No. _____

In the Supreme Court of the United States

TONY MAYS, WARDEN, *Petitioner*,
v.
ANTHONY DARRELL DUGARD HINES, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Counsel of Record

MARK ALEXANDER CARVER
Honors Fellow, Office of the Solicitor General
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-4351
john.bledsoe@ag.tn.gov

Counsel for Petitioner

October 13, 2020

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

CAPITAL CASE

QUESTION PRESENTED

More than 35 years ago, Anthony Hines stabbed Katherine Jenkins to death at a motel in Kingston Springs, Tennessee. The Sixth Circuit invalidated his decades-old murder conviction and death sentence on the ground that a state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Hines suffered no prejudice from any deficiencies in his counsel's performance at the guilt and penalty phases of his capital trial.

The question presented is whether the Sixth Circuit's decision conflicts with the Court's precedents governing claims of ineffective assistance of counsel under the Antiterrorism and Effective Death Penalty Act of 1996.

RELATED PROCEEDINGS

Supreme Court of the United States:

Hines v. Tennessee, No. 08-10346 (Oct. 5, 2009) (denying certiorari in state postconviction DNA analysis appeal)

Hines v. Tennessee, No. 95-9268 (Oct. 7, 1996) (denying certiorari in direct appeal)

United States Court of Appeals (6th Cir.):

Hines v. Mays, No. 15-5384 (May 14, 2020) (granting habeas relief)

United States District Court (M.D. Tenn.):

Hines v. Carpenter, No. 3:05-cv-00002 (Mar. 16, 2015) (denying habeas relief)

Supreme Court of Tennessee:

Hines v. State, No. M2017-02413-CCA-R11-PD (Jun. 6, 2018) (denying permission to appeal on motion to reopen)

Hines v. State, No. M2006-02447-SC-R11-PD (Dec. 8, 2008) (denying permission to appeal postconviction DNA analysis ruling)

Hines v. State, No. M2004-01610-SC-R11-PD (Nov. 29, 2004) (denying permission to appeal in postconviction appeal)

Hines v. State, No. M2002-01352-SC-R11-PD (Jun. 28, 2004) (reversing and remanding for reconsideration in postconviction appeal)

State v. Hines, No. 01S01-9303-CC-00052 (Sept. 5, 1995) (affirming death sentence)

State v. Hines, No. 86-48-I (Sept. 6, 1988) (affirming conviction and remanding for resentencing)

Tennessee Court of Criminal Appeals:

Hines v. State, No. M2017-02413-CCA-R28-PD (Feb. 15, 2018) (denying permission to appeal on motion to reopen)

Hines v. State, No. M2006-02447-CCA-R3-PD (Jan. 29, 2008) (affirming denial of petition for postconviction DNA analysis)

Hines v. State, No. M2004-01610-CCA-RM-PD (Jul. 14, 2004) (affirming denial of postconviction relief on remand from Supreme Court of Tennessee)

Hines v. State, No. M2002-01352-CCA-R3-PD (Jan. 23, 2004) (affirming denial of postconviction relief)

Circuit Court of the 23rd Judicial District, Cheatham County, Tennessee:

Hines v. State, No. 9852 (Nov. 9, 2017) (denying motion to reopen postconviction petition)

Hines v. State, No. 9852 (Oct. 24, 2006) (denying petition for postconviction DNA analysis)

Hines v. State, No. 9852 (May 9, 2002) (denying postconviction petition)

State v. Hines, No. 9852 (Jun. 27, 1989) (resentenced to death)

State v. Hines, No. 9852 (Jan. 10, 1986) (convicted of first-degree murder and sentenced to death)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Tony Mays, Warden of Riverbend Maximum Security Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-100) is reported at 814 F. App'x 898. The opinion of the district court (App. 101-305) is not reported but is available at 2015 WL 1208684.

The opinion of the Tennessee Court of Criminal Appeals affirming the state trial court's denial of postconviction relief (App. 377-464) is not reported but is available at 2004 WL 1567120. The state trial court's order denying postconviction relief is not reported but is reproduced at App. 465-536. The opinion of the Supreme Court of Tennessee affirming Hines's death sentence is reported at 919 S.W.2d 573. The opinion of the Supreme Court of Tennessee affirming Hines's conviction is reported at 758 S.W.2d 515.

JURISDICTION

The court of appeals entered its judgment on May 14, 2020. This Court's general order dated March 19, 2020, extended the due date for this petition to October 13, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d)(1).

INTRODUCTION

Few principles are more firmly established in this Court's precedents than the narrow scope of federal habeas review under AEDPA. AEDPA does not allow a federal court to grant the writ merely because it believes the state court got it wrong. Instead, relief is available only if the state court so obviously misapplied existing Supreme Court precedent that no fairminded jurist could think otherwise. This standard is hard to satisfy, as it was meant to be.

The decision below flouted this settled principle and invalidated a lawful, 34-year-old murder conviction and death sentence. The Sixth Circuit, over a dissent by Judge Kethledge, held that Anthony Hines established both elements of ineffective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 687 (1984), and that the Tennessee Court of Criminal Appeals unreasonably determined that Hines failed to prove prejudice. The majority opinion reads like a *de novo* application of *Strickland*, devoid of the deference to the state court's no-prejudice determination that AEDPA requires. As Judge Kethledge explained in dissent, the majority opinion "nowhere gives deference to the state courts, nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect, and nowhere explains why fairminded jurists could view the petitioner's claim only the same way the majority does." App. 95 (alteration adopted) (internal quotation marks omitted).

If the errors committed by the Sixth Circuit sound familiar, that is because they are. The Court has

summarily reversed the Sixth Circuit for erroneously granting habeas relief, often in capital cases, no fewer than 13 times in the past 17 years. *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (per curiam); *Jenkins v. Hutton*, 137 S. Ct. 1769, 1771-73 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1151-52 (2016) (per curiam); *White v. Wheeler*, 136 S. Ct. 456, 458 (2015) (per curiam); *Woods v. Donald*, 575 U.S. 312, 313 (2015) (per curiam); *Parker v. Matthews*, 567 U.S. 37, 38 (2012) (per curiam); *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (per curiam); *Bobby v. Mitts*, 563 U.S. 395, 400 (2011) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4, 4-5 (2009) (per curiam); *Bradshaw v. Richey*, 546 U.S. 74, 75, 79-80 (2005) (per curiam); *Bell v. Cone*, 543 U.S. 447, 447-48 (2005) (per curiam); *Holland v. Jackson*, 542 U.S. 649, 651-52 (2004) (per curiam); *Mitchell v. Esparza*, 540 U.S. 12, 13 (2003) (per curiam).

The Court has repeatedly admonished the Sixth Circuit "that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty." *Wheeler*, 136 S. Ct. at 462. Even so, "some federal judges" on the Sixth Circuit continue to find AEDPA "too confining." *White v. Woodall*, 572 U.S. 415, 417 (2014).

The Court should grant the petition for a writ of certiorari and summarily reverse the Sixth Circuit. The "plain and repetitive error[s] [of] the Sixth Circuit," *Matthews*, 567 U.S. at 49, call for the "strong medicine" of summary reversal. *Pavan v. Smith*, 137 S. Ct. 2075, 2080 (2017) (Gorsuch, J., dissenting). And absent relief in this Court, the State of Tennessee faces the prospect of either releasing a violent murderer or conducting

new guilt- and penalty-phase trials for a crime that occurred more than 35 years ago. Hines's victims, and the people of Tennessee, deserve better.

STATEMENT

A. The Crime

More than 35 years ago, Anthony Hines stabbed Katherine Jenkins to death at a motel in Kingston Springs, Tennessee. Two days before the murder, Hines boarded a bus in North Carolina with a nonrefundable ticket to Kentucky. App. 381. His girlfriend's mother bought the ticket and accompanied him to the bus station. R. 173-4 at 102, 106-08.[1] Hines carried a large hunting knife beneath his shirt on the bus. App. 381. When his girlfriend's mother advised him against taking the knife on the bus, Hines responded: "I never go anywhere naked. I always have my blade." *Id.*; R. 173-4 at 112.

Hines checked into Room 9 of the CeBon Motel in Kingston Springs during the early hours of Sunday, March 3, 1985. App. 381-82. Later that morning, the manager left one of the maids, Katherine Jenkins, in charge of the motel and gave her a bank bag that contained $100 in small bills. *Id.* at 381. A few hours later, around 12:40 p.m., another maid saw a man driving out of the motel in Jenkins's Volvo. *Id.* at 382; R. 173-2 at 2-6. The maid followed in her own car but was unable to catch the Volvo as it sped off, heading east toward Nashville. App. 382.

---

[1] Citations to "R." are to the record in *Hines v. Carpenter*, No. 3:05-cv-00002 (M.D. Tenn. filed Jan. 3, 2005).

Ken Jones also visited the CeBon Motel that day. R. 173-2 at 64-65. After unsuccessfully searching for a motel employee, Jones took the key to Room 21 and left a note to management that he was using the bathroom in that room. *Id.* at 65-66. But as testimony at a state postconviction hearing later revealed, Jones was actually at the motel that day to carry on an extramarital affair with Vernedith White. App. 387. Jones and White had been regularly visiting the motel on Sundays for years. *Id.* at 387, 391.

When Jones entered Room 21, he saw a bloody body wrapped in a sheet and lying on the floor. R. 173-2 at 67-68. Jones left the room and went across the street to a restaurant, where he asked someone to call the sheriff. *Id.* at 68, 71.

Emergency personnel soon arrived and searched Room 21. *Id.* at 13. In addition to Jenkins's body, they found the bank bag—bloody and empty—and an unfiltered cigarette butt. App. 381; R. 173-5 at 25-26. Jenkins's body was still wrapped in the sheet on the floor. R. 173-2 at 13-14. Someone had pulled her clothing up to her breasts and cut or torn her underwear in two pieces. App. 380. A $20 bill was under the wristband of her watch. *Id.* Jenkins had superficial wounds on her neck, consistent with "some firm sharp object [held] to [her] neck." R. 173-5 at 75-76. Her hands had defensive wounds as if she had tried to "ward off injury." *Id.* at 96. But the fatal wounds were to her chest—"[f]our deep, penetrating wounds, ranging from 2.5 inches to 6.4 inches in depth." App. 380. A final knife wound, likely inflicted as Jenkins

was dying, went through her vagina and penetrated her abdominal cavity. *Id.* at 380-81.

Law enforcement discovered stab holes with similar widths and depths in the walls of Room 9—the room where Hines stayed the night before. *Id.* at 384; R. 173-4 at 81-84; R. 173-5 at 87. Hines later admitted that the holes were knife marks. App. 384. Jenkins's wallet, keys (which were attached to an "I love my Volvo" keychain), and Volvo were nowhere to be found. *Id.* at 381; R. 173-1 at 19-20.

That same afternoon, four college-aged youths discovered Hines stranded on the side of Interstate 65, just north of Nashville, with Jenkins's stalled Volvo. App. 382-83; R. 173-2 at 25-28. After unsuccessfully trying to help Hines restart the Volvo, the youths agreed to give Hines a ride to Bowling Green, Kentucky. App. 382-83; R. 173-2 at 29-31. According to the youths, Hines "seemed real nervous," his eyes were wide and bright, and he "talked a lot." R. 173-2 at 56; R. 173-3 at 34. Hines told the youths that he bought the Volvo from an old lady for about $300. R. 173-2 at 55. One of the youths noticed dried blood on Hines's shoulder. *Id.* at 44; App. 383. During the drive, Hines carried a jacket that he kept folded. App. 383; R. 173-2 at 36, 58.

Hines arrived at his sister's house in Bowling Green later that afternoon. App. 383; R. 173-2 at 86-87. His sister also noticed blood on his shirt. R. 173-2 at 97. Hines told her that someone had attacked him at the motel and that he had stabbed the assailant "in the side . . . and in the chest." *Id.* at 89-90; App. 383. But he told his brother-in-law a different story: that he had

hitchhiked a ride with a stranger driving a Volvo, that the stranger had tried to rob him, and that during the ensuing struggle the stranger's Volvo had run off the road and flipped over. R. 173-3 at 2, 9-10. Afterwards, Hines said, he had grabbed the Volvo's keys and escaped. App. 383. He showed his brother-in-law the keychain, which said something like, "I love Volvo." R. 173-3 at 10. The brother-in-law also noticed something large, heavy, and bulky in the pocket of Hines's jacket. *Id.* at 8; App. 383. The brother-in-law gave Hines a ride to Cave City, Kentucky, where Hines's grandparents lived. R. 173-3 at 4-5, 8. On the trip, Hines bought a grill as a gift for his sister and brother-in-law. *Id.* at 8-9.

The police found the Volvo that afternoon on the side of Interstate 65 where Hines had abandoned it. R. 173-4 at 2-7. They also found Jenkins's wallet—emptied of any cash—a short distance from the car, wrapped in a shirt. *Id.* at 9-10, 13; App. 384.

For the next eight days, Hines camped out in a rural area near Cave City. R. 173-4 at 64-66. He eventually turned himself in to a Kentucky sheriff. R. 173-3 at 51, 53-54. Before the sheriff said anything about the murder, Hines volunteered that he had stolen the Volvo but said that he had not killed Jenkins. *Id.* at 55. Hines later told another officer that he would confess and tell him "all about the murder" if the officer could guarantee that he would be sentenced to death. App. 384; R. 173-4 at 72. Officers later searched Hines's campsite and found the key to Room 9 of the CeBon Motel and an empty pack of unfiltered

cigarettes—much like the one discovered in Room 21. App. 384; R. 173-4 at 65-67, 99.

B. The State Proceedings

After hearing the evidence, a jury convicted Hines of first-degree murder and sentenced him to death. The Supreme Court of Tennessee affirmed his conviction but vacated and remanded for resentencing based on omissions in the penalty-phase jury instructions. *State v. Hines*, 758 S.W.2d 515, 524 (Tenn. 1988). The jury again imposed a death sentence, which the Supreme Court of Tennessee affirmed. *State v. Hines*, 919 S.W.2d 573, 584 (Tenn. 1995). This Court denied Hines's petition for a writ of certiorari. *Hines v. Tennessee*, 519 U.S. 847 (1996) (mem.).

In state postconviction proceedings, Hines asserted a claim of ineffective assistance of counsel based on his trial counsel's failure to investigate Ken Jones and present him as an alternative suspect. *See Strickland*, 466 U.S. at 687. The state trial court held an evidentiary hearing on the claim. App. 466. The hearing resulted in testimony about Jones's affair with White but no basis to suspect that Jones murdered Jenkins.

Testimony at the postconviction hearing established that both the prosecution and defense knew that Jones was at the motel to carry on an affair when he found Jenkins's body but that both sides chose not to present evidence of the affair at trial. Kenneth Atkins, the prosecutor who examined Jones at trial, testified that he knew Jones was at the motel with a woman other than his wife. *Id.* at 393. He also knew that Sheriff

Weakley, who investigated the crime scene and spoke with Jones after he found the body, was concerned about unnecessarily embarrassing Jones about the affair. *Id.* But Sheriff Weakley never asked Atkins to limit his questioning of Jones. *Id.*

Defense counsel Steve Stack testified that he did not interview Jones before trial because Sheriff Weakley had told him that Jones was at the crime scene only briefly and did not know anything about the murder other than finding the body. *Id.* at 397. Stack explained that he trusted Sheriff Weakley and "would take that man's word for anything in the world." *Id.* Since Sheriff Weakly wanted to avoid embarrassing Jones about the affair, Stack decided that he "wasn't going to embarrass the man" at trial. *Id.* Accordingly, neither the prosecution nor the defense questioned Jones about the affair at trial.

Because Jones had suffered a stroke in the thirteen years since his trial testimony and was confined to a nursing home, he testified by deposition for the postconviction hearing. *Id.* at 387; *see also* R. 174-5 at 1-35 (deposition transcript). The timeline of events Jones gave in his deposition varied slightly from his trial testimony thirteen years earlier, but the bottom line remained the same: Jones knew "nothing" about the murder other than finding Jenkins's body at the motel and reporting it. App. 389.

On the day of the murder, Jones picked White up in his van and drove to the motel, as was their custom on Sundays. *Id.* at 387-88. Jones usually rented a room at the motel directly from Jenkins, who would accept $20 for the room instead of the standard rate. *Id.* at 387; R.

174-5 at 27. But on this Sunday, Jones could not find Jenkins or anyone else at the motel to rent them a room. App. 387-88. After waiting with White for about an hour and briefly driving to a restaurant across the street, Jones retrieved a room key from a box outside the motel office. *Id.*

Upon entering the room and finding Jenkins's body, Jones immediately ran out of the room, drove across the street to the restaurant, and had someone call the sheriff. *Id.* at 388. Jones then drove White home and returned to the motel to discuss his discovery of the body with Sheriff Weakley, who was a friend of his. *Id.* Jones told Sheriff Weakley that he was concerned about his wife finding out about his affair with White. *Id.* Sheriff Weakley tried to put him at ease about the issue. *Id.* Jones believed that none of the attorneys would question him about being at the motel with White, but he remained nervous about testifying at trial. *Id.*

Jones's girlfriend, Vernedith White, also testified at the postconviction hearing. *Id.* at 389. Although she was unsure about the specific timing of events this many years after the fact, her testimony was largely consistent with Jones's. *Id.* at 389-91. White testified that she and Jones had been together at the CeBon Motel on at least 100 prior occasions. *Id.* at 391. Each week they usually rented a room from either the manager or the maid. *Id.* at 390. On the Sunday in question, they were unable to find anyone at the motel to rent them a room, so Jones retrieved a room key from the office. *Id.* White waited in the van while Jones went to check the room. *Id.* Because the curtains to

Room 21 were open, White could see Jones the entire time he was in the room. *Id.* Jones walked into the room past the beds, saw the body, and then ran out of the room. *Id.* Jones and White drove across the street to the restaurant to call the sheriff. *Id.* at 391. Jones then drove White home before returning to the motel to speak with Sheriff Weakley. *Id.* According to White, "there was no possibility that Ken Jones had anything to do with the . . . murder." *Id.* at 392.

After hearing this testimony, the state trial court denied Hines's petition for postconviction relief. *Id.* at 466, 536. It determined that Hines had not shown prejudice from his counsel's failure to investigate Jones because the additional evidence elicited from Jones and White in the postconviction proceedings would not have created a reasonable probability of a different outcome at trial. *Id.* at 483-84, 487-88. In particular, any argument that Jones was the real killer would have been "farfetched" given the lack of evidence against Jones and the strong evidence against Hines. *Id.* at 483-84. At most, the testimony elicited in the postconviction proceedings "could have 'muddied the water' concerning the details of the discovery of the body," but would have been "insufficient . . . to cast reasonable doubt" on Hines's guilt. *Id.* at 484.

The Tennessee Court of Criminal Appeals affirmed. *Id.* at 378. It agreed with the state trial court that Hines failed to prove prejudice because any argument casting Jones as the real killer would have been "farfetched." *Id.* at 437. To accept such an argument, the jury would have had to conclude that Jones, who had visited the motel with White approximately 100

times before and was "known by the staff, including the victim," suddenly decided on this Sunday to stab Jenkins to death without any apparent motive, drive White to another location and "clean[] blood from himself and his vehicle," and then "return[] to the scene to report the crime and wait for law enforcement officers to arrive." *Id.* "[G]iven the strength of proof against [Hines]," the court determined that this alternative theory "would have been 'farfetched' and could have resulted in a loss of credibility for the defense." *Id.* For the same reasons, the court concluded that Hines "would not have created residual doubt" at the penalty phase "by arguing that Ken Jones had killed the victim." *Id.* at 439.

C. The Federal Proceedings

The federal habeas proceedings began in 2005 and have yet to end. Hines filed and twice amended a federal habeas petition under 28 U.S.C. § 2254. App. 105. His last amended petition alleged, among other claims, that his trial lawyers rendered ineffective assistance of counsel by failing to investigate Jones and present him as an alternative suspect at the guilt and penalty phases of the trial. R. 23 at 15-17.

The district court rejected all of Hines's claims and denied his habeas petition. App. 305, 375-76. It ruled that Hines was not entitled to relief on his claim that counsel were ineffective for failing to investigate Jones because the state court's conclusion that Hines failed to prove prejudice was not an unreasonable application of *Strickland*. *Id.* at 204-12.

A divided panel of the Sixth Circuit reversed. App. 1-100. The majority held that the Tennessee Court of Criminal Appeals unreasonably applied *Strickland* when it concluded that Hines failed to prove prejudice. *Id.* at 2, 84. According to the panel majority, Jones's deposition testimony from the postconviction hearing would have created a reasonable probability of a different outcome in both the guilt and penalty phases had it been available at trial, and the state court's contrary conclusion was objectively unreasonable. *Id.* at 84-94. The panel majority also concluded that Hines's trial counsel rendered objectively unreasonable performance by failing to investigate Jones before trial. *Id.* at 83-84. Accordingly, the panel majority held that Jones was entitled to prevail on both his guilt- and penalty-phase claims of ineffective assistance. *Id.* at 83-95.

Judge Kethledge dissented. *Id.* at 95. He explained that under AEDPA the question was not whether the majority disagreed with the state courts' resolution of Hines's claims. *See id.* Instead, the question was "whether every 'fairminded jurist' would agree that, if only Hines's counsel had investigated Ken Jones, there would have been a 'reasonable probability' that the result at Hines's trial would have been different." *Id.* at 99. Based on the overwhelming evidence against Hines and the absence of any evidence implicating Jones, Judge Kethledge concluded the answer to that question was "no." *See id.* at 95-100. He explained that that "the Tennessee Court of Criminal Appeals had every reason to reject Hines's *Strickland* claim on the ground that it was 'farfetched'" and that the Sixth Circuit had "no

reason whatever to grant habeas relief on that same claim here." *Id.* at 100.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's holding that the Tennessee Court of Criminal Appeals unreasonably applied *Strickland*'s prejudice standard is wrong. The Court should summarily reverse the Sixth Circuit's erroneous award of habeas relief for three reasons: (1) to vindicate the important interests AEDPA was designed to protect; (2) to promote respect for precedent in the lower courts; and (3) to avoid the grave consequences that will flow from the Sixth Circuit's erroneous decision.

I. The Sixth Circuit's Award of Habeas Relief Defies This Court's Precedents.

Settled precedent makes clear that Hines cannot succeed on his *Strickland* claim under 28 U.S.C. § 2254(d)(1). The reasons the Sixth Circuit gave to support its contrary conclusion cannot withstand scrutiny.

A. Hines Is Not Entitled to Relief Under § 2254(d)(1).

To establish ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. *Strickland*, 466 U.S. at 687. Proving prejudice requires a defendant to show a "reasonable probability" of a different outcome had counsel not performed deficiently. *Id.* at 694. Although "reasonable probability" does not mean "more likely than not," the difference between those standards "is slight and

matters only in the rarest case." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (internal quotation marks omitted). "The likelihood of a different result must be *substantial*, not just conceivable." *Id.* at 112 (emphasis added).

"Surmounting *Strickland*'s high bar is never an easy task," but it is almost impossible when the strictures of § 2254(d)(1) apply. *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). That statute allows a federal court to grant habeas relief "only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." *Hill*, 139 S. Ct. at 506 (quoting 28 U.S.C. § 2254(d)(1)).

"This standard . . . is difficult to meet." *Metrish v. Lancaster*, 569 U.S. 351, 357-58 (2013) (internal quotation marks omitted). It precludes federal habeas relief on a claim adjudicated by a state court unless the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Hill*, 139 S. Ct. at 506 (quoting *Richter*, 562 U.S. at 103).

Hines cannot satisfy this demanding standard. The Tennessee Court of Criminal Appeals ruled that Hines was not prejudiced by his counsel's failure to investigate Ken Jones because any argument that Jones was the real killer would have been implausible given the strength of the evidence against Hines and the lack of evidence implicating Jones. App. 437. That

ruling was neither "contrary to" nor "an unreasonable application of" *Strickland*. 28 U.S.C. § 2254(d)(1).

1. The State Court's Decision Was Not "Contrary to" *Strickland*.

Neither Hines nor the panel majority maintains that the state court's decision was "contrary to" *Strickland* or any other decision of this Court, and for good reason.

A decision is "contrary to" Supreme Court precedent only if it either: (1) rests on "a rule that contradicts the governing law set forth in" Supreme Court precedent; or (2) "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a [different] result." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The state court quoted *Strickland* and applied the governing standard for proving prejudice; it did not contradict it. App. 426, 434-39; *see also Jackson*, 542 U.S. at 654-55. And the facts the state court confronted were not "materially indistinguishable" from *Strickland* or any other decision of this Court that existed when it adjudicated Hines's claim. *Williams*, 529 U.S. at 406. So its decision was not "contrary to" clearly established federal law. 28 U.S.C. § 2254(d)(1).

2. The State Court's Decision Was Not an "Unreasonable Application" of *Strickland*.

Nor did the state court unreasonably apply *Strickland*'s prejudice standard, as the Sixth Circuit held.

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (quoting *Williams*, 529 U.S. at 410). To qualify as "unreasonable," a state court's decision must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *Woodall*, 572 U.S. at 419 (internal quotation marks omitted). If "fairminded jurists could disagree on the correctness of the state court's decision," it is not unreasonable. *Richter*, 562 U.S. at 101 (internal quotation marks omitted).

Thus, AEDPA bars relief if there is "*any* reasonable argument" in support of the state court's ruling. *Id.* at 105 (emphasis added). "[E]ven a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. And because *Strickland*'s prejudice standard is a "general one" with a substantial "range of reasonable applications," AEDPA review of these claims must be "doubly" deferential. *Id.* at 105 (internal quotation marks omitted); *see also Cullen v. Pinholster*, 563 U.S. 170, 202 (2011) (explaining that "doubly deferential" review applies to state-court rulings on *Strickland* prejudice).

Under this highly deferential standard, the question is whether every "fairminded jurist" would agree that, if only Hines's counsel had investigated Ken Jones, there would have been a "reasonable probability" of a different result at the guilt and penalty phases of Hines's trial. *See Richter*, 562 U.S. at 101-02; *Strickland*, 466 U.S. at 694. As Judge Kethledge explained in dissent, the answer to that question is "no." *See* App. 99-100. The reasons the state court gave

for rejecting Hines's *Strickland* claim were eminently reasonable, and the Sixth Circuit should have deferred to them. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

The state court concluded that presenting Jones as an alternative suspect would have been a losing strategy for two main reasons. Both were reasonable.

First, the state court determined that the postconviction investigation had uncovered no viable motive for Jones to kill Jenkins. App. 437. Jones and his girlfriend had been together at the motel "approximately 100 times before and were known by the staff, including [Jenkins]." *Id.* In fact, Jones and White usually rented their room directly from Jenkins. *Id.* at 387. Given this history, the notion that Jones suddenly decided to kill Jenkins on this particular Sunday—supposedly because she had somehow "thwarted" Jones's sexual liaison with White—would have made no sense. *Id.* at 437.

Second, the state court also determined that "the strength of proof against" Hines would have made any argument that Jones was the real killer similarly farfetched. *Id.* Hines fled the crime scene in Jenkins's Volvo with blood on his clothes. *Id.* at 382-83. He stole her car keys and wallet, which Jenkins habitually kept on her person when she worked. *Id.* at 381-84. Jenkins died from multiple stab wounds inflicted "with a knife similar to a butcher knife or a hunting knife," much like the knife that Hines always carried on his person. *Id.* at 380-81. Officers found stab marks from a large knife in Hines's motel room that were consistent with Jenkins's wounds. *Id.* at 384; R. 173-4 at 81-84; R. 173-

5 at 87. When Hines turned himself in, he disclaimed killing Jenkins before the sheriff said anything about the murder. R. 173-3 at 55. And Hines later told an officer that "he would confess and tell him all about the murder" if the officer could guarantee him the death penalty. App. 384.

In contrast to this compelling evidence against Hines, the postconviction investigation revealed no evidence implicating Jones in the murder. To accept Jones as an alternative killer, the state court explained, a jury would have had to believe that Jones stabbed Jenkins to death at the motel with no apparent motive, left the motel to dispose of evidence, and then returned to the scene "to report the crime and wait for law enforcement . . . to arrive." *Id.* at 437. The state court reasonably rejected that theory as "farfetched." *Id.*

Given the lack of motive or evidence implicating Jones and the strength of the proof against Hines, there is at least a "reasonable argument" that Hines was not prejudiced by his counsel's failure to investigate Jones. *Richter*, 562 U.S. at 105. Fairminded jurists could conclude that the evidence against Hines was so strong, and the evidence implicating Jones so weak, that any attempt to cast Jones as the real killer would have been unlikely to avoid a conviction and death sentence. Indeed, one fairminded jurist reached just that conclusion below, in dissent. App. at 99-100 (Kethledge, J., dissenting).

B. The Sixth Circuit's Reasoning Cannot Withstand Scrutiny.

The Sixth Circuit offered the flimsiest of reasons for concluding that the state court unreasonably applied *Strickland*. None of them withstand scrutiny.

First, the panel majority accused the state court of "unreasonably ignor[ing] the key evidence learned at Jones's post-conviction deposition." App. 90-91. But there was nothing to ignore. As the majority opinion recounts, Jones's postconviction deposition testimony revealed that he was at the motel on the Sunday in question to carry on his years-long affair with White, that the murder victim, Jenkins, often rented them a room on Sunday mornings at a discount rate, and that Jones was specifically looking for Jenkins when he arrived at the motel that day. *Id.* at 84-85; *see also* R. 174-5 at 7-34 (deposition transcript). None of this testimony remotely suggests that Jones killed Jenkins. To the contrary, both Jones and White testified in the postconviction proceedings that Jones did *not* commit the murder. App. 389, 392. A fairminded jurist could conclude that this testimony would have made no difference to the jury's guilt- and penalty-phase verdicts.

Second, the majority relied on the fact that Jones gave a slightly different timeline of events in his postconviction testimony than in his trial testimony. *Id.* at 86. But the majority never explained how this slightly different timeline—which Jones provided 13 years after his trial testimony, after suffering a stroke and being confined to a nursing home—could have led the jury to think that Jones was the real killer. And it

certainly never explained why the state court's contrary conclusion was unreasonable. The state court concluded that learning "the exact details" of Jones's movements on the day of the murder might "have 'muddied the water' concerning the details of the discovery of the body" but would have been "insufficient . . . to cast reasonable doubt" on Hines's guilt. *Id.* at 436-37. That conclusion was reasonable, and it precludes federal habeas relief.

Third, the majority rejected the state court's conclusion that Jones had no viable motive to murder Jenkins and instead reasoned that "Jones's desire to keep his affair a secret from his wife *could*" have motivated him to kill Jenkins. *Id.* at 87 (emphasis added). The majority never explained why Jenkins—who had helped facilitate Jones's affair for years by renting him a room at a discount rate—suddenly posed a threat to the affair's secrecy. But more importantly, fairminded jurists could agree with the state court that the postconviction evidence did not reveal a motive plausible enough to overcome the compelling evidence against Hines.

Fourth, the majority suggested that an adequate investigation of Jones "*could* have allowed defense counsel to effectively challenge the prosecution's case by . . . seriously undermining Jones's testimony and calling the prosecution's timeline of events into question." *Id.* at 89. But Jones "offered no testimony regarding Hines's guilt" and instead testified only "about his discovery of the body." *Id.* at 99 (Kethledge, J., dissenting); *see also* R. 173-2 at 64-82 (Jones's trial testimony). So any attempt to impeach Jones "would

have been a waste of time." App. 99 (Kethledge, J., dissenting). Proving that Jones was not completely truthful about the circumstances surrounding his discovery of the body would have done nothing to cast doubt on Hines's guilt.

Fifth, the majority relied on alleged inconsistencies between Jones's trial testimony and the trial testimony of another witness regarding whether Jones knew the sex of the victim and the means of the murder when he reported the crime. *Id.* at 83, 86-87. But to the extent such inconsistencies existed, they were fully available for Hines's counsel to exploit at trial. There is no evidence that further investigation of Jones would have been fruitful on this score: none of the evidence developed in postconviction proceedings would have enabled counsel to better exploit these inconsistencies. Because failing to investigate Jones did not affect counsel's ability to exploit these alleged inconsistencies, the Sixth Circuit erred by relying on them to establish prejudice.

Most fundamentally, the majority failed to apply the deference AEDPA requires. It granted relief based on its speculation that Jones "could" have had a possible motive to kill Jenkins, that presenting Jones as the real killer "may have" been a viable defense, and that questioning Jones about timeline discrepancies "could have" allowed the defense to poke holes in the prosecution's case. *Id.* at 87, 89. Maybe so. But it was not unreasonable for the state court to conclude that these tactics would not have created a *substantial* likelihood of a different outcome. *See Richter*, 562 U.S. at 112. The postconviction evidence was hardly so one-

sided that every fairminded jurist would have been compelled to find *Strickland*'s prejudice standard satisfied.

II. The Decision Below Warrants Summary Reversal.

Unfortunately, this is hardly the first case in which the Sixth Circuit has ignored the requirements of AEDPA to invalidate a lawful criminal judgment. As the cases cited in the Introduction make clear, the Sixth Circuit has a long history of erroneously granting habeas relief, especially in capital cases. And this Court has an equally long history of summarily reversing those decisions. *See* p. 4, *supra*. The Court should follow that same course here.

A. Summary Reversal Is Necessary to Vindicate Important State Interests.

Although this Court ordinarily does not grant certiorari merely to correct erroneous applications of settled law, *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment), it does not hesitate to correct erroneous awards of habeas relief. In recent years, the Court has summarily reversed awards of habeas relief at a rate of more than once per term.[2]

---

[2] The Court has summarily reversed awards of habeas relief no fewer than 36 times in the past two decades. *See* p. 4, *supra* (citing 13 summary reversals of the Sixth Circuit); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018) (per curiam); *Kernan v. Cuero*, 138 S. Ct. 4, 5-6 (2017) (per curiam); *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728 (2017) (per curiam); *Glebe v. Frost*, 574 U.S. 21, 23 (2014) (per curiam); *Lopez v. Smith*, 574 U.S. 1, 2 (2014) (per curiam); *Nevada v. Jackson*, 569 U.S. 505, 506 (2013) (per curiam); *Marshall v.*

The Court also frequently reverses awards of habeas relief in argued cases.[3]

There is good reason for this practice. Federal habeas relief "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (internal quotation marks omitted). It disturbs the finality of criminal judgments, denies society the right to punish admitted offenders, prolongs the suffering of victims, and frustrates state efforts to honor constitutional rights. *Id.*; *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998). By summarily

---

Rodgers, 569 U.S. 58, 59 (2013) (per curiam); *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam); *Wetzel v. Lambert*, 565 U.S. 520, 525-26 (2012) (per curiam); *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam); *Felkner v. Jackson*, 562 U.S. 594, 597-98 (2011) (per curiam); *Swarthout v. Cooke*, 562 U.S. 216, 219-22 (2011) (per curiam); *Wilson v. Corcoran*, 562 U.S. 1, 1-2 (2010) (per curiam); *Thaler v. Haynes*, 559 U.S. 43, 44 (2010) (per curiam); *Wong v. Belmontes*, 558 U.S. 15, 16 (2009) (per curiam); *Wright v. Van Patten*, 552 U.S. 120, 120-21 (2008) (per curiam); *Kane v. Garcia Espitia*, 546 U.S. 9, 9-10 (2005) (per curiam); *Middleton v. McNeil*, 541 U.S. 433, 436 (2004) (per curiam); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam); *Early v. Packer*, 537 U.S. 3, 4 (2002) (per curiam); *Woodford v. Visciotti*, 537 U.S. 19, 20 (2002) (per curiam); *Horn v. Banks*, 536 U.S. 266, 267 (2002) (per curiam).

[3] The Court has reversed awards of habeas relief by the Sixth Circuit alone in at least 11 argued cases in recent years. *Woodall*, 572 U.S. at 417; *Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Lancaster*, 569 U.S. at 354-55; *Howes v. Fields*, 565 U.S. 499, 502 (2012); *Renico v. Lett*, 559 U.S. 766, 769 (2010); *Berghuis v. Thompkins*, 560 U.S. 370, 373-74, 388-91 (2010); *Berghuis v. Smith*, 559 U.S. 314, 320 (2010); *Smith v. Spisak*, 558 U.S. 139, 141-42 (2010); *Bobby v. Bies*, 556 U.S. 825, 828 (2009); *Price v. Vincent*, 538 U.S. 634, 636 (2003); *Bell v. Cone*, 535 U.S. 685, 688-89 (2002).

reversing erroneous awards of habeas relief, the Court vindicates these weighty interests. It also "ensure[s] observance" of congressionally imposed limits on federal courts' habeas power. *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from the denial of certiorari).

B. Summary Reversal Is Necessary to Promote Respect for Precedent.

Summarily reversing obvious misapplications of AEDPA promotes respect for the rule of law by "treat[ing] like cases alike." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment). The practice ensures that lower courts follow settled precedent and thus guards against "arbitrary discretion in the courts." *Id.* (quoting The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton)). Given this important interest, it is unsurprising that "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam).

Summary reversal also serves to "enforce the Court's supremacy over recalcitrant lower courts." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & Liberty 1, 2 (2015). "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 the denial of certiorari). The Court should summarily reverse "to discourage this appetite." *Id.* at 390.

The Court has previously used summary reversal to correct the precise error the Sixth Circuit committed in this case. On at least three occasions, the Court has summarily reversed lower courts for failing to defer under AEDPA to a state court's ruling on *Strickland* prejudice. *Etherton*, 136 S. Ct. at 1152 (reversing the Sixth Circuit); *Jackson*, 542 U.S. at 654-55 (reversing the Sixth Circuit); *Woodford v. Visciotti*, 537 U.S. 19, 22-27 (2002) (per curiam) (reversing the Ninth Circuit). The Court has also summarily reversed lower courts for incorrectly finding *Strickland* prejudice in capital habeas cases even where AEDPA did not apply. *Wong v. Belmontes*, 558 U.S. 15, 16 (2009) (per curiam) (reversing the Ninth Circuit); *Van Hook*, 558 U.S. at 12-13 (reversing the Sixth Circuit). The same result should obtain here.

C. Summary Reversal Is Necessary to Avoid Grave Consequences in This Case.

Summary reversal is especially warranted in this case to avoid the grave consequences that will otherwise flow from the Sixth Circuit's erroneous decision.

Hines brutally murdered Katherine Jenkins more than 35 years ago. Retrying him this many years after the fact will be difficult, perhaps impossible. That is reason enough to summarily reverse. *See Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (summarily reversing an award of habeas relief in a capital case because "[a]ny retrial . . . would take place *three decades* after the crime, posing the most daunting difficulties for the prosecution").

Public safety also necessitates summary reversal. If the State cannot successfully retry Hines, a violent murderer will go free. That result would be tolerable if the law required it. But here, no sound reason exists to acquiesce in the Sixth Circuit's "latest unsupportable § 2254 judgment." *Maxwell*, 132 S. Ct. at 617 (Scalia, J., dissenting from the denial of certiorari). This Court has seen fit to summarily reverse a Sixth Circuit AEDPA decision that involved only "a single count of possession with intent to deliver cocaine." *Etherton*, 136 S. Ct. at 1150. It should do no less here.

Allowing the Sixth Circuit's decision to stand will impose serious costs on Hines's victims. Jenkins's surviving family members have already endured one guilt-phase trial, two sentencing proceedings, and decades of postconviction litigation. They should not be forced to start over just as their quest for justice was drawing to a close.

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). To say that those interests would be "frustrated" by allowing the Sixth Circuit's decision to stand would be an understatement. *Id.* Hines's victims deserve to "move forward knowing the moral judgment [of the State] will be carried out." *Thompson*, 523 U.S. at 556.

The State does not lightly seek the strong medicine of summary reversal. But the Sixth Circuit has yet again set aside a decades-old murder conviction and death sentence "based on the flimsiest of rationales."

Matthews, 567 U.S. at 38. Its decision "is a textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 779 (2010)). Its judgment should not stand.

If the Court does not summarily reverse, it should alternatively grant the petition and set the case for argument. *See, e.g.*, *Rice v. Collins*, 546 U.S. 333, 335 (2006) (explaining that the Court granted plenary review in a habeas case because it was "[c]oncerned that . . . a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record").

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

JOHN H. BLEDSOE
Deputy Attorney General
Counsel of Record

MARK ALEXANDER CARVER
Honors Fellow, Office of the Solicitor General

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-4351
john.bledsoe@ag.tn.gov

Counsel for Petitioner