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

No. 23–5964

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

RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent's brief is no more than a summary of the opinion from the Sixth Circuit below. Respondent argues that Mr. Rogers has failed to set forth any basis for this Court to accept certiorari, while simultaneously failing to meaningfully respond to Mr. Rogers substantive legal arguments. While Mr. Rogers believes that his petition for certiorari adequately summarizes the factual and legal arguments that warrant both review and relief, he will briefly address a few matters.

1. Respondent repeatedly states that certiorari should not be granted because Mr. Rogers seeks no more than simple error correction. This is false. The questions presented by Mr. Rogers in his petition are complex and important legal issues that involve the boundaries of this Court's precedent and the obligations and limitations for federal courts in applying the statutory provisions of the AEDPA.[1] Mr. Rogers's petition clearly sets out the argument that the decisions of the Tennessee courts and the United State Court of Appeals for the Sixth Circuit in this matter conflict with the relevant binding decisions of this Court, which alone makes it worthy of review. These legal questions not only have great import in the present capital case but have potential far-reaching ramifications in state and federal habeas actions

[1] Respondent goes so far as to declare that the question presented is "whether the en banc Sixth Circuit Court of Appeals correctly denied habeas relief." Because the question of whether the decision below was right or wrong is the question in every single case before this Court, such framing fails to satisfy the requirements of Rule 14.1(a) (providing that the question presented should be expressed in relation to the circumstances of the case). Moreover, "it is the petitioner himself who controls the scope of the question presented" and who "possesses the ability to frame the question to be decided in any way he chooses." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Given that Respondent's generalized framing ignores the pivotal role of the state court's decisions in this capital habeas case, this Court should follow its precedent and consider the scope of the questions presented by Mr. Rogers himself.

nationwide. Respondent has notably declined to respond to Mr. Rogers's arguments about the broader consequences that may stem from this Court's silence in this case.

2. Mr. Rogers has argued at every stage of federal review that the state court unreasonably applied the prejudice standard from *Strickland v. Washington*, 446 U.S. 668 (1984), by requiring him to "eliminate or completely discredit" the prosecution's trial evidence to prove prejudice, rather than merely show a "reasonable probability" of a different outcome. The Sixth Circuit sitting en banc, and now Respondent for the first time, accuse Mr. Rogers of "flyspecking" the state court's opinion, cherry-picking words out of context that did not actually reflect what the state court *meant*. But Respondent's argument before this Court doubles down on the fact that this is *precisely* what the state court meant. Indeed, Respondent states: "[Mr. Rogers] needed to 'eliminate' or 'discredit' the finding of *sperm heads* too. And as the state court rightly concluded, he could not do that." Resp. Br. at 17. Respondent justifies this position by stating that "[s]o long as the evidence showed the presence of sperm on the [victim's] shorts, the inference drawn . . . would always be the same: Rogers raped Jackie." *Id*. This statement is both factually inaccurate (as the proof at postconviction showed that neither expert ever found *sperm* on the shorts, but rather, only "rare" sperm *heads*) and legally problematic.

It is true that such an inference is possible and permissible, even under the proof presented by Mr. Rogers. But it is not the only possible inference. The en banc court and now Respondent describe how "farfetched" an inference in Mr. Rogers's favor would be under the proof presented to the state court. It bears repeating that this theory was *not* the brainchild of Mr. Rogers or his lawyers. Rather, Mr. Rogers presented proof in state court, through a qualified expert, that scientific research

supports this theory. Based upon that expert testimony and a review of the scientific study supporting it, the state court concluded that Mr. Rogers's counsel was constitutionally ineffective for failing to pursue this line of investigation and cross-examination. So Respondent is patently and objectively wrong that Mr. Rogers has presented "a farfetched theory *supported by no evidence*." *Id*. at 14 (emphasis added).

It does not strain the boundary of credulity to find a reasonable probability that at least one juror, if presented with the testimony and evidence that was not presented at trial due to counsel's ineffectiveness, would have struck a different balance at the penalty phase. And because Tennessee is a "weighing" state—where each member of a capital jury must find beyond a reasonable doubt that aggravating factors outweigh mitigating circumstances in order to impose the death penalty—one juror is all that was needed to change the outcome of Mr. Rogers' sentencing proceeding. *See Lundgren v. Mitchell*, 450 F.3d 754, 770 (6th Cir. 2006) (quoting *Wiggins*, 539 U.S. at 523–28).

The inference, therefore, is not destined to "always be the same," in light of new scientific expert testimony. That is to say, the testimony presented by Megan Clement at the postconviction stage allows another inference to be drawn *that could not be reasonably drawn from the testimony presented at trial*. And if the inference will "always be the same" *unless* a petitioner can "eliminate or completely discredit" the prosecution's trial evidence, then the court has *not* applied the *Strickland* reasonable probability standard.

Rather, as Mr. Rogers argued in his Petition for Certiorari, requiring that no possible contrary inference may be drawn unless and until a petitioner refutes the

State's proof is contrary to *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000) (hereinafter, *Terry Williams*).[2] In that case, this Court rejected application of a "preponderance of the evidence" standard to the *Strickland* prejudice analysis, finding it "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)). In fact, in *Terry Williams*, this Court concluded that, in the *Strickland* prejudice context, mitigating evidence "may 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 (emphasis added). If "more likely than not true" is not required to show prejudice, then "always the same unless you eliminate or completely discredit the state's proof" certainly cannot be required. And yet, that is exactly what the courts at every level of state and federal court have required of Mr. Rogers, and what Respondent urges this Court to endorse by declining to grant review in this case.

3. Respondent repeatedly cited *Richter* but failed to respond to Mr. Rogers's argument that the Sixth Circuit's analysis extends *Richter* beyond any reasonable interpretation. There is 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 an unreasonable application "reasonable"

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[2] Respondent failed to respond to Mr. Rogers's arguments regarding the *Terry Williams* case and how the standard here is even higher than the preponderance of the evidence standard rejected in that case.

under § 2254(d). Such a reading does not support comity and federalism; rather, it infringes upon the purview of the legislature by stripping out the exceptions set forth in 28 U.S.C. § 2254(d). *Richter* applies only when the state court issues a summary disposition without explanation or statement of reasons. When a state court does, however, explain and offer reasons for a particular decision, the federal courts may not subvert § 2254(d) by ignoring a state court's stated basis for a decision.

4. Respondent argues that the claim "was not subject to de novo review, but to AEDPA's deferential standard." Resp. Br. at 7. But AEDPA deference is inapplicable after the § 2254(d) bar is overcome. *See Rice v. White*, 660 F.3d 242, 252 (6th Cir. 2011). It bears repeating: its brief in opposition to Mr. Rogers's petition for writ of certiorari marks the first time that Respondent has argued that the state court unreasonably applied clearly established federal law. Mr. Rogers has satisfied § 2254(d)(1) by showing that the state court's decision was an unreasonable application of *Strickland* prejudice, which means that no deference is due to any state court finding on this issue.

5. As he has done at every stage of federal review, Respondent continues to misstate and overstate the facts in order to minimize Mr. Rogers's claim. Respondent repeatedly asserts that Mr. Rogers could not succeed because trial counsel could not challenge "the presence of sperm." Resp. Br. at 13, 17. At no point in this litigation has Respondent acknowledged the testimony (and scientific reality) that *sperm* are not the same as *sperm heads*. Neither expert found sperm, but instead found only sperm *heads*. And, as previously stated, Mr. Rogers *does* have a basis for claiming that counsel could have challenged the presence of *sperm heads*—that is, the testimony of Megan Clement and scientific research showing that sperm heads

can be found on items of clothing that have nothing to do with rape or sexual contact via secondary transfer during laundering. The jury heard only that *semen* was found on the shorts, and there is no similar argument that can be made regarding secondary transfer of *semen*. Because what the experts actually agreed upon was that only "rare" sperm *heads* were identifiable, Mr. Rogers indeed has a valid challenge to undermine the testimony and evidence presented at trial.

6. Mr. Rogers agrees with Respondent on one point: the AEDPA exists to protect against extreme malfunctions in the state criminal justice system. Mr. Rogers, though, submits that this is such a malfunction. Trial counsel failed to conduct any investigation or prepare meaningful cross-examination as to the prosecution's *sole* evidence of rape, despite the fact that such evidence was purely circumstantial. Based on that failure, the jury heard a version of scientific and expert testimony that allowed it to reach only one conclusion: that the child victim was raped prior to her murder. Despite later proving both that counsel was constitutionally ineffective and that valid scientific research and a qualified expert were available to provide the jury with an alternate explanation, the state court refused to find even a reasonable probability that one juror could have come to the conclusion that the victim was *not* raped, because that proof was not so decisive as to completely eviscerate the prosecution's original trial evidence.

Here, both Mr. Rogers's trial counsel and the state courts entrusted with protecting his constitutional rights through faithful application of this Court's precedent failed him. Given the stakes—Mr. Rogers's very life—such malfunction is extreme and must be vindicated.

CONCLUSION

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

Dated: January 22, 2024.

Respectfully submitted,

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