

No. 21-107

IN THE
Supreme Court of the United States

EDWARD THOMAS KENDRICK, III,

Petitioner,

v.

MIKE PARRIS, WARDEN,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The central issue in Kendrick’s “awfully close” case (Pet.39) was whether he shot his wife intentionally or his gun discharged accidentally. His trial counsel had no expert to fulfil his opening promise to prove the gun was “faulty,” support Kendrick’s accidental shooting defense, or counter the state’s expert. (Pet.7). Nor was Kendrick’s counsel able to remember a hearsay rule to introduce a veteran police officer’s admission that he accidentally shot himself with Kendrick’s gun the same night as Kendrick’s shooting. (Pet.7–8). Counsel’s defense shifted by closing argument and the jury heard his unsuccessful impeachment questions, not substantive evidence; counsel recalled no backup plans, recalled consulting no experts, and did no research to find then-existing information about a grave trigger defect. (Pet.11,37). Kendrick is entitled to relief on his *Strickland* claims even before this Court evaluates his actual innocence to overcome procedural default.

The State of Tennessee’s response raises new points insofar as it misstates Kendrick’s issues. The response neither disputes that Kendrick timely filed an initial petition for a writ of habeas corpus nor explains why the District Court’s identification of an *incorrect* legal principle governing its review should be excused. (Resp.24). Instead, the response emphasizes “doubly deferential” review under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), arguing further review is unwarranted. (Resp.14). AEDPA may present a

“formidable barrier” and state courts may be “adequate” forums to vindicate federal rights, according to a case cited in the response, *Burt v. Titlow*, 571 U.S. 12, 19 (2013), but AEDPA’s barrier is permeable when constitutional protections are compromised, and careful review is required when actual innocence is at stake. (Pet.33,35–36). Here, review is acutely necessary because the Sixth Circuit’s opinion endorsed virtually insurmountable standards inconsistent with this Court’s precedent, but it is now cited (more than half a dozen times so far) for the propositions that federal courts are “constrained” by states’ interpretations of the Constitution since AEDPA’s “high bar” is intentionally difficult to meet.¹ Review is necessary because, “[e]ven in federal habeas, deference does not imply abandonment or abdication of judicial review.” (Pet.24) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

In his *pro se* petition filed pursuant to 28 U.S.C. § 2254, Kendrick identified a suite of constitutional defects undergirding his first-degree murder conviction, including two that caused the Tennessee Court of Criminal Appeals to vacate his conviction before the Tennessee Supreme Court reversed. (Pet.12–13). The first reason Kendrick’s conviction should not stand, according to the court that granted relief, was that it was ineffective assistance not to

¹ *E.g., Porter v. Eppinger*, No. 19-3443, 2021 U.S. App. LEXIS 26020, at *9 (6th Cir. Aug. 27, 2021); *Finley v. Burt*, No. 2:15-cv-14455, 2021 U.S. Dist. LEXIS 189162, at *11–12 (E.D. Mich. Sep. 30, 2021).

pursue “crucial” evidence on the trial’s “key question” by failing to retain a firearm expert, knowing Kendrick’s defense was that his firearm discharged accidentally and the state’s expert would dispute that possibility. That conclusion is supported by this Court’s clearly established precedent, *e.g.*, (Pet.31) (citing *Hinton v. Alabama*, 571 U.S. 263 (2014), which involved an earlier trial than Kendrick’s), but the state asks this Court to defer to the Tennessee Supreme Court’s contrary decision without fully engaging with Kendrick’s point that the court unreasonably applied the standard. (Resp.14–17).

The second basis for Kendrick’s too short-lived relief was that the Court of Criminal Appeals found Kendrick’s trial counsel ineffective because he did not invoke a straightforward hearsay exception to introduce a police officer’s statement that he accidentally shot himself within hours of Kendrick’s asserted accidental shooting. That conclusion is supported by this Court’s clearly established precedent (Pet.30–31), but the state merely says “fairminded” jurists could agree that “counsel’s failure to lodge a second, excited-utterance evidentiary request was not a mistake of law qualifying as deficient performance.” (Resp.21).² The state’s defense of that conclusion avoids the fact that Kendrick’s counsel did not get before the jury the

² No citation is provided. The state court found that counsel admitted the hearsay rule “did not occur to him” but his “lack of familiarity with relevant court rules” was forgiven by his “labor[]” to convince the jury. (Pet.203a). The habeas courts deferred. (Resp.16–17).

officer's clear statements right after he shot himself, as opposed to his testimony suggesting he might have pulled the trigger.

When the District Court evaluated Kendrick's habeas petition, it declined to hold an evidentiary hearing and dismissed the case. Its reasoning was based, in part, on having misidentified the standard to determine whether a fundamental miscarriage of justice marred Kendrick's case. The state says the court nonetheless applied the correct standard (Resp.24), but as discussed below, the opinion belies that contention. The court also declined to grant a certificate of appealability, finding that reasonable jurists would not disagree Kendrick's counsel was constitutionally ineffective, though reasonable jurists had disagreed.³

The state says this Court should afford deference to avoid further review, but further review and reinstated relief are warranted.

I. Constitutional errors in Kendrick's case undermined fundamental fairness principles and justify this Court's review.

Kendrick asks this Court to review the lower courts' conclusions regarding his trial counsel's ineffective assistance (Pet. §§ I.B–C), as well as an issue fairly raised in Kendrick's habeas petition (Pet. §

³ Indeed, the intermediate state court decision finding Kendrick's counsel ineffective was authored by a judge who became a Tennessee Supreme Court justice and served as Chief Justice through 2021. See (Pet.208a); *In re Covid-19 Pandemic*, No. ADM2020-00428, 2021 Tenn. LEXIS 249 (Feb. 12, 2021).

I.D). In addition, Kendrick petitions this Court to review his “actual innocence” claim for procedurally defaulted issues. (Pet.§ II). The response attempts to limit three of the issues.

A. Trial counsel’s failure to retain an expert should not have been excused by requiring proof of his availability.

The state frames Kendrick’s counsel’s failure to retain a firearms expert as a factual dispute (Resp.12), but Kendrick argued both that the lower courts unreasonably determined the facts and unreasonably applied clearly established law. (Pet.5, 21–22, 25–29).

The District Court and Sixth Circuit adopted the Tennessee Supreme Court’s logic that Kendrick offered insufficient proof a *specific* expert would have been available, but the state does not respond to Kendrick’s argument that *Strickland* requires no such proof, as a matter of law.⁴

With respect to the unreasonable factual determination, the state truncates Kendrick’s record proof. He did not simply claim working with gunsmiths has a long history in Tennessee litigation (Resp.18), which it does, but he pointed to post-conviction testimony of (1) his counsel who said his office regularly consulted with a gunsmith (but

⁴The state appears to acknowledge that whether a petitioner must prove a particular expert was available is a legal question (Resp.19) but does not otherwise justify that reading of *Strickland*.

apparently did not in Kendrick’s case) and (2) a gunsmith active in the industry who said he knew about the trigger defect for decades and participated in related litigation around the time of Kendrick’s trial. (Pet.11,10–11,27). Further, on appeal, counsel showed how well known the problem with the Remington trigger mechanisms was. (R.12,PageID39) (citing 1994 article about Remington referencing jury trials, settled and pending lawsuits, and 1,400 consumer complaints, “many of which assert the rifle went off without the trigger being pulled”); (*id.*,PageID37–38) (citing Texas Supreme Court and Eighth Circuit opinions about defective Remington triggers pre-dating Kendrick’s trial).⁵

The state’s citations support Kendrick’s position. In *Brumfield v. Cain* (Resp.19), despite affording “substantial deference” pursuant to § 2254(d)(2), this Court deemed “critical factual determinations” unreasonable. 576 U.S. 305, 314 (2015).⁶ In *Knowles*

⁵ Cf. Oral Argument, *Kendricks v. Parris*, No. 19-6226 (6th Cir. Jan. 26, 2021) (JUDGE LARSEN: “Counsel, there wasn’t Google back then, so how’s he supposed to find this expert that testified in one case....We couldn’t find anything about that case, despite our efforts to track that down.”) [no official transcript has been prepared; statement at approximately 10:10 of court’s audio file]; *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (“[T]he record under review is also limited to the record in existence at that same time—i.e., the state-court record.”).

⁶ Unreasonable determinations might include alleged “barriers” to expert testimony (Resp.15), reflecting the Tennessee Supreme Court’s post hoc rationalization to excuse counsel’s failure to seek an expert. The court did not cite authority that post-conviction counsel was required to establish expert availability. (Pet.193a–194a). Kendrick explained why he was likely to have met the prevailing test and why, prior to the

v. *Mirzayance* (Resp.13,14), counsel’s strategic decision was acceptable because he was “left with four experts.” 556 U.S. 111, 124 (2009). Here, counsel had no expert, and his decisions were uninformed.⁷

B. Trial counsel’s failure to put evidence before the jury on a critical question should not have been excused where he did not prepare.

Trial counsel called the officer’s statement about shooting himself the “most important piece of evidence in the entire trial” (D.14-5,PageID#3276), but he did not introduce it with a straightforward hearsay exception. The state characterizes Kendrick’s issue about this failure as whether “deficient performance should be presumed” (Resp.12), but Kendrick argued counsel’s failure entitles him to relief either under *Strickland*’s reasonableness test or its reasoning that some defects are so fundamental they cannot be excused and are “effectively” per se deficient. (Pet.30–31).

Based on its characterization, the state claims “per se deficient performance” was not advanced before the

court’s aside, there was nothing in the record to suggest hiring an expert would have been an issue. (R.12,PageID39–41). The Sixth Circuit expressly declined to make findings about expert funding but found its assessment supportive of its holding. (Pet.33a).

⁷ Fundamentally, the record does not support the contention that Kendrick’s counsel made a “calculation” about needing an expert (Resp.15) since he neither put substantive evidence before the jury about the second shooting nor did research regarding the trigger mechanism. (Pet.11).

Sixth Circuit and so should not be addressed by this Court. (Resp.20) (citing *United States v. Williams*, 504 U.S. 36, 41 (1992)). However, this argument was squarely before the Sixth Circuit: whether trial lawyer was ineffective for failing to do basic research or be prepared to assert a rule of evidence when, at trial, the officer changed his story.

Thus, *Williams* is not determinative insofar as the state appears to invoke it for an overly restrictive interpretation of this Court’s “traditional rule” concerning certiorari review. In *Williams*, the Court noted that the rule operates “in the disjunctive” and found review proper even though the petitioner had not contested the issue or conceded the precedent. 504 U.S. at 41, 44–45. Here, the Sixth Circuit granted a certificate of appealability and limited the appeal to two issues, but the court acknowledged that Kendrick’s *pro se* habeas petition raised forty-eight issues; it reviewed the District Court’s conclusions. (Pet.38a;37a–46a).⁸ The state does not dispute that Kendrick timely appealed the denial of his entire habeas petition. (Pet.24). Nor does the state suggest Kendrick could have otherwise properly “pressed” issues not contained in the certificate. The state’s argument that this Court should avoid issues fairly raised in the petition should be rejected.

⁸ See also (D.1,PageID#27) (regarding prior ineffective assistance claims).

C. The relationship of trial counsel's errors to the trial's fairness is an appropriate question for this Court's review.

The state says the cumulative effect of Kendrick's counsel's errors was "not squarely raised in federal court and separately rejected in state court (Resp.12), but the state admits *Strickland* takes a holistic view of errors considering the "totality of the circumstances" (Resp.21), and Kendrick's point is that *Strickland*'s inquiry concerns fundamental fairness. (Pet.33). *See also* (Pet.76a); (Pet.78a) (noting "cumulative impact of counsel's errors" pretermitted issue not among claims allegedly abandoned).

II. This Court should grant review to confirm that, when faced with a claim of actual innocence, a court must identify the correct standard.

Kendrick seeks review of his actual innocence claim to establish a fundamental miscarriage of justice and overcome procedural default (Resp.12), but the state does not address the petition's merits when it asks this Court to deny review because the innocence exception is "narrow" and reserved for "extraordinary" cases, citing *Dretke v. Haley* and *Murray v. Carrier* (Resp.23). However, *Dretke* noted that the "narrow exception" has been extended, 541 U.S. 386, 393 (2004), and *Murray* underscored that sometimes comity and finality principles must yield to the "imperative" to correct fundamentally unjust incarcerations. 477 U.S. 478, 495 (1986).

This Court need not extend the exception here, though, because Kendrick identified multiple ways it was mishandled in his case. (Pet.38–39). The state offers no case where deference is owed under the wrong standard. In fact, the state cites *Pinholster* (Resp.13), which concerns identifying “the correct governing principle.” 563 U.S. at 182. Identifying and applying an *incorrect* principle should be grounds for reversal. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000) (court erred by modifying *Strickland*’s requirements).

A. Kendrick should not have been required to prove “clear and convincing” innocence.

Kendrick appeals the requirement to prove his innocence by “clear and convincing” evidence. (Pet.38). The state claims the court’s “full analysis shows that it appropriately applied” the correct standard but offers no further explanation. (Resp.24) (citing “*Kendricks*, 2019 WL 4757813, at *17”). In fact, the full analysis shows the court both identified the standard as “clear and convincing” and applied it by finding the defective trigger did not “definitively” establish Kendrick’s innocence. (Pet.93a).

B. Kendrick’s close case became closer post-conviction, but the reviewing courts did not consider evidence comprehensively.

Kendrick explained that “old and new” evidence, even if inadmissible, must be considered and that his

close case heightened the impact of new evidence. (Pet.38–39). The state says the district court “considered and reviewed all of the evidence” when rejecting his basis for overcoming procedural default but offers no further explanation about what it believes the court considered. (Resp.24). The court’s relevant discussion alluded to expert testimony (Pet.93a–94a), but that was not the only evidence or the scope of its significance.

For example, Kendrick’s statement that he “hope[d] this is only a dream” is described by the state as evidence he “made no suggestion that the shooting was accidental” and therefore evidence of guilt. (Resp.2,25). A jury presented with expert evidence that the gun discharged accidentally would have reasonably seen—through the lens of an accidental shooting—that Kendrick’s post-incident behavior and statements were consistent with the “frenzied panic of someone in the hazy aftermath of trauma” and “could be easily explained by someone in a state of shock after a rifle they were holding shot and killed their spouse at close range,” as he pointed out to the Sixth Circuit (R.12,PageID48).⁹ *See also* (Pet.6–13)

⁹ Negating the state’s incriminatory gloss on Kendrick’s actions via context has precedent: Kendrick explained that he and his wife carried guns because they were an interracial couple in Tennessee and worked in a dangerous part of town; the post-conviction court concluded those facts reduced the inculpatory significance of Kendrick’s decision to carry a firearm the night of the shooting. (Pet.326a–327a). The events surrounding Kendrick’s arrest could similarly benefit from research like the Court has considered in other habeas cases. *See Yarborough v. Gentry*, 540 U.S. 1, 6–11 (2003) (citing social

(noting defense expert testimony about conditions ripe for accidental discharge and other facts consistent with accidental discharge).

The District Court’s failure to engage in this kind of comprehensive analysis was error.¹⁰

psychology and scientific research, as well as treatises). *Cf.* (Pet.124a) (alluding to “racial tension” during arrest).

¹⁰ The courts have largely accepted the state’s characterization of the evidence. *E.g.*, (Resp.1–8, 25–26). If this Court grants review, a re-appraisal of the proof should call that accepted narrative into question. For example, the state highlights so-called “eyewitness testimony,” including the state supreme court’s reasoning that counsel’s failure to secure an expert was acceptable because the “bulk of the State’s case consisted of eyewitnesses.” (Resp.16). The term “eyewitness” is not quite right, though. *Accord* (Pet.243a) (describing evidence as “circumstantially...very damaging” such that defense expert testimony was “critical to bolstering” [Kendrick’s] credibility”). For one, the circumstantial testimony provided by three witnesses’ *after-the-fact* observations was questionable (*e.g.*, only one (Lisa’s friend) claims Kendrick said, “I told you so,” and he only made that claim a week before trial). Similarly, a statement attributed to Kendrick’s four-year old child was introduced by a police officer who did not talk to the prosecution about it until the trial was underway (Resp.2); (D.14-6,PageID#1069); at trial, the child’s testimony was inconsistent, and her vantage point was disputed. (R.12,PageID49) (summarizing inconsistencies); (R.20,PageID19–20) (same). Regarding “forensic evidence of stippling” (Resp.2, 25), the transcript is opaque. *E.g.*, (D.14-5,PageID#817) (“If I could put my own arm in that position, it would be like this (indicating.”); (*id.*,PageID#823) (“both hands all the way back, elbows together and forearms together also”).

C. Kendrick's claim of innocence should have evaluated credibility.

Kendrick challenges the court's refusal to make credibility assessments as another error warranting review. (Pet.39). The response argues that credibility assessments would not have cut in Kendrick's favor, citing the conclusion of the "trial court" and the state's own assessments. (Resp.24–25). An estimation of what a federal court might have found (despite different standards) does not satisfy the judicial obligations that went unmet here.

CONCLUSION

The petition for a writ of certiorari should be granted. If the Court believes the issues are not ripe, Kendrick asks this Court to remand the case for further proceedings. Indeed, in *Bousley v. United States*, cited by the state, this Court remanded so the petitioner could make a showing of his actual innocence, even though he failed to raise it initially. 523 U.S. 614, 623–24 (1998).

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