No. 17-417

IN THE

Supreme Court of the United States

MAURICE SHAUNDELL HOPE,

Petitioner,

v.

WARDEN CARTLEDGE,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

In assuming that jurors will make every logical deduction from general-purpose instructions, the decisions below contradict and unreasonably apply the requirement for "special-purpose" jury instructions on complicated legal issues. *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). The panel majority found no error in the State court's no-prejudice determination, because Maurice Hope's jury received the boilerplate reasonable-doubt instructions given in every criminal case. The majority believed these boilerplate instructions obviated the need for South Carolina's special-purpose alibi instruction that explains that the State bears the burden of disproving an alibi defense. But "[j]urors are not experts in legal principles," and they need case-specific instructions "to function effectively." *Carter v. Kentucky*, 450 U.S. 288, 302 (1981).

Respondent initially accepts "the important purpose" of special-purpose alibi instructions, Opp.25, but then proceeds to dismiss any actual importance. His three arguments for avoiding review all fail.

First, Respondent argues that the sufficiency of general instructions in alibi cases is the subject of "divisions among circuits" and state courts. Opp.25, 28-31. There is no circuit- or state-court split. But, no matter. If the most Respondent can muster is a circuit split, that itself requires this Court's attention.

Second, Respondent argues that this Court should never review a failure-to-request-instruction case, because "assessing *Strickland* prejudice when trial counsel has failed to request a particular jury instruction, by its very nature, requires intensive factfinding review." Opp.34. This Court has not given lower courts *carte blanche* on issues that necessarily involve "intensive factfinding" before, and it should not do so now.

Third, Respondent argues that, because this Court has never addressed the exact question of the need for an alibi instruction, there can be no *habeas* relief. Opp.28, 33. Not so. Section 2254 is explicit that *habeas* relief is appropriate not only where a state court decision is "contrary to" this Court's precedent but also where it is an "unreasonable application" of this Court's clearly established precedent—here, *Strickland*.

I. THE ROLE OF "SPECIAL-PURPOSE" INSTRUCTIONS LIKE ALIBI INSTRUCTIONS IS WELL ESTABLISHED, WARRANTING REVIEW OF THE SIGNIFICANT DEPARTURE HERE

This Court has clearly established the need for "special-purpose" jury instructions for complicated and important legal issues. *Taylor*, 436 U.S. at 488. Thus, a defendant is entitled to a separate presumption-of-innocence instruction, over and above a reasonable-doubt instruction, even though the two instructions are "logically" indistinct. *Id.* at 483.

As the dissent below observed, the alibi instruction—which explains that the State has the burden of disproving defendant's alibi beyond a reasonable doubt—is a classic example of a necessary special-purpose instruction. Indisputably, the proper standard and burden of proof is a "fundamental," "substantive" issue. *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979). The petition also details how many courts have been profoundly confused regarding how to apply alibi; even as they recognized that the State generally bears the burden of proving every element of its case beyond a reasonable doubt, numerous courts mistakenly held that the defendant, not the State, bears the burden of proving the alibi defense, sometimes even beyond a reasonable doubt. Pet.11-15. In recognition of the potential confusion, courts and model-jury instructions have crafted special-purpose alibi instructions, over and above boilerplate instructions. Pet.15-17.

Respondent repeatedly concedes this point. On three occasions, he admits to the "importance" of alibi instructions. Opp.25; 27; 34. He even concedes that "[a]n alibi charge is considered *especially crucial* when the evidence is entirely circumstantial *as in this case*." Opp.23 (emphases added). This is because an alibi charge "ensur[es]" that "a jury understands the State maintains the burden of proof when a defendant presents an alibi defense." Opp.25. Indeed, Respondent's substantive argument begins: "The Fourth Circuit's majority opinion did not minimize the importance of the state crafted alibi instruction." Opp.25.

Respondent's very next step, however, is to minimize the importance of the state-crafted alibi instruction. Respondent analogizes *Strickland* prejudice—where, as here, state law guarantees an alibi instruction but the defendant's attorney fails to request one—to the "constitutional due-process" right to an alibi instruction. He argues that whether there is a constitutional due-process right is the subject of both circuit and state-court splits and that these splits, *per se*, render South Carolina's choice reasonable. Opp.25-26.

A. At the threshold, Respondent's analogy is flawed. There is a significant difference between

(1) reviewing a state's finding on whether, in a specific case, the failure to request an alibi instruction is prejudicial (the circumstances here) and (2) deciding that a state is required to provide an alibi instruction. The first is a classic application of *Strickland*. The second raises federalism issues, as it intrudes on states' rights to formulate their own jury instructions. *Cf. Sandstrom v. Montana*, 442 U.S. 510, 516-17 (1979) (The State is "the final authority on the legal weight to be given a presumption under [State] law, but it is not the final authority on the interpretation which a jury could have given the instruction.").

Here, Respondent agrees that "had a jury instruction on alibi been requested," state law would "require[]" the trial court "to deliver such a charge because it was supported by evidence presented at trial." Opp.3. Thus, this Court does not need to decide the thorny question of the limits of states' discretion in crafting their own instructions. Rather, the question presented starts and ends with *Strickland* prejudice: Is there "a reasonable probability that," had South Carolina's alibi instruction been given, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

B. Respondent is also wrong that there is "disagreement" among courts on this question. The circuits *agree* that a special-purpose instruction is needed for alibi. *See* Pet.15-18. Respondent cites two circuit decisions as purportedly splitting from this rule. Opp.26. In both cases, however, the courts only found that the absence of an alibi instruction was not prejudicial because the juries in those cases received a logically related, special-purpose instruction that the State had the burden of proving the defendant was present at the crime. In *Duckett v. Godinez*, the Ninth Circuit emphasized and italicized the trial court's instruction that "the State [has] the burden of proving beyond a reasonable doubt every material element of the crime charged and that *the defendant is the person who committed the offense*." 67 F.3d 734, 745 (9th Cir. 1995) (emphasis in original). And in *Alicea v. Gagnon*, the Seventh Circuit noted that the jury was instructed that "the prosecution [had] to prove petitioner's presence" at the scene of the crime, 675 F.2d 913, 926 (7th Cir. 1982), referring to the trial court's instruction that the jury "must be satisfied beyond a reasonable doubt that the defendant is the person who committed" the crime. *See State v. Alicea*, 295 N.W.2d 835 (Wis. Ct. App. 1980) (noting that the trial judge in the Alicea case gave Wisconsin Criminal Instruction No. 141); *State v. Williamson*, 267 N.W.2d 337, 347 (Wis. 1978) (setting forth the 141 instruction). Elswhere, Respondent cites to state cases that likewise found that a special-purpose identification charge can obviate the need for a special-purpose alibi instruction. *See State v. Echols*, 972 A.2d 1091, 1102-03 (N.J. 2009).

These cases do not dispute the well-recognized importance of special-purpose alibi instructions. They merely question whether the lack of that instruction is prejudicial *if* the defendant received a special-purpose instruction that the State has to prove the defendant's presence at the crime. As the district court properly recognized, Mr. Hope's jury charge "did not include a[n] identification charge or other special instruction advising the jury of the essential elements of the law of alibi." App.48a. The jury only received "boilerplate jury charges [that] are given in virtually every criminal case." App.49a. For such cases, there is no circuit split on the importance of an alibi instruction.

C. A split, even if one existed, would itself be good reason for this Court's intervention. Respondent argues that "the variety of opinions from different jurisdictions clearly reflect that fairminded jurists do disagree." Opp.27. This Court, however, has held that a decision does not become fair-minded or reasonable under section 2254 merely because "at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Williams v. Taylor*, 529 U.S. 362, 409-10 (2000) (majority opinion as to that section). "[C]onflicting authority" does not preclude review. *Id.* at 410. Thus, the need for this Court's intervention would not be absolved even if Respondent could summon a decision that made the same mistakes as the courts below. To the contrary, a decision that is "in conflict with the decision of another United States court of appeals on the same important matter [or that] has decided an important federal question in a way that conflicts with a decision by a state court of last resort" is a reason to grant certiorari. Sup. Ct. R. 10(a).

II. THE FACT-DEPENDENT NATURE OF *STRICKLAND* DOES NOT PRECLUDE REVIEW

Respondent also seeks to avoid review based on the necessity of considering facts in addressing prejudice. He argues that because prejudice always depends on the facts of a case (true premise), this Court should never review such cases (false deduction). Opp. 27-31.

Respondent cites a number of cases that have found that the lack of an alibi instruction was not prejudicial "based upon the facts and circumstances presented in those cases." Opp.28. In support, Respondent cites the following cases:

- *Ford v. State*, 442 S.E.2d 604 (S.C. 1994), and *Commonwealth v. Sileo*, 32 A.3d 753, 767 (Pa. Super. Ct. 2011): both cases in which Respondent concedes "there was overwhelming evidence of guilt," Opp.24, 28;
- *Schmitt v. State*, 779 A.2d 1004, 1022 (Md. App. 2001): a case where the court found no deficiency, because the alibi was not "unmistakably identifiable" in that case;
- *Merrill v. State*, 716 N.E.2d 902, 906 (Ind. 1999): a case where the court found neither deficiency nor prejudice, because the defendant's alibi did not cover the entire time of the crime so other defenses were more likely to succeed and the weak alibi was likely irrelevant; and
- *State ex rel. Boso v. Hedrick*, 391 S.E.2d 614, 620 (W. Va. 1990): a case where the jury *was* instructed that it had to "find[] that the defendant was present at the scene," which is a special-purpose instruction that is similar to an alibi instruction, *see supra* at 4-6.

These cases properly support Respondent's premise that analyzing *Strickland* prejudice requires a case-specific inquiry. But Respondent makes an improper deduction that failure-to-request-instruction decisions are therefore never reviewable because, by their "very nature," such cases might "require[] intensive factfinding review." Opp.34. Based on this false deduction, Respondent presents this Court with a false choice of either affirming or taking the extreme position that "failure to request an alibi instruction is *per se* prejudicial." Opp.34.

There is no need for a bright-line rule. This Court is perfectly competent to review fact-heavy decisions, and it often does just that—*Strickland* itself being a classic example.[1] Looking to the facts of this case, there is prejudice. The courts below focused on the boilerplate reasonable-doubt instructions that are given in virtually every case. App.64a-66a (state court); App.39a-40a (district court); App.11a-12a (circuit court). If more-than-a-century of judges believed that a defendant has the burden of proof even as they recognized that the State generally bears the burden of proving guilt beyond a reasonable doubt, then it is reasonably probable that Mr. Hope's jury believed that a defendant has the burden of proof even as the jury was instructed that the State generally bears the burden of proving guilt beyond a reasonable doubt. Pet.11-15.

The courts below also found that "[t]he guilty verdict necessarily establishes that the jury found the State's witnesses to be credible and believed the State's version of events." App.12a (circuit court); App.68a (state court holding that "Applicant's alibi witness testimony must have been given little or, no weight by the jury"). The courts below failed to appreciate that juries make credibility determinations in light of their understanding of the

[1] In any event, this Court always has the option of remanding for the court below to consider the specific facts of this case, under the proper standard that is required by this Court's precedent.

standard and burden of proof. Because it is likely that the jury misunderstood the standard and burden of proof in alibi, the verdict tells us nothing about whether the jury believed the State had disproven Mr. Hope's alibi testimony beyond a reasonable doubt or whether they thought that Mr. Hope failed to meet a (non-existent) burden of proving his alibi perhaps by a preponderance of the evidence. *Cf. Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) ("the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings").

Respondent argues that there was some evidence of Mr. Hope's guilt. *See* Opp.34-35. Respondent might be arguing that a reasonable jury, even properly instructed, *could have convicted*. Even if true, that is irrelevant. The question under *Strickland* is not whether "substantial evidence" supports the verdict. *See Hardy v. Chappell*, 849 F.3d 803, 819 (9th Cir. 2016) (citing cases). Indeed, in cases where substantial evidence does not support the jury's verdict, *Strickland* is unnecessary for reversal. *See* Fed. R. Crim. P. 29. Rather, *Strickland* requires only a "reasonable probability" that the jury might have acquitted. *Strickland*, 466 U.S. at 694.

Respondent cannot possibly mean that the evidence of guilt here was "overwhelming"—a term it uses to describe other cases. Opp.24, 28. Mr. Hope's alibi was corroborated by five other witnesses, and the State's evidence of guilt was premised on the testimony of two brothers who testified "[p]ursuant to plea deals." App.4a-5a. Even without a special-purpose instruction, Mr. Hope's jury convicted him only after they deliberated for almost as long as the entire trial lasted and after they asked to rehear portions of the alibi testimony. Pet.4. As Respondent concedes, "[a]n alibi charge is considered *especially crucial* when the evidence is entirely circumstantial *as in this case*." Opp.23 (emphases added).

Respondent claims that the two brothers' testimony "was generally corroborated" by other eyewitnesses. Opp.34. "Generally" is the operative word. The corroborating testimony is "witness[es] seeing the car with three individuals in the parking lot; victims in the store noting two males with guns completed the robbery. Opp.34. That corroborates only the vaguest outlines of the brothers' testimony and says nothing about Mr. Hope's involvement. Respondent ignores that the purportedly corroborating witnesses described the criminal as someone who was 2 to 4 inches shorter and 50 to 70 pounds lighter than Mr. Hope. App. 24a.

Respondent's other "corroborations" also prove little. Respondent notes that there was "a surveillance video that showed the robbery," Opp.35, but, as the State itself admitted in having the video admitted, "you can't identify anyone" from the video. App.73a. Respondent also cites to the fact that Mr. Hope's wallet was found in the car, but, as the dissent notes, this "is of little probative value, as Hope was undisputedly in Heath's car a week before the robbery." App.25a. The State courts never even mentioned the wallet in their prejudice analysis. *See* App.55a-70a. Finally, Respondent cites to the fact that Mr. Hope fled the State, but, as this Court has explained, innocent people have been fleeing authorities going as far back as the story in Genesis

Chapter 31 of Jacob fleeing from Laban. *Hickory v. United States*, 160 U.S. 408, 421 (1896) (citing sources).

The point is that here, where the jury's verdict is "only weakly supported by the record," there is a high likelihood of prejudice. *Strickland*, 466 U.S. at 696. It is at least reasonably probable that the jury's likely misunderstanding of the burden and standard of proof affected the verdict. It was unreasonable to conclude otherwise.

III. THE STATE COURT'S UNREASONABLE APPLICATION OF *STRICKLAND* WARRANTS REVIEW

Section 2254 is clear as can be that *habeas* relief is appropriate not only where a State's adjudication is "contrary to" this Court's precedent but also where it is "an unreasonable application of" this Court's precedent. 28 U.S.C. § 2254(d)(1). This Court need not have addressed the precise set of facts at issue for its review (and *habeas* relief) to be warranted.

For example, this Court has granted *habeas* relief under *Strickland* to a prisoner whose counsel failed to "present[] and explain[] the significance of all the available [mitigating sentencing] evidence." *Williams*, 529 U.S. at 399. Those were not the precise facts of *Strickland*—a case where this Court found neither deficiency nor prejudice. *Strickland*, 466 U.S. at 698-701. Nevertheless, as this Court explained, "[t]hat the *Strickland* test of necessity requires a case-by-case examination of the evidence, obviates neither the clarity of the rule nor the extent to which the rule must be seen as established by this Court." *Williams*, 529 U.S. at 391 (citations omitted). In *Williams*, the state court's finding of no prejudice "was both" contrary to and an unreasonable application of *Strickland*—even though this Court had not previously addressed that precise set of facts. *Id.*

Respondent, however, ignores the plain text of the statute (and the decision in *Williams*). Again and again he points to the fact that this Court has never addressed exactly these circumstances: "This Court has never held an alibi instruction is required by the Constitution." Opp.28. "None of [this Court's] cases directly address whether a defendant is prejudiced under *Strickland* when trial counsel does not request an alibi jury instruction when such an instruction is warranted." Opp.33. No opinion of this Court has addressed "whether a failure to give an alibi instruction constitutes constitutional error." Opp.33. "The cases relied upon by Petitioner were in different procedural postures from his." Opp.33.

The State court's decision is at least an "unreasonable application" of *Strickland*, based on clearly established (and undisputed) law on the importance of special-purpose instructions. That is error enough.

CONCLUSION

The petition should be granted.

December 18, 2017

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