NO: 25-6655

ORIGINAL

In The
Supreme Court of the United States

December Term 2025

Kerry E. Silvers,
Applicant/Petitioner,

v.

State of Indiana
Respondent.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Kerry E. Silvers
I.D.O.C. #884862
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, Indiana 46064

pro-se Applicant/Petitioner

December 12, 2025

QUESTIONS PRESENTED

1. Whether the Indiana Court of Appeals, as a state court of last resort, has decided an important federal question in a way that conflicts with two decisions of the United States Court of Appeals for the Seventh Circuit, *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Jones v. Zatecky*, 917 F.3d 578 (7th Cir. 2019)?

2. Whether the decision by the Indiana Court of Appeals is in conflict with United States Supreme Court precedent *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and its progeny?

RELATED PROCEEDINGS

The proceedings directly related to this *Petition* are:

Kerry E. Silvers v. State of Indiana, No. 24A-PC-277. *See* 250 N.E.3d 511 (Ind. Ct. App. January 31, 2025) (Indiana Court of Appeals).

Kerry E. Silvers v. State of Indiana, No. 24A-PC-277. *See* 255 N.E.3d 564 (Ind. Ct. App. April. 2, 2025) (Indiana Court of Appeals).

Kerry E. Silvers v. State of Indiana, No. 24A-PC-277. *See* 2025 Ind. LEXIS 421 (Ind. July 15, 2025) (Indiana Supreme Court).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kerry E. Silvers[1] respectfully petitions for a *Writ of certiorari* to the Indiana Court of Appeals.

OPINIONS BELOW

The Indiana Court of Appeals Opinion affirming the denial of Petitioner Silvers' petition for post-conviction relief is reported at *Silvers v. State*, 250 N.E.3d 511 (Ind. Ct. App. 2025), and is reprinted in the ***Appendix to the Petition at A1.*** The *Opinion* of the Indiana Court of Appeals affirming the denial of Petitioner Silvers' petition for post-conviction relief on rehearing is reported at *Silvers v. State*, 255 N.E.3d 564 (Ind. Ct. App. 2025), and is reprinted in the ***Appendix to the Petition at B1.*** The decision by the Indiana Supreme Court denying Petitioner Silvers' petition to transfer is reported at *Silvers v. State*, 2025 Ind. LEXIS 421 (Ind.), and is reprinted in the ***Appendix to the Petition at C1.***

JURISDICTION

The Indiana Court of Appeals entered its *Opinion* of judgment at issue herein on January 31, 2025. On April 2, 2025, the Indiana Court of Appeals, by *Opinion*, affirmed on rehearing the *Opinion* of the Indiana Court of Appeals for January 31, 2025. The Indiana Supreme Court denied Transfer on July 15, 2025. The Honorable Amy Coney Barrett, Justice, United States Supreme Court, granting an extension of

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[1] Hereinafter **["Petitioner Silvers"]**.

time within which to file a *Petition for Writ of certiorari*, to and including December 12, 2025. This Court's Jurisdiction is invoked under *28 U.S.C. § 1257(a).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Sixth Amendment to the United States Constitution*[2] provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

The *Fourteenth Amendment to the United States Constitution* provides, in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law ...

Indiana Code § 35-34-1-5 (1993),[3] provides *in toto*:[4]

> **(a)** an indictment or information which charges the commission of an offence may not be dismissed but may be amended on motion by the prosecuting attorney at any time because of any immaterial defect, including:
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> **(1)** Any miswriting, misspelling, or grammatical error;
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> **(2)** Any misjoinder or parties defendant or offenses charged;
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> **(3)** The presence of any unnecessary repugnant allegation;
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> **(4)** The failure to negate any excerption, excuse or provision contained in the stature defining the offense;
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> **(5)** The use of alternative or disjunctive allegation as to the

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[2] Hereinafter **["U.S. Const. Amend. VI"]**.

[3] This is the last relevant amended version of the Statute, that which was in effect during the relevant period of Petitioner Silvers' alleged commission of the offense. *See P.L.164-1993, § 7.*

[4] Hereinafter **["I.C. § 35-34-1-5"]**.

acts, means, intents, or results charged;

(6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;

(7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense; or

(8) The failure to state an amount of value or price of any matter that value or price is not of the essence of the offense; or

(9) Any other defect which does not prejudice the substantial rights of the defendant.

(b) The indictment or information may be amended in matters of substance or form, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time up to:

(1) thirty (30) days if the defendant is charged with a felony; or

(2) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors: before the omnibus date. When the information or indictment is amended, it shall be signed by the prosecuting attorney.

(c) Upon motion to the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant.

(d) Before amendment of any indictment or information other than amendment as provided in subsection (b) of this section, the court shall give all parties adequate notice of the intended amendment and an opportunity to be heard. Upon permitting such amendment, the court shall, upon motion by defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

(e) An amendment of an indictment or information to include a habitual offender charge under *IC 35-50-2-8* must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

Ind. Code § 35-34-1-5, P.L.164-1993, § 7 (1993).

STATEMENT OF THE CASE

A. Factual Background and Initial Proceedings

In 1997, Petitioner Silvers was charged in the Lawrence County [Indiana] Circuit Court with three B felonies stemming from a single criminal episode: burglary[5], robbery[6], and carjacking[7] [Appendix at A6 (*Silvers*, 250 N.E.3d at 516)]. During Petitioner Silvers' Initial Hearing, the trial court scheduled Petitioner Silvers' "Omnibus Date"[8] for September 22, 1997 [Appendix at A19 (*Silvers*, 250 N.E.3d at 529)]. Under State Law at the time, substantive amendments to a criminal charging information were only permitted up to thirty days before the Omnibus Date. See Ind. Code § 35-34-1-5(b)(1), supra.

On September 2, 1997, the State of Indiana, by the Prosecuting Attorney of Lawrence County, filed an amended *Charging Instrument* that changed Petitioner Silvers' burglary offense to an A felony (burglary resulting in injury) [Appendix at

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[5] Ind. Code § 35-43-2-1 (effective 1982 to June 30, 1999).

[6] Ind. Code § 35-42-5-1 (effective 1984 to June 30, 2014).

[7] Ind. Code § 35-42-5-2 (effective 1993 to June 30, 2014).

[8] In Indiana, the "*Omnibus Date*" is a temporal event set by a State Trial Court, in criminal felony prosecutions, where certain procedural actions are to be taken by the Parties and the Court, pursuant to Statute. See Ind. Code § 35-36-8-1.

A19-20 (*Silvers*, 250 N.E.3d at 529-30)]. Petitioner Silvers' Trial Counsel failed to object to this Amendment prior to Petitioner Silvers' trial pursuant to Ind. Code § 35-34-1-5(b)(1), *supra*, as construed by the then-controlling Precedent of the Indiana Supreme Court, *Haak v. State*, 695 N.E.2d 944 (Ind. 1998). Petitioner Silvers was convicted of all charges and sentenced to an aggregate sentence of fifty-five years (forty years of which was for the A felony burglary offense) [Appendix at A8 (*Silvers*, 250 N.E.3d at 518)].

B. Proceedings Below

On November 18, 2010, Petitioner Silvers filed a petition for post-conviction relief alleging ineffective assistance of trial counsel under the Sixth Amendment in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984) [*Id.*] On April 27, 2023, a third amended PCR petition was filed [Appendix at A8, A17-19 (*Silvers*, 250 N.E.3d at 518, 527-29)]. Relevant to this proceeding, Petitioner Silvers argued in his petition that his trial counsel had rendered ineffective assistance when he failed to object to the untimely substantive amendment to Petitioner Silvers' charges [Appendix at A19 (*Silvers*, 250 N.E.3d at 529)].

The trial court held an evidentiary hearing on Petitioner Silvers' PCR petition, and Petitioner Silvers called two witnesses: his prior defense attorney [John Plummer ("Mr. Plummer")] and himself [Appendix at A9 (*Silvers*, 250 N.E.3d at 519)]. When questioned about specific decisions he made in Petitioner Silvers' case, Mr. Plummer could not recall many of the reasons behind those decisions due to the passage of time [*Id.*]. In particular, Petitioner Silvers' trial occurred more than 20 years before the

PCR evidentiary hearing, and Mr. Plummer had "handled probably ten thousand . . . cases since then," [*Id.*]. Mr. Plummer was primarily only able to testify about his general practice and strategy regarding the types of decisions he was questioned about [*Id.*].

On January 8, 2024, the trial court issued its order denying Petitioner Silvers' post-conviction petition [*Id.*]. Of relevance here, the trial court determined that Petitioner Silvers' had generally failed to demonstrate that Mr. Plummer provided ineffective assistance of counsel [*Id.*]. Petitioner Silvers appealed to the Indiana Court of Appeals [Appendix at A1 (*Silvers*, 250 N.E.3d 511)].

On appeal, Petitioner Silvers argued that the trial court erred when denying Petitioner Silvers' petition for post-conviction relief because his trial counsel had performed deficiently, causing prejudice to Petitioner Silvers in violation of the Sixth Amendment, when counsel failed to object to the untimely substantive amendment of a Charging Instrument which violated Ind. Code § 35-34-1-5, as construed by the Indiana Supreme Court in *Haak*, *supra* [Appendix at A19-20 (*Silvers*, 250 N.E.3d at 529-30)].

In denying Petitioner Silvers appeal, the Indiana Court of Appeals held:

> Because of conflicting caselaw regarding Ind. Code section 35-34-1-5 at all times relevant to this case, Mr. Plummer likely had a firm basis on which to object to the Amended Information, but so, too, would the trial court have had a firm basis on which to overrule that objection. Therefore, we conclude that Silvers has failed to show he was prejudiced by Mr. Plummer's failure to object to the Amended Information.
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> [Appendix at A23 (*Silvers*, 250 N.E.3d at 533)].

Petitioner Silvers sought rehearing, arguing that the appellate decision was in conflict with precedents from this Court and the Seventh Circuit Court of Appeals, and the Court of Appeals granted a rehearing; however, the court reaffirmed its prior *Opinion* denying Petitioner Silvers' Appeal [Appendix at B1-3 (*Silvers*, 255 N.E.3d at 564-66)], [Petition for Rehearing].

Petitioner Silvers then sought transfer from the Indiana Supreme Court on the ineffective assistance of counsel claims, but that court declined to grant transfer [Appendix at C1 (*Silvers*, 2025 Ind. LEXIS 421)].

ARGUMENTS

I. The Indiana Court of Appeals has decided an important federal question, to-wit, whether an Indiana defendant is afforded the right to effective assistance of counsel as set forth in the Sixth amendment, when his trial attorney fails to object to an illegal amendment that substantially increases the penalties her client faces, in a way that conflicts with two decisions of the United States Court of Appeals for the Seventh Circuit, *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013), and *Jones v. Zatecky*, 917 F.3d 578 (7th Cir. 2019). Because only the United States Supreme Court can resolve this conflict, the Court should review this case and settle the matter once and for all.

Petitioner Silvers would first submit to the Court that the Seventh Circuit Court of Appeals has rightly and properly adjudicated the issue under the Sixth Amendment.

At the time of Petitioner Silvers' 1997 criminal proceeding, Indiana law provided that a charging instrument could only be substantively amended up to thirty (30) days before the scheduled *Omnibus Date*. Ind. Code § 35-34-1-5(b)(1) (1993), *supra*. "[T]he Omnibus date is the date from which various other procedural deadlines

are to be established. " *Fajardo v. State*, 859 N.E.2d 1201, 1203 n.4 (Ind. 2007) (citing Ind. Code § 35-36-8-1). The ability to amend a charging instrument is tied to the omnibus date under Ind. Code § 35-34-1-5 (1982) ("a statute that had long limited prosecutor's discretion to amend pending charges." *Shaw*, 721 F.3d at 911).

Under the then existing version of Ind. Code § 35-34-1-5, Amendments were treated differently depending upon whether they were of form or substance. An amendment of mere "form" could be made after the omnibus date, but only if the amendment did not prejudice the substantive rights of the defendant." Ind. Code § 35-34-1-5(c) (1982). An Amendment of substance, however, could only be made up to thirty (30) days before the *Omnibus Date*—regardless of whether it was non-prejudicial. In short, the stature provided for more flexibility for Amendments of form than those of substance, so long as the form Amendments were not prejudicial.[9] *Id.*

Despite this clear statutory proscription, the State made—and the Trial Court allowed—an untimely amendment of substance. Indiana Courts classified amendments as "form" or "substance" under the following criteria:

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[9] Ind. Code § 35-34-1-5 was first codified in 1973, and the 1973 statute contained a catchall provision stating, "[n]notwithstanding any other provision in this section, an indictment or information shall not be amended in any respect which changes the theory or theories of the prosecution as originally Stated, or changes the identity of the crime charged." Acts 1973m Pub L. No. 325, § 3 (codified at Ind. Code § 35-43-1-5 (1982)). Despite the statutory change, some case law subsequently "retained the prohibition on changes in the theory of the case." *Haak*, 695 N.E.2d at 952 n.7.

> An amendment is one of form and not substance if a defense under the original information would be equally available after the amendment and the accused evidence would apply equally to the information in either form. Further, an amendment is of substance only if it is essential to making a valid charge of the crime.
>
> *Fajardo v. State*, 859 N.E.2d 1201, 1205 (Ind. 2007) (quoting *McIntyre v. State*, 717 N.E.2d 114, 125-26 (Ind.1999) (citations omitted)).

The upgrading of Petitioner Silvers' burglary charge to an A felony (burglary resulting in injury) was an Amendment of Substance, as adding a new element (injury) was essential to making a valid charge of A felony Burglary, which the Court of Last Resort expressly acknowledged, *to wit*:

> Because of conflicting caselaw regarding Indiana Code section 35-34-1-5 at all times relevant to this case, Mr. Plummer likely had a firm basis on which to object to the Amended Information, but so, too, would the trial court have had a firm basis on which to overrule that objection. Therefore, we conclude that Silvers has failed to show he was prejudiced by Mr. Plummer's failure to object to the Amended Information.
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> [Appendix at A23, ¶45 (*Silvers*, 250 N.E.3d at 533)].

Despite the restriction on amendments, [Appendix at A19 (*Silvers*, 250 N.E.3d at 529)]. Plummer never objected when the prosecution amended Petitioner Silvers' burglary charge from a B felony to an A felony after the statutory deadline had passed [Appendix at A20 (*Silvers*, 250 N.E.3d at 530)]. That *Amendment*, upon Petitioner Silvers' *Judgment of Conviction and Sentence*, resulted in a forty (40) year addition to Petitioner Silvers' Sentence.

In *Shaw*, 721 F.3d 908, the United States Court of Appeals for the Seventh Circuit construed the same Indiana Statute and recognized that the failure of an appellate lawyer to raise that a trial court abused its discretion when permitting an

untimely amendment to a charging instrument renders ineffective assistance of counsel. The Shaw Court reasoned:

> Although no Indiana appellate court ever had invalidated an amendment under the 1982 law, in 1998 in *Haak v. State*, 695 N.E.2d 944, 951 (Ind. 1998), the Indiana Supreme Court held unequivocally that if an amendment "was of substance, or prejudicial to the defendant even if of form, it was impermissible under the statute" from 30 days before the omnibus date.
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> *Shaw*, 721 F.3d at 913.

In *Jones v. Zatecky*, 917 F. 3d 578 (7th Cir. 2019), the Seventh Circuit reaffirmed *Shaw*:

> At the time of Shaw's conviction, the same Indiana law was in effect, and the state similarly amended the information to add a more serious charge against Shaw after his omnibus date had passed. Shaw's trial counsel objected to the amendment, but the trial court ruled against him. Shaw's appellate attorney declined to pursue this point on appeal, choosing instead to make a near-frivolous argument about the sufficiency of the evidence. *Id.* at 912.
>
> When *Shaw* reached this court, the state made the same arguments against a finding of ineffective assistance of counsel that it is making in Jones's case. We were not persuaded. We found irrelevant the fact that no Indiana appellate court had previously invalidated an untimely amendment at the time of Shaw's conviction-for all we knew, the trial courts were policing this rule on their own. There could be no doubt, we thought, that the combination of the terms of the statute and *Haak* made this argument available for responsible counsel. *Id.* at 916. We also rejected the state's attempt to portray the facts as unfairly requiring counsel to predict a change in the law, for the simple reason that nothing had changed. *Id.* at 916-17. And we held that the possibility of additional time to prepare for trial did not alleviate any potential prejudice, since dismissal was a real possibility under existing law. *Id.* at 918.
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> *Jones*, 917 F. 3d at 583-84.

The *Jones* Court concluded:

> Jones, like Shaw, had a strong argument for dismissing one of the charges against him, yet his trial attorney did not pursue it. The state

> suggests that *Haak* was widely ignored by defense counsel, but we have no hard data to back up that impression. We are loath to say that an attorney's failure to heed the specific direction of the Indiana Supreme Court and the plain text of Indiana law is excusable. To the contrary, that action falls "outside the wide range of professionally competent assistance" required by the Sixth Amendment. *Strickland*, 466 U.S. at 690. As in *Shaw*, this feature of Indiana law created a real opportunity for Jones's defense, but counsel let it slip away.
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> *Jones*, 917 F. 3d at 58

The Seventh Circuit Court's logic in *Shaw and Jones* hold true in Petitioner Silvers' case. In fact, if anything, Petitioner Silvers' case presents an even stronger claim of ineffective assistance of counsel because unlike in *Shaw* and *Jones*, Petitioner Silvers' case was pending in the period after *Haak* before *any* appellate courts has decided to ignore *Haak*. *Haak* was decided on June 26, 1998. At that time, Petitioner Silvers' trial was scheduled for September 8, 1998. When Mr. Plummer moved to continue Petitioner Silvers' trial on August 28, 1998, and the trial was continued until January 19, 1999, there would be no holdings from Indiana's appellate courts that conflicted with *Haak* throughout this period. Thus, in the wake of *Haak*, it is indefensible that Mr. Plummer did not move to dismiss the untimely amendment. There was therefore no justification for counsel's failure to file a motion to dismiss Silvers' untimely amendment in the latter half of 1998 as he (twice) approached trial.

Importantly, the Indiana Court of Appeals made a fact-finding error in this respect. In denying Petitioner Silvers appeal, the Indiana Court of Appeals held:

> Because of conflicting caselaw regarding Ind. Code section 35-34-1-5 at all times relevant to this case, Mr. Plummer likely had a firm basis on which to object to the Amended Information, but so, too, would the trial

> court have had a firm basis on which to overrule that objection. Therefore, we conclude that Silvers has failed to show he was prejudiced by Mr. Plummer's failure to object to the Amended Information.
>
> [Appendix at A23 (*Silvers*, 250 N.E.3d at 533)].

Yet, the Record clearly demonstrates that Mr. Plummer had an opportunity to move to dismiss the untimely amendment long before any appellate courts ignored *Haak*[10], counsel simply failed to take action. Besides, it is likely that subsequent interpretations of the statute from appellate courts would not have obligated trial courts to ignore the clear and unambiguous construction of the statute. See, e.g., *Bostic v. House of James, Inc.*, 784 N.E.2d 509, 510-11 (Ind. Ct. App. 2003) ("The cardinal rule of statutory construction is that a statute clear and unambiguous on its face need not and cannot be interpreted by a court.") (citing *Storey Oil Co., Inc. v. American States Ins. Co.*, 622 N.E.2d 232, 235 (Ind. Ct. App. 1993)). See also *Walczak v. Labor Works – Fort Wayne LLC*, 983 N.E.2d 146, 1153 (Ind. 2013) ("That is not what the General Assembly intended, and even if we wanted to do so, we have no authority to modify its statutory scheme."). Also, since the higher courts' unorthodox interpretation of Ind. Code § 35-34-1-5 essentially made Section (b) meaningless, this also demonstrated the interpretation was improper. See, e.g., *State v. Brown*, 947 N.E.2d 411, 416 (Ind. 2011) ("[I]t is a rule of statutory interpretation that courts will not presume the legislature intended to do a useless thing.").

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[10] See Ind. Code § 35-34-1-4(a)(8), (b) (a motion to dismiss can be made for an untimely prosecution at any time up to and even during trial).

Additionally, it is likely that trial courts would have been duty-bound to follow *Haak* even after contrary holdings from appellate courts since the state supreme court's interpretation of a statute takes precedence over all other courts. See *Eastbrook v. State*, 140 N.E.3d 830, 834 (Ind. 2020) ("[W]e alone are the final arbiter of Indiana law and owe no deference to the interpretations of Indiana law pronounced by other courts."); *Ind. High Sch. Athletic Ass'n v. Schafer*, 598 N.E.2d 540 (Ind. Ct. App. 1992) ("A state intermediate appellate court must follow the teachings of its state court of last resort. This obligation binds the state intermediate appellate court even where the state supreme court has explained neither the rationale nor the 'constitutional implications' of its decisions."). This would likely be true even if *Haak*'s interpretation of the statute was *dicta*. *Horner v. Curry*, 125 N.E.3d 584, footnote 11 (Ind. 2019) (observing that Supreme Court *dicta* that interprets the law may not be ignored by other courts).

As the Seventh Circuit stated in *Jones*:

> When *Shaw* reached this court, the state made the same arguments against a finding of ineffective assistance of counsel that it is making in Jones's case. We were not persuaded. We found irrelevant the fact that no Indiana appellate court had previously invalidated an untimely amendment at the time of Shaw's conviction-for all we knew, *the trial courts were policing this rule on their own.*
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> 917 F.3d 578, 582 (7th Cir. 2019) (emphasis added).

At the time Mr. Plummer could have filed a motion to dismiss the untimely amended information in the wake of *Haak*, it is even *more* likely that trial courts were

following[11] the plain meaning of the statute as interpreted by *Haak*. That is, because the statute was not ambiguous on its face, and the supreme court had elucidated what constituted a straight-forward application of it in *Haak*, every trial court in the state would presumably—at *least* for the time being— have been expected to follow the clear meaning of the statute as interpreted by the Indiana Supreme Court. It is, after all, the duty and authority of the court of last resort to "ascertain and give effect to the legislature's intent." *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008).

Of course, these complex legal issues need not be resolved here since Mr. Plummer had an extended opportunity to file a motion to dismiss the untimely amendment *before* any appellate decisions conflicted with *Haak*. At that time, the clear language of the statute and *Haak* would have unquestionably controlled the trial court's response. Counsel had only to raise the issue through a properly constructed motion to dismiss, and the trial court would have been obligated to follow the law.

In sum, there is a clear conflict between the Indiana Court of Last Resort and the United States Court of Appeals for the Seventh Circuit on the issue of whether Indiana lawyers who failed to object to untimely substantive amendments to charging informations during the relevant period were performing below the Constitutional

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[11] There would actually be no appellate decision that ignored *Haak* and the clear meaning of the statute until *Davis v. State*, N.E.2d 717 (Ind. Ct. App. July 23, 1999). Yet, in *Davis* the appellate court actually acknowledged *Haak*'s reading of Ind. Code § 35-34-1-5, but then surprisingly decided to reject this interpretation.

standard. The Seventh Circuit has indicated that the issue is well settled. E.g., *Jones v. Cummings*, 998 F.3d 782, 788 (7th Cir. 2021) ("It is common ground by now that when defendants Koester and Kopp filed the untimely amendment, they violated Indiana law."). Meanwhile, the Indiana Court of Appeals in Petitioner Silvers' case holds otherwise. For this reason, this Court's intervention is needed to resolve the conflict between the courts.

If the Supreme Courts fails to resolve this conflict, it is axiomatic that Indiana defendants who raise the issue moving forward will lose in the Indiana courts, contrary to justice, while those who are able to carry their challenge forward to federal courts will prevail. Such a schism between the courts creates an uneven administration of justice that is repugnant to our citizens. Therefore, in the interest of fundamental fairness and to maintain public confidence in our judiciary, Supreme Court intervention is warranted.

II. The decision by the Indiana Court of Appeals is in conflict with United States Supreme Court precedent *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, and *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and its progeny

A. Petitioner Silvers was denied the effective assistance of trial counsel

First, the decision by the Indiana Court of Appeals cannot be reconciled with a long line of this Court's Sixth Amendment ineffective assistance of counsel law which culminated in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, nor its *Fourteenth Amendment Due Process of Law* decisions, which culminated in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and its progeny.

The Sixth Amendment embraces the right to effectiveness of counsel, and a counsel's ineffectiveness can be predicated on an attorney's failure to raise a state-law issue in a state-court proceeding. *Jones*, 917 F. 3d at 581 (*citing McNary v. Lemke*, 708 F.3d 905, 914 (7th Cir. 2013).

In *Strickland*, this Court held that the Sixth Amendment's provision that the accused shall "have the Assistance of Counsel for his defence," U.S. Const. amend. VI was "the constitutional requirement of effective assistance." *Strickland*, 466 U.S. at 686, A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Id* at 687.

Petitioner Silvers unquestionably was denied these rights when Mr. Plummer failed to object to the untimely Amendment to the Charging Information, notwithstanding controlling Indiana Supreme Court precedent that forbade such Amendments under the controlling Statute in effect at the time of the Proceedings. Here, the Indiana Court of Appeals refused to remedy that straightforward constitutional violation on the ground that both Petitioner Silvers and The Trial Court had counter grounds to object and overrule the objection. That conclusion cannot be reconciled with this Court's longstanding *Sixth* and *Fourteenth Amendment Precedents*, which emphasize that the criminal Statute in effect at the time a crime is committed controls, and such is necessary to protect the right of a criminal

Defendant to have fair warning of what they are subject to as far as punishment. *See argument infra at 21-22.* The decision whether to apply the law in effect is not a trade-off that courts can utilize to perform an end run around the plain and controlling text of a criminal statute in effect during a Defendants criminal proceedings.

This Court's review is manifestly warranted to ensure appropriate enforcement of this Court's decisions, and to guarantee that Petitioner Silvers is tried in a manner consistent with the Sixth and Fourteenth Amendments. And because the Indiana Court of Appeals application of state-law timeliness turned entirely on its conclusion that a Petitioner and a Court have competing grounds to object or overrule an objection—a question that is determined by federal law—there is no jurisdictional obstacle to this Court's consideration. This Court should grant *certiorari.*

Trial counsel's failure to object to the amended information constitutes deficient performance

Mr. Plummer's failure to object to the untimely amendment adding the A felony constitutes deficient performance. Trial counsel should have objected to the request to amend, especially in the wake of *Haak*, and "[t]he failure to file a plainly meritorious objection could constitute deficient performance if proved." *Brock-Miller v. United States,* 887 F.3d 298, 310 (7th Cir. 2018).[12] Moreover, '[a]ll lawyers that

[12] See also *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) ("[C]ounsel's failure to call the Court's attention to the late filing was no mere garden-variety blunder. Where, as here, an attorney fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the mission, his performance falls below the standard of proficient representation that the Constitution demands."); *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) ("an attorney's ignorance of a point of law that

represent criminal defendants are expected to know the laws applicable to their client's defense." *Julian v. Bartley*, 495 F.3d 487, 497 (7th Cir. 2007).

At the time of Petitioner Silvers' 1997 Trial, this anti-amendment argument would have found support from the plain text of Ind. Code § 35-34-1-5 and the Indiana Supreme Court's 1998 *Haak* decision. Then, just ten (10) years later, the Indiana Supreme Court validated the merits of this precise argument in *Fajardo, supra*, in which the Court vacated a conviction because the charge was added by an untimely amendment. Simply put, in *Fajardo*, the Indiana Supreme Court indicated that it meant what it said in *Haak* - *i.e.*, that Ind. Code § 35-34-1-5 prohibits untimely Amendments of Substance.

As the *Shaw* Court recognized, Indiana courts did not apply Ind. Code § 35-34-1-5 as consistently or as uniformly as the statutory text and *Haak* would command. *Shaw*, 721 F.3d at 916. Nevertheless, Ind. Code § 35-34-1-5 was not a "dead letter" at the time of Petitioner Silvers' trial, and any inconsistent or improper application of Ind. Code § 35-34-1-5 by the Indiana appellate Courts must be weighed against the clarity of the statutory text and the Indiana Supreme Court's unambiguous holding in *Haak*.

Also, while it is true that "when an attorney articulates a strategic reason for a decision, the Court defers to that choice," this case involves neither such an

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is fundamental to his case combined with this failure to perform basic research on that point is quintessential example of unreasonable performance under *Strickland*").

articulation nor a discernable strategy. See *United States v. Cieslowski*, 410 F.3d 353, 360 (7th Cir. 2005), cited in *United States v. Jansen,* 884 F.3d 649, 656 (7th Cir. 2018). Crucially, "The *Strickland* presumption protects '*actual*' strategic trial judgments." *Jones v. Calloway*, 842 F.3d 454, 464 (7th Cir. 2016)[13] In other words, "The presumption applies only if the lawyer actually exercised judgment." *Id.* "A Court adjudicating a *Strickland* claim can't just label a decision 'strategic; and thereby immunize it from constitutional scrutiny." *Id.*[14]

Here, the record reveals no strategic reason for the failure to object, nor would there be any conceivable strategy for counsel's failure to object that could be deemed "reasonable."

Silvers was prejudiced by trial counsel's failure to object

As for the second prong of the *Strickland* test, Petitioner Silvers was demonstrably prejudiced by Mr. Plummer's errors. That is, there is more than a reasonable probability that the outcome of Petitioner Silvers' trial would have been different had Mr. Plummer objected to the untimely amendment. Both the relevant statute and guidance from Indiana Supreme Court held that a substantive

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[13] Strategic decisions typically involve a cost-benefit analysis that is absent here. *See, E.g., Bell v. Cone,* 535 U.S. 685, 692 (2002) ("Defense counsel waived final argument, preventing the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal.").

[14] And even if the failure to object could be construed as tactical, "[c]ase law does not mandate deference to unreasonable defense tactics." *Baer v. Neal*, 879 F.3d 769, 784 (7th Cir. 2018); *See* also *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 249 (7th Cir. 2015) ("a strategic choice based on a misunderstanding of law or fact ... can amount to ineffective assistance.").

amendment—like the addition of a Class A felony—had to be made thirty days before the omnibus date. Ind. Code § 35-34-1-5 (1982); *Haak*, 695 N.E.2d 951. While this statute was not applied as uniformly as the statutory text commanded, that inconsistent application does not absolve Mr. Plummer of the responsibility to object-particularly given the considerable weight of the authority on the amendment issue that was at Mr. Plummer's disposal.[15]

Had Mr. Plummer successfully objected to the untimely amendment, Petitioner Silvers' sentence would have been reduced by at least twenty years. As this Court has held, "Any amount of actual jail time has Sixth Amendment significance." *Glover v. United States,* 531 U.S. 198, 203 (2001); *see also Hawkins v. United States* 706 F.3d 820, 829 (7th Cir. 2013), *opinion supplemented on denial of reh'g*, 724 F.3d 915 (7th Cir. 2013) ("[I]n the context of considering prejudice under a Strickland analysis, The Supreme Court has instructed that any amount of errantly imposed actual jail time matters.").

Ultimately, to establish prejudice, Petitioner Silvers need not prove that an objection to the criminal-confinement charge would have been successful and his sentence would have been reduced by twenty years. Under *Strickland*, a claim and does "not need to show that the result of the trial would have been different but for counsel's error." *Calloway*, 842 F.3d at 465. On the contrary, a *Strickland* claimant like Petitioner Silvers need only "show a '*reasonable* probability that, but for

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[15] *Fajardo*, 859 N.E.2d at 1206 & n.9 (collecting cases on inconsistent application); *Shaw*, 721 F.3d at 912.

Counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*, 466 U.S. at 694) (emphasis original). Because such a reasonable probability exists here, *Strickland's* prejudice requirement is satisfied.

In sum, Mr. Plummer's indefensible failure to challenge the untimely Amendment constituted ineffective assistance of counsel under the *Sixth Amendment*, and the Indiana Court of Appeals' decision holding that the failure to object did not amount to ineffective assistance of counsel is an unreasonable application of *Strickland*, the leasing case on this issue. *Strickland*, 466 U.S. at 688.

***The decision by the State Court is inconsistent with Bouie v. City of Columbia,* 378 U.S. 347 (1964)**

In *Bouie v. City of Columbia,* 378 U.S. 347 (1964), and its progeny, this Court held that a criminal conviction violates the *Due Process Clause* of the *Fourteenth Amendment*, in view of the fact that not until after the commission of the alleged offense, the State's Highest Court of last resort gives a new construction to a criminal statute that covers the subject matter therein. The Question presented here is whether, under the framework established in *Bouie*, and its progeny, did the State Court in Petitioner Silvers' case ascribe a new judicial construction of a settled Criminal Statute, and gave that construction a forbidden retroactive effect, in violation of the *Due Process Clause*?

The *Fourteenth Amendment* guarantees the accused in a criminal proceeding the right to application of the basic principle that a criminal statute must give fair warning of the conduct that it makes a crime. *Id.* The standards of state decisional

consistency underlying the rule that an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude United States Supreme Court review of a federal question are also applicable in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Federal Constitution entitles him. *Id* at 354.

Based on those bedrock principles, this Court has long held that a state court which overrules a consistent line of procedural decisions, with the retroactive effect of denying a litigant a hearing in a pending case, thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend his substantive right. *Ibid.* For instance, a violation of the due process clause may be accomplished by a state judiciary in the course of construing an otherwise valid state statute. *Id.* at 354-355.

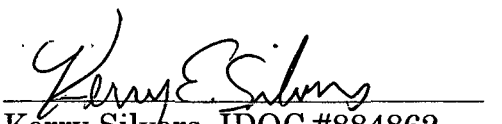
In the instant case, the Indiana Court of Appeals ignored *Haak* and a duly enacted statute forbidding the amendment of Petitioner Silvers' charge, and held that the trial court would have been free to ignore the law. This constitutes a violation of due process of law under the Fourteenth amendment, warranting intervention by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in order to resolve a conflict between a State Court of Last Resort and the United

States Court of Appeals for the Seventh Circuit, and in the interests of substantial justice.

Respectfully submitted,



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