No. 21-____

IN THE

Supreme Court of the United States

JOSEPH WILBORN,

Petitioner,

v.

ALEX JONES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LAUREN GAILEY
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
LGailey@winston.com

LINDA T. COBERLY
Counsel of Record
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

Counsel for Petitioner

QUESTIONS PRESENTED

During opening statements at Petitioner's murder trial, his counsel promised the jury that it would hear from the only eyewitness. Counsel later reneged on that promise without explanation. Instead of hearing from the eyewitness—who has sworn that he would have taken sole responsibility for the murder—the jury was left to draw the inference that his account would have been harmful to Petitioner's case.

Petitioner was convicted and sentenced to 55 years in prison. On state post-conviction review, he argued that he was denied the effective assistance of counsel in violation of the Sixth Amendment. The state courts denied relief, conflating counsel's broken promise with a run-of-the-mill decision not to call a witness at trial.

Petitioner then raised the same claim on federal habeas review, invoking on-point circuit precedent recognizing that a state court unreasonably applies *Strickland* v. *Washington*, 466 U.S. 668 (1984), when it denies relief despite counsel's inexplicable broken promise to the jury to put on critical testimony. The Seventh Circuit affirmed on the ground that "this [argument] relies only on our Court," and "[a]lthough we think highly of our own decisions, we are not the Supreme Court." Pet. App. 4a.

This case presents two questions:

1. Is a federal court bound only by the decisions of this Court in determining whether a state court has unreasonably applied "clearly established Federal law" as announced by this Court?

2. Is the Sixth Amendment violated when counsel promises a jury critical evidence and then breaks that promise without apparent justification?

PARTIES TO THE PROCEEDINGS

Petitioner-appellant below was Joseph Wilborn, an Illinois state prisoner.

Respondent-appellee below was Alex Jones, in his official capacity as warden of Menard Correctional Center, where Wilborn is currently incarcerated. Jones's predecessor respondent-appellee was Frank Lawrence, former warden of Menard. Lawrence was preceded as respondent-appellee by Michael Melvin and Randy Pfister, former wardens of the Pontiac Correctional Center, another Illinois state prison where Wilborn had been incarcerated before his transfer to Menard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

This case presents the Court with the opportunity to resolve a long-standing and deep split of authority central to cases under 28 U.S.C. § 2254—namely, whether a court of appeals may (or must) ignore its own precedent in determining whether a state court unreasonably applied the precedent of this Court. The Seventh Circuit and three others say yes; seven circuits say no.

Further, the Seventh Circuit's decision in this case also creates a new conflict relating to the Sixth Amendment's assistance-of-counsel guarantee. When counsel promises evidence to the jury and then breaks that promise—either for no reason or for a reason that should have been apparent from the beginning—his performance is constitutionally ineffective and risks great prejudice to the defendant. This Court should intervene to resolve both of these issues.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. A) is at 964 F.3d 618. The district court's opinion (Pet. App. B) is at 2017 WL 3278942. The opinion of the Appellate Court of Illinois (Pet. App. C) is at 962 N.E.2d 528.

JURISDICTION

The Seventh Circuit entered judgment on July 6, 2020, and denied rehearing on August 4, 2020. This petition is timely per this Court's order of March 19, 2020, extending the time in which to file to "150 days from the date of the * * * order denying a timely petition for rehearing." *See* Rule 30.1.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) provides, in relevant part:

> 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 * * * 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).

STATEMENT OF THE CASE

A. Trial counsel promises the jury critical witness testimony, only to renege on that promise without explanation.

In 2004, Emmitt Hill was shot and killed in a pedestrian gangway between two buildings in the South Side of Chicago. No one saw the shooting. Joseph Wilborn and Cedrick Jenkins, who knew Hill from the neighborhood, were charged with Hill's murder. 7th Cir. App. A347–50, A664.

At Wilborn's June 2006 trial, the State's theory was that a feud between Jenkins and Hill—which Wilborn had recently tried to defuse—had boiled over. *Id.* A380–83. Hill insulted Jenkins, causing Jenkins and Wilborn "to walk away" via the gangway. *Id.* A320, A380–81. When Hill charged after them, the State claimed Wilborn and Jenkins "turned on him, both firing." *Id.* A321.

To convict Wilborn of first-degree murder, the State had to prove there were "two shooters and * * * [Wilborn]'s one of them." *Id.* A594. The forensic and firearms evidence, however, failed to establish this. No guns were found at the scene; there was no clear link between two guns recovered from the home where Wilborn and Jenkins were arrested and the crime scene; and no physical evidence, such as fingerprints, connected Wilborn to either gun. *Id.* A437–38, A466–68, A482–85.

To close these evidentiary gaps, the State relied on hearsay testimony from Wilborn's acquaintance Stacey Daniels, who was on parole and therefore unable to resist the State's efforts to compel his testimony. *Id.* A322, A418; *see* 7th Cir. Appellant's Supp. App. SA1–4. Over counsel's objections to the

prosecutor's leading questions, Daniels sputtered through an account of a purported conversation with Wilborn (*e.g.*, "I don't know. * * * I don't really remember. I ain't gonna start lying up here."), finally testifying that "I guess * * * [Wilborn] start [sic] shooting." 7th Cir. App. A408–09.

Credibility issues aside, Daniels had to be rebutted. To this end, Wilborn's counsel had announced during his opening statement that Jenkins—the only available eyewitness—would testify to "what happened inside that gangway," and "[i]t won't be the same story that you hear from Mr. Daniels." *Id.* A325. Jenkins dominated the opening statement; counsel said his name eighteen times in a span of just three transcript pages and expressly promised the jury his testimony on four separate occasions. *See id.* A323–26.

From counsel's perspective, this was a critically important strategy. Jenkins was Wilborn's former co-defendant; the cases had been severed in the spring of 2005 after Jenkins made statements tending to implicate Wilborn. *Id.* A647. But after Jenkins pled guilty in December 2005 (7th Cir. Respondent's Supp. App. RA5), he informed Wilborn's counsel that he was willing to testify that he alone shot Hill, and Wilborn was innocent. 7th Cir. App. A98–99 (affidavit).

As planned, Jenkins reported to the courthouse to testify. *Id.* A550. Just before he was to take the stand, Wilborn's counsel asked the court for "a second to talk to" Jenkins. *Id.* After "five minutes," the judge told Wilborn that his "attorney has decided that he thinks it is to your best interest not to call this witness." *Id.* Wilborn was left with no choice but to acquiesce. *See id.* A551.

When proceedings resumed, counsel did not call Jenkins or acknowledge his absence. The only defense witness was an officer who described the crowd at the crime scene. *Id.* A557–58. With that, the defense rested. *Id.* A566. After Jenkins failed to materialize, the State seized on his absence in its closing, reminding the jury of counsel's promises and asking, "Is that what you got?" *Id.* A623.

The jury convicted Wilborn of first-degree murder (*id.* A635), and he was sentenced to 55 years in prison. *Id.* A279–80. His direct appeal was unsuccessful. *Id.* A260, A278.

B. The state court unreasonably applies *Strickland*.

Wilborn filed a pro se petition for post-conviction relief in Illinois state court. 7th Cir. App. A164–65. One of his arguments was that trial counsel was constitutionally ineffective in that he had "promised the Jury a witness"—Jenkins—but "did not produce the witness." *Id.* A166. Wilborn attached an affidavit from Jenkins taking full responsibility for Hill's murder:

> On July, 28th, 2004, I Cedric Jenkins was walking through the gangway with Wilborn between Michigan and Wabash to go to the gasstation to get some blunts. M.O [i.e., Emmitt "Emmo" Hill] came running behind us in the gangway * * * . M.O was still following us talking crazy with his hand in his pocket. I Cedric turned around a second time and told M.O to go about his business that's when M.O acted like he was about to pull a gun out of his pocket.
>
> *Thats when I pulled out a gun and shot one time thats when Wilborn ran. I Cedric shot two more*

> *times* and my gun jam so I pulled out my other gun and shot four more times thats when I ran. Two weeks later August, 13th, 2004 I was arrested with one of the guns I shot M.O with, I told the police I had got rid of one of the guns I shot M.O with *I also told the police I shot and killed M.O alone (by my self).*
>
> *Wilborn never knew that night I had guns on me, or Wilborn never knew I was going to shoot M.O.* If I would have been or was called as a witness I would testify to this affidavit.

Id. A212 (typographical errors in original) (emphasis added). The state trial court dismissed Wilborn's petition on procedural grounds. *Id.* A127, A130.

On (counseled) appeal, the Illinois Appellate Court denied relief, misapplying *Strickland* in concluding that "defense counsel's decision to not call Jenkins as a witness appears to be the product of sound trial strategy." Pet. App. 62a. Although the court "agree[d] * * * that counsel's assistance may be ineffective if he or she promises that a particular witness will testify during opening statements, but does not provide the promised testimony during trial," it failed to distinguish a broken promise to the jury from any other decision—made without the jury's knowledge—"concerning which witnesses to call at trial and what evidence to present." *Id.* at 59a–60a. Such decisions, the court concluded, "ultimately rest[s] with trial counsel." *Id.*

The court also omitted a critical fact from its *Strickland* analysis: it assumed that "after interviewing [Jenkins], defense counsel determined that Jenkins's testimony would not be in defendant's 'best interest'" because "Jenkins was a codefendant

and his testimony may have been harmful to defendant." *Id.* at 62a–63a. This analysis did not account for the timeline: counsel had *already promised the jury* Jenkins's testimony, with full knowledge that "Jenkins was a codefendant" whose interests had once been adverse to Wilborn's. *See id.*; 7th Cir. App. A647. Similarly, the court found counsel's decision to be "the product of sound trial strategy at the time that he interviewed Jenkins," but it did not account for the fact that counsel waited until *after* he had made his fateful promise to the jury—and just minutes before Jenkins was to take the stand as the star witness—to conduct the interview. Pet. App. 62a. Nor did the court's opinion account for the lack of evidence in the record about any justification for counsel's cold feet.

C. Affirming the denial of relief under § 2254, the Seventh Circuit acknowledges but ignores its own on-point precedent.

Wilborn next filed a pro se § 2254 petition. He included another affidavit from Jenkins, signed and notarized, in which Jenkins reiterated that he was the sole shooter. 7th Cir. App. A98–99. Jenkins explained that while he had felt pressure to implicate Wilborn in the shooting while they were co-defendants, he had been prepared to testify at Wilborn's trial about what really happened—and he told Wilborn's counsel so. *Id.*

Nevertheless, the district court denied relief. The court misread the record to show that "counsel [could]not be faulted" because "[i]t was Jenkins, not the defense attorney, who turned on" Wilborn. Pet. App. 28a. In fact, Jenkins had sworn that he had not done so, but the court rejected his affidavit as not credible. *Id.* at 28a–29a. Based on this error—which not only misread the record but improperly rejected an

uncontroverted affidavit at the pleading stage—the district court concluded that the state court's decision "was [n]either contrary to, [n]or an unreasonable application of, *Strickland*." *Id.* at 25a.

Wilborn sought a certificate of appealability from the Seventh Circuit. 7th Cir. App. A38. Judge Scudder found that Wilborn "made a substantial showing of the denial of a constitutional right * * * as to whether trial counsel performed deficiently and caused cognizable prejudice when he told the jury in his opening statement that Wilborn's codefendant would testify but then declined to call the codefendant as a witness." Pet. App. 76a. Citing the Seventh Circuit's 2003 decision in *Hampton* v. *Leibach*, which held that "when the failure to present * * * promised testimony cannot be chalked up to unforeseeable events, [an] attorney's broken promise may be unreasonable, for little is more damaging than to fail to produce important evidence that had been promised in an opening," Judge Scudder granted the certificate. *Id.* (quoting 347 F.3d 219, 257 (7th Cir. 2003)).

In *Hampton*, the petitioner had been on trial for a violent gang assault. 347 F.3d at 221–22. In his opening statement, Hampton's counsel promised the jury that Hampton would testify that he "had not participated in the attack" and "that the evidence would show that Hampton was neither a member of, nor involved with, any gang." *Id.* at 226. "Subsequently, however, [counsel] raised with Hampton the possibility that his testimony might aggravate the possibility of the jury thinking him guilty by association." *Id.* at 258. Deferring to this judgment, "Hampton made the decision not to testify." *Id.* As a result, "[n]either [of counsel's] promise[s] was kept. Hampton did not testify, and his jury heard no

evidence that he had lacked involvement with a gang." *Id.* at 226. He was convicted. *Id.*

The Illinois Appellate Court denied postconviction relief, reasoning that counsel's "failure to fulfill the promise that Hampton would testify in his own defense" was a reasonable "change in trial strategy" in light of concerns about his ability "to withstand the rigors of cross-examination." *See id.* at 229.

Hampton sought relief under § 2254, and the Seventh Circuit held that the Illinois Appellate Court had erred in "determin[ing] that it was reasonable for [counsel] to make and then break these promises." *Id.* at 259. The absence of the promised evidence had "g[iven] rise to [a] negative inference against the defendant" that "taint[ed] both the lawyer who vouchsafed it and the client on whose behalf it was made." *Id.* at 257 (quotations omitted). "[W]hen the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for little is more damaging than to fail to produce important evidence that had been promised in an opening." *Id.* (quotation omitted). The court concluded that counsel's broken promises had given the jury "reason to believe that there was no evidence contradicting the State's case, and thus to doubt the validity of Hampton's defense." *Id.* at 260. Accordingly, the Illinois Appellate Court had applied *Strickland* unreasonably, and relief under § 2254 was warranted. *Id.*

In so holding, the Seventh Circuit adhered to a line of precedent dating back to *Harris* v. *Reed*, a pre-AEDPA ineffective assistance case where the court had applied the same rationale in reversing the district court's denial of habeas relief. 894 F.2d 871,

879 (7th Cir. 1990). There, too, counsel's opening statement "emphasized" that two witnesses "would figure quite prominently in the trial," as they could have "discredited [the] account" of the prosecution's star witness and "provided the jury with a viable basis for clinging to the presumption that [the defendant] was innocent." *Id.* at 873, 878. Counsel ultimately reversed course and decided not to produce them, instead "gambl[ing] on * * * the weakness of the prosecution's case." *Id.* at 879.

The Seventh Circuit held that counsel's balk had prejudiced the defendant, as his "opening [had] primed the jury to hear a different version of the incident," and "[w]hen counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up the claims made in the opening." *Id.* "By resting without presenting any evidence in favor of the defense, counsel left the jury free to believe [the State's witness's] account of the incident as the only account." *Id.* Because "the trial—turning as it did on the questionable testimony of a single witness—[could not] be 'relied on as having produced a just result,'" the court reversed and remanded with directions to grant a writ of habeas corpus. *Id.* (quoting *Strickland*, 466 U.S. at 686).

Before the Seventh Circuit, Wilborn argued that the Court's broken-promise precedent in *Hampton* and *Harris* was controlling. 7th Cir. Opening Br. 32. Those cases stood for the proposition that a state appellate court applies *Strickland* unreasonably if it concludes that making and breaking (without justification) a promise to a jury to produce critical witness testimony was not deficient and prejudicial; because the same material facts were present in Wilborn's case, relief under § 2254 was warranted.

A panel of the Seventh Circuit disagreed in a published opinion, rejecting Wilborn's straightforward argument because it disagreed with the major premise that it was bound to follow *Hampton* and *Harris*. "The problem," as the court saw it, was "that this relies only on our Court * * * . Although we think highly of our own decisions, we are not the Supreme Court." Pet. App. 4a. For this proposition, the panel cited *Kernan* v. *Cuero*, 138 S. Ct. 4 (2017) (per curiam), which, as the panel read it, "summarily revers[ed] a court of appeals for relying on circuit precedent." Pet. App. 4a.

Having given itself a blank slate on which to conduct its analysis, the court concluded that counsel's errors in making and breaking his promise to the jury were not "serious," as "unforeseen situations may arise during trial." *Id.* The record, however, contains no indication of any such "unforeseen situation[]." Although the record is silent as to what transpired during the five-minute conversation between counsel and Jenkins (7th Cir. App. A550), Jenkins has sworn that he was prepared to "contradict the states [sic] witness" and "to tell the jury the truth about what happen [sic] in the gangway": that "Wilborn was not involved" (*id.* A99). And if counsel had been concerned about Jenkins "chang[ing] his story" because his and Wilborn's interests had once been in tension (Pet. App. 4a), counsel was aware of these concerns well over a year before, at least as early as March 2005, when he moved to sever the trials. *See* 7th Cir. App. A648–51. Any such risk was not "unforeseen" to a public defender, who could have interviewed Jenkins before he arrived at the courthouse—and certainly before promising his testimony to the jury.

The panel cited no case law in its prejudice analysis either. Analyzing the issue de novo—the state court

had not reached the prejudice prong (*see* Pet. App. 69a–70a)—it concluded that Wilborn had not suffered constitutional prejudice because "Jenkins' testimony wavered multiple times and could have been more of a hindrance." Pet. App. 5a. This too did not accurately reflect the record and echoed the state court's erroneous focus on the decision not to call the witness, in isolation from the promise to call him at the outset. Jenkins has consistently maintained his story for at least 15 years, since he pled guilty in his own case. *See* 7th Cir. App. A98–99; 7th Cir. Respondent's Supp. App. RA5. Had he testified accordingly—that he alone shot Hill (7th Cir. App. A212 (2008 affidavit)), and that "Wilborn was not involved" (*id.* A99 (2013 affidavit)), it is "reasonably likely" that a single juror would have voted to acquit. *See Strickland*, 466 U.S. at 696. And even without his testimony, the case against Wilborn was sufficiently weak that an acquittal would have been "reasonably likely" but for counsel's broken promise to the jury—a broken promise that played a major role in the State's closing argument.

The panel affirmed the district court's denial of habeas relief and entered judgment. Pet. App. 5a, 74a. Wilborn's petitions for en banc and panel rehearing were denied. Pet. App. 72a–73a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision warrants this Court's review because it exacerbates an existing circuit split and creates another. Both of these issues—(i) whether circuit precedent is binding in § 2254 "unreasonable application" analyses, and (ii) whether breaking a promise to a jury to present critical evidence (absent justification) is ineffective assistance of counsel in violation of the Sixth Amendment—raise questions of

great importance to criminal defendants and state prisoners seeking habeas relief nationwide.

I. The circuits are split on whether their own precedent is binding in "unreasonable application" cases.

This Court has long recognized the value of precedent. Because "the very concept of the rule of law" requires "continuity over time * * * a respect for precedent is, by definition, indispensable." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854 (1992) (plurality opinion). Indeed, "no judicial system could do society's work if it eyed each issue afresh in every case that raised it." *Id.* (citing BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).

Yet several circuits have permitted themselves to do just that, in the context of whether a state court's decision 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). As discussed below, the Seventh Circuit has now become the fourth of appeals (and the second in the past year) to hold that its own precedent does not bind its analysis of whether a state court has applied that law unreasonably. On the other hand, seven circuits see nothing in AEDPA requiring them to ignore their own decisions. This Court should grant certiorari to resolve this deeply established conflict.

A. The issue in this case turns on the nature of the "unreasonable application" clause of § 2254.

The issue on which the circuits have split is narrow: When a court of appeals is called upon to decide

whether a state court's decision was "an unreasonable application of[] clearly established Federal law" under § 2254(d)(1), are that circuit's previous decisions as to how that clearly established law applies on this set of facts binding precedent?

This question presupposes the existence of "clearly established Federal law, as determined by [this Court]." 28 U.S.C. § 2254(d)(1). While courts can "look to circuit precedent to ascertain whether * * * the particular point in issue is clearly established by Supreme Court precedent," there is no dispute that only this Court can announce the "clearly established Federal law" in the first place. *Marshall* v. *Rodgers*, 569 U.S. 58, 64 (2013).

Where, as here, the question is whether the state court applied *Strickland* unreasonably, *Strickland* itself is the "clearly established law." It has long been "past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000) (majority opinion of Stevens, J.).

Once the clearly established law has been identified, the question becomes whether the state court's decision "was contrary to, or involved an unreasonable application of," that law. "[T]he 'contrary to' and 'unreasonable application' clauses" of paragraph (d)(1) have "independent meaning." *Id.* at 405 (majority opinion of O'Connor, J.). That is, a writ of habeas corpus may be granted if the state decision "was either (1) '*contrary to* * * * clearly established Federal law * * *' or (2) '*involved an unreasonable application of* * * * clearly established Federal law.'" *Id.* at 404–05 (emphasis in original).

The two clauses are also conceptually distinct. A "contrary" decision is one in which the state court either "applies a rule that contradicts the governing law" or "arrives at a [different] result" despite "a set of facts that are materially indistinguishable from a decision of this Court." *Id.* at 405–06, 413. An "unreasonable application," by contrast, occurs when the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 406, 413.

Although Wilborn's pro se petition did not specify a particular clause of § 2254(d)(1) (*see* 7th Cir. App. A43–102), on appeal, he framed the issue as whether the Illinois Appellate Court's "application of *Strickland* was unreasonable." 7th Cir. Opening Br. 35; *see also, e.g.*, *id.* at 41; 7th Cir. Reply Br. 2. The Seventh Circuit panel analyzed the issue under both clauses (*see* Pet. App. 4a–6a), though the issue Wilborn presents here implicates only the "unreasonable application" clause.

This distinction matters because a habeas petitioner's burden is different under each clause. While a "contrary to" argument requires a showing that the state decision diverged directly from Court's precedent, whether by applying a "different" legal rule or reaching the opposite result in an on-point case with "a set of materially indistinguishable facts," an "unreasonable application" argument is open-ended. *Bell* v. *Cone*, 535 U.S. 685, 694 (2002). The burden is still high—to establish that the state court "unreasonably applie[d] [an existing principle] to the facts of the particular case" (*id.*), a petitioner must show that no "fairminded jurist[] could disagree on the correctness of the state court's decision (*Harrington* v.

Richter, 562 U.S. 86, 101 (2011))—but, unlike the contrary-to clause, neither the statute nor cases like *Williams* and *Cone* specify a particular route a petitioner must take to meet it. *See Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004) (reasonableness is a sliding scale).

As discussed in detail in the next section, the circuits have split as to what this silence means. Unlike the majority of courts—which have concluded that courts' own precedent may determine whether a Supreme Court rule has been applied unreasonably—others have imposed the contrary-to clause's on-point-case requirement onto both clauses of § 2254(d)(1).

The Seventh Circuit, for example, found it "problem[atic]" that Wilborn's unreasonable-application argument "relie[d] only on our Court," as "we are not the Supreme Court." Pet. App. 4a.

For the proposition that it could not look to its own precedent to determine whether *Strickland* had been applied unreasonably, the Seventh Circuit cited *Kernan* v. *Cuero*, 138 S. Ct. 4 (2017) (per curiam), explaining that this Court had "summarily revers[ed] a court of appeals for relying on circuit precedent." Pet. App. 4a. But that statement did not capture the full import of *Cuero*. In *Cuero*, this Court had relied on *Glebe* v. *Frost*, where the problem was not just that the precedent in question was *circuit* precedent; it was that the petitioner was trying to use it to create "clearly established Federal law" where it did not exist. 574 U.S. 21, 24 (2014) (per curiam) (circuit precedent did not "reflect the law clearly established by this Court's holdings" because none of the cited cases "arose under AEDPA").

While *Cuero* and *Glebe* added nothing new to the uncontroversial rule of *Williams* that "clearly established Federal law[] *as determined by the Supreme Court*" means what it says, the Seventh Circuit overread these per curiam decisions to say that whether a particular application of that clearly established rule must *also* have been clearly established by this Court. On that basis, it held that its own precedent on the unreasonable-application issue has no value; "only decisions of the Supreme Court matter on collateral review of state-court judgments," and "[a] court of appeals must not rely on its own precedents." *Fayemi* v. *Ruskin*, 966 F.3d 591, 594 (7th Cir. 2020) (citing *Cuero* and *Wilborn*).

B. The decision below deepens an already-established circuit split.

In holding—whether for the right reasons or not—that a court of appeals can look only to an on-point decision of this Court to determine whether a state court's decision was unreasonable under AEDPA, the Seventh Circuit deepened an entrenched split among the federal courts of appeals. While seven circuits either expressly or functionally give binding effect to their own precedent in unreasonable-application cases, the Seventh Circuit is now the fourth to hold that circuit precedent is non-binding. In fact, it was one of two circuits in the last year to adopt the extreme position that their own precedents cannot even be *persuasive*. Because all but one of the regional circuits (D.C.) have weighed in on this issue, this split of authority is ripe for resolution by this Court.

A majority of the circuits either expressly or implicitly give their own precedent binding effect in determining whether a state court's application of this

Court's case law was unreasonable. The leading case on this side of the split was authored by a Justice of this Court. In *Serrano* v. *Fischer*, then-Judge Sotomayor explained that the Second Circuit's "precedent remains binding on us insofar as our cases establish what constitutes a "[]reasonable application" of [Supreme Court case law] under § 2254(d)(1)." 412 F.3d 292, 299 n.3 (2d Cir. 2005). While "state courts may be free to adopt reasonable interpretations" of Supreme Court case law that "differ from our own, nothing in AEDPA authorizes this Court to ignore its own precedents in determining what constitutes a '[]reasonable application' of Supreme Court law under § 2254(d)(1)." *Id.*; *see also Wilson* v. *McGinnis*, 413 F.3d 196, 199–200 (2d Cir. 2005) ("[T]hese prior [circuit] decisions can *and indeed must* guide us in determining what constitutes an unreasonable application, under § 2254(d), of" a rule announced by the Supreme Court (emphasis added)). Nor did "[any]thing in § 2254(d)(1) preclude[]" the court "from looking to [its] prior non-binding decisions or decisions of other courts for persuasive guidance." *Serrano*, 412 F.3d at 299 n.3.

The Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits also continue to adhere, without controversy, to their own precedent in determining whether a state court has applied a clearly established rule unreasonable. *See, e.g.*, *Branch* v. *Sweeney*, 758 F.3d 226, 235–36 (3d Cir. 2014) (holding that state court's "conclusion that trial counsel's decision not to call these witnesses was an exercise of reasonable trial strategy was an unreasonable application of federal law" because "[t]he situation here is similar to that which we considered recently" in another case); *Jeffs* v. *Sec'y, Pa. Dep't of Corr.*, 715 F. App'x 131, 133 (3d

Cir. 2017) (analyzing "whether [a circuit decision] compels a finding of deficient performance"); *United States* v. *Carthorne*, 878 F.3d 458, 469 (4th Cir. 2017) (looking to own precedent to determine whether there were "strategic reasons that could have justified counsel's failure to object" and whether that error rose to the level of constitutional prejudice); *Dodson* v. *Ballard*, 800 F. App'x 171, 179 (4th Cir. 2020) (citing *Carthorne* and other Fourth Circuit cases in concluding that "[t]he state supreme court misapplied *Strickland*"); *Mejia* v. *Davis*, 906 F.3d 307, 316 (5th Cir. 2018) (synthesizing a number of Fifth Circuit decisions in concluding that state court's determination that counsel was not ineffective was reasonable and reversing district court's grant of relief); *Maxwell* v. *Thaler*, 350 F. App'x 854, 862 (5th Cir. 2009) (citing own precedent and concluding that deficient-performance analysis was reasonable); *Escobedo* v. *Lund*, 760 F.3d 863, 870–71 (8th Cir. 2014) (following own precedent in determining whether analysis of *Strickland* performance prong was reasonable); *Parker* v. *Bowersox*, 188 F.3d 923, 930 (8th Cir. 1999) (relying on Eighth Circuit precedent); *Littlejohn* v. *Trammell*, 704 F.3d 817, 860–61 (10th Cir. 2013) (following own precedent as to whether state court's *Strickland* evaluation of counsel's performance was reasonable); *Weedman* v. *Hartley*, 396 F. App'x 556, 562 (10th Cir. 2010) (applying "Supreme Court and Tenth Circuit precedent" in ineffective-assistance case); *Hittson* v. *GDCP Warden*, 759 F.3d 1210, 1248–49 (11th Cir. 2014) (citing own precedent in concluding that state court's assessment of counsel's performance was reasonable); *Downs* v. *Fla. Dep't of Corr.*, 738 F.3d 240, 263 (11th Cir. 2013) (same).

The minority position that circuit precedent is not binding is not monolithic. Two of the circuits permit their own precedent to be used as persuasive authority, while, more recently, two others (including the Seventh Circuit in this case) have taken the position that circuit precedent has no value at all.

The First and Ninth Circuits have held that while their own AEDPA reasonable-application precedents are not binding, they "may rely on circuit precedent as persuasive authority for determining whether a state court decision unreasonably applies Supreme Court law." *Horton* v. *Mayle*, 408 F.3d 570, 581 n.5 (9th Cir. 2005).

The First Circuit has applied this rule in a habeas case alleging ineffective assistance on the basis of a broken promise. Before analyzing the merits and concluding that relief was warranted (*see infra* Part II), the court in *Ouber* v. *Guarino* explained that, while AEDPA "requires that the relevant legal rule be clearly established in a Supreme Court holding, rather than * * * holdings of lower federal courts," that "does not mean * * * that other federal court decisions are wholly irrelevant to the reasonableness determination." 293 F.3d 19, 26 (1st Cir. 2002). On the contrary, "[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." *Id.* (quotation omitted); *accord Evans* v. *Thompson*, 518 F.3d 1, 10 (1st Cir. 2008) ("factually similar cases from the lower federal courts can provide a valuable reference point when considering the reasonableness of a state court's application of Supreme Court precedent" (quotation marks and alterations omitted)).

The Sixth and Seventh Circuits, however, have both adopted a more dramatic approach in the past year. As discussed above, in this case and another decided around the same time, the Seventh Circuit held that "rel[ying] only on our Court" to support an argument that a state court applied Supreme Court law unreasonably is impermissible. Pet. App. 4a.; *accord* *Fayemi*, 966 F.3d at 594 ("A court of appeals must not rely on its own precedents."). Under these decisions, irrespective of whether the petitioner's argument implicates the contrary-to clause or the unreasonable-application clause of § 2254(d)(1), "only decisions of the Supreme Court matter." *Fayemi*, 966 F.3d at 594; *see also* Pet. App. 4a. ("[W]e are not the Supreme Court."). Circuit precedent has no role to play.

The Sixth Circuit recently used similarly absolute language in an AEDPA case, reasoning that, "since the § 2254(d)(1) inquiry focuses *only* on Supreme Court decisions," relevant circuit precedent "is *of no moment* in considering whether the Ohio court failed to follow 'clearly established' law." *Smith* v. *Cook*, 956 F.3d 377, 391 (6th Cir. 2020) (emphasis added).

* * *

The Court should intervene to resolve this split, and to make clear to the minority of circuits who hold otherwise that "nothing in AEDPA authorizes [them] to ignore [their] own precedents in determining what constitutes a '[]reasonable application' of Supreme Court law under § 2254(d)(1)." *Serrano*, 412 F.3d at 299 n.3. Given the "microscopically low rate of habeas relief" in recent years—according to a 2007 study, "fewer than sixty of the more than seventeen thousand habeas cases filed each year challenging state criminal judgments," or approximately 0.35 percent (NANCY J.

KING AND JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 81–83 (2011))—allowing artificially heightened standards to persist places an even heavier burden on petitioners in those areas of the country than Congress intended when it enacted AEDPA.

II. The circuits are now split on whether breaking a promise to the jury to produce important evidence is ineffective assistance.

The circuits are also split on the merits issue. The Seventh Circuit has now held that promising but not delivering critical testimony is not a "serious error[] amounting to deprivation of a fair trial." Pet. App. 4a–5a. Every other circuit to confront the issue has held that it is unreasonable for a state court to find, absent a supervening event that would justify a change of course, that breaking a promise to a jury to produce key evidence is not ineffective assistance under *Strickland*. Still other circuits have agreed in dicta. This Court should intervene to resolve this split as well.

The First and Sixth Circuits have held that a writ of habeas corpus was warranted where (as in Wilborn's case) the broken promise was definite, memorable, consequential, and inexplicable. The leading court on this issue is the First Circuit, which has repeatedly held that "little is more damaging than to fail to produce important evidence that had been promised in an opening," because the broken promise acts as a "speaking silence" that "throw[s] into the scales the heavy inference the jurors [will] draw from" the absence of that evidence (*Anderson* v. *Butler*, 858 F.2d 16, 17–18 (1st Cir. 1988))—especially when the

promise is explicit and specific and the witness important (*see Yeboah-Sefah* v. *Ficco*, 556 F.3d 53, 78 (1st Cir. 2009); *Sleeper* v. *Spencer*, 510 F.3d 32, 41 (1st Cir. 2007); *Ouber* v. *Guarino*, 293 F.3d 19, 27 (1st Cir. 2002)).

In *Anderson* v. *Butler*, the seminal broken-promise case, defense counsel promised in his opening statement that the jury would hear medical expert testimony that "went to the vitals" of the only defense. 858 F.2d at 18. After the opening, counsel realized that these witnesses also presented "possible disadvantages by way of [eliciting] collateral facts" that were unflattering, and never produced them. *Id.* at 17. Although the state court and district court held that the broken promise was reasonable in light of these concerns, the First Circuit disagreed, reasoning that "if it was still wise [to pull the promised witnesses] because of the damaging collateral evidence, it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise." *Id.* at 18.

The state court and the district court had not accounted for "the effect on the jury of counsel's not putting the doctors on the stand after he had said he would." *Id.* While the First Circuit "might have no quarrel with counsel's decision to call, or not to call [the promised medical expert witnesses], as a strategic decision, had that matter stood alone (although our own decision would have been to call), * * * but counsel's choice was not made in that parameter." *Id.* Rather, his decision to break the promise had been "made in the posture of the jurors having heard, only the day before," that they would hear important evidence, "and now they would not do so." *Id.* Given the context, it was impossible to "weigh[] counsel's

choice [not to call the witness] as if there had been no opening." *Id.*

Under these circumstances, breaking the promise was not "a 'strategic choice,' or a 'plausible option[].'" *Id.* at 18–19. Pulling the witnesses "was a very bad decision" of constitutional proportions, and the "speaking silence" it gave rise to was "prejudicial as a matter of law." *Id.*

The First Circuit has continued to reaffirm these principles after AEDPA. *Ouber* v. *Guarino*, for example, is another leading case with a broken promise "at [its] heart." 293 F.3d at 27. There, defense counsel promised during his opening "not once, but four times" that the defendant would testify in her own defense. *Id.* at 22. He "emphasized the importance of this testimony," and told the jury that "her version of the relevant events * * * was very different from" that of the prosecution witness its case "hinged on." *Id.* After the prosecution rested, however, counsel persuaded the defendant that "it would be in her best interest not to" testify after all. *Id.* at 24. She acquiesced, but was "never advised that her decision to refrain from testifying might be counterproductive in light of those promises." *Id.*

As in *Anderson*, the First Circuit deemed counsel's broken promise a "critical error in professional judgment." *Id.* In "brush[ing] aside" the impact of the "initial promises" on the jury, the state court had applied federal law unreasonably, as the promise and the decision not to follow through with the evidence were "inextricably intertwined." *Id.* at 24–27.

Counsel "acted as if he had no doubt about whether his client should testify," "promis[ing], over and over, that [she] would" and, indeed, "structur[ing] the entire

defense around the prospect of [her] testimony." *Id.* at 28. Breaking the promise was "an error in professional judgment" under the circumstances, where no "unforeseeable events forc[ed] a change in strategy"; "everything went according to schedule[, and] nothing occurred * * * that could have blindsided a reasonably competent attorney or justified a retreat from a promise previously made." *Id.* at 27, 29.

"[T]he ferocity of potential cross-examination" was no excuse, as "counsel should have anticipated [it] when he was deciding what to tell the jury in his opening statement." *Id.* at 31–32. All along, "counsel knew of this sword of Damocles—the threat that the impeaching evidence would be introduced—when he made his opening statement." *Id.* at 29. These considerations "should have been easily foreseeable to competent counsel at [that] time," and because "[t]here were no surprises * * * the lawyer's tergiversation could not be excused by changed circumstances." *Id.* at 30.

In the absence of "any semblance of a colorable excuse," "[t]here [wa]s simply no record support for the state court's finding that the attorney's conduct constituted a reasonable strategic choice." *Id.* at 32. Rather, counsel's decision to break his promise was an "obvious error" that "was constitutionally deficient under *Strickland*—and severely so." *Id.*

The First Circuit further held that counsel's error in "failing to present the promised testimony of an important witness * * * was not small, but monumental"—and prejudicial. *Id.* at 33. As in *Anderson*, "[t]he net result of the failure to call the petitioner to the witness stand was that the jury heard only [the prosecution's] version of what transpired"

and "never had an opportunity to assess the conflicting testimony" or the witnesses' relative credibility. *Id.* at 34; *accord United States* v. *Gonzalez-Maldonado*, 115 F.3d 9, 15 (1st Cir. 1997) ("If the defense fails to produce promised expert testimony that is critical to the defense strategy, a danger arises that the jury will presume that the expert is unwilling to testify and the defense is flawed."). Counsel's "egregious" error also had the secondary effect of "sabotag[ing] the bulk of [counsel's] efforts prior to that time (and, in the process, undermined his own standing with the jury, thereby further diminishing the [defendant]'s chances of success)." *Id.* at 34. For those reasons, the court was "fully persuaded that, but for [the broken promise], a different outcome might well have eventuated." *Id.*

The Sixth Circuit too has held that the failure to present promised testimony is ineffective assistance counsel under *Strickland*, affirming a grant of relief under § 2254 where the state court had held otherwise. In *English* v. *Romanowski*, timing was again everything: "[i]t was objectively unreasonable for [the defendant]'s trial attorney to decide *before* trial to call [a certain corroborating] witness, make that promise to the jury, and then *later* abandon that strategy, all without having fully investigated [the witness] and her story *prior* to opening statements." 602 F.3d 714, 728 (6th Cir. 2010) (emphasis added).

Counsel's deficient performance was also prejudicial. Quoting *Anderson*, the Sixth Circuit reasoned that because the jury was left to "wonder[] what happened," and "may well * * * count[] this unfulfilled promise against [the defendant]," "[l]ittle is more damaging than to fail to produce important evidence that [was] promised in an opening." *Id.* at

729 (quoting 858 F.2d at 17). The effect of the "negative inference[s]" that resulted from the broken promise in the opening statement was particularly harmful in English's case, where the "actual evidence of [his] guilt * * * [wa]s not overwhelming." *Id.* at 729–30. Had the promise not been made, there was "a reasonable probability that at least one juror would have struck a different balance." *See id.* at 730.

The Third and Ninth Circuits have agreed, albeit in dicta, as they happened to find no promises on the specific facts before them. *See Saesee* v. *McDonald*, 725 F.3d 1045, 1050 (9th Cir. 2013); *McAleese* v. *Mazurkiewicz*, 1 F.3d 159, 167 (3d Cir. 1993). Still, both courts have endorsed the same theoretical underpinnings as the First and Sixth Circuits.

The Third Circuit has recognized that the "failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel." *McAleese*, 1 F.3d at 166. The court reasoned that, "when counsel primes the jury to hear a different version of the events from what he ultimately presents, one may infer that reasonable jurors would think the witnesses to which counsel referred in his opening statement were unwilling or unable to deliver the testimony he promised." *Id.* at 166–67.

More recently, but for the same reasons, the Ninth Circuit acknowledged that counsel's failure to present promised evidence can be unreasonable and prejudicial. *Saesee*, 725 F.3d at 1049. Because "[a] juror's impression is fragile," when counsel fails to produce a promised witness, "[t]he juror will naturally speculate why the witness backed out * * * [and] may

resolve his confusion through negative inferences." *Id.* Accordingly, "[b]y failing to present promised testimony, counsel has broken a pact between counsel and jury, in which the juror promises to keep an open mind in return for the counsel's submission of proof." *Id.* (quotation marks omitted). And "[w]hen counsel breaks that pact, he breaks also the jury's trust in the client. Thus, in some cases—particularly cases where the promised witness was key to the defense theory of the case and where the witness's absence goes unexplained—a counsel's broken promise to produce the witness may result in prejudice to the defendant." *Id.* at 1049–50; *Mann* v. *Ryan*, 828 F.3d 1143, 1153–54 (9th Cir. 2016) (recognizing that "it may violate *Strickland* for counsel to promise evidence in an opening statement and then fail to present that evidence at trial." (citing *Hampton*, *Ouber*, and *McAleese*)).

The Court should grant certiorari to realign the Seventh Circuit's jurisprudence with its sister circuits and prevent the circuit split from deepening.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAUREN GAILEY
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
LGailey@winston.com

LINDA T. COBERLY
Counsel of Record
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

Counsel for Petitioner

JANUARY 4, 2021