No. 20-507

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

REPLY BRIEF OF PETITIONER

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

January 27, 2021

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULE

ARGUMENT

Hines has very little to say in defense of the Sixth Circuit's opinion. He instead tries to distinguish the specific errors the Sixth Circuit committed here from the errors committed in the many other cases in which this Court has summarily reversed awards of habeas relief. BIO 8-11. Ironically, Hines's discussion of these cases only underscores their central lesson: federal courts have a duty to get *every* AEDPA case right *every* time, no matter the issue. As Judge Kethledge explained in dissent, the panel majority clearly breached that duty in this case. App. 95-100.

It is hard to think of a case more deserving of summary reversal than this one. By granting Hines relief on his *Strickland* claim, the Sixth Circuit "clearly violated this Court's AEDPA jurisprudence." *Shinn v. Kayer*, 141 S. Ct. 517, 520 (2020) (per curiam). And its decision will produce grave consequences. Pet. 27-28. Chief among them is that a guilty, violent murderer may well go free. The State is committed to protecting its citizens by doing everything in its power to keep Hines behind bars, including retrying him if necessary. But because any retrial will occur nearly *four decades* after his crime, there is a real risk that the prosecution may fail. *See Engle v. Isaac*, 456 U.S. 107, 127-28 (1982). This Court's intervention is urgently needed.

Hines's efforts to evade review cannot succeed. The Sixth Circuit's decision is clearly wrong, summary reversal is plainly warranted, and Hines's alternative grounds for habeas relief, BIO 20-27, are both outside the scope of the question presented and meritless. The

Court should grant the petition for certiorari and summarily reverse.

I. The Sixth Circuit Defied the Court's Precedent.

Hines's arguments, like the panel majority's opinion, fall far short of showing that the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Fairminded Jurists Could Conclude That Hines Failed to Prove Prejudice.

Hines does not dispute any of the damning evidence against him discussed in the petition. BIO 1. He instead argues that there was also some evidence that could have implicated Jones in the murder, which if heard by the jury could have led to an acquittal or spared him the death penalty. *Id.* at 3-6, 14-17. But Hines has not shown, as he must, that every fairminded jurist would agree that this evidence would have created a substantial likelihood of a different outcome at trial. Pet. 15-16, 18.

Most of the evidence Hines relies on in his attempt to implicate Jones has already been discussed in the petition. *Id*. at 21-24. The petition's criticisms of the panel majority's reasoning, *id.*, apply equally to Hines's arguments. But a few of Hines's arguments warrant additional response.

Hines's main argument is that the evidence against Jones would have been sufficient to convict Jones of murdering Jenkins *if* considered in isolation from the evidence against Hines. BIO 14-17. As his brief

explains, "*had* Mr. Hines not been found with Mrs. Jenkins' car" and "*[h]ad* Mr. Hines not been arrested," Jones might have been "the primary suspect." *Id.* at 16-17 (emphasis added).

But that is not how the *Strickland* prejudice inquiry works. Hines *was* arrested, and the evidence against him *was* damning. Pet. 19-20; App. 99 (Kethledge, J., dissenting). Given the compelling evidence against Hines, fairminded jurists could conclude that the much weaker evidence against Jones would have been unlikely to change the outcome of the trial. Pet. 20. There is at least a reasonable argument that Hines was not prejudiced, which is enough to preclude federal habeas relief. *Id.*

Even considered in isolation, the evidence pointing to Jones as the murderer is incredibly weak. The two main pieces of evidence that Hines identifies both have multiple explanations that are consistent with Jones's innocence and Hines's guilt. A fairminded jurist could conclude that this evidence would have had no impact on the outcome of the trial.

The first piece of evidence is an alleged discrepancy in trial testimony about whether Jones knew the victim's sex and manner of death when he reported the crime. BIO 4, 14; App. 83, 86-87. At trial, Jones testified that he saw a body with "a head of hair" covered in a sheet that had "blood all over it" when he entered Room 21. R. 173-2 at 67-68. He also saw a cleaning cart outside the room and a vacuum cleaner when he entered the room. *Id.* at 67, 75. When asked if he recognized the victim as male or female, Jones responded, "Not then." *Id.* at 68. But the first

responder who was dispatched to the CeBon Motel testified that the 911 caller said that Jones had reported that a "woman" had been "stabbed." *Id.* at 11-13, 15-16. Hines suggests that Jones must have been the murderer to have known the victim's sex and manner of death. BIO 4, 14.

As the petition explained, this alleged discrepancy in testimony is irrelevant to the prejudice inquiry because the jury *heard* the discrepancy at trial but still convicted Hines and sentenced him to death. Pet. 23. Hines has no response to this argument.

Perhaps Hines thinks that investigating Jones before trial would have allowed his counsel to effectively cross-examine Jones about this alleged discrepancy and somehow avoid a conviction or death sentence. But if that is his theory of prejudice, then Hines was obliged to prove it in the postconviction proceedings. And during Jones's postconviction testimony, Hines never asked him to explain why he told the 911 caller that the victim was a woman who had been stabbed. R. 174-5 at 1-35 (Jones's postconviction testimony). We do not know how Jones might have explained his statement to the 911 caller because Hines *never asked him to do so*. Without any evidence about what a hypothetical cross-examination of Jones on this issue might have looked like, Hines cannot prove that the absence of cross-examination prejudiced him.

In any event, there are innocent explanations for Jones's statement to the 911 caller. By the time Jones arrived at the nearby restaurant to report his discovery, he may have inferred from the "head of hair"

that the victim was likely a woman. R. 173-2 at 67. He may also have surmised from the nearby cleaning cart and vacuum cleaner that the victim was a motel maid—and thus likely a woman. *Id.* at 67, 75. And the sheet with "blood *all* over it" may have led Jones to assume that the victim had been stabbed, as opposed to shot or killed in another manner that would produce less blood. *Id.* at 68 (emphasis added). Alternatively, perhaps Jones looked at the body more closely than he testified to at trial. The truth is that we will never know because Hines failed to develop any proof on the issue in the postconviction proceedings.

The second piece of evidence Hines relies on is a $20 bill found under Jenkins's watchband. BIO 4, 14-15. Because Jones's postconviction testimony revealed that he regularly paid Jenkins $20 for a room at the motel, Pet. 10, Hines speculates that Jones must have paid Jenkins for his room before she was murdered and that he therefore lied about not seeing her on the day of the murder. BIO 5, 14-16.

But the $20 bill could have come from any number of sources besides Jones. Maybe it came from the bank bag the motel manager gave Jenkins earlier that morning. Pet. 5. Maybe Jenkins found it in a room—she had already cleaned several that morning. R. 173-1 at 24-27. Maybe Hines placed the bill under her watchband, as the prosecution argued. BIO 4-5. None of the evidence Hines uncovered in the postconviction proceedings ruled out these possibilities. There is at least a reasonable argument that the jury's guilt- and penalty-phase verdicts would not have

changed even if the jury had learned that Jones often paid Jenkins $20 for his room.[1]

B. The Sixth Circuit Flouted AEDPA.

As Judge Kethledge explained in dissent, this is not a close case. App. 95. By failing to afford the deference AEDPA requires, the panel majority did "exactly what the Supreme Court has repeatedly told us not to do." *Id.* (quoting *Etherton v. Rivard*, 800 F.3d 737, 757 (6th Cir. 2015) (Kethledge, J., dissenting), *cert. granted, judgment rev'd sub nom. Woods v. Etherton*, 136 S. Ct. 1149 (2016) (per curiam)).

Hines contends that the panel majority faithfully applied AEDPA because it recited the correct standard. BIO 11-12. But the Court routinely reverses decisions that recite the correct AEDPA standard yet fail to give it effect. *See, e.g.*, *Etherton*, 800 F.3d at 748-49 (reciting standard), *cert. granted, judgment rev'd*, 136 S. Ct. at 1152 ("[T]he Sixth Circuit did not apply the appropriate standard of review under AEDPA.").

---

[1] Hines's argument that his sentencing jury might have found one less aggravating factor had it known about the $20 payments is forfeited, meritless, and irrelevant. BIO 17-20. Hines failed to raise this argument in his Sixth Circuit brief, and that court did not address it. And it is hard to believe that learning about the $20 payments would have impacted the jury's finding that the murder was especially heinous, atrocious, or cruel. What made the murder heinous was not the possibility that Hines slipped a $20 bill under Jenkins's watchband but the fact that he stabbed her to death and mutilated her vagina. Finally, the $20 payments could not conceivably have impacted the other two aggravating factors the jury found: that Hines had at least one prior violent felony conviction and that he committed the murder during a robbery. App. 2.

Hines also contends that only one layer of deference applies to state-court rulings on *Strickland* prejudice. BIO 12-13. The Court has said otherwise. *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). But regardless, the correct result here does not turn on how many layers of deference apply. Any amount of deference is sufficient to reverse the Sixth Circuit.

II. Summary Reversal Is Warranted.

Only weeks ago, the Court summarily reversed a Ninth Circuit decision that failed to defer under AEDPA to a state court's ruling on *Strickland* prejudice. *Kayer*, 141 S. Ct. at 520-26. This case is even more worthy of review and reversal than *Kayer*. The Ninth Circuit wrongly invalidated a murderer's death sentence, which was enough to warrant summary reversal. *Id.* at 522-24. The Sixth Circuit went further: it wrongly invalidated Hines's death sentence *and* conviction, which means he must be retried—more than 35 years after his crime—*or released*. If this error does not warrant summary reversal, it is hard to know what would.

Hines cannot argue with the Court's regular practice of summarily reversing in cases like this one, Pet. 24-25, 27-28, so he falls back on the traditional criteria for granting certiorari. BIO 6-7. But these criteria have not stopped the Court from summarily reversing fact-bound awards of habeas relief in at least 38 other cases in the past two decades. Pet. 24 n.2; *see also Kayer*, 141 S. Ct. at 520; *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (per curiam). They should not do so here either.

That the decision below is unpublished should carry "no weight in [the Court's] decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *see also Ricci v. DeStefano*, 557 U.S. 557, 576 (2009). "Nonpublication must not be a convenient means to prevent review." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from the denial of certiorari). And the special considerations that warrant review and reversal of fact-bound habeas decisions, Pet. 24-29, apply "regardless of nonpublication and regardless of any assumed lack of precedential effect." *McCoy*, 484 U.S. at 7.

If the Court does not summarily reverse, it should grant plenary review. Pet. 29. It is not uncommon for the Court to grant plenary review in capital cases whose primary significance is to the parties involved. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); *Kansas v. Carr*, 577 U.S. 108, 111 (2016). That practice extends even to noncapital cases in the habeas context. *See, e.g.*, *Metrish v. Lancaster*, 569 U.S. 351, 354-55 (2013); *Renico v. Lett*, 559 U.S. 766, 769 (2010); *Rice v. Collins*, 546 U.S. 333, 335 (2006). Whether by summary disposition or through full briefing and argument, this case warrants review.

III. Hines's Alternative Grounds for Habeas Relief Provide No Basis to Deny Review.

Finally, Hines seeks refuge in entirely separate claims to habeas relief that even the panel majority rejected. BIO 20-27. But these claims are outside the scope of the question presented. And they are meritless in any event. Not one of the four federal judges assigned to this case has found any merit to

these claims, and this Court need not address them further.

The question presented is limited to the Sixth Circuit's *grant* of habeas relief "on the ground that a state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. i. Hines's arguments that the Sixth Circuit incorrectly *denied* relief on *other* claims are outside the scope of this question. For that reason alone, the Court need not and should not consider them. This Court's Rule 14.1(a); *see also, e.g.*, *Glover v. United States*, 531 U.S. 198, 205 (2001) (declining to address alternative grounds for affirmance because "[a]s a general rule, . . . we do not decide issues outside the questions presented"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279-80 (1993) (declining to address a separate claim not raised in the petition because "it is the petition for certiorari (not the brief in opposition and later briefs) that determines the questions presented").

If the Court does address these claims, it should hold that they are meritless.

First, the Sixth Circuit correctly ruled that Hines could not establish his gateway claim of actual innocence to excuse the procedural default of his separate *Strickland* claim based on counsel's failure to forensically test certain evidence. App. 12-19. The Sixth Circuit's reasons for rejecting the gateway claim were sound: none of the forensic evidence uncovered in the postconviction proceedings undermined the evidence of Hines's guilt presented at trial. *Id.* at 16-17, 19. Moreover, it should be obvious based on the

compelling evidence against Hines discussed in the petition—evidence Hines does not dispute—that he cannot make the strong showing of actual innocence necessary to succeed on his gateway claim.

Even if the Sixth Circuit wrongly rejected his gateway claim, that would not entitle Hines to habeas relief—only to an evidentiary hearing on his procedurally defaulted *Strickland* claim. *Id.* at 12. But to grant Hines that relief now "would alter the Court of Appeals' judgment, which is impermissible in the absence of a cross-petition from [Hines]." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013).

Second, the Sixth Circuit correctly rejected Hines's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), because the alleged *Brady* evidence was not material. App. 32-39. The alleged *Brady* evidence—handwritten notes from the state crime lab—revealed that there was no microscopic evidence of sperm in the swabs taken from Jenkins's vagina and anus and that the swabs were not subjected to further testing for semen. *Id.* at 33, 37-38. Contrary to the evidence at trial, Hines's theory on postconviction review was that Jenkins had been sexually assaulted before she was killed. *Id.* at 13, 16-17, 38. Hines argued that he could have used the fact that the swabs were never tested for semen to show that the prosecution could not definitively rule out that someone else had left semen on Jenkins. *Id.* at 38. But because there was no evidence of any semen on Jenkins's body—indeed, all the evidence was to the contrary—the Sixth Circuit concluded that "Hines's argument would have been mere unconvincing speculation," which would have been unlikely to change

the outcome of his trial. *Id.* at 38-39. Hines has not come close to showing that this reasoning was erroneous. BIO 24-25.

Even if the *Brady* claim had merit, the State argued below that it was procedurally defaulted. App. 34. The Sixth Circuit did not address that argument because it rejected the claim on the merits, *id.* at 34, 38-39, but the procedural default is yet another reason this claim fails.

Third, the Sixth Circuit correctly ruled that Hines failed to prove prejudice for his penalty-phase *Strickland* claims based on his counsel's failure to (1) present available mitigating evidence, (2) argue that Jenkins was dead or unconscious when Hines stabbed her through the vagina, and (3) make a specific argument against the death penalty. App. 40-74. Hines barely even tries to show that the Sixth Circuit's no-prejudice rulings were erroneous. BIO 25-27. He has not come close to succeeding. And even if he had, the third subclaim is procedurally defaulted, App. 72, the Sixth Circuit erred in reviewing the second subclaim *de novo*, *id.* at 42-44, instead of under AEDPA deference, *see Holland v. Jackson*, 542 U.S. 649, 654-55 (2004) (per curiam), and none of these penalty-phase subclaims could invalidate Hines's conviction, as the Sixth Circuit did.

Because Hines's alternative claims have been finally adjudicated by the Sixth Circuit, are outside the question presented, and are meritless in any event, there is nothing left for the Sixth Circuit to do if this Court reverses the award of habeas relief. Accordingly, this Court should simply reverse the Sixth Circuit's

judgment; there is no need to remand for further proceedings. *See, e.g.*, *Etherton*, 136 S. Ct. at 1153 (reversing with no remand where the Sixth Circuit had already rejected the habeas petitioner's other claims).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed without remanding for further proceedings.

Respectfully submitted,

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

JOHN H. BLEDSOE
Deputy Attorney General
Counsel of Record

ANDRÉE S. BLUMSTEIN
Solicitor General

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