*****CAPITAL CASE*****

No.

IN THE
Supreme Court of the United States

WILLIAM GLENN ROGERS,
Petitioner,

v.

ZAC POUNDS, WARDEN,
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

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is application of a prejudice standard that requires a habeas petitioner to "eliminate or completely discredit" the prosecution's trial evidence in order to prevail on a claim ineffective assistance of counsel during the penalty phase contrary to or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984)?

2. Is a federal court free to ignore the reasoned decision of a state court, in favor of substituting its own basis for the outcome of that decision, when it is clear that the state court's decision is unreasonable under 28 U.S.C. § 2254(d)?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, petitioner-appellant below, is William Glenn Rogers, a Tennessee citizen who is presently incarcerated and sentenced to death.

Respondent, respondent-appellee below, is Zac Pounds, Warden of Riverbend Maximum Security Institution, where Mr. Rogers is presently incarcerated.

LIST OF PROCEEDINGS

1. *State v. Rogers*, 188 S.W.3d 593 (Tenn. 2006) (affirming convictions and sentences on direct appeal), *cert. denied*, 549 U.S. 862 (2006)
2. *Rogers v. State*, No. M2010-01987-CCA-R3-PC, 2012 WL 3776675 (Tenn. Crim. App. Aug. 30, 2012) (affirming denial of state postconviction petition).
3. *Rogers v. Westbrooks*, No. 3:13-cv-00141, 2019 WL 1331035 (M.D. Tenn. Mar. 25, 2019) (denying 28 U.S.C. § 2254 petition for federal habeas relief).
4. *Rogers v. Mays*, 43 F.4th 530 (6th Cir. 2022) (panel opinion granting in part and denying in part federal habeas relief).
5. *Rogers v. Mays*, 69 F.4th 381 (6th Cir. 2023) (en banc order affirming district court's denial of § 2254 petition).

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INTRODUCTION

For over 25 years, William Glenn Rogers has maintained his innocence of the rape and murder of 8-year-old Jackie Beard. The rape aggravating circumstance was the lynchpin of the State's case for the death penalty; indeed, the prosecutor advised the jury that the fact of rape alone was sufficient to condemn Mr. Rogers to death. But, due to constitutionally ineffective assistance by Mr. Rogers' trial counsel, the jury was not advised of a credible alternate explanation for the State's sole evidence of rape. The evidence in question was the testimony of one expert who allegedly confirmed the presence of seminal fluid on the victim's shorts. However, scientific evidence was available to trial counsel that not only could have shown the jury that only "rare" sperm heads—as opposed to semen—were on the shorts, but also that there was a credible alternate explanation for the presence of that microscopic evidence. Because he failed to investigate the State's forensic proof, trial counsel was unable to challenge the rape and rape aggravating circumstance with proof that sperm heads transfer during laundering in a washing machine and unprepared to otherwise challenge the "proof" of rape.

Every state court unequivocally found trial counsel's failure to investigate and challenge the State's evidence of rape to be deficient performance under *Strickland*. Nonetheless, the state court denied relief using a prejudice standard unknown to this Court's jurisprudence. Specifically, the state court concluded that Mr. Rogers could not demonstrate prejudice under *Strickland* because he did not show that he would have been able to "eliminate or completely discredit" the State's proof absent counsel's deficiency. Because *Strickland* itself requires only a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding"—in this case, the

penalty phase—would have been different, the state court's decision was contrary to and/or an unreasonable application of this Court's precedent under 28 U.S.C. § 2254(d).

Although a panel of the United States Court of Appeals for the Sixth Circuit agreed with Mr. Rogers as to this point, the court sitting en banc chose to ignore the state court's stated basis for its decision, instead accusing Mr. Rogers of "flyspecking" the state court's opinion. Focusing on the "75-page opinion as a whole," the en banc court noted that the state court's order correctly recited the *Strickland* prejudice standard some 13-pages prior to its application to the claim in question and concluded that the state court "faithfully" applied that test. This rationale distorts AEDPA deferential review, making it deference to the *outcome*, rather than deference to the *reasoning*. This interpretation pushes both *Strickland* and the AEDPA past their limits. There is, simply put, nothing in in the AEDPA itself or in this Court's precedents suggesting that federal courts on habeas review are authorized to ignore the state court's actual stated basis for its decision in order to render it "reasonable" under § 2254(d).

OPINIONS AND ORDERS BELOW

The June 5, 2023 opinion from the United States Court of Appeals for the Sixth Circuit, sitting en banc, is reported, *Rogers v. Mays*, 69 F.4th 381 (6th Cir. 2023) (en banc), App. A, as is the panel opinion that was vacated by the en banc court, *Rogers v. Mays*, 43 F.4th 530 (6th Cir. 2022), App. B. The district court's order denying Mr. Rogers's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is unreported and available on Westlaw, *Rogers v. Westbrooks*, No. 3:13-cv-00141, 2019 WL 1331035

(M.D. Tenn. Mar. 25, 2019), App. C. On August 16, 2023, Mr. Rogers application to extend the time to file his petition for writ of certiorari was granted by Justice Kavanaugh, with a new filing deadline of November 2, 2023.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254. This petition is timely filed pursuant to Supreme Court Rule 30.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to constitutionally effective assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner William Glenn Rogers was convicted by a Tennessee jury on nine counts, including first-degree murder and rape of a child. R.25-11, PageID#5132–33; *see* R.24-5, PageID#1066–67. That same jury subsequently sentenced Mr. Rogers to death. R.24-5, PageID#1127–28, 1137–42. The existence of rape was central to the prosecution's theory of the case at both the guilt and penalty phases; indeed, the prosecutor advised the jurors that their finding of rape was "enough in and of itself" to justify a death sentence. *See, e.g.*, R. 25-17, PageID#5951–53.

However, the prosecution's theory of rape was supported by only weak circumstantial evidence. A single expert—Mark Squibb, a Tennessee Bureau of Investigation serologist with only two years' experience—testified that "semen" was found on the victim's shorts, which were recovered in the woods months after her

disappearance. R.25-9, PageID#4554–74. An outside forensic scientist, Meghan Clement, testified for the prosecution that no DNA profile could be obtained from the fabric cutting from which Squibb claimed to have found semen. *Id.* at 4583, 4588–95. Squibb's testimony regarding "semen" on the victim's shorts was the sole evidence of rape presented at trial. At the motion for new trial stage, the state court opined that sufficiency of the evidence establishing rape—and specifically the element of penetration—was "somewhat of a close call." R.24-5, PageID#1173.

Despite this "close call" and the lack of other evidence to prove that a rape occurred, Mr. Rogers's trial counsel failed to take any action to investigate the prosecution's forensic proof or prepare to cross-examine Squibb;[1] trial counsel did not even question Squibb about his testing methodology or his adherence to TBI policies and procedures in performing the testing. *See* R.25-8, PageID#4571–81.[2] At the hearing on Mr. Rogers's postconviction petition in state court, trial counsel conceded that Squibb's testimony about the presence of semen must have "weighed heavily with the jury" given that "there were no other facts . . . that would lead a reasonable person to conclude that there had been a rape[.]" R. 26-9, PageID#8125–26. Nonetheless, trial counsel admitted that he had no understanding or knowledge of the various testing acronyms or methodologies referenced in the lab reports that allegedly confirmed the presence of semen on the shorts. R.26-9, PageID#8159–60.

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[1] Trial counsel's "theory" of defense to combat Squibb's testimony was to concede the presence of semen, but argue that the semen was not human, was placed on the victim's shorts postmortem, and/or that there were two different samples of semen on the victim's shorts—theories that are either outlandish or that are unhelpful to proving Mr. Rogers's innocence of the crime of rape.

[2] Page 166 of the of the trial transcript, which marks the transition to cross-examination of Squibb is missing from the state court record filed by Respondent in the federal habeas proceeding.

He never spoke to, or requested funding for consultation with, a forensic expert regarding the alleged semen evidence. *See* R.124-10. Indeed, he did no investigation of the forensic evidence at all.

Instead, he stated that, when the results came back that the DNA from the alleged semen evidence was inconclusive, he "wasn't as concerned about it at that point," as the prosecution did not "even [have] any testimony as to who emitted that fluid[.]"[3] R.26-9, PageID#8159–60. Trial counsel noted that part of the potential defense was that another person—like the victim's older brother, Jeremy—was the source of the semen on the victim's shorts. *Id*. at 8126. However, trial counsel had no knowledge of a scientific study finding sperm on even "pristine" underwear after they were washed with clothing with semen on it. *Id*. at 8154–56, 8207–08. He conceded that, had he discovered the existence of the study, it "probably would have been something we certainly would have considered using." *Id*.

Published in the Canadian Society of Forensic Science Journal, the study was conducted by three forensic biologists to "test the likelihood of transfer of spermatozoa during machine washing," and the "extent to which spermatozoa are retained in fabric after laundering[.]"[4] App. F at 2. The researchers noted that interpretation of semen on clothing is "problematic as the time and manner of deposition may not be readily evident," because of "innocuous sources of spermatozoa exist such as secondary transfer, or theoretically, transfer during laundering." *Id*. The

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[3] Despite the prosecution's own expert testifying that no DNA sample could be obtained, at the trial, trial counsel described the odds of the DNA belonging to Mr. Rogers as "at least a one in four chance." R.25-11, PageID#5080–81.

[4] The 1996 study is a part of the state court record, but Petitioner has attached the report as App. F for ease of the Court's reference.

groundbreaking study was undertaken because of the lack of other scientific studies on sperm transfer during laundering. *Id.*

In the study, a single semen stain was deposited on a pair of clean panties and allowed to air dry. *Id*. In three independent washes, one such pair of stained panties was washed with three pairs of pristine panties, as well as other items to fill the load, and washed for only 10 minutes on warm wash, with a cold rinse, and then placed in the dryer. *Id*. Then, 18 samples were cut from each pair of pristine panties. *Id*. at 3. Upon analysis, spermatozoa were found on each of the 9 pairs of pristine underwear. *Id*.. "[T]he total number of spermatozoa varied on each item, possibly due to random movement in the wash." *Id*. at 3–4 (showing that that total number of sperm identified on each pair of pristine underwear ranged from 10 to 50). Specifically, 3 to 8 spermatozoa were identified on 16 percent of the 162 samples cut, with 38 percent of the samples presenting with 1 or 2 spermatozoa. *Id*. at 1, 3.

The study concluded:

> The fact that spermatozoa can be present on a garment that has in no way been involved in any sexual event can have strong implications in relation to opinion testimony. *This is particularly important in cases involving complainants who are not sexually active and who are unable to provide a detailed account of the occurrence*.

Id. at 3 (emphasis added). The scientists concluded that, "[i]n the absence of DNA results and others indicators such as AP activity, transfer during washing *warrants equal consideration with direct and secondary transfer* as a possible explanation for the presence of a small numbers[sic] of spermatozoa." *Id*. at 4.

Clement and Squibb both provided illuminating testimony regarding the forensics at the postconviction hearing. Squibb, for his part, clarified that his only forensic proof of "semen" on the victim's shorts was a "weak positive" acid

phosphatase (AP) test result—a test which can render positive results from the presence of *any* bodily fluids, and which can also provide false positive results. R.26-10, PageID#8360–71. Indeed, according to Clement—the more experienced forensic analyst between the two—a forensic analyst "cannot draw a conclusion [that a presumptive positive AP test is semen] simply based on that alone." *Id*. at 8310. Moreover, Clement's own AP test on the same fabric sample that Squibb tested yielded a negative result for the presence of human fluids. *Id*. at 8306–11. Both Squibb and Clement received negative test results for the prostate specific antigen, which is only found in seminal fluid. *Id*. at 8306–11, 8379–84.

Instead of being positive for "semen," the postconviction testimony showed that, on microscopic examination, the shorts were positive for "sperm heads"—a distinction with a material difference. Squibb's official serology report stated that both semen and spermatozoa were present, despite the fact that Squibb found only sperm heads and not any actual spermatozoa. R.26-12, PageID#8946–47. Squibb identified "rare" sperm heads—that is, one to ten—on three different areas of the shorts, for a total of approximately 14. *Id*. at 8366, 8372–74, 8388. Clement also performed a microscopic examination of the same cuttings reviewed by Squibb; she found no evidence of spermatozoa and identified only two or three sperm heads. *Id*. at 8317–25.

Squibb did not follow his lab's protocol requiring two other people to review each of his possible findings; instead, only one other person reviewed his findings, but that person was not asked to check *each* of his findings. R.26-10, PageID#8388–89. A review of the report itself suggests that the one individual who reviewed Squibb's work confirmed a total of four sperm heads—a result more consistent with Clement's

finding of two to three sperm heads, than Squibb's finding of fourteen. R.26-12, PageID#8943–44; R.26-10, PageID#8319–25, 8388. Despite these inconsistencies, trial counsel did not question Squibb regarding his testing methodology, specific findings, or adherence to his lab's required protocol.

Clement discussed the laundry transfer study, which she had replicated with similar results, in which sperm were detected on a young child's undergarment after that item was washed with other clothing. R.26-10, PageID#8323–29. This research and her extensive professional experiences made her "very cautious about saying *semen* is present" on clothing when *only sperm heads* are found. *Id.* (emphasis added); *see also* R.26-12, PageID#8955–59. Clement's expert opinion was that the presence of sperm heads alone does not support a conclusion that semen is—or was ever—present because such microscopic evidence may be found "on an article of clothing that is no way related to semen." R.26-10, PageID#8323; R.26-12, PageID#8954.

The postconviction court denied Mr. Rogers's claim that trial counsel were ineffective with respect to both investigation of and cross-examination regarding the forensic proof. Applying the *Strickland* ineffective assistance of counsel standard for the deficiency prong, it found that trial counsel performed deficiently in failing to present to the jury portions of Squibb's testing evidence that was "favorable to the petitioner" and in failing to adequately cross-examine Squibb about his testing methodology. R.26-8, PageID#7919–22. Nonetheless, the court found Mr. Rogers was not prejudiced because "counsel still presented ample evidence attacking the entirely circumstantial evidence regarding the rape-related offenses[.]" *Id.* at 7922–23, 8021.

On appeal of the denial, the Tennessee Court of Criminal Appeals ("CCA")—after correctly transcribing the two-part *Strickland* test and accurately reciting the

definition of "prejudice"—also found deficient performance by trial counsel but no resulting prejudice. R. 26-17, PageID#10127–28, 10141–45. The court minimized and mischaracterized the scientific study, stating that it established that sperm transfer was possible only when "washing new clothing with a pair of underwear worn by someone who had consensual relations." *Id*. at 10144–45. Although trial counsel failed to competently attack the State's proof, the CCA concluded that Mr. Rogers failed to show "that the defense would have been able to *eliminate or completely discredit* the State's proof that sperm head[s] were found in the crotch area of the victim's shorts." *Id*. (emphasis added). Because of the evidence that rare sperm heads were found on the victim's shorts, the CCA noted "confiden[ce] in the jury's verdict." *Id*. at 10145.

But the State's proof at trial did not speak to "sperm heads" on the victim's shorts. Rather, the prosecution emphasized over and over at trial that *semen* was found on the victim's shorts. R. 25-9, PageID#4764–66; R.25-11, PageID#5014–20, 5117; R. 25-17, PageID#5951–53. No trial testimony was offered, nor cross-examination conducted, regarding the distinction between semen and its component parts. *But see* R. 26-10, PageID#8309–25 (Clement testifying at postconviction regarding seminal fluid and its component parts, as well as the parts of an individual spermatozoa, including the head).

Mr. Rogers thereafter raised this claim of ineffective assistance of counsel in his federal habeas petition. R. 153 (Claim C.12). His primary argument at each stage has been that the state court's *Strickland* prejudice analysis must be rejected as

contrary to and/or an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1).[5]

A unanimous panel of the United States Court of Appeals for the Sixth Circuit agreed that the state court unreasonably applied the *Strickland* prejudice standard and that de novo review of this IAC claim was warranted; two judges agreed with Mr. Rogers that he was prejudiced at the penalty phase. *Rogers v. Mays*, 43 F.4th 530, 547–48 (6th Cir. 2022), reh'g en banc granted, vacated by, 54 F.4th 443 (Mem.) (6th Cir. Dec. 6, 2022). The State sought en banc review, but it did not challenge the panel's conclusion that the state court's *Strickland* prejudice analysis was an unreasonable application of clearly established federal law.

Sitting en banc, a majority of the Sixth Circuit's judges concluded that Mr. Rogers was not entitled to relief on this claim. The court first concluded that the state court's decision was not contrary to clearly established federal law:

> A state-court decision is "contrary to" clearly established federal law only if it (1) applies a rule that directly conflicts with a rule prescribed by the Supreme Court or (2) confronts a case with materially identical facts to a Supreme Court decision and decides the case differently. *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., delivering the opinion of the Court in relevant part) (*Terry Williams*). But the state court did neither here. The state

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[5] The State has not—at any stage of federal proceedings—disputed the conclusions of the Tennessee courts that trial counsel rendered deficient performance in failing to investigate the serological evidence—including the scientific study regarding secondary sperm transfer—and adequately cross-examine Squibb. R.94, PageID#12448–52; R.134, PageID#26999–27000; Appellee Br., Doc. 43, PageID#48 n.3 ("Both the Court of Criminal Appeals and the district court determined that trial counsel's performance in this area was deficient. Therefore, Respondent will confine his analysis of the claim to the prejudice prong in *Strickland*.") (internal citations omitted); *see also* Appellee Suppl. Br., Doc. 72. Given Respondent's implied waiver before the district court and express abandonment before the Sixth Circuit panel, the decisions from both the district court and the panel readily agreed with the state court's analysis regarding deficiency and focused on Mr. Rogers's prejudice arguments.

> court accurately quoted *Strickland*'s rules at length as it recited the ineffective-assistance standard. *Rogers*, 2012 WL 3776675, at *32–34. And *Strickland* did not involve materially identical or even similar facts.[6]

Rogers v. Mays, 69 F.4th 381, 389 (6th Cir. 2023) (en banc).

And, despite Respondent's decision not to challenge the panel's conclusion that the state court unreasonably applied clearly established federal law, the court concluded, to the contrary, that "the state court faithfully applied the *Strickland* prejudice standard." *Id.* at 389–90. The Sixth Circuit summarized some of the trial and postconviction testimony that the state court relied upon in its decision. *Id.* at 390–91. It surmised that the state court's decision was that Mr. Rogers was not prejudiced by counsel's deficient performance because "the additional evidence would not have made any difference [as] it only emphasized what the jury already knew: testing did not conclusively show the sperm came from Rogers." *Id.* at 391. The court concluded that this decision by the state court was "a reasonable application of the fact-bound *Strickland* prejudice standard." *Id.* at 391.

Finally, the en banc court turned to the crux of Mr. Rogers's argument: that the state court's decision was contrary to or an unreasonable application of *Strickland* because it concluded that he could not show prejudice without "eliminat[ing] or completely discredit[ing] the State's proof that sperm heads were found" on the victim's shorts:

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[6] Mr. Rogers has never argued that he can satisfy the "materially identical facts" prong of the "contrary to" analysis for § 2254(d)(1). He has, however, consistently maintained that the state court applied a rule that directly conflicts with a rule prescribed by this Court when it eschewed application of *Strickland*'s prejudice standard in favor of its own more burdensome eliminate-or-completely-discredit prejudice test.

> [A]s the Supreme Court has repeatedly held, we may not flyspeck state-court opinions. *See* [*Johnson v. Williams*, 568 U.S. 289, 300 (2013)] ("[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts."); *Coleman v. Thompson*, 501 U.S. 722, 739, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (similar). This makes sense. After all, AEDPA instructs us to look for "*a decision*"—not a few words or a stray thought—"that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1) (emphasis added). The goal is to protect against "extreme malfunctions in the state criminal justice system," not to create a grading system for state-court opinion writing. *Davenport*, 142 S. Ct. at 1524 (citation omitted).
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> Taking the state court's 75-page opinion as a whole and reading those words in context, the state court's decision closely tracks the legal standard prescribed by the Supreme Court. To show prejudice, Rogers would have had to "undermine confidence in the jury's sentence of death." [*Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)]. That is difficult when the State presented uncontroverted evidence that Rogers was the last person to see [the victim] alive and that sperm was found concentrated in the crotch area of her shorts.[7] The jury already knew that DNA testing did not conclusively identify Rogers as the source of the sperm. So the state court properly concluded that neither the additional details about the testing nor the washing-machine theory would have made any difference to Rogers's sentence.

Id. at 391–92.

The dissent agreed with Mr. Rogers that the state court unreasonably applied *Strickland*:

> . . . Rogers did not need to "eliminate or completely discredit" the semen evidence to undermine confidence in the jury verdict. The majority criticizes this as "flyspeck[ing]" a state-court opinion. Maj. Op. at 391–92. But there is a difference between requiring a state court to recite magic words in an opinion and requiring that a state court reasonably apply federal constitutional standards as announced by the Supreme Court. By insisting that Rogers "eliminate or completely discredit" the semen evidence, the state court held Rogers's ineffective assistance claim to a higher standard than required by the Supreme Court, which has repeatedly announced that a petitioner need only demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the

[7] Again, Clement's expert testimony and the lab report documenting Squibb's colleague checking his initial findings identified 2 to 4 stray "rare" sperm heads—hardly a sufficient number to qualify as a "concentration."

> result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *see also Wiggins* [*v. Smith*, 539 U.S. 510, 534 (2003)].
>
> The state court's misapplication of the *Strickland* standard matters because Rogers can demonstrate a reasonable probability that the result of his sentencing proceeding would have been different absent his counsel's errors without having to "eliminate or completely discredit" the semen evidence.

Rogers v. Mays, 69 F.4th at 403–04 (Moore, J., dissenting). The dissent pointed out that, because the rape conviction and aggravator were "only weakly supported by the record"—as demonstrated by the state court's acknowledgement that even sufficiency of the evidence was a "close call"—it is more likely that Mr. Rogers's outcome was influenced by counsel's errors than in a case "with overwhelming record support." *Id.* at 404 (quoting *Strickland*, 466 U.S. at 696). The dissent concluded:

> [E]ven under AEDPA's deferential standard, I am not confident that, in the absence of his counsel's errors, Rogers would have been convicted of rape. Eliminating the statutory aggravator for rape would have removed the most powerful aggravating factor and would have likely caused the jury to weigh the aggravating and mitigating factors differently at sentencing. Murdering a child is an unspeakably tragic crime. But raping and then murdering a child is altogether more heinous. This compels my conclusion that there is a reasonable probability that, to at least one juror, this difference mattered.

Id. at 406–07.

REASONS FOR GRANTING THE WRIT

This case presents particularly compelling reasons for this Court's exercise of discretionary review via a writ of certiorari. *See* Sup. Ct. R. 10. This is not a case in which a lower court has simply misapplied a properly-stated rule of law. *See id*. Rather, the lower courts have individually and collectively crafted their own legal standards—onerous and burdensome ones that seem designed not to carefully review the merits of constitutional claims of error or the propriety of state court rulings, but rather, to ensure that a habeas petitioner may never succeed. Both the Tennessee state courts and the United States Court of Appeals for the Sixth Circuit sitting en banc have issued rulings in this matter that conflict with the relevant decisions of this Court.

Specifically, in denying Mr. Rogers's ineffective assistance of counsel claims, these courts have applied a prejudice standard that is inconsistent with the standard that this Court set forth in *Strickland* and its progeny. *See* Sup. Ct. R. 10(c). In requiring Mr. Rogers to "eliminate or completely discredit" the prosecution's scientific proof, rather than simply show a "reasonable probability" that the outcome would have differed absent counsel's error, the state court created its own legal standard for *Strickland* prejudice—action which is undoubtedly "contrary to" and/or an "unreasonable application of clearly established federal law." 28 U.S.C. § 2254(d)(1). And, in approving of this standard, the Sixth Circuit has, under the pretext of "deference," eschewed the commands of the AEDPA. That is to say, the Sixth Circuit has now interpreted AEDPA "deference" as deference to the state court's *outcome*, instead of deference to the state court's *reasoning*.

This Court should grant certiorari in this case to clarify that it is the province of this Court to create legal standards and the province of the lower courts to faithfully apply those standards.

A. Certiorari is warranted so that this Court can make clear that a state court's creation and/or application of a prejudice test that is higher and more burdensome than the *Strickland* standard itself is contrary to *Strickland*.

The governing standard for Mr. Rogers's claim is, and at all times has been, the two-part test from *Strickland v. Washington*, 466 U.S. 668 (1984). "The importance to the process of counsel's efforts combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes 'effective assistance' be applied especially stringently" in capital cases. *Strickland*, 466 U.S. at 716.

Strickland's two-part test requires a petitioner to demonstrate both deficient performance by counsel and prejudice resulting from counsel's deficient performance. *Id*. Deficient performance is "representation [that] fell below an objective standard of reasonableness." *Id.* at 687–88. Upon a showing of deficiency, petitioner must then demonstrate prejudice stemming from counsel's deficient representation by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because Tennessee is a "weighing" state—where the capital jury must find beyond a reasonable doubt that aggravating factors outweigh mitigating circumstances in order to impose the death penalty—the prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance."

Lundgren v. Mitchell, 450 F.3d 754, 770 (6th Cir. 2006) (quoting *Wiggins*, 539 U.S. at 523–28).

The *Strickland* prejudice standard thus requires a reviewing court to consider whether there was a reasonable probability—that is, a probability sufficient to undermine confidence in the outcome—that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Although the state court *recited* this standard in Mr. Rogers's case, the one that it *applied* was far more burdensome. To require a petitioner to "eliminate or completely discredit" the State's trial proof in a postconviction proceedings would transform the requisite "reasonable probability" standard into one of virtual certainty, and reasonable doubt into no doubt.

Indeed, in *Terry Williams*, 529 U.S. at 405–06, this Court concluded that application of a "preponderance of the evidence" standard to the *Strickland* prejudice analysis would be "contrary to" *Strickland* itself. The preponderance-of-the-evidence standard requires a defendant to present evidence that would "allow a reasonable juror to conclude that [his] position *more likely than not* is true." *Hammoud v. Equifax Info. Servs., LLC*, 52 F.4th 669, 678 (6th Cir. 2022) (Nalbandian, J., concurring) (citing *Pineda v. Hamilton Cnty.*, 977 F.3d 483, 491 (6th Cir. 2020)).

Here, the state court's decision—applying a rule that is even higher than the preponderance standard expressly rejected in *Terry Williams*—"directly conflicts" with the standard prescribed by this Court. Fair-minded jurists could not disagree that the prejudice standard of *Strickland* does not require that a petitioner show counsel's ineffective performance would eliminate or completely discredit the State's proof, and that application of such a standard was "contrary to" clearly established

federal law, just as application of the preponderance standard was "contrary to" *Strickland* in *Terry Williams*. *See Terry Williams*, 529 U.S. at 405–06; 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

The state court concluded that Mr. Rogers could not show prejudice because, absent counsel's error,[8] he would not "have been able to eliminate or completely

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[8] With the notable exception of the Sixth Circuit sitting en banc, every court to consider the issue unequivocally found that defense counsel's performance at trial was deficient—that is, that counsel's efforts with respect to the State's relatively weak forensic evidence and expert testimony supporting rape fell below objective standards for professional competence. *See Rogers v. Mays*, 69 F.4th 381, 400 (6th Cir. 2023) (Moore, J., dissenting) ("The majority quickly brushes aside the fact that every court that has considered this issue has found that Rogers's counsel performed deficiently. *Rogers v. Westbrooks* ("Rogers IV"), No. 3:13-cv-00141, 2019 WL 1331035, at *30 (M.D. Tenn. Mar. 25, 2019); *Rogers v. State* ("Rogers III"), M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *47 (Tenn. Crim. App. Aug. 30, 2012); R. 26-8 (Order at 59–60) (Page ID #7921–22)"); *see also* R.26-17, PageID#10144–45 (finding that trial counsel failed to elicit testimony regarding some of Squibb's testing evidence that was "favorable to the petitioner" and failed to cross-examine Squibb vigorously and adequately about the testing). As previously detailed in footnote 7, Respondent has repeatedly declined to justify counsel's inaction, thereby conceding deficiency.

The en banc opinion, however, eviscerated the state court's deficiency analysis, finding—*based solely upon the testimony of the very attorney who has repeatedly been held to have performed in a constitutionally deficient manner in this case*—that Mr. Rogers's trial attorney would have been deficient if he *had* presented the scientific study to the jury:

> Even Rogers's own trial counsel testified that he was not sure he 'could have gotten a jury to swallow' the washing-machine theory. That gave him good reason not to present it. As any good trial lawyer knows, presenting far-fetched theories risks your credibility with the jury, not just on one issue but on the entire case. One wonders why a good lawyer would take such a risk to challenge evidence that was already inconclusive. *See* R. 26-9, Pg. ID 8154–55 (Rogers's counsel testifying that he 'wasn't as concerned' once he heard that the DNA testing was inconclusive). Indeed, our caselaw recognizes an attorney may actually be deficient for pursuing a 'far-fetched' theory.

Rogers v. Mays, 69 F.4th at 391. The court reached this conclusion despite Respondent offering no such argument on brief or at oral argument. *See Rogers v. Mays*, 69 F.4th 381, 400 (6th Cir. 2023) (Moore, J., dissenting) (noting that "[t]he

discredit" the State's forensic evidence. R.26-17, PageID#10145. The Sixth Circuit concluded that this decision was not "contrary to" *Strickland* because the state court "accurately quoted *Strickland*'s rules at length" when setting forth the ineffective assistance standards on pages 33 to 34 of its opinion. *Rogers v. Mays*, 69 F.4th at 389; *Rogers v. State*, 2012 WL 3776675, at *33–34. But the fact that the state court *correctly recited* the *Strickland* standard on page 34 of its opinion is irrelevant to whether it *actually applied* that same rule subsequently on page 47 of the same

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deficient performance of Rogers's counsel is also undisputed before this [en banc] court"). In response to the dissent's assertion that there were no grounds to second guess the state court's deficiency finding—given its superior position to assess the factual proof offered and because Respondent has never challenged this conclusion or offered contrary evidence— the en banc majority simply stated that the AEDPA "does not require us to defer to state court decisions when we *deny* relief." *Id*. at 391 n.1 (emphasis original).

The AEDPA does not permit a federal court to challenge the legal conclusion of a state court when that ruling has not been challenged in federal court. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (noting that "appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance," and finding abuse of discretion where federal appeals court raised defense sua sponte despite the State's waiver of the same); *see also Foster v. Wolfenbarger*, 687 F.3d 702, 708 (6th Cir. 2012) (quoting *Massaro v. United States* 538 U.S. 500, 506 (2003), for proposition that federal courts defer "to the conclusions of the trial judge on the effectiveness of counsel, because '[t]he judge, having observed the earlier trial, [has] an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.'"). To allow otherwise would destroy the deferential foundation of the AEDPA and undermine principles of federalism and comity.

Given the en banc court's focus on principles of deference, it is difficult to imagine a reason for the court to reverse course on a factual and legal conclusion by the state court that was not challenged by the Respondent in federal court other than that it had a singular goal in this appeal: to ensure a resounding defeat for Mr. Rogers. This Court should signal to federal courts of appeals that such an outcome determinative approach to federal habeas litigation is out of bounds and inconsistent with the purpose and intent of the AEDPA and this Court's interpretive precedent.

opinion.[9] The "contrary to" inquiry focuses on the rule that the state court *applies*—not whether the state court can correctly utilize the copy/paste function of a word processing program.

This Court's opinion in *Terry Williams* confirms as much. The Court quoted the standards set forth by both the trial judge and the Virginia Supreme Court and concluded that "the trial judge analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not." *Terry Williams*, 529 U.S. at 394–95. Under the Sixth Circuit's rationale, the Court's analysis would have ended right there—that is, after confirming which court correctly recited the applicable standard. But this Court did not stop there: it went on to conclude that the "trial judge *correctly applied both components of that standard*" to the claim in question.[10] *Id*. at 395 (emphasis added).

To permit such an interpretation to stand would give license to state courts to simply pay lip service to this Court's precedent by quoting the correct legal standard somewhere within the four corners of their opinions and then applying any standard of their own devising (or none at all) with no fear of reversal. This would transform federal habeas review as a whole into a "flyspecking" inquiry, with federal courts simply searching state court decisions for the appropriate "magic words"—i.e., an

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[9] The page numbers in Westlaw are slightly shifted from the record version, available at R.26-17, in which the *Strickland* standard appears on pages 41 to 42, and the analysis on pages 58 to 59.

[10] Notably, in that case—which also involved the *Strickland* IAC standard in capital case—the trial judge that was affirmed applied the "reasonable probability that the result of the sentencing phase would have been different" standard *in favor of the petitioner*. *Terry Williams*, 529 U.S. at 396–97.

accurate recitation of a correct legal standard from this Court—and then affirming on that basis alone.

B. Certiorari is warranted so that this Court can make clear that a state court's application of a prejudice test that is higher and more burdensome than the *Strickland* standard itself is an unreasonable application of *Strickland*.

Similar issues arise when this case is viewed under the "unreasonable application" lens. An "unreasonable application" can be found where the state court (1) identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or (2) "either unreasonably extends a legal principle from [this Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams,* 529 U.S. at 407 (O'Connor, J., delivering opinion of the Court as to Part II). In *Terry Williams*, the federal appellate court construed § 2254(d) as providing that a federal court could grant habeas relief "only if the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists *would all agree* is unreasonable." *Id*. at 374 (Stevens, J., delivering opinion of the Court as to Part I) (internal quotation marks omitted, emphasis added). But this Court concluded that this "additional overlay" on the unreasonable application clause was "erroneous" and "may be misleading." *Id*. at 409 (O'Connor, J., delivering opinion of the Court as to Part II).

The state court ruling in Mr. Rogers's case was not simply "incorrect" but fundamentally unreasonable under either definition from *Terry Williams*. And yet the Sixth Circuit has gone to great lengths to perform the kind of misleading and subjective inquiry that Justice O'Connor cautioned against in that case.

Mr. Rogers agrees with the Sixth Circuit that AEDPA requires that its deferential review be applied to a "decision"—but in this case, the "decision" did not involve an application of the correct legal standard from this Court, but rather, an outcome determinative one of the state court's own devising. Nor is the relevant decision "the 75-page opinion as a whole."[11] *See Rogers*, 69 F.4th at 392. The state court's relevant "decision" was that Mr. Rogers could not satisfy *Strickland* at the penalty phase, despite uncontrovertibly deficient performance by counsel, because he did not present proof at the postconviction stage sufficient to "eliminate or completely discredit" the prosecution's forensic proof from the guilt phase. *See Terry Williams*, 529 U.S. at 398 (analyzing the *Strickland* prejudice prong at penalty phase and concluding that mitigating evidence "may alter the jury's selection of penalty, *even if it does not undermine or rebut*" the prosecution's guilt phase evidence) (emphasis added). The en banc appellate court has created an alternative truth as to what the state court's "decision" entailed, rather than reviewing what it actually decided. In doing so, it has perverted the deference standard, making it deference to the *outcome*,

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[11] This point from the en banc opinion is particularly troublesome. To be clear, neither § 2254(d) nor this Court's precedent ask whether a state court has gotten it right "as a whole" in order to determine whether relief is warranted as to a particular claim. If the Sixth Circuit's rationale stands, a state court's reasonable decision on 99 percent of a petitioner's claims would be a reason to deny relief as to 1 claim decided in a manner that is egregiously and blatantly contrary to or an unreasonable application of this Court's precedent. Should a petitioner be denied habeas relief, for example, on a clear-cut *Batson* claim, if the state court has faithfully applied the *Strickland* analysis to countless ineffective assistance of counsel claims? *See Batson v. Kentucky*, 476 U.S. 79 (1986) Furthermore, one need only look at the burdens imposed upon petitioners to see the fallacy of this logic. If a habeas petitioner were to assert that he was not subject to procedural default "taking the claims as a whole," the reviewing federal court would nonetheless refuse to review a single claim that was defaulted. It is thus the state court's decision on a particular claim, and not the totality of the state court's written work product as to any and all possible claims, that matters under the AEDPA.

rather than deference to the *reasoning*. This interpretation pushes both *Strickland* and the AEDPA past their limits.

The AEDPA's deferential review is not so insurmountable, or Congress would not have bothered to include § 2254(d). By putting limits on deference to the state court, Congress recognized that state courts sometimes egregiously err as a matter of fact or law, and in those cases, it is the job of the federal courts to look at the claims anew to preserve the integrity of the Constitution. This is one such case.

Essentially, the Sixth Circuit's analysis attempts to extend *Richter* by authorizing federal courts to create from whole cloth a reasonable basis for a fundamentally unreasonable decision. But this is a bridge too far. *Richter*, by its very terms, did not rule that federal courts must make any and all efforts to read a reasonable basis into a state court's merits ruling on the altar of deference. Instead, it held that *when a state court issues a summary disposition without explanation or a statement of reasons*, federal courts should presume that the ruling was on the merits, in the absence of indicia to the contrary. In such circumstances—that is, when the state court has entered a summary decision—*Richter* authorizes a federal habeas court to determine what "*could have* supported[] the state court's decision[.]" *Id.* at 102. But that is in contrast to the federal habeas court's obligation to "determine what arguments or theories [*actually*] supported . . . the state court's decision" when the disposition was, in fact, supported by a statement of reasons. *Id.* ("Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported*, the state court's decision."). There is, simply put, nothing in the holding or dicta of *Richter* authorizing federal courts on habeas review to ignore the

state court's actual stated basis for its decision in order to render it "reasonable" under § 2254(d).

The court accused Mr. Rogers of "flyspecking" the state court's opinion by focusing on the words that the state court actually used when it concluded that Mr. Rogers had not shown *Strickland* prejudice. But in *ignoring* the words that the state court actually used, in favor of looking at a copy/paste boilerplate legal standard 13-pages prior, the Sixth Circuit has read into the state court opinion that which is clearly not present. Just as the highly deferential standard of *Strickland*'s deficiency prong does not allow federal courts to "indulge '*post hoc* rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions," the highly deferential standard of the AEDPA does not allow federal courts to indulge in *post hoc* rationalization for a state court's decision that contradicts the available evidence regarding its analysis.[12] *See Harrington*, 562 U.S. at 109.

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[12] Although it is not outcome determinative in this case, it is notable that the Sixth Circuit invoked the concept of "double deference" in this case—that is, the combined effect of § 2254(d) deference and *Strickland* deference. *Rogers v. Mays*, 69 F.4th at 389. Numerous courts have concluded that double deference is owed to the state court's ruling on the performance prong. *Haight v. Jordan*, No. 17-6095, 2023 WL 1859893, at *3 (6th Cir. Feb. 9, 2023) ("[W]e must be "doubly deferential" to the state court's ruling on counsel's performance."); *Id.* at *28 (6th Cir. Feb. 9, 2023) (Stranch, J., dissenting in part) (noting that "[d]ouble deference to a state court's adjudication of a *Strickland* claim applies only to *Strickland*'s performance prong, not to the prejudice inquiry"); *see also, e.g., Raheem v. GDCP Warden*, 995 F.3d 895, 909 (11th Cir. 2021); *Apelt v. Ryan*, 906 F.3d 834, 841 (9th Cir. 2018); *Hebert v. Rogers*, 890 F.3d 213, 220 (5th Cir. 2018). Contrary cases, cursorily invoking "double deference" as to *Strickland* prejudice, have failed to articulate what such deference looks like—or to whom it is owed. Given that this prong requires consideration of a counterfactual scenario for assessment of probability of a different outcome, it is difficult to discern the nature of such deference. *See Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1334 (11th Cir. 2013) (Jordan, J., concurring) ("Unlike the performance evaluation, which asks us to assess what counsel did or did not do . . ., the prejudice question is, in the end, a legal one. There is no 'what' to analyze. There is only the ex post legal determination, by a court based on a hypothetical construct with counsel's errors

It is thus the Sixth Circuit, and not Mr. Rogers, that is attempting to impose mandatory opinion writing standards. Its erroneous mandate is simple: State courts need only include cursory, rote repetition of Supreme Court legal standards in order to avoid actual review of the objective and stated bases for their decisions. Mr. Rogers simply urges a standard of federal review that takes the state court at its word, instead of rationalizing outcomes on a *post hoc* basis with the federal courts' own reasoning and analysis that is divorced from the state court's statement of reasons.

The Tennessee state court's objectively unreasonable view of the *Strickland* prejudice test as requiring the petitioner to show that counsel's error would have "eliminat[ed] or completely discredit[ed]" the State's proof is evident when applied to the sentencing stage. But using the actual *Strickland* prejudice standard, Mr. Rogers's prejudice from counsel's deficiency is evident, as set forth in detail in the original panel opinion and the dissent from the en banc opinion. *Rogers v. Mays*, 43 F.4th at 547–51; *Rogers v. Mays*, 69 F.4th at 403–07 (Moore, J., dissenting). Tennessee requires jurors to engage in subjective individualized weighing of aggravators and mitigators, not to mention that issues such as residual doubt and moral culpability are often the straws that tip the scale from execution to mercy. Trial counsel's deficiencies deprived the jury of evidence offering alternate explanation(s) regarding the State's physical evidence—the sole evidence suggesting that the victim was raped. *See Jackson v. Virginia*, 443 U.S. 307, 323 (1979); *Mullaney v. Wilbur*, 421

'corrected, as to whether the defendant was or was not prejudiced by his counsel's actions or omissions[.] It therefore makes no sense to say that initial judicial review as to whether prejudice resulted from counsel's deficient performance—on its own, before adding AEDPA deference—involves any deference.").

U.S. 684, 697–98 (1975); *see also Andrus v. Texas*, 140 S.Ct. 1875, 1877–78 (2020) (noting counsel's deficiencies in failing to investigate prevented defense from being able to "provide a counternarrative" or to "contextualize or counter the State's evidence").

The en banc court gave short shrift to Mr. Rogers's arguments supporting prejudice on de novo review. AEDPA deference is inapplicable after the § 2254(d) bar is overcome. Federal courts review de novo claims "adjudicated on the merits in state court if the petitioner shows, by virtue of one of its exceptions, that the relitigation bar of § 2254(d) does not apply." *Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011) (citing *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011)); *Smith v. Bradshaw*, 591 F.3d 517, 522, 525 (6th Cir. 2010); *Hill v. Mitchell*, 400 F.3d 308, 313 (6th Cir. 2005); *accord Walter v. Kelly*, 653 F. App'x 378, 391 (6th Cir. 2016) (applying de novo review to "portion" of claim that cleared 2254(d)(2) bar). Thus, after Mr. Rogers satisfied § 2254(d)(1) by showing that the state court's decision was contrary to and/or an unreasonable application of *Strickland* prejudice, no deference was due to any state court finding on this issue. *See Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.").

The en banc opinion refused to respond to the dissenting opinion's de novo analysis, concluding it was unnecessary due to the applicability of § 2254(d)(1). *Rogers v. Mays*, 69 F.4th at 392 ("Applying de novo review, the dissent faults us for not discussing the history and details of the death penalty in Tennessee and far-afield

Supreme Court precedent. But we need not discuss those materials because AEDPA narrowly focuses us on whether the state court contradicted or unreasonably applied clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).").

Instead of meaningfully engaging with Mr. Rogers's prejudice arguments based upon the state court record, the Sixth Circuit majority cherry-picked a few of the more salacious facts from the prosecution's case at the guilt phase and simply concluded that "[t]hese highly inflammatory and disturbing facts would have most likely resulted in the same sentence." *Rogers v. Mays*, 69 F.4th at 392. The court did not discuss aggravating factors, let alone the *weighing* of aggravators and mitigators. But, as previously discussed, this Court has established that, in assessing *Strickland* penalty phase prejudice, mitigating evidence may, indeed, "alter the jury's selection of penalty, even if it does not undermine or rebut" the prosecution's guilt-phase evidence. *See Terry Williams*, 529 U.S. at 398. The en banc court's cursory dismissal of Mr. Rogers's prejudice on the merits, and reliance on a curated subset of nocent facts from the prosecution's case-in-chief, is further proof that its decision was outcome determinative.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

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Respectfully submitted,

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