without any mention of Judge Brigham's testimony that the outcome of the proceeding was "very much in doubt," *id.* at 64, at the time of waiver. Seemingly ignoring that testimony, the court suggested there was "no reasonable probability that [respondent] would not have been transferred to adult court had all of the evidence been presented to the juvenile court." *Id.* at 104.

The Tennessee Court of Criminal Appeals affirmed. Pet. App. 46. That court did not mention the trial court's finding that the evidence was in equipoise on the critical facts. *See id.* at 103. And although it

did mention in passing Judge Brigham's testimony that "the issue of transfer was very much in doubt when counsel agreed to waive the hearing," *id.* at 64, it found that evidence unavailing in a single paragraph, noting only that the trial court had heard all the evidence and concluded that no prejudice had resulted. *See ibid.* In its conclusion to this sole analytical paragraph, the state court appeared to suggest that *Strickland* required respondent to prove not a "reasonable probability" that effective assistance would have led to a different outcome, but rather that ineffective assistance was the but-for cause of his transfer to adult court. *See ibid.* ("[W]e conclude that [Clinard] has failed to establish that but for counsel's deficient performance, his case would not have been transferred from juvenile court to adult court.").

The Tennessee Supreme Court denied review. Pet. App. 16.

5. Respondent renewed his ineffective assistance argument in his federal habeas proceeding. The district court agreed with the state courts that respondent had clearly suffered ineffective assistance of counsel. But the district court failed to find the standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, satisfied on the prejudice issue and so denied habeas relief. *See* Pet. App. 40. Finding its "assessment of [respondent's] claim of ineffective assistance during his juvenile transfer hearing to be debatable," however, it granted a certificate of appealability on that claim. *Id.* at 42.

The Sixth Circuit unanimously reversed. Pet. App. 2. After acknowledging that the State no longer contested whether counsel's representation had been

ineffective, *id.* at 20, the court began its analysis by correctly setting forth the AEDPA standard at length, citing this Court's decisions in *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) and *Harrington v. Richter*, 562 U.S. 86, 105, 112 (2011). *See* Pet. App. 17-20. Accordingly, the court of appeals recognized that it could not reverse if there was "any reasonable argument that [respondent's] counsel satisfied *Strickland*'s deferential standard." *Id.* at 20 (quoting *Richter*, 562 U.S. at 105).

Next, the court of appeals addressed respondent's argument that the state courts had applied the wrong standard altogether, because they denied relief on the theory that respondent had "failed to establish that but for counsel's deficient performance, his case would not have been transferred." Pet. App. 20 (citation omitted). Although that certainly appears to have required respondent to prove that he *would* have obtained relief, rather than a "reasonable probability" of relief as *Strickland* requires, the Sixth Circuit noted that the state court had correctly recited the standard earlier in its opinion. It then applied this Court's "presumption that state courts know and follow the law," and gave the state court the benefit of the doubt, thereby declining to review the relevant issue de novo. *Id.* at 20-21 (citation omitted).

The Sixth Circuit mentioned in a footnote that there was an alternative reason that de novo review might apply, but that it would not reach that argument because it was granting relief on other grounds. *See* Pet. App. 22 n.6. The argument was that the state court decisions were "'based on an unreasonable determination of the facts'" because they had "failed to discuss Dr. Currey's opinion that [respondent] could

likely be rehabilitated and mischaracterized Dr. Stalford's testimony." *Ibid.* (citation omitted). The court recognized that this was "a closer question" than whether the state courts had applied an incorrect legal standard, but pretermitted any decision because—as explained below—it found respondent "entitled to relief even under the more deferential AEDPA standard." *Ibid.*

The Sixth Circuit then turned to the question of whether the state courts had unreasonably applied the *Strickland* prejudice standard to respondent's case. It placed heavy emphasis on Judge Brigham's unique testimony into his decisionmaking and the state of his determination at the time that counsel unexpectedly and inexplicably rolled over on the transfer issue. It noted that the key question for Judge Brigham "was whether [respondent] could be rehabilitated before age nineteen such that he would not reoffend," and that because "Judge Brigham was uncertain about [respondent's] potential for rehabilitation, he 'hadn't made up his mind' whether to approve the transfer." Pet. App. 23 (citation and alteration omitted). And while the state courts had noted that there was evidence in the record that would justify a transfer order, the Sixth Circuit pointed out that there was also "ample evidence at the transfer hearing that could have led Judge Brigham to decide the rehabilitation issue in [respondent's] favor." *Ibid.* As support, the Sixth Circuit identified the state courts' own finding that the evidence on the critical issue was "in equipoise." *Id.* at 25. That evidence, coupled with Judge Brigham's explicit testimony that "the issue of transfer was very much in doubt when counsel agreed to waive the hearing," *id.* at 24 (quoting state court findings), meant

that the only reasonable conclusion was that *Strickland*'s requirement of a reasonable probability for a different outcome had been met.

After the Sixth Circuit chronicled how the evidence presented in the transfer hearing—per the findings of the state courts themselves—would have supported either outcome, was in fact in "equipoise" on the key issue, and had left the decisionmaker's own conclusions "very much in doubt," it then explained that such a factual record was "rare," Pet. App. 25, but demanded a finding that the *Strickland* standard was satisfied:

> When a "reasonabl[e], conscientious[], and impartial[]" judge says that he 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." [*Strickland*, 466 U.S.] at 694-95. It is the rare case that benefits from judicial testimony such as that offered by Judge Brigham. In a case that challenges counsel's decision to abandon an issue that would have been subject to a discretionary ruling, such as a transfer to adult court, the decisionmaker's testimony that he had not made a decision at the time the issue was abandoned must be considered.
>
> ....
>
> Ultimately, 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. *See State v. Strickland*, 532 S.W.2d 912, 920 (Tenn. 1975) (listing "the seriousness of the alleged crime" as one factor to be considered in transfer decisions). But Judge Brigham's testimony makes clear that denying the motion was also a reasonable probability.

Id. at 25-26. Thus, because it was "clear" that the "reasonable probability" standard had been satisfied on the facts as found by the state courts, the Sixth Circuit determined that "there [was] no reasonable argument that [respondent] was not prejudiced by his counsel's deficient performance" and accordingly held that relief should be granted. *Id.* at 27.

The Sixth Circuit then turned to the issue of remedy. Respondent had argued that the court "should order his conviction vacated entirely." Pet. App. 28. The State, however, did not make *any* arguments regarding the appropriate scope of relief, even at oral argument.[*] Instead, the panel members questioned on their own initiative whether the appropriate remedy under this Court's decision in *Kent v. United States*, 383 U.S. 541 (1966), and their precedent in *White v. Sowders*, 644 F.2d 1177 (6th Cir. 1980), would be to remand the matter to the district court for a new transfer hearing, rather than to release respondent

---

[*] *See generally* Pet. C.A. Br. There is no transcript of the Sixth Circuit oral argument, but the audio is available by searching for case number 16-6511 on the court's Web site: http://www.opn.ca6.uscourts.gov/internet/court_audio/audSearch.html.

outright. Pet. App. 28. Respondent's counsel "conceded" that this would be "an appropriate remedy"—indeed, as the Sixth Circuit explained, it is exactly what happened in *White*—and so the Sixth Circuit "agree[d]" with the concession, *ibid.*, and found its "discretion … better exercised by a remand to the district court" to determine the appropriate outcome of a proper transfer hearing. *Id.* at 30 (citation omitted).

The State did not seek rehearing or rehearing en banc. This petition followed.

REASONS FOR DENYING THE WRIT

Neither question presented is certworthy.

As to the first question, petitioner seeks splitless, factbound, error correction on an unpublished, unanimous opinion in an interlocutory posture without any convincing demonstration of error. Petitioner makes no effort to identify a single court of appeals that has reached a different result on a similar fact pattern, nor does he present any on-point, contrary precedent of this Court that would approach a basis for summary reversal. The Sixth Circuit's rationale is not even debatable: It held only that when a state court's *own* finding is that the result of a proceeding at which a juvenile received *admittedly* ineffective assistance of counsel was "very much in doubt," with the critical evidence "in equipoise," it cannot reasonably be denied that the requirement under *Strickland v. Washington*, 466 U.S. 668 (1984), of "reasonable probability" of a different outcome has been met. And even if that were a debatable holding, that would be a basis for granting plenary review on an otherwise certworthy question, not summary reversal on a plainly uncertworthy one.

As to the second question, certiorari cannot be granted. Petitioner has at no previous point raised any objection to a remand to district court, despite his present acknowledgment (at 34-36) that this was a foreseeable result of Sixth Circuit precedent. Respondent requested outright release and then conceded at oral argument that remand to district court would be an appropriate form of relief; the State had ample opportunity to insist on remand to the state courts instead, including by filing a rehearing petition (which it declined to do). This alone prohibits this Court from reaching the question as a matter of initial review.

Even if this question were properly presented, it too is manifestly uncertworthy. Indeed, petitioner seems to seek only summary reversal on this question, *see* Pet. 36, despite acknowledging that the most closely related case in this Court favors *respondent* (by itself ordering a remand to district court), and that the courts of appeals have apparently reached different results on this issue in a set of stale, 40-year-old opinions. *See* Pet. 33-36. Petitioner admits that the form of habeas relief is left to the federal court's discretion by statute, *see* Pet. 32; 28 U.S.C. § 2243, and so his only effort to demonstrate any error (much less the kind that justifies summary reversal) consists of vague and off-point references to federalism rather than on-point precedents of this Court. Certiorari should be denied.

I. Review Of The First Question Presented Is Not Warranted.

A. No traditional certiorari criteria are present.

Petitioner asks the Court to summarily reverse the Sixth Circuit on the ground that its decision showed inadequate deference to the state courts under AEDPA. Neither certiorari nor the extraordinary relief of summary reversal is appropriate here.

As an initial matter, petitioner makes no pretense of attempting to satisfy the ordinary criteria for certiorari. Accordingly, he does not attempt to justify granting review on an unpublished decision that will not determine the outcome of future cases. He does not attempt to justify granting review in an interlocutory posture, before it is even clear whether respondent will receive habeas relief. He does not attempt to demonstrate that fact patterns like this one are common or recurring—nor, conversely, does he address the Sixth Circuit's explicit note that the kind of on-point testimony from the decisionmaker that decided this case is likely to be "rare." Pet. App. 25. Indeed, petitioner does not seem to discuss the precedential effects of the decision below at all; his discussion is entirely limited to identifying putative errors that need correction in this case alone.

Most importantly, petitioner omits any effort to show that there is a disagreement among the courts of appeals as to the existence of prejudice in the "rare" case where a decisionmaker explicitly testifies that the outcome was "very much in doubt" at the time that admittedly ineffective assistance of counsel occurred. Nor does he purport to identify another case in which

the state courts found the evidence on the critical factor "in equipoise" before finding ineffective assistance of counsel to be non-prejudicial. That failure is doubly telling. First, it counsels strongly against a grant of certiorari, because a disagreement among the circuits is the principle justification for granting plenary review in this Court. *See* Sup. Ct. R. 10(a). And second, it counsels strongly against summary reversal, because it demonstrates that the Sixth Circuit's decision is not remotely an outlier and not contrary to this Court's AEDPA precedents, which have never rejected anything like the powerful evidence here that the state courts unreasonably applied *Strickland*'s prejudice standard.

Ultimately, petitioner's presentation is indistinguishable from a brief on an appeal as of right—a mere effort to demonstrate case- and fact-specific error, with nothing more. Even if the court of appeals' decision were debatable or ultimately incorrect (and, as explained below, it is not), that alone is not a basis for a grant of certiorari or summary reversal.

B. The decision below was correct.

In any event, the Sixth Circuit did not err at all in finding that the only reasonable conclusion in this case was that *Strickland*'s prejudice standard had been met. Petitioner's contrary arguments rely on vague and haphazard citations to this Court's decisions discussing application of *Strickland* in the AEDPA context. Nearly all involve only the question of whether a habeas petitioner's counsel was in fact ineffective—the issue that is not even disputed here. Conversely, none remotely suggests that the state courts' application of *Strickland*'s standard regarding *prejudice* was reasonable here.

To begin, petitioner's repeated argument (*see* Pet. 22) that the court of appeals somehow failed to "accord 'doubly deferential' review" to the state courts' determination is without merit. The petition uses the phrase "doubly deferential" or some variant thereof nine times (*see* Pet. i, 2, 4, 16, 22, 23, 24, 25, 31). But petitioner neglects to mention that the reason for "double" deference in the *Strickland* context comes from *Strickland*'s first prong, which asks whether counsel's representation was in fact defective. In that context, federal courts exercising AEDPA review layer their deference to state courts on top of *Strickland*'s deference *to the original attorney*, given the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (citing this "strong presumption" as reason for "doubly deferential" standard when AEDPA deference also applies); *see also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("When [28 U.S.C.] §2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that *counsel satisfied Strickland*'s deferential standard.") (emphasis added); *Burt v. Titlow*, 571 U.S. 12, 15 (2013) ("When a state prisoner asks a federal court to set aside a sentence due to ineffective assistance of counsel during plea bargaining, our cases require … a 'doubly deferential' standard of review that gives both the state court *and the defense attorney* the benefit of the doubt.") (emphasis added) (citation omitted); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) ("Judicial review of a defense attorney's summation is therefore highly deferential—and doubly deferential

when it is conducted through the lens of federal habeas.").

Simply put, as the foregoing quotations unambiguously demonstrate, the reason for "double" deference is that *Strickland* evaluates the attorney's *conduct* deferentially—giving the "defense attorney the benefit of the doubt"—and then AEDPA does the same for the state court's judgment about that conduct. *Titlow*, 571 U.S. at 15. Because reversal entails a rejection of one decisionmaker's (the state court's) deferential review of *another* decisionmaker's (the original attorney's) strategic choices, AEDPA analysis of ineffective assistance claims is correctly described as requiring "doubly deferential" review.

Here, however, there is only one decisionmaker to defer to because the state courts correctly concluded—and the State now concedes—that respondent's attorney *did* render ineffective assistance of counsel. The sole remaining question is whether that ineffective assistance was prejudicial, and there is only one decisionmaker that receives deferential review on that question—the state courts. For this reason, petitioner affirmatively concedes that the Sixth Circuit asked the right question, which (as a simple matter of logic) can only involve one layer of deference. In *petitioner's own words*:

> 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. And the Sixth Circuit also correctly stated the

> prejudice standard from *Strickland*—*i.e.*, "prejudice 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."

Pet. 17 (citations and brackets omitted). Or, in the Sixth Circuit's words, it could provide relief in this case only because "there is no reasonable argument that [respondent] was not prejudiced by his counsel's deficient performance." Pet. App. 27.

None of this is to deny that AEDPA requires considerable deference to state court determinations under *Strickland*'s general prejudice standard. *See* Pet. 24. But the Sixth Circuit recognized as much, and applied the "substantial … latitude," *ibid.* (citations omitted), that AEDPA requires for such a general-standard determination. It concluded only that the state courts' decisions fell outside that broad "range of reasonable applications," *ibid.* (citation omitted), because they failed to take account of direct testimony from the relevant decisionmaker confirming that the proceeding afflicted by ineffective assistance was "very much in doubt" when that ineffective assistance was rendered. That factbound determination was correct under the AEDPA standard, and as the Sixth Circuit explained, did not amount to second-guessing the state courts' conclusions on anything approaching *de novo* review. *See* Pet. App. 20-22 & n.6 (determining that AEDPA applied and that *de novo* review would be inappropriate); *contra* Pet. 25 (asserting that "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA") (quoting *Richter*, 562 U.S. at 101).

Notably, the Sixth Circuit's determination was based fully on the state courts' own assessment of the evidence that *had already* been presented when Clinard's attorney rendered admittedly ineffective assistance of counsel by waiving ongoing proceedings. The prejudicial nature of that ineffective counsel is vastly multiplied, however, by recognizing that this waiver was made before respondent's presentation at the transfer hearing had *even begun*, by an attorney who failed to put any effort into the matter. Indeed, that ineffective attorney had failed even to retrieve Clinard's massive case file, reflecting over 300 hours of attorney work on a case described as one of the strongest that Clinard's original attorney had ever seen. *See supra* p. 8; Pet. App. 7-8, 12.

Ultimately, the Sixth Circuit's determination was thus a correct application of AEDPA deference; certainly it was not an out-of-the-mainstream application that would in any way justify a request for extraordinary relief like summary reversal. And given petitioner's failure to even attempt to show the existence of a certworthy issue beyond error correction in this case, certiorari on Question 1 should be denied.

II. Review Of The Second Question Presented Is Not Warranted.

Review is equally unwarranted on Question 2, albeit for even more reasons. In addition to seeking review of an unpublished, unanimous, interlocutory decision in a "rare" factual context, petitioner's second question has never previously been briefed in this case. Petitioner did not argue in his brief to the Sixth Circuit that remand should be ordered only to the state courts; petitioner did not argue at oral argument that remand should be directed only to the state courts

when the panel raised it with respondent's counsel; and petitioner declined to seek rehearing in the Sixth Circuit on the theory that it should have remanded only to the state courts.

For that reason, the issue has not been appropriately preserved for this Court's review. This Court's "traditional rule … precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). The rule is disjunctive; the petitioner does not need to have "pressed" the issue if the court of appeals nonetheless passed upon it. But it is unfair to say here that the court of appeals "passed upon" the propriety of remand to the district court rather than the state courts simply by ordering a district court remand. That is because, as a consequence of petitioner's utter silence on the remedy, the sole question confronting the panel was whether to remand to the district court (as the Sixth Circuit's precedent suggested) or to release respondent outright (as he had requested). Put otherwise, after determining that the district court erred, the panel ordered relief *more favorable to the State* than it thought to ask for itself. Ordering that more-limited relief does not amount to "passing upon" the propriety of remanding to the district court vis-à-vis the state courts.

Nor can petitioner claim any unfair surprise at the relief that the Sixth Circuit ordered. Not only did petitioner pass up a chance to object to a district court remand when the issue was raised by the court at oral argument, but petitioner now concedes that this relief was suggested by the Sixth Circuit's existing precedent on the issue. *See* Pet. 34 (discussing *White v.*

Sowders, 644 F.2d 1177 (6th Cir. 1980)). Petitioner chose not to brief or discuss the continuing applicability of that *pre-AEDPA* decision to the arguments that it (only now) advances based on AEDPA principles. *See* Pet. 36 ("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."). Such a defaulted argument constitutes a particularly inappropriate basis on which to grant the summary reversal petitioner now requests.

Indeed, petitioner's late-breaking request for summary reversal on this ground is particularly untenable because petitioner's own best version of the case is that courts of appeals have divided on whether remand to the district court is appropriate. *See* Pet. 35-36 (identifying allegedly different outcomes between three courts of appeals and the Sixth and Seventh Circuits). And they have done so, as petitioner admits (at 33-34), because the closest on-point precedent of this Court also remanded to the district court. *See Kent v. United States*, 383 U.S. 541 (1966). Perhaps petitioner has an argument that remand to the state courts is the preferable remedy in this situation, but that argument cannot possibly be an appropriate basis for summary reversal when lower courts disagree about it and the closest on point precedent of this Court points the other way.

Nor does that disagreement support plenary review. For one thing, petitioner does not even seem to seek plenary review on this question, *see* Pet. 36 (seeking only summary reversal). But even if he did, it would be unwise to grant such review in this case.

First, even assuming the issue were deemed technically preserved (*contra supra* pp. 21-23), it would be highly imprudent to grant certiorari here to decide it. This is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and there is no reasoned decision below for this Court to review regarding the propriety of remanding to the federal trial court or to the state courts. Indeed, there are no reasoned decisions *from any court* that petitioner identifies on this issue that post-date AEDPA. Instead, the decisions petitioner does identify on this question are all over 40 years old and (in petitioner's words) "ha[ve] not [been] revisited," *see* Pet. 35-36. This conclusively demonstrates that this issue is not certworthy; it is apparently unimportant and infrequently occurring, and any disagreement petitioner alludes to is rather stale.

Second, it bears noting that—when it comes to the merits—there is essentially no argument that the Sixth Circuit's remedy exceeded its powers under AEDPA. Though petitioner gestures vaguely in the direction of "federalism and comity," Pet. 36, he freely admits that Congress has granted "federal habeas court[s] discretion in fashioning an appropriate remedy." Pet. 32 (citing 28 U.S.C. § 2243). Because a federal court would have discretion to order a habeas petitioner released outright after finding that his conviction was obtained through ineffective assistance of counsel, the same court surely has discretion to order the same release contingent on a *further* showing by the habeas petitioner in the federal trial court. Given the State's own silence on this issue, the faults petitioner now purports to identify in the Sixth Circuit's remedy amount to looking a gift horse in the mouth.

CONCLUSION

Neither question presented is certworthy and neither even approximates an appropriate basis for summary reversal—the sole remedy petitioner affirmatively seeks. The petition should be denied.

Respectfully submitted,

Michael Clark Holley
OFFICE OF THE FEDERAL PUBLIC DEFENDER
810 Broadway
Suite 200
Nashville, TN 37203

Eric F. Citron
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Avenue
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

August 15, 2018