

No. 24-____

IN THE
Supreme Court of the United States

DESHAWN ANDREW BOYLAN,
Petitioner,

v.

WARDEN MICHAEL BURGESS,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

JO-ANN TAMILA SAGAR
DANA A. RAPHAEL
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
dana.rafael@hoganlovells.com

Counsel for Petitioner

SEPTEMBER 2024

QUESTION PRESENTED

Whether the Sixth Circuit erroneously reversed the District Court's grant of habeas relief based on trial counsel's ineffective assistance in failing to raise the preclusive effect of sentencing findings in a subsequent criminal proceeding, where state law recognizes collateral estoppel as a defense.

PARTIES TO THE PROCEEDING

Petitioner is Deshawn Andrew Boylan, an individual. Respondent is the Warden Michael Burgess.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit:

Boylan v. Burgess, No. 23-1244 (6th Cir. June 20, 2024) (unreported but available at 2024 WL 3069362)

U.S. District Court for the Western District of Michigan:

Boylan v. Nagy, No. 2:19-cv-00210 (W.D. Mich. Feb. 14, 2023) (reported at 656 F. Supp. 3d 743)

Boylan v. Nagy, No. 2:19-cv-00210 (W.D. Mich. Sept. 10, 2024) (unreported but available at 2024 WL 4131644)

Michigan Supreme Court:

People v. Boylan, No. 158120 (Mich. Dec. 21, 2018) (Mem.) (reported at 920 N.W.2d 595)

Michigan Court of Appeals:

People v. Boylan, No. 335556 (Mich. Ct. App. Apr. 24, 2018) (unreported but available at 2018 WL 1936182)

Muskegon County, Michigan, Fourteenth Judicial Circuit Court

People v. Boylan, No. 14-65008 (Mich. Cir. Ct., Muskegon Cnty. Dec. 3, 2014) (unreported)

People v. Boylan, No. 16-00072 (Mich. Cir. Ct., Muskegon Cnty. Sept. 27, 2016) (unreported)

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| STATEMENT OF RELATED PROCEEDINGS | iii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL PROVISION INVOLVED..... | 2 |
| INTRODUCTION | 2 |
| STATEMENT OF THE CASE..... | 4 |
| A. Factual Background..... | 4 |
| B. Procedural Background | 8 |
| REASONS FOR GRANTING THE PETITION..... | 12 |
| I. The Sixth Circuit s Decision Is Wrong..... | 14 |
| A. The Sixth Circuit Applied The Wrong Standard In Assessing Deficient Performance | 14 |
| B. The Sixth Circuit Applied The Wrong Standard In Assessing Prejudice..... | 22 |
| II. Certiorari Is Proper Because The Sixth Circuit Failed To Apply A Governing Legal Rule | 27 |
| CONCLUSION..... | 29 |
| APPENDIX | |
| APPENDIX A Sixth Circuit Opinion (June 20, 2024) | 1a |
| APPENDIX B Sixth Circuit Judgment (June 20, 2024)..... | 10a |

TABLE OF CONTENTS Continued

| | <u>Page</u> |
|--|-------------|
| APPENDIX C District Court Opinion (Feb. 14, 2023) | 11a |
| APPENDIX D Michigan Court of Appeals Opinion (Apr. 24, 2018) | 38a |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|---|----------------|
| CASES: | |
| <i>Burns v. Mays</i> , 143 S. Ct. 1077 (2023) | 14 |
| <i>Dobrowski v. Jay Dee Contractors, Inc.</i> , No. 288206, 2010 WL 293069 (Mich. Ct. App. 2010) | 24 |
| <i>Dye v. Hofbauer</i> , 546 U.S. 1 (2005) | 14, 27 |
| <i>Goff v. Bagley</i> , 601 F.3d 445 (6th Cir. 2010) | 14 |
| <i>Harrington v. Richter</i> , 562 U.S. 86 (2011) | 20, 22 |
| <i>Hinton v. Alabama</i> , 571 U.S. 263 (2014) | 20 |
| <i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986) | 15, 19, 21 |
| <i>Overton v. Ohio</i> , 534 U.S. 982 (2001) | 28 |
| <i>People v. Albers</i> , 100 N.W. 908 (Mich. 1904)..... | 15 |
| <i>People v. Beverly</i> , No. 344460, 2020 WL 746939 (Mich. Ct. App. Feb. 13, 2020) | 23 |
| <i>People v. Brown</i> , 755 N.W.2d 664 (Mich. Ct. App. 2008) | 17 |
| <i>People v. Dupree</i> , 993 N.W.2d 185 (Mich. 2023)..... | 25, 26 |
| <i>People v. Gates</i> , 452 N.W.2d 627 (Mich. 1990)..... | 15, 18, 24 |
| <i>People v. Grainger</i> , 324 N.W.2d 762 (Mich. Ct. App. 1982) | 17 |

TABLE OF AUTHORITIES Continued

| | <u>Page(s)</u> |
|---|----------------------------------|
| <i>People v. Gray</i> , 222 N.W.2d 515 (Mich. 1974)..... | 16 |
| <i>People v. Harris</i> , No. 335831, 2018 WL 3074031 (Mich. Ct. App. June 21, 2018) | 26 |
| <i>People v. Jackson</i> , 539 N.W.2d 758 (Mich. Ct. App. 1995), <i>appeal denied, ordered not precedential</i> , 549 N.W.2d 574 (Mich. 1996) | 18 |
| <i>People v. Lee</i> , No. 316110, 2018 WL 1652470 (Mich. Ct. App. Apr. 5, 2018) | 23 |
| <i>People v. McCuller</i> , 739 N.W.2d 563 (Mich. 2007)..... | 5 |
| <i>People v. Smith</i> , 754 N.W.2d 284 (Mich. 2008)..... | 23 |
| <i>People v. Watt</i> , 320 N.W.2d 333 (Mich. Ct. App. 1982) | 3, 8, 13, 15, 17, 19, 20, 25, 26 |
| <i>Salazar-Limon v. City of Houston</i> , 137 S. Ct. 1277 (2017) | 14 |
| <i>Shaw v. Wilson</i> , 721 F.3d 908 (7th Cir. 2013) | 14, 19, 21 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984) | 4, 14, 20, 26, 28 |
| <i>United States v. Biheiri</i> , 341 F. Supp. 2d 593 (E.D. Va. 2004)..... | 18 |
| <i>United States v. Carthorne</i> , 878 F.3d 458 (4th Cir. 2017) | 19, 20 |
| <i>United States v. Plaster</i> , 16 F. Supp. 2d 667 (W.D. Va. 1998)..... | 18 |
| <i>W.J. O Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.</i> , 700 F. App x 484 (6th Cir. 2017) | 22, 24 |

TABLE OF AUTHORITIES Continued

| | <u>Page(s)</u> |
|---|----------------|
| <i>Wiggins v. Smith</i> , 539 U.S. 510 (2003) | 22 |
| STATUTES: | |
| Mich. Comp. L. 7 750.413 | 5 |
| Mich. Comp. L. 7 770.12 | 27 |
| Mich. Comp. L. 7 777.31(1)(a) | 6 |
| Mich. Comp. L. 7 777.31(2)(b) | 6 |
| Mich. Comp. L. 7 777.32(1)(d) | 6 |
| Mich. Comp. L. 7 777.32(2)..... | 6 |
| Mich. Comp. L. 7 777.33 | 24 |
| Mich. Comp. L. 7 777.33(1)(a) | 6 |
| Mich. Comp. L. 7 777.46 (1)(c)..... | 6 |
| Mich. Comp. L. 7 777.66 | 23, 24 |
| RULES: | |
| Mich. Ct. R. 7.202(6)(b)(ii) | 23 |
| Sup. Ct. R. 10(a)..... | 14 |
| OTHER AUTHORITIES: | |
| S. Shapiro et al., Supreme Court Practice (11th ed. 2019) | 27 |

IN THE
Supreme Court of the United States

No. 24-_____

DESHAWN ANDREW BOYLAN,
Petitioner,

v.

WARDEN MICHAEL BURGESS,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Deshawn Andrew Boylan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-9a) is unreported but available at 2024 WL 3069362. The District Court's opinion (Pet. App. 11a-37a) is reported at 656 F. Supp. 3d 743. The Michigan Court of Appeals' opinion (Pet. App. 38a-58a) is unreported but available at 2018 WL 1936182. The Michigan Supreme Court's denial of leave to appeal is unreported. No. 158120, 920 N.W.2d 595 (Mich. Dec. 21, 2018).

JURISDICTION

The Sixth Circuit entered judgment on June 20, 2024. Pet. App. 10a. This Court has jurisdiction under 28 U.S.C. 7 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that [i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense. U.S. Const. amd. VI.

INTRODUCTION

The Sixth Amendment's guarantee of effective assistance of counsel requires that counsel raise meritorious state-law defenses. Competent counsel must raise that defense even in the absence of precedent applying it in precisely the same factual context. After all, effective assistance of counsel calls for the exercise of skill and judgment, not a rote precedent-matching game.

The Sixth Circuit departed from those principles here, and the result is that Deshawn Andrew Boylan is serving a life-without-parole sentence because his trial counsel failed to raise a meritorious state-law defense in his felony-murder prosecution.

In 2014, Boylan drove away in another person's car after a night of drinking. Unbeknownst to him, the car owner's brother, Jacob Rameau, chased after Boylan, who was in turn pursued by four of Boylan's acquaintances. One of those acquaintances, Robert Gee, shot and killed Rameau after catching up to him.

The State of Michigan charged Gee with first-degree murder, and separately charged Boylan with taking the car. Boylan readily pled guilty to that charge, fully admitting that he stole the car and t[ook] full responsibility for [his] action. R. 11-4, PageID.329.¹ Boylan apologized to the victim s family for precipitating the events that ultimately resulted in Rameau s death, but Boylan emphatically denied that he had any idea Gee was pursuing him or that Gee would kill Rameau.

At sentencing, the prosecutor argued that Boylan s sentence for taking the car should be lengthened because, in the prosecutor s view, Boylan and Gee were multiple offenders within the same set of facts, and so Boylan should be held responsible for Gee s using a firearm to kill Rameau. *Id.* at 321. The trial court rejected that argument, concluding that this was not a multiple offender case. *Id.* at 323. Boylan was sentenced up to ten years imprisonment for taking the car.

A year later, the very same prosecutor came back and charged Boylan with aiding and abetting felony murder on the theory that this *was* a multiple offender case not because of any new evidence, but because the prosecutor had since secured a first-degree murder conviction for Gee, the shooter. Any competent Michigan defense lawyer would have raised Michigan s collateral-estoppel defense to this subsequent prosecution Michigan courts, after all, have long recognized collateral estoppel as a vital defense to the prosecutor s charge. *People v. Watt*, 320 N.W.2d 333, 335 (Mich. Ct. App. 1982) (per curiam). Yet Boylan s trial counsel inexplicably never raised that likely outcome-determinative defense and Boylan was convicted of

¹ Record citations are to the District Court s docket.

felony murder. Boylan is now serving a mandatory life-without-parole sentence when his sentence for taking the car would have expired months ago.

The District Court granted habeas relief after determining that the Michigan Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), to deny relief because Michigan clearly recognizes a collateral-estoppel defense to a subsequent criminal prosecution, and there was no strategic reason for failing to raise it. The Sixth Circuit, however, applied the wrong legal standard and reversed. The Sixth Circuit acknowledged that Michigan has long recognized collateral estoppel as a defense in criminal prosecutions. Yet the court concluded that Michigan law was not sufficiently clear that sentencing findings could be afforded preclusive effect, even though Boylan cited a case that did exactly that.

The Sixth Circuit's decision is plainly wrong and results in manifest injustice: Boylan is being punished for Gee's crimes, when the first sentencing court already concluded that Boylan should not be held responsible for Gee's conduct. In appropriate cases, this Court has summarily reversed where the lower court's decision was obviously incorrect including in another case where the Sixth Circuit erroneously denied habeas relief to a Michigan prisoner. The Court should follow the same procedure here, grant Boylan's petition, and reverse the decision below.

STATEMENT OF THE CASE

A. Factual Background

1. Boylan is serving a mandatory life-without-parole sentence after being convicted of felony murder arising out of the death of Jacob Rameau on June 16, 2014.

That night, Boylan was at a bar with four other men, including Robert Gee, Harry McBride, Everett Glover, and Steven Bailey. Boylan left the bar, entered a car at random in the parking lot, found the keys, and drove away. The car owner's brother, Jacob Rameau, saw Boylan pulling away and pursued Boylan by motorcycle.

Unbeknownst to Boylan and unplanned, the four men who had been with Boylan at the bar jumped in another car and pursued both Boylan and Rameau. Boylan eventually stopped on a residential street, and Rameau slowed or stopped nearby. When the car with the four men caught up to Boylan and Rameau, Gee pulled out a handgun and shot at Rameau. Rameau sped away on his motorcycle and was later found dead a few blocks away. The driver of the car who would later plead guilty to lying to the police in exchange for testifying against Boylan and no further charges claimed that Boylan said he intended to pop Rameau before Gee shot him first. R. 11-7, PageID.394; R. 11-10, PageID.711-713.

The State charged Gee with first-degree murder. It charged the three other men in the car with various offenses, including lying to the police and evidence tampering. R. 11-7, PageID.394, 461-464; R. 11-10, PageID.711-713; R. 11-12, PageID.858-859. The State charged Boylan with unlawful driving away of an automobile. Mich. Comp. L. 7750.413. Boylan pled no contest. R. 15-1, PageID.1367.

At his sentencing hearing in December 2014, the State urged the sentencing court to score four offense variables. Under Michigan law, offense variables are used to calculate the defendant's minimum sentence. *See People v. McCuller*, 739 N.W.2d 563, 566 (Mich. 2007) (explaining that Michigan has a true indeterminate sentencing

scheme, where [a] sentencing court scores the [offense variables] only to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute). The State urged the court to score two offense variables related to possessing and discharging a firearm, a third offense variable related to a death occurring, and a fourth offense variable related to the property value of the car that Boylan took. *See Mich. Comp. L. 777.31(1)(a), 777.32(1)(d), 777.33(1)(a), 777.46(1)(c).*

Boylan's counsel opposed scoring the first three variables (related to firearms and the death) because Boylan did not have a lethal weapon, did not know that Gee had a weapon, and was not charged with participating in any way in Rameau's death. R. 11-4, PageID.318-319.

The court found the third offense variable (related to death) applied because Michigan caselaw defines the causation for that variable as not one of proximate cause but causal in fact, and Boylan's taking of the car put into play a series of events that culminated in the death of an individual. *Id.* at 320-321.

The court then asked for additional argument on the first two offense variables (related to possessing and discharging a firearm). *Id.* at 321. Boylan's counsel argued that the firearms offense variables should not be scored because the State did not allege that Boylan himself possessed or discharged a gun, and was instead seeking to punish Boylan for Gee's crimes. Although the offense variables can apply [i]n multiple offender cases, *see Mich. Comp. L. 777.31(2)(b), 777.32(2)*, Boylan's counsel argued that the caselaw indicates that multiple offenders have to know what

a likely consequence of the criminal act is going to be and that someone may possess a gun, and here there was no indication that Mr. Boylan knew about this gun or knew that anyone possessed a weapon in this particular case. R. 11-4, PageID.322.

The State insisted that scoring the firearms offense variables was appropriate regardless of Boylan's knowledge. The State urged that the Court's interpretation of causation for the third offense variable related to the death was in line with what the interpretations *** should be for the firearms offense variables that is, factual causation meaning establishing the but-for test, and not an aiding and abetting standard. *Id.* at 323. In the prosecutor's view, Boylan was one of multiple offenders within the same set of facts simply because there was someone at this event armed with a gun and that person pulled the trigger and that bullet killed the victim in this case. *Id.* at 321-322.

The trial court concluded that it would not score the firearms offense variables on a multiple-offender theory, stating, I don't find this to be a multiple offender case. *Id.* at 323.

Finally, the prosecutor argued that Boylan should be assessed a fourth offense variable related to the value of the car Boylan took, and the prosecutor introduced witness testimony as to the car's value. *Id.* at 323-326. The court agreed to score that offense variable. *Id.* at 326.

Boylan was sentenced to serve between 38 months to 10 years, a sentence that expired in June 2024. *Id.* at 331.

3. More than a year later, the same prosecutor charged Boylan with murder for the death of Rameau not because any new evidence came to light, but because the State had since secured a murder conviction for Gee, the shooter. *See* R. 11-1, PageID.294. The State premised the murder charge on a theory of felony murder with a predicate felony of either larceny of the car or larceny of property within the car, *id.* at 480, which required proof that Boylan and Gee acted in concert, in pursuit of a common plan, Pet. App. 42a-43a, 52a (citation omitted).

Ahead of trial, Boylan stated that he had concerns with his trial counsel, who Boylan felt was unprepared and had failed to communicate. R. 15-2, PageID.1375, 1378-82. Boylan's appointed counsel filed no pretrial motions, put on no witnesses or evidence, failed to object to incorrect jury instructions, and failed to elicit that the State agreed not to prosecute a key witness in exchange for his testimony. Boylan's counsel also never investigated whether Boylan's unlawful-driving-away conviction and sentence were preclusive in Boylan's subsequent prosecution for murder arising out of the same set of facts even though Michigan law recognizes that collateral estoppel is a vital defense to the prosecutor's charge. *Watt*, 320 N.W.2d at 335.

After a two-day jury trial, Boylan was found guilty on August 12, 2016. R. 11-13, PageID.1082. He was sentenced to mandatory life imprisonment without the possibility of parole. R. 11-14, PageID.1099.

B. Procedural Background

1. Boylan was appointed new counsel for his state court appeal. Among other things, Boylan argued that his trial counsel was ineffective for failing to investigate

and raise that the State was estopped from prosecuting Boylan for murder because Boylan had already pled guilty to unlawful driving away and was sentenced to prison regarding this same factual scenario, R. 1-3, PageID.52, and his trial counsel had no valid reason to fail to file a potentially dispositive motion, R. 11-16, PageID.1219-21.

The Michigan Court of Appeals concluded that Boylan's counsel was not ineffective in failing to seek dismissal based on issue preclusion and affirmed Boylan's conviction and sentence. Pet. App. 49a. The court recognized that the [Michigan] Supreme Court has applied issue preclusion to criminal prosecutions, meaning that a criminal defendant may prevent the prosecution from relitigating a fact that was necessarily decided in his favor during a previous trial. *Id.* at 47a. The court also recognized that Boylan's unlawful-driving-away plea-based conviction was a final adjudication on the merits to which issue preclusion may apply. *Id.* at 48a. Yet the court rejected Boylan's ineffective-assistance claim without discussing the sentencing court's finding that Boylan should not be scored the firearms offense variables because it was not a multiple offender case. The Michigan Supreme Court denied review.

2. Boylan filed a pro se federal habeas petition pursuant to 28 U.S.C. 72254 in the Western District of Michigan. As relevant here, Boylan claim[ed] that his trial attorney performed ineffectively by not moving to quash the felony-murder charge as barred by issue preclusion (or collateral estoppel, as the Michigan courts call it). Pet.

App. 4a. All agree that the state court adjudicated that claim on the merits under a standard identical to *Strickland*. *Id.* at 4a-5a.

The District Court conditionally granted habeas relief on Boylan's ineffective-assistance claim, holding that Boylan's counsel was ineffective for failing to raise collateral estoppel based on the unlawful-driving-away proceedings. The court recognized that the already-deferential standard of *Strickland* is doubly deferential on federal habeas review. *Id.* at 25a. But the court concluded that the Michigan Court of Appeals had unreasonably applied *Strickland* because it wholly ignored the factual findings made at Boylan's unlawful-driving-away sentencing—the one phase of Boylan's unlawful-driving-away proceedings where factual findings could have been made in his favor—and thus failed to consider whether a pretrial motion based upon the preclusive effect of those findings would have succeeded. *Id.* at 33a, 36a.

The court explained that Michigan law likely would have precluded relitigation of whether Boylan acted with (i.e. co-offended with) the other men, including Gee. *Id.* at 35a. At Boylan's unlawful-driving-away sentencing, the sentencing court specifically found that this was not a multiple offender case after substantial argument by the parties, yet [t]he prosecution's theory of the felony murder charge wholly relied on the presumption that Boylan co-offended with the other men. *Id.* at 34a-35a. The District Court held that failing to raise a potentially dispositive defense could not be explained as sound strategy, and that counsel's failure clearly prejudiced Boylan. Pet. App. 36a.

Michigan appealed, and the Sixth Circuit reversed, concluding that Boylan's counsel was not deficient and, even if counsel was deficient, that Boylan was not prejudiced.

On deficient performance, the Sixth Circuit reasoned that a fairminded jurist could conclude that Boylan's lawyer's performance did not fall below an objective standard of reasonableness. *Id.* at 6a. The court acknowledged that Michigan has long recognized issue preclusion in criminal proceedings. *Id.* at 5a. But the Sixth Circuit believed it was not unreasonable for Boylan's counsel to fail to raise that defense because the court thought that the preclusive effect of prior sentencing determinations was not clear under Michigan law. *Id.* at 6a. The Sixth Circuit reached that conclusion despite the fact that Michigan courts recognize that facts found in a broad range of proceedings can be preclusive in subsequent criminal proceedings including one case in the sentencing context specifically. The Sixth Circuit did not address Michigan's extensive case law applying collateral estoppel. And the court brushed aside the sentencing case as provid[ing] no support because it was an unpublished decision and the sentencing determination there was made by a jury, not the judge. *Id.* The Sixth Circuit did not explain why the case's publication status defeated an ineffective-assistance-of-counsel claim, nor did it acknowledge the other Michigan cases recognizing that collateral estoppel can attach to jury findings.

As for prejudice, the Sixth Circuit concluded that Boylan was not prejudiced by his counsel's failure to raise a collateral-estoppel defense because, in the Sixth

Circuit's view, the defense would not have succeeded for two reasons. First, the unlawful-driving-away sentencing court's finding that this was not a multiple offender case was not, according to the Sixth Circuit, essential to the judgment, because declining to score the two firearms offense variables did not change the guidelines' ultimate recommended minimum sentence. *Id.* at 8a. The Sixth Circuit reached that conclusion even though a finding can be essential to the judgment without changing the guidelines' minimum, and despite the State's concession at oral argument that the firearms offense variables were important as potential alternative grounds to sustain the judgment. Second, the Sixth Circuit concluded that because the sentencing judge did not say *why* this was not a multiple offender case, Boylan could not show that the judge necessarily decided—or even decided at all—a fact that would be required to convict Boylan of felony murder. *Id.* at 9a. But rather than addressing the plain import of the sentencing judge's findings, the Sixth Circuit speculated—based on a case decided *seven years after* sentencing—that the judge could have intended a different meaning.

The Sixth Circuit accordingly vacated the order conditionally granting Boylan habeas relief. This petition follows.

REASONS FOR GRANTING THE PETITION

Boylan's trial counsel was ineffective for failing to investigate or raise the preclusive effect of the prior unlawful-driving-away proceeding. Michigan law recognizes that facts found in a broad range of proceedings, including at sentencing, can be preclusive in later criminal proceedings, and has described collateral estoppel

as a vital defense to the prosecutor's charge. *Watt*, 320 N.W.2d at 335. Given the sentencing finding that Boylan's unlawful-driving-away offense was not a multiple offender situation, the issue of whether Boylan and Gee acted together could not be relitigated at Boylan's felony-murder trial. Had Boylan's counsel filed a motion on this ground, there is a reasonable probability the felony-murder charge would have been dismissed.

The Sixth Circuit reached the contrary conclusion only by applying the wrong legal standard in assessing Boylan's ineffective-assistance claim. Despite the robust Michigan precedent broadly applying collateral estoppel in criminal cases, the Sixth Circuit nevertheless concluded that Michigan law was not clear that collateral estoppel attaches to sentencing findings specifically, and so Boylan's counsel was not deficient for failing to raise it. The Sixth Circuit gave no explanation for why it required an identical case in an identical factual context to establish deficient performance, which has no basis in precedent. That Michigan courts hold that facts found at a broad range of proceedings including criminal suppression hearings, administrative adjudications, and at least one case in the sentencing context can be preclusive in subsequent criminal prosecutions makes clear that facts found at sentencing can also be preclusive. The Sixth Circuit was wrong to conclude otherwise, and it was wrong to conclude that a motion raising a collateral-estoppel defense would not have succeeded.

The Court should grant the petition and summarily reverse, following the same procedure it used to correct another Sixth Circuit decision that erroneously denied

habeas relief to a Michigan prisoner. *See Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam).

I. The Sixth Circuit's Decision Is Wrong.

For ineffective-assistance-of-counsel claims brought by state prisoners under 28 U.S.C. 72254(d)(1), the underlying clearly established Federal law is the standard established in *Strickland*, which requires showing that counsel's performance was deficient, and that the deficient performance prejudiced the defense, 466 U.S. at 687. The Sixth Circuit committed multiple errors in applying that standard to deny Boylan habeas relief, and that departure from precedent call[s] for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a); *see also Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari) (We may grant review if the lower court conspicuously failed to apply a governing legal rule.).

A. The Sixth Circuit Applied The Wrong Standard In Assessing Deficient Performance.

Deficient performance requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Those errors include cases where counsel's underlying failure is a matter of state law. *Goff v. Bagley*, 601 F.3d 445, 464 (6th Cir. 2010); *see also Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013) (It is well established that a defense attorney's failure to raise a state-law issue can constitute ineffectiveness.); *Burns v. Mays*, 143 S. Ct. 1077, 1079 (2023) (Sotomayor, J., dissenting from denial of certiorari) (Because deficiency for purposes of *Strickland*

is measured by an objective standard of reasonableness, federal ineffective-assistance-of-counsel claims can also be based on failures under state law. (citation omitted)).

Boylan's trial counsel was constitutionally ineffective because he failed to raise let alone investigate a potentially complete state-law defense to Boylan's prosecution for felony murder. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel's startling ignorance of the law is deficient performance). Michigan law recognizes collateral estoppel as a vital defense to the prosecutor's charge, *Watt*, 320 N.W.2d at 335, and Michigan courts have broadly applied collateral estoppel in criminal proceedings. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. *People v. Gates*, 452 N.W.2d 627, 630 & n.7 (Mich. 1990). Michigan has recognized collateral estoppel in criminal cases since at least 1904. *See People v. Albers*, 100 N.W. 908, 910 (Mich. 1904) (When a fact has once been judicially determined, that determination is conclusive in all other controversies between the same parties, even though the subject-matter and purposes of the two controversies are not the same, and even though the fact which is directly determined in the first suit is only tried in a collateral way or is incidentally involved in the second suit.). And the Michigan Court of Appeals confirmed in Boylan's case that a criminal defendant may prevent the prosecution from

relitigating a fact that was necessarily decided in his favor during a previous trial. Pet. App. 47a.

The Sixth Circuit below acknowledged that Michigan has long recognized issue preclusion in criminal proceedings. Pet. App. 5a. Yet the court nevertheless concluded that Boylan's counsel was not deficient because, in the court's view, Michigan law did not provide clear support that collateral estoppel applies to sentencing finding[s] specifically. Pet. App. 5a-6a.

That was error. By focusing only on sentencing findings, the Sixth Circuit ignored the robust Michigan case law holding that facts found in a wide range of proceedings can be preclusive in subsequent criminal prosecutions. Had the Sixth Circuit considered those cases, it would have understood that Michigan law provides clear support for a general collateral-estoppel defense, and there was no reason to think that defense did not also extend to sentencing findings particularly where Boylan cited a case in the sentencing context.

Michigan's broad application of collateral estoppel reflects that Michigan does not limit the type of proceedings to which collateral estoppel attaches, so long as the requirements for collateral estoppel are otherwise met. For example, Michigan courts have held that collateral estoppel may apply to findings at suppression hearings in previous criminal trials. In *People v. Gray*, 222 N.W.2d 515 (Mich. 1974), the court's suppression of statements as involuntary in a narcotics trial was binding on the [State] for all purposes under the doctrine of collateral estoppel, including in the defendant's subsequent prosecution for forged checks, *id.* at 517. And in *People v.*

Brown, 755 N.W.2d 664 (Mich. Ct. App. 2008), where the validity of several search warrants was previously litigated and necessarily determined at a suppression hearing in the defendant's previous prosecution for neglect of duty, collateral estoppel prevented defendant from further challenging the validity of [those] search warrants in a subsequent prosecution for drugs, *id.* at 671 n.1, 674-675.

Michigan courts have also held that facts found in administrative proceedings can be preclusive in later criminal prosecutions. For example, the Michigan Court of Appeals reversed a woman's welfare fraud conviction as barred by facts found in a previous administrative proceeding that had overturned a state agency's termination of welfare benefits for insufficient evidence of fraud. *Watt*, 320 N.W.2d at 336. The factual determination made by the administrative law judge that there was insufficient evidence to support the termination of benefits was binding upon the court in the criminal proceeding by virtue of the application of the doctrine of collateral estoppel. *Id.* at 336-337. The Michigan Court of Appeals similarly reversed a conviction for carrying an unlicensed concealed weapon based on collateral estoppel. *People v. Grainger*, 324 N.W.2d 762, 764 (Mich. Ct. App. 1982) (per curiam). The prosecutor sought to prove that the defendant's concealed weapons permit had been revoked prior to the date of the offense. *Id.* at 767. But it was error for the judge to submit to the jury the question of the validity of the license, because a previous proceeding before the licensing board had already determined that the permit was not revoked, and so [t]he jury could not otherwise determine the issue. *Id.*

The Sixth Circuit did not address this ample precedent applying collateral estoppel based on facts found at many types of proceedings, which give no reason to think sentencing findings would be treated differently. Yet the Sixth Circuit also refused to credit Boylan's cited case applying collateral estoppel to sentencing findings specifically. *Contra* Pet. App. 5a. In *People v. Jackson*, the Michigan Court of Appeals held that a sentencing finding in a previous prosecution that the defendant was a habitual offender could not be relitigated in a later prosecution because it had been conclusively determined in a prior proceeding. 539 N.W.2d 758, 761 (Mich. Ct. App. 1995), *appeal denied, ordered not precedential*, 549 N.W.2d 574 (Mich. 1996). To the extent there was any doubt about whether Michigan's broad recognition of collateral estoppel could extend to facts found at sentencing, *Jackson* erased it. That is further underscored by the fact that other federal courts have likewise concluded that facts found at a previous sentencing can be preclusive in a later proceeding, as the District Court noted. *See* Pet. App. 28a-29a (discussing *United States v. Plaster*, 16 F. Supp. 2d 667 (W.D. Va. 1998), and *United States v. Biheiri*, 341 F. Supp. 2d 593 (E.D. Va. 2004)).

The Sixth Circuit brushed *Jackson* aside, believing the case provides no support because it was an unpublished decision and the sentencing determination there was made by a jury, not the judge. Pet. App. 6a. But the court below offered no reason why the identity of the factfinder would be relevant for purposes of collateral estoppel. It isn't under Michigan law, which recognizes that collateral estoppel can attach to jury verdicts. *See Gates*, 452 N.W.2d at 631 (In order for

collateral estoppel to operate as a bar to a subsequent prosecution, *the jury* in the earlier probate proceeding must necessarily have determined that defendant was not guilty of the criminal sexual conduct charged in the prosecutor's complaint. (emphasis altered)).

It is likewise irrelevant that *Jackson* was unpublished. *Strickland* does not demand the ability to point to a single published case, particularly where the argument is sufficiently foreshadowed in existing case law. *Shaw*, 721 F.3d at 916-917; *see also United States v. Carthorne*, 878 F.3d 458, 465-466 (4th Cir. 2017) ([T]he ineffective assistance standard may require that counsel raise material issues even in the absence of decisive precedent.). The fact that the Michigan Court of Appeals applied collateral estoppel based on sentencing findings simply confirms that Michigan recognizes a broad collateral-estoppel defense a vital defense to the prosecutor's charge. *Watt*, 320 N.W.2d at 335. With ample Michigan precedent applying collateral estoppel in criminal cases including based on facts found at a previous sentencing it was objectively unreasonable for Boylan's counsel not to investigate or raise collateral estoppel as a defense. *Cf. Kimmelman*, 477 U.S. at 385 ([C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. (citation omitted)).

That failure cannot be written off as a matter of trial strategy. This case is unlike those where counsel made a judgment call in choosing between contradictory defenses, or where pursuing a particular theory itself carried its own serious risks because it could reveal evidence that might be harmful to the defense. *Harrington*

v. *Richter*, 562 U.S. 86, 108 (2011). Because collateral estoppel is a legal defense, there was no risk that expert testimony could shift attention to esoteric matters of forensic science, distract the jury from whether [the defendant] was telling the truth, or transform the case into a battle of the experts. *Id.* at 108-109. There was no strategic reason not to raise a potential complete defense to a criminal prosecution carrying an extremely severe sentence of mandatory life without parole. Yet nothing in the record suggests that Boylan's counsel ever considered a collateral-estoppel defense, or even knew that Michigan recognizes collateral estoppel as a vital defense to the prosecutor's charge. *Watt*, 320 N.W.2d at 335. Although, as a general rule, defense counsel's conduct is presumed to have been part of a sound trial strategy, *Strickland*, 466 U.S. at 689, [a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*, *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam); see also *Carthorne*, 878 F.3d at 469 (no presumption of effectiveness when counsel fails to do basic legal research, because lack of preparation and research cannot be considered the result of deliberate, informed sentencing strategy (cleaned up)). Counsel's failure here to demonstrate a grasp of the relevant legal standards, to conduct basic legal research relating to those standards, and to raise the vital defense of collateral estoppel, taken collectively, constituted deficient performance.

The failure to investigate or raise a collateral-estoppel defense is particularly unreasonable against the backdrop of counsel's overall performance throughout the

case. *Kimmelman*, 477 U.S. at 386. Boylan's trial counsel filed no pretrial motions and introduced no evidence at trial. R. 11-9, PageID.588-589. Counsel's sole theory was that Boylan could not have foreseen Rameau's death, *cf.* Pet. App. 40a, but as counsel acknowledged, that was really a matter of interpretation of the largely undisputed evidence, R. 11-10, PageID.630. Boylan's counsel recognized that his case would fall apart if the jury credited the prosecutor's interpretation, and even told the jury that there is zero I can do about it if the jury believed testimony from Everett Glover that both Boylan and Gee were armed at the time. R. 11-12, PageID.1030; *see* Pet. App. 45a (Michigan Court of Appeals affirming Boylan's conviction based on Glover's testimony). Yet defense counsel did little to undermine that testimony, failing to elicit serious issues going to Glover's credibility and incentive to lie like failing to object when the prosecutor told the jury that Glover had made no deals with [her] office about testifying, R. 11-11, PageID.794, even though the prosecutor had previously stated outside the jury's presence that nothing [Glover] says here would be used against him in any subsequent prosecution, R. 11-7, PageID.464.

Counsel's meager defense based entirely on lackluster cross-examination made counsel's failure to investigate or raise a potentially dispositive legal defense all the more unreasonable. No tactical reason can be assigned for [counsel's] failure to raise the only substantial claim that [Boylan] had. *Shaw*, 721 F.3d at 917 (cleaned up). The Sixth Circuit erred in concluding otherwise.

B. The Sixth Circuit Applied The Wrong Standard In Assessing Prejudice.

The Sixth Circuit also wrongly concluded that Boylan was not prejudiced by his counsel's failure to raise a collateral-estoppel defense because, in the court's view, that defense would not have succeeded. Prejudice under *Strickland* turns on whether it is reasonably likely the result would have been different—not whether a court can be certain counsel's performance had no effect on the outcome. *Harrington*, 562 U.S. at 111. Boylan was prejudiced by his counsel's failure to raise a collateral-estoppel defense even if it would not necessarily have been a slam dunk. The Sixth Circuit applied the wrong standard by essentially requiring Boylan to definitively prove a state-law collateral-estoppel defense, rather than evaluating whether it was reasonably likely that the defense could have succeeded. *Cf. Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (holding that prisoner was prejudiced when omitted report *may* have been admissible under state law (emphasis added)).

The Sixth Circuit gave two reasons why it believed Boylan's collateral-estoppel defense would not have succeeded, but both overlooked Michigan case law and critical parts of the record. First, the Sixth Circuit believed that the sentencing court's conclusion on the multiple-offender issue was not essential to the judgment because declining to score the two firearms offense variables did not change the guidelines recommended minimum sentence. Pet. App. 8a. But a finding can be essential to the judgment even if it did not change the guidelines minimum. *See W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 700 F. App'x 484, 492 (6th Cir. 2017)

(under Michigan law, an issue may be essential even if it does not constitute the sole basis for the previous proceedings decision).

Here, the sentencing court's conclusion on the multiple-offender issue was necessary and material to its rejection of the firearms offense variables, making it an essential part of the ultimate sentence imposed and thus the final judgment. *People v. Beverly*, No. 344460, 2020 WL 746939, at *4 (Mich. Ct. App. Feb. 13, 2020) (citing Mich. Ct. R. 7.202(6)(b)(ii)). Had the sentencing court scored the two firearms offense variables, Boylan's total offense-variable level would have been 135—nearly double the number of points triggering the highest offense-variable level on the sentencing grid. *See* Mich. Comp. L. 7 777.66. Such a high offense-variable score would have provided justification for the court to impose an upward departure from the minimum sentence: Where a defendant's total [offense-variable] score far exceeds the maximum score contemplated by a particular grid, a proportionate sentence may well depart from the guidelines because the Legislature did not contemplate a defendant with such a high [offense-variable] score. *People v. Lee*, No. 316110, 2018 WL 1652470, at *4 (Mich. Ct. App. Apr. 5, 2018) (quoting *People v. Smith*, 754 N.W.2d 284, 295 (Mich. 2008)). By finding that Boylan was not one of multiple offenders, Boylan's offense-variable score dropped significantly, and that basis for departure disappeared.

Even the State confirmed that scoring the firearms offense variables mattered, apart from any change to the guidelines. The prosecution sought to score the firearms offense variables *after* the sentencing judge had already scored the offense variable

related to a death occurring, which alone had put Boylan at the highest offense-variable level on the guidelines grid. R. 11-4, PageID.321; *see* Mich. Comp. L. 777.33, 777.66. The State explained why it persisted in seeking the additional points for additional offense variables even though the guidelines range would not have changed: things can get overturned on appeal, so it's important to get as many points as possible for different variables. Oral Arg. 34:00-:30. Under the State's own view, then, the firearms offense variables would have presented alternative grounds for sustaining Boylan's sentence. And Michigan has explicitly recognized that collateral estoppel extends to alternative grounds for a prior decision. *W.J. O'Neil*, 700 F. App'x at 492 (citing *Dobrowski v. Jay Dee Contractors, Inc.*, No. 288206, 2010 WL 293069, at *4 (Mich. Ct. App. 2010)). As a result, the Sixth Circuit was incorrect to conclude that the multiple offender issue was not an essential part of the judgment. At a minimum, there is a reasonable likelihood that the Michigan courts would conclude otherwise under Michigan collateral-estoppel precedents.

Second, the Sixth Circuit was wrong to conclude that because the sentencing judge did not say *why* this was not a multiple offender case, Boylan could not show that the judge necessarily decided or even decided at all a fact that would be required to convict Boylan of felony murder. Pet. App. 9a. The Sixth Circuit's demand for an explicit explanation conflicts with Michigan law, which holds that the first proceeding need not explicitly have addressed the issue to be precluded. *Gates*, 452 N.W.2d at 631; *see also id.* (The fact that a verdict is a general verdict may make

the determination of what issues have been decided problematic, but it does not automatically bar the application of collateral estoppel.).

Here, there was only one reason why the judge could have concluded this was not a multiple offender case: because the judge accepted defense counsel's argument that multiple offenders have to know what a likely consequence of the criminal act is going to be and that someone may possess a gun, and the prosecution failed to establish that Boylan knew about this gun or knew that anyone possessed a weapon in this particular case. R. 11-4, PageID.322. Had the judge agreed with the prosecutor's view that the same but-for causation standard applied as it did for the third offense variable related to a death occurring that the judge scored, *id.* at 320-323, the judge would have scored the firearms offense variables for the same reason. No further explanation was needed for the judge's finding that Boylan was not one of multiple offenders to be preclusive in a subsequent prosecution. And whether Boylan was a multiple offender because he was working with Gee or foresaw Gee's actions was substantially the same issue involved in Boylan's subsequent prosecution for felony murder, *cf. Watt*, 320 N.W.2d at 336, which wholly relied on the presumption that Boylan co-offended with Gee, Pet. App. 34a.

Ignoring the plain import of the sentencing judge's findings, the Sixth Circuit instead concocted an alternative rationale: that under Michigan law, the judge could have chosen not to assess points for these offense-specific variables because no other offender in the case had been assessed any points for the [unlawful-driving-away] offense. Pet. App. 9a (citing *People v. Dupree*, 993 N.W.2d 185 (Mich. 2023)). It is

true that in 2023, the Michigan Supreme Court held that the firearms offense variables require that another offender be assessed points as a threshold matter before points may be assessed to th[e] defendant on a multiple-offender theory. *Dupree*, 993 N.W.2d at 189. But Boylan was sentenced seven years before *Dupree* was decided and at that time, Michigan courts affirmed the scoring of the firearms offense variables on the basis of [an] accomplice's conduct, even where that accomplice was never identified, charged, or convicted. *People v. Harris*, No. 335831, 2018 WL 3074031, at *10 (Mich. Ct. App. June 21, 2018) (per curiam). The Sixth Circuit's reliance on case law far post-dating the relevant proceeding thus erroneously relied on the distorting effects of hindsight, *Strickland*, 466 U.S. at 689, rather than considering the law at the time and the arguments made to the sentencing judge.

The Sixth Circuit's errors aside, it is reasonably likely that counsel's failure to raise a collateral-estoppel defense prejudiced Boylan because Boylan checked all the remaining requirements for collateral estoppel to apply. The same prosecutor represented the State in both prosecutions for unlawful driving away and felony murder. R. 11-4, PageID.312; R. 15-2, PageID.1373; *cf. Watt*, 320 N.W.2d at 336 (same-party requirement is satisfied even where proceedings involve different state agencies because they are both creatures of the same sovereign, namely, the State of Michigan).

It would also not have been unjust to apply collateral estoppel to prevent the State from prosecuting Boylan for felony murder for the same two reasons as the

Michigan Court of Appeals endorsed in *Watt*, 320 N.W.2d at 336. First, the burden of proof in Boylan's prosecution for felony murder beyond a reasonable doubt was greater than that at his sentencing proceeding for unlawful driving away preponderance of the evidence and yet the State was unable to satisfy this lower evidentiary burden. *Cf. id.* Second, [n]othing in the record indicates that there was any unusual difficulty or trouble experienced by the state in preparing for and obtaining evidence for the unlawful-driving-away sentencing. *Cf. id.* The State's investigation into Rameau's death had closed months earlier. R. 11-12, PageID.928. The form of a sentencing proceeding did not limit the State's ability to present evidence, as proved by the fact that the State introduced witness testimony for the fourth offense variable to establish the value of the car Boylan took. R. 11-4, PageID.323-326. And the State had ample other procedural protections, including the ability to appeal. *See Mich. Comp. L. 7 770.12.*

II. Certiorari Is Proper Because The Sixth Circuit Failed To Apply A Governing Legal Rule.

Where the error in a lower court's decision is obvious, this Court will [o]ccasionally * * * grant certiorari and simultaneously reverse or vacate through a brief per curiam opinion. S. Shapiro et al., *Supreme Court Practice* 4.17 (11th ed. 2019); *see also id.* (collecting cases). This Court has previously used that procedure to correct the Sixth Circuit's error in another habeas case involving a Michigan prisoner. *See Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam). There, the Court concluded that the Sixth Circuit was simply incorrect in holding that the prisoner had failed to present his federal claims of prosecutorial misconduct, based on this

Court's own review of the District Court record and petitioner's briefing below [o]utlining specific allegations of prosecutorial misconduct. *Id.* at 3-4.

That same procedure is appropriate in this case. The Sixth Circuit wrongly concluded that counsel was not deficient for failing to raise a legal claim absent clear precedent accepting that claim in an identical factual context. But such directly controlling precedent is rare, and under the Sixth Circuit's incorrect view, exceedingly few people could ever prevail on an ineffective-assistance-of-counsel claim. By elevating factual differences to make clearly applicable authority distinguishable, the decision below undermines the right to counsel that plays a crucial role in the adversarial system embodied in the Sixth Amendment. *Strickland*, 466 U.S. at 685. It excuses attorneys from their basic duties, and thus deprives prisoners of the access to counsel's skill and knowledge * * * necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled. *Id.* at 688 (citation and quotation marks omitted).

That the decision below was unpublished does not make it less worthy of correction. Although an unpublished intermediate court decision below lacks significant value as precedent, Justices on this Court have previously recognized that summary reversal may be warranted when the matter has a general aspect, and there is a possibility that the case is not unique. *Overton v. Ohio*, 534 U.S. 982, 985-986 (2001) (Breyer, J., for Stevens, O'Connor, and Souter, J.J., respecting denial of certiorari). The Sixth Amendment right to the effective assistance of counsel is undermined when courts excuse lawyers from making arguments that are not

dictated by precedent in an identical factual context. Effective assistance of counsel calls for the exercise of skill and judgment, not an automaton. That is true in Boylan's case as it is for many others.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

JO-ANN TAMILA SAGAR

DANA A. RAPHAEL

Counsel of Record

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-5600

dana.rafael@hoganlovells.com

Counsel for Petitioner

SEPTEMBER 2024