

No. 17-160

IN THE
Supreme Court of the United States

OMAR RASHAD POUNCY, *Petitioner*,
v.

SHANE JACKSON, WARDEN,
CARSON CITY CORRECTIONAL FACILITY, *Respondent*.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Omar Pouncy has framed three issues for this Court’s review, each involving a circuit split and warranting immediate review. Respondent does not contest the conflict with respect to two of those issues, but instead attempts to paint this case as a poor vehicle for resolving the conflicts. Respondent’s vehicle arguments are misplaced.

First, even Respondent concedes that it is appropriate for this Court to grant interlocutory review when issues are controlling, will have a far-reaching effect, or have jurisprudential significance. Opp. 20. The three issues the petition frames satisfy these criteria, and Respondent tacitly concurred below, agreeing it was proper for the district court to stay review of Pouncy’s remaining habeas claims pending this Court’s resolution of the petition.

Second, under AEDPA, habeas relief is appropriate not only when a state-court decision is “contrary” to this Court’s precedents, Opp. 21–27, but when the decision is an “unreasonable application” of those precedents. 28 U.S.C. § 2254(d)(1). A state-court decision involves an “unreasonable application” of this Court’s precedent in one of two ways: (1) “if the state court identifies the governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or (2) “if the state court either unreasonably extends a legal principle from our 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.” *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Here, the first and third questions presented satisfy these criteria, so § 2254(d)(1) *requires* relief rather than presenting a barrier to granting it.

Finally, Respondent says the second question presented—which this Court reserved in *Cullen v. Pinholster*, 563 U.S. 170, 181 n.10 (2011)—does not involve a circuit split at all. Not so. Pet. 18–22; Prof. Moran Amicus Br. 5–17 (citing voluminous conflicting cases). The petition should be granted.

ARGUMENT

I. The petition warrants this Court’s immediate review even though Pouncy has other habeas claims pending in the district court.

Respondent first argues the petition should be denied because it is interlocutory. Opp. 3, 18–20. But as Respondent concedes, this Court grants interlocutory petitions when the issues presented are controlling, affect numerous parties, or are of jurisprudential significance. Opp. 20. Recognizing that this is just such a case, the district court made a “decision not to proceed further in [its] part of the case unless and until we hear from the Supreme Court.” R.142, 8/2/17 Hr’g Tr., PgID 7980. And until filing his Opposition, Respondent agreed that the district court was correct to stay its hand pending this Court’s review: though “some of Pouncy’s remaining habeas claims remain pending before” the district court, said Respondent, the district court “is properly awaiting the Supreme Court’s decision on the petition before proceeding further.” R.144, 8/14/17 Br., PgID 7993.¹

¹ Respondent also characterizes the evidence as overwhelming, ignoring how adequately-prepared counsel would have developed the record, including ID’ing the actual perpetrator. Owczarak, *Man takes responsibility for crime after another man did time*, WNEM (Apr. 18, 2016), <https://goo.gl/zFa4sz>.

The district court and Respondent—at least in his briefing below—viewed this case correctly. To begin, the issues presented are controlling, will affect many parties, and are of jurisprudential significance. Take question two, which asks this Court to decide the question reserved in *Cullen v. Pinholster*, 563 U.S. 170, 181 n.10 (2011): where to “draw the line between new claims and claims adjudicated on the merits” for purposes of the deference owed to a state-court criminal conviction under AEDPA. Resolving the question in Pouncy’s favor has the potential to change the standard of review in innumerable habeas cases, *including* the district court’s analysis of the habeas claims still pending below. As detailed in the *amicus curiae* brief of Professor David Moran, founder of the Innocence Clinic, this is a recurring issue that has befuddled the circuits and warrants this Court’s immediate review. Prof. Moran Amicus Br. 5–17 (citing voluminous, conflicting lower-court cases). This Court’s answer to the question “is of critical importance for the thousands of state prisoners who file federal habeas petitions each year in district courts around the country.” *Id.* at 5. And because the Court’s answer will clarify the standard of review in all habeas cases, it is often controlling. See *Brown v. Payton*, 544 U.S. 133, 148 (2005) (Breyer, J., concurring) (AEDPA deference can be outcome determinative for state prisoners).

Question one, regarding the proper standard for analyzing a defendant’s Hobson’s choice claim, is also of widespread importance. *Amicus curiae* the Center on the Administration of Criminal Law notes that the issue has been resolved in conflicting fashion in nine different circuits and similarly warrants this Court’s immediate resolution. Center on the Admin. of Crim. Law Amicus Br. 6–14.

As the Center explains, this question “arises frequently because the vast majority of criminal defendants are represented by appointed counsel. Indeed, nearly every federal court of appeals has decided the question.” *Id.* at 3. “And the question is important because our criminal justice system cannot operate fairly unless courts ensure that defendants have effective counsel and do not involuntarily waive their right to counsel.” *Id.*

Question three, the quantity and quality of an attorney’s trial-court preparation necessary to satisfy the standard of attorney competence this Court articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), has placed the Sixth Circuit at odds with four other circuits as to what constitutes a reasonable application of this Court’s ineffective-assistance jurisprudence. Pet. 28–32. And the Sixth Circuit’s watered-down standard for attorney preparation, announced in this very case, allowed the panel majority to conclude that attorney Breczinski “was adequately prepared for trial,” App. 35a, even though Breczinski (1) expressed concern whether he was ready for trial, App. 56a, (2) was unable to calculate Pouncy’s sentencing guidelines within two decades of accuracy, App. 58a–60a, (3) botched both motions *in limine* and had to be corrected by the prosecutor about facts favorable to Pouncy, *id.*, and (4) gave an opening argument that lasted only two transcript pages, App. 61a–62a. Breczinski himself candidly conceded in a post-proceeding affidavit that he was “unprepared to proceed to trial,” App. 24a–25a, and the district court found that “there can be no serious dispute on this record that Breczinski was entirely unprepared for trial,” App. 78a. This is a paradigm case for interlocutory review.

II. 28 U.S.C. § 2254(d)(1) is not a barrier to reaching the constitutional issues Pouncy raises.

Respondent next tries to create a vehicle problem by pointing to 28 U.S.C. § 2254(d)(1). Opp. 21–27. That objection is similarly misplaced.

Under AEDPA, a federal court may only overturn a state-court criminal conviction when the state court’s merits decision is “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. 28 U.S.C. § 2254(d)(1). To begin, this heightened standard of review has no application to question two, which asks this Court to answer the question reserved in *Pinholster* and draw the line between new and adjudicated claims for purposes of AEDPA review. Respondent makes no contrary argument.

With respect to questions one and three, § 2254(d)(1) is still not a barrier to this Court’s review, because this Court has issued decisions addressing both questions. Contra Opp. 21. The problem is not the lack of this Court’s clearly established precedent, but rather that the Sixth Circuit “unreasonably applied” that precedent. See *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000) (confirming that the phrases “contrary to” and “unreasonable application of” in § 2254(d)(1) have “independent meaning”).

A state-court decision involves an “unreasonable application” of this Court’s clearly established precedent in one of two ways: (1) “if the state court identifies the governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case,” or (2) “if the state court either unreasonably extends a legal principle from our 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.” *Id.* at 407. Regarding the first method, a federal habeas court should ask “whether the state court’s application of clearly established federal law was objectively unreasonable.” *Id.* at 409.

As to the first question presented, the Hobson’s choice claim, the state courts—if they “decided” the issue at all—and the Sixth Circuit majority both unreasonably applied this Court’s precedents and unreasonably extended a legal precedent (*Strickland*) to a new context where it should not apply. The basic issue is whether a *Faretta* challenge is structural, such that proof of *Strickland* prejudice is unnecessary for a petitioner to succeed. And, as the dissenting judge observed below, this Court has held that a *Faretta* violation is structural. App. 48a (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984), and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–49 (2006). Accord, *e.g.*, *Strickland*, 466 U.S. at 692 (“constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice”). As a result, this Court’s precedents should have been dispositive here.

Even the Sixth Circuit panel majority initially viewed Pouncy’s Hobson’s choice claim (correctly) as being controlled by this Court’s precedents: “[W]e

have previously interpreted the basic teachings of *Iowa v. Tovar*, [541 U.S. 77 (2004)], *Faretta* [v. *California*, 422 U.S. 806 (1975)], and *Johnson v. Zerbst*, [304 U.S. 458 (1938)]—that the voluntariness of a waiver is measured by reference to the surrounding circumstances—as *clearly establishing the principle that ‘the choice between unprepared counsel and self-representation is no choice at all.’*” App. 34a (emphasis added). The problem was not a lack of this Court’s clearly established precedent; it was the panel majority’s next step, which was to follow the Seventh Circuit’s decision in *Wilks v. Israel*, 627 F.2d 32 (7th Cir. 1980), and extend *Strickland* by importing the *Strickland* prejudice standard into a *Faretta* claim. App. 34a. Accord *Arrendondo v. Neven*, 763 F.3d 1122, 1137 (9th Cir. 2014) (“a *Faretta* waiver is involuntary *if* the alternative is constitutionally inadequate counsel,” but “to establish the inadequacy of counsel,” a petitioner must prove “that his attorney’s performance was both objectively deficient and prejudicial.”) (citing *Strickland*).

To put it in § 2254(d)(1)’s terms, the rejection of Pouncy’s Hobson’s choice claim (1) unreasonably applied this Court’s decisions in *Faretta*, *McKaskle*, *Gonzalez-Lopez*, *Tovar*, and *Johnson*, and (2) extended the *Strickland* prejudice standard to a *Faretta* context, where it should not be applied. So what started as a pre-AEDPA divergence from this Court’s precedents in the Seventh Circuit’s decision in *Wilks* has now extended to three circuits, in conflict with eight others. Pet. 13–18; Center on the Admin. of Crim. Law Amicus Br. 6–14. That is precisely the kind of situation that § 2254(d) *directs* the federal courts to address.

Question three survives § 2254(1)(d) for similar reasons. It is true, as Respondent asserts, Opp. 3, 22, that the Petition uses numerous decisions from other circuits to illustrate the point that an attorney who fails to adequately conduct pretrial investigation and witness interviews fails to satisfy the *Strickland* standard. Pet. 29–30 (citing *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), *Thomas v. Lockhart*, 738 F.2d 304 (8th Cir. 1984), *Anderson v. Johnson*, 338 F.3d 882 (5th Cir. 2003), and *Code v. Montgomery*, 799 F.2d 1481 (11th Cir. 1986)). But those cases illustrate how the decisions of the state court and Sixth Circuit majority below disregarded this Court’s clearly established precedents.

The cases that should have controlled the outcome in the Michigan courts here were this Court’s decisions in *Taylor v. Illinois*, 484 U.S. 400 (1988), and *Strickland* itself. Pet. 32. In *Strickland*, this Court clearly established that the proper standard for evaluating attorney performance under the Sixth Amendment is whether that attorney “plays the role necessary to ensure that the trial is fair.” 466 U.S. at 685. That is, “the right to counsel is the right to the effective assistance of counsel.” *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). To apply that standard, the Court directed lower courts to consider the legal profession’s “prevailing professional norms.” *Id.* at 688. In particular, “[p]revailing norms of practice as reflected in American Bar Association standards, such as the “ABA Standards for Criminal Justice,” are guides to such an analysis.

Strickland did not outline the specific parameters for what constitutes effective pre-trial preparation. But *Taylor* and the American Bar Association have. In *Taylor*, this Court stated unequivocally that “[r]outine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial.” 484 U.S. at 415–16. And under the ABA’s Standards for Criminal Justice, a defense lawyer’s duties include “conduct[ing] a prompt investigation of the circumstances of the case and explor[ing] all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.” *Standards for Criminal Justice*, American Bar Association (3d ed. 1993), Standard 4 – 4.1 Duty to Investigate. Accord, e.g., *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009) (“professional standards” require “interviewing witnesses” and “requesting records”) (citing *Wiggins v. Smith*, 539 U.S. 510, 524, 525 (2003)).

The Fifth, Seventh, Eighth, and Eleventh Circuits properly applied this clearly established law in nearly identical circumstances. Pet. 29–30 (discussing *Anderson*, *Washington*, *Thomas*, and *Code*, respectively). The state court and Sixth Circuit panel majority here departed from that law, as the district court, App. 83a, and Sixth Circuit dissent, App. 50a–52a, observed. Accordingly, § 2254(d)(1) is not a bar to relief.

III. The circuits are hopelessly divided as to when a new legal argument or new evidence constitutes a new claim rather than an adjudicated claim.

As the Innocence Clinic’s Professor Moran explains in his *amicus curiae* brief, in the absence of instruction from this Court, “the circuits have devised their own approaches to determining when habeas claims are new.” Prof. Moran Amicus Br. 8. The Eleventh Circuit applies an “irreducible minimum” approach. *Id.* (discussing *In re Hill*, 715 F.3d 284 (11th Cir. 2013)). The Sixth and Ninth Circuits have applied a “gravamen” standard, though the Sixth Circuit failed to apply that standard here. *Id.* at 8–9 (discussing *Franklin v. Jenkins*, 839 F.3d 465 (6th Cir. 2016), and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc), among others). The Fourth Circuit applies “a more prisoner-friendly approach.” *Id.* at 9 (discussing *Gordon v. Braxton*, 780 F.3d 196 (4th Cir. 2015), among others). Worse, many lower courts are now applying “both AEDPA deference and *de novo* review to avoid implicating *Pinholster* altogether.” *Id.* at 13–14 (referencing numerous cases).

The conflict between the Sixth Circuit’s decision here and the Seventh Circuit’s decision in *Warren v. Baenen*, 712 F.3d 1090 (7th Cir. 2013), is particularly stark. Pet. 19. In both cases, a habeas petitioner raised a new legal argument in a motion for post-conviction relief, the state court erroneously said that argument had already been decided, and the argument was then presented to the federal court in a habeas petition. The Seventh Circuit reviewed the petitioner’s claim *de novo*; the Sixth Circuit reviewed Pouncy’s claim applying AEDPA deference.

Respondent belittles the Seventh Circuit’s decision as mere *dicta*. Opp. 28. But the opinion announces a clear rule: when a “state court’s opinions did not actually address the constitutional issue at stake,” “AEDPA deference [does] not apply and *de novo* review [is] proper.” 712 F.3d at 1098. The same is true of the Ninth Circuit’s decision in *Dickens v. Ryan*, 740 F.3d 1302, 1321–22 (9th Cir. 2014) (if claim “fundamentally altered” from one previously decided, AEDPA deference not applicable). Had Pouncy been litigating in either of those circuits, there is no question his Hobson’s choice claim would have been reviewed *de novo*.

In fact, the State of Michigan recently conceded this very distinction in another case. In *Torres v. Bauman*, 677 F. App’x 300 (6th Cir. 2017), Torres was convicted of a drug crime. On direct appeal, he raised a series of ineffective-assistance claims but not the specific claim of ineffective assistance during plea bargaining. After losing his direct appeals, Torres filed a post-judgment motion that raised the plea-bargain issue for the first time. As here, the Michigan trial court in *Torres* held that claim had been rejected when Torres claimed ineffective assistance on direct appeal. Torres filed a habeas petition. Regarding AEDPA deference, “Torres argued, *and the State concede[d]*, that Torres’s claim . . . was never adjudicated on the merits by a state court as required for deference under 28 U.S.C. § 2254(d).” *Id.* at 302 (emphasis added). The district court “should not have applied deference to the state court decision.” *Id.*

Here, Pouncy raises a completely new legal theory—the Hobson’s choice claim—that was neither raised nor decided in the initial state-court proceeding and direct appeal. And that new legal theory is also based on “new evidence.” App. 30a. The Court should grant the petition and hold that such a claim is not subject to AEDPA deference and should be reviewed *de novo*.

* * *

As the petition and *amici curiae* make clear, all three questions presented involve deep, mature, and recurring circuit splits requiring this Court’s resolution. Respondent does not make a § 2254(d)(1) objection with respect to the second question (AEDPA deference), and § 2254(d)(1) compels relief on the first and third questions presented because the state-court and Sixth Circuit decisions unreasonably applied this Court’s clearly established precedent.

Most important, the questions presented are jurisprudentially significant and will affect not just proceedings but outcomes in hundreds if not thousands of cases. Notwithstanding the pendency of Pouncy’s other habeas claims, this Court’s immediate review and resolution of these conflicts is necessary. Certiorari is warranted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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