No. 17-1627

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In habeas proceedings arising from Jason Clinard's conviction for first-degree premeditated murder, the Sixth Circuit held that Clinard was entitled to relief on his claim that his attorney rendered ineffective assistance of counsel by consenting to Clinard's transfer from juvenile to adult court. That decision warrants review because the Sixth Circuit failed to adhere to AEDPA's deferential standard when it concluded that the state court had unreasonably applied *Strickland*'s prejudice element. The Sixth Circuit then flouted the federalism and comity principles underlying AEDPA a second time when it granted Clinard a new transfer hearing in the federal district court rather than allowing the state court an opportunity to remedy the alleged constitutional violation.

Clinard only halfheartedly attempts to defend the Sixth Circuit's decision on the merits. He contends that the state court's prejudice determination was unreasonable because it did not follow an illogical rule that this Court has never even hinted at, much less clearly established. And while readily acknowledging that it would have been preferable to allow the state court to conduct the transfer hearing, he claims that the Sixth Circuit's remedy nevertheless was permissible because a federal habeas court need not be bothered with federalism and comity concerns when exercising its remedial discretion. Those arguments, like the Sixth Circuit's decision, ignore that a federal habeas court's review is constrained by AEDPA.

Clinard also attempts to cast the Sixth Circuit's disregard of AEDPA as mere "factbound" error that is unworthy of this Court's attention. Opp. 1. To the contrary, the Sixth Circuit "seems to have acquired a taste for disregarding AEDPA," *Rapelje v. Blackston*, 136 S. Ct. 388, 389 (2015) (Scalia, J., dissenting from denial of certiorari), and has committed the same error in cases involving completely different facts, Pet. 30-31. This Court has previously granted review to correct the Sixth Circuit's persistent refusal to follow AEDPA's requirements, Pet. 30-31, and it should do so again here.

I. 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.

Clinard offers two unpersuasive defenses of the Sixth Circuit's conclusion that the state court unreasonably applied *Strickland*'s prejudice prong. First, Clinard agrees with the Sixth Circuit that the state courts' decisions were unreasonable 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." Opp. 20. But neither the Sixth Circuit nor Clinard is able to cite any decision by this Court clearly establishing that, when such testimony exists, it must be considered as part of the prejudice determination, let alone that it conclusively establishes prejudice. That omission dooms Clinard's argument, because "[i]t is not an unreasonable application of clearly

established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (alteration and internal quotation marks omitted).

To the extent this Court has said anything on the subject, it has instructed that "evidence about the actual process of decision, if not part of the record of the proceeding under review . . . should *not be considered* in the prejudice determination." *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (emphasis added). Instead, "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* This Court has never held that there are circumstances in which testimony regarding the actual process of decision *must be considered*.[1] And it certainly has not held that testimony like Judge Brigham's, indicating only that the judge was keeping an open mind and had

[1] Indeed, it is unclear whether such testimony is even admissible. In *Fayerweather v. Rich*, 195 U.S. 276, 307 (1904), this Court held that "the testimony of [a] trial judge . . . in respect to the matters he considered and passed upon, was obviously incompetent" and that "no testimony should be received except of open and tangible facts[]—matters which are susceptible of evidence on both sides." The petitioner in *Strickland* asked this Court to decide whether *Fayerweather* precluded the federal habeas court from admitting testimony from the judge who had sentenced the defendant. But this Court found it unnecessary to reach that issue because its conclusions that the defendant had not satisfied the performance and prejudice elements did not "depend on the trial judge's testimony." *Strickland*, 466 U.S. at 700.

not yet decided how he would rule,[2] necessarily establishes prejudice. Such testimony merely confirms that the judge was going to "reasonably, conscientiously, and impartially" apply the law to the evidence presented. *Id.* As explained in the petition, that evidence—including undisputed evidence that Clinard had committed first-degree premeditated murder—weighed strongly in favor of transfer to adult court. *See* Pet. 27-30.

Second, Clinard argues that "[u]ltimately, the Sixth Circuit's determination was . . . a correct application of AEDPA deference" when one considers not only the evidence that had already been presented at the transfer hearing, but also evidence that a competent attorney *would have* presented. Opp. 21. But the Sixth Circuit's determination was *not* based on such evidence—and for good reason: Clinard's "mental health witnesses had already testified [at the transfer hearing] and no proof was adduced at the [state] post-conviction hearing that any other mental health witnesses were available to testify concerning [Clinard's] transfer." App. 94. Because Clinard failed to offer any proof at the state post-conviction hearing

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[2] Clinard relies heavily on the state court's statement that Judge Brigham viewed the outcome of the transfer hearing as "very much in doubt when counsel agreed to waive the hearing," App. 64. *See* Opp. 11, 14, 16, 20. It is clear based on a review of Judge Brigham's actual testimony at the post-conviction hearing, *see* Pet. 11-12, that the state court was *not* saying that Judge Brigham thought it was unlikely that he would transfer Clinard. Rather, he simply had not yet made up his mind. In fact, Judge Brigham 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.

as to what additional evidence would have been presented at his transfer hearing, prejudice must be assessed based on the evidence that was actually presented. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("[N]either a trial judge nor an appellate court can speculate [about] . . . what a witness's testimony might have been if introduced by defense counsel."). Based on that evidence, it was undoubtedly reasonable for the state court to hold that Clinard had failed to establish prejudice.

The Sixth Circuit reached the contrary conclusion only by failing to afford the state court the deference AEDPA demands. Not surprisingly, Clinard spends as much time disputing the degree of deference the Sixth Circuit owed to the state court as he does attempting to defend the Sixth Circuit's ultimate conclusion. Clinard contends that the doubly deferential standard that governs federal habeas review of ineffective-assistance claims applies only to *Strickland*'s performance element, and not the prejudice element. Opp. 18-19. Yet this Court has said the opposite. In *Cullen v. Pinholster*, 563 U.S. 170 (2011), this Court applied a "doubly deferential" standard of review to the California Supreme Court's decision that the defendant had failed to satisfy the performance *and prejudice* elements of *Strickland*. *See id.* at 190 (internal quotation marks omitted). Indeed, in reviewing the state court's prejudice determination, this Court distinguished the prejudice analysis of two of its prior cases because those cases "lack[ed] the important 'doubly deferential' standard of *Strickland* and AEDPA." *Id.* at 202.

Applying doubly deferential review to the state court's prejudice determination makes sense. As this Court reiterated earlier this year, AEDPA deference should be "near its apex" when a federal habeas court is reviewing the state court's application of a "general, fact-driven" standard. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam); *see also Renico v. Lett*, 559 U.S. 766, 776 (2010) ("[T]he more general the rule . . . the more leeway [state] courts have . . . ." (second alteration in original) (internal quotation marks omitted)). The prejudice standard, which requires a court to consider "the totality of the evidence" and determine, based on that evidence, whether the defendant has shown a "reasonable probability" of a different outcome, *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010) (internal quotation marks omitted), is exactly that kind of standard.

Regardless, any dispute over whether the state court's prejudice determination is entitled to double deference is ultimately irrelevant. The Sixth Circuit's decision warrants review and reversal because it failed to accord the state court's decision *any* deference, let alone double deference. Clinard suggests that this Court's intervention is unnecessary because the Sixth Circuit "identified and purported to follow" AEDPA's deferential standard. Opp. 1. But that is precisely the problem—the Sixth Circuit merely "purported" to follow the required standard. Identifying AEDPA's deferential standard and actually applying that standard are two very different things. This Court has reversed courts for merely giving lip service to AEDPA, as the Sixth Circuit did here. *See, e.g.*, *Beaudreaux*, 138 S. Ct. at 2560 (summarily reversing Ninth Circuit for "essentially evaluat[ing] the merits *de novo*, only

tacking on a perfunctory statement at the end of its analysis asserting that the state court's decision was unreasonable"); *White v. Wheeler*, 136 S. Ct. 456, 461 (2015) (per curiam) (summarily reversing Sixth Circuit because, despite "acknowledg[ing] that deference was required under AEDPA," it "did not properly apply" that deference).

Remarkably, Clinard claims that, because this Court has never reviewed a state court's prejudice determination in a case involving testimony by the decisionmaker, the Sixth Circuit's decision could not be "contrary to this Court's AEDPA precedents." Opp. 16-17. That argument gets AEDPA's deferential standard of review backwards. Under AEDPA, the fact that this Court has never held on similar facts that *Strickland*'s prejudice element was satisfied was all the more reason for the Sixth Circuit to defer to the state court's judgment on that issue. It provides no reason for this Court to overlook the Sixth Circuit's disregard of AEDPA.

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

Far from defending the remedy the Sixth Circuit granted in this case, Clinard concedes that "[p]erhaps petitioner has an argument that remand to the state courts is the preferable remedy in this situation." Opp. 23.[3] At the same time, Clinard urges this Court to

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[3] Clinard observes that "the closest on point precedent of this Court"—*Kent v. United States*, 383 U.S. 541 (1966)—"also remanded to the district court." Opp. 23. *Kent* is not on point at all, however, because it was not a federal habeas proceeding. *See* Pet. 33-34.

deny review because federal habeas courts have discretion to fashion an appropriate remedy. Opp. 24. Clinard apparently believes that this remedial discretion is entirely unconstrained by the federalism and comity principles that underlie AEDPA; he reasons that, "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 Sixth Circuit had the discretion to order a new transfer hearing in federal district court. Opp. 24.

Both the premise and conclusion are flawed. Because an unconditional writ is "in tension with 'AEDPA's goal of promoting comity, finality and federalism,'" it is an "extraordinary remedy" that would constitute an abuse of discretion except in "rare circumstances." *Woodfox v. Cain*, 805 F.3d 639, 645 (5th Cir. 2015) (some internal quotation marks omitted) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009)). The Sixth Circuit's remedy of remanding to the federal district court was an abuse of discretion for the same reason: it contravened principles of comity and federalism by denying the "state courts the first opportunity to . . . correct any constitutional violation," absent any showing that the state court would be unable to do so. *Jimenez*, 555 U.S. at 121 (internal quotation marks omitted). Contrary to Clinard's view, a federal habeas court's remedial discretion is not a license to ignore the federalism and comity principles on which AEDPA is based.

Clinard's other reasons for denying review fare no better. He contends that summary reversal would be inappropriate because the Seventh Circuit made the

same mistake as the Sixth Circuit in an opinion issued over forty years ago. Opp. 23. But the Seventh Circuit's decision in *Geboy v. Gray*, 471 F.2d 575 (7th Cir. 1973), like the Sixth Circuit's earlier decision in *White v. Sowders*, 644 F.2d 1177, 1184-85 (6th Cir. 1980), predated AEDPA and mistakenly relied on this Court's decision in *Kent*. Neither *Geboy, White*, nor the Sixth Circuit's decision in this case contains any reasoning that would justify a remand to the federal district court when the state court stands ready and willing to conduct a new transfer hearing. In any event, to the extent there is a circuit conflict regarding the appropriate remedy in these circumstances, this Court should grant plenary review rather than deny the petition.

Clinard's final objections are procedural. First, he argues that the remedy issue "has not been appropriately preserved for this Court's review" because the State did not argue in its brief or at oral argument that remand to the district court would be inappropriate. Opp. 22. But it is well settled that this Court may grant certiorari on an issue that was not pressed below, as long the issue was "passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 42 (1992) (internal quotation marks omitted). The Sixth Circuit plainly "passed on" the question of remedy when it concluded 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 in original) (internal quotation marks omitted). Clinard posits that the question the Sixth Circuit "passed on" was "whether to remand to the district court (as the

Sixth Circuit's precedent suggested) or to release respondent outright (as he had requested)," and not whether the state court or the district court should conduct the new transfer hearing. Opp. 22. The Sixth Circuit's opinion makes clear, however, that it considered the latter question and thought its discretion "better exercised" by a remand to the district court. App. 29 (internal quotation marks omitted).

It is understandable, moreover, that the State did not focus on the appropriate remedy in the proceedings before the Sixth Circuit. Given that every court to have considered the prejudice issue—the state trial court, the state appellate court, and the federal district court—had ruled in favor of the State, the Sixth Circuit's conclusion that the state court's prejudice determination was objectively unreasonable was unexpected (and, as explained, directly contravened this Court's AEDPA precedents). It was even more unexpected that the Sixth Circuit would compound its error by denying the state courts an opportunity to remedy the alleged constitutional violation.[4]

Second, Clinard contends that review is unnecessary because "there is no guarantee the district court hearing . . . will afford respondent any ultimate relief." Opp. 1. Whether or not Clinard is ultimately granted relief, review is warranted to restore the state courts' proper role in the remedial process—a role that

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[4] Clinard also faults the State for not filing a petition for panel or en banc rehearing. Opp. 2-3. That is no obstacle to this Court's review either, because filing a petition for rehearing "is not a prerequisite to the filing of a petition for certiorari." *Nichols v. United States*, 563 F.3d 240, 252 (6th Cir. 2009).

is guaranteed by AEDPA's federalism and comity principles. *See* Pet. 32-33. The possibility that the federal court will hold that Clinard's transfer to adult court was appropriate does nothing to remedy the Sixth Circuit's failure to adhere to those principles.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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