Capital Case

No. 21-7660

In The Supreme Court Of The United States

SCOTT MCLAUGHLIN,

Petitioner,

v.

PAUL BLAIR,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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*KENT E. GIPSON, Mo. Bar #34524
Law Office of Kent Gipson, LLC
121 East Gregory Blvd.
Kansas City, MO 64114
816-363-4400 / fax 816-363-4300
kent.gipson@kentgipsonlaw.com

LAURENCE E. KOMP, Mo.Bar#40446
Chief, Capital Habeas Unit
PAULA HARMS, Az. Bar # 022489
Assistant Public Defender
Federal Public Defender,
Western District of Missouri
1000 Walnut, Ste. 600
Kansas City, MO 64106
(816) 471-8282
Laurence_Komp@fd.org
Paula_Harms@fd.org

COUNSEL FOR PETITIONER

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether a reviewing court, in assessing trial counsel's overall performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), should consider the cumulative effect of multiple errors of counsel in determining whether a Sixth Amendment violation occurred.

2. Whether a reviewing court's determination that a prisoner must show a substantial likelihood of a different result imposes a preponderance of the evidence test for prejudice that was explicitly rejected in *Strickland*.

3. Whether the Court of Appeals' finding that counsel in this case performed effectively, despite failing to investigate the background and credentials of an expert witness beyond the review of his curriculum vitae, conflicts with this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003) and decisions from other circuits.

4. Whether the Court of Appeals' review of a distinct ineffectiveness claim [under 28 U.S.C. § 2254(d)] in assessing prejudice from the Dr. Caruso fiasco conflicts with this statute and decisions from this Court.

INTRODUCTION

As a threshold matter, it is important to note Respondent's shifting positions regarding the relevance of trial counsel's "broken promise" to the adjudication of Petitioner's *Wiggins* claim. Before the district court, Respondent consistently argued that the district court should reject the *Wiggins* claim based upon the substance of trial counsel's opening statement. *See* Doc. 38 pp. 17-18 ("In fact, it is unlikely the jury even took note of the name of the witness and then would hold it against McLaughlin that they did not hear from that particular witness. The claims trial counsel made in opening statement were supported and therefore McLaughlin was not prejudiced by any allegedly 'broken promise.'"); Doc. 70 p. 9 ("[C]ounsel ultimately delivered on his promise to the jury.").

After Petitioner prevailed before that court, Respondent then staked out a contrary and materially inconsistent legal position before the Eighth Circuit. On appeal, Respondent alleged the district court erred in considering the opening statement of trial counsel in assessing the "Dr. Caruso fiasco" claim. This about-face runs afoul of settled principles of judicial estoppel.

The doctrine of judicial estoppel is grounded upon fundamental principles of justice that it is unfair to allow a party to a lawsuit to change his or her position in a later stage in the same proceeding in order to gain an unfair advantage. *Davis v. Wakelee*, 156 U.S. 680, 691 (1895). This Court has described this legal doctrine in the following terms: "[W]here a party assumes a certain position in a legal proceeding, . . ., he may not thereafter, simply because his interests changed, assume a contrary

position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Zedner v. United States*, 547 U.S. 489, 504 (2006).The doctrine of judicial estoppel embodies the notions of common sense and fair play.

This Court should also keep in mind that Petitioner's jury deadlocked on punishment and rejected three of the four aggravating factors submitted by the State. This was a close case and, as a result, trial counsel's errors were outcome determinative. Counsel's failures deprived the jury from hearing critical expert testimony regarding Petitioner's state of mind that would have undermined the validity of the depravity of mind aggravator and supported two statutory mitigating factors, making Respondent's about-face even more significant and alarming.

I.

REPLY ARGUMENT

THE EIGHTH CIRCUIT'S ISOLATED VIEW THAT MULTIPLE *STRICKLAND* CLAIMS MUST BE CONSIDERED IN ISOLATION WARRANTS DISCRETIONARY REVIEW.

Rather than addressing the clear conflict between the Eighth Circuit's views and the views of virtually every other circuit that reviews counsel's errors in the aggregate in determining whether a Sixth Amendment violation occurred, Respondent's primary argument in opposition is that review of this issue would require the Court to issue an advisory opinion because the Eighth Circuit's panel majority found that trial counsel's performance was not deficient. This argument clearly ignores the substance of the question presented, which alleged that the Eighth

Circuit, in conflict with the views of other circuits and prior decisions from this Court, does not consider the cumulative effect of multiple errors in assessing both trial counsel's performance and *Strickland* prejudice.

The Eighth and Fourth Circuit Courts of Appeals are outliers on the question of whether attorney errors should be cumulatively evaluated in assessing performance and prejudice under *Strickland*. Six other Circuit Courts of Appeal have held that *Strickland* errors must be reviewed in the aggregate. *See* Petition at 17-18. In addition, state courts are also split on this question. *Cf. People v. Gandiaga*, 70 P.3d 523, 529 (Colo. App. 2002) (recognizing the cumulative impact of multiple attorney errors); *Grinstead v. State*, 845 N.E.2d 1027, 1036 (Ind. 2006) (same); *State v. Trujillo*, 42 P.3d 814, 828 (N.M. 2002) (same); *State ex rel. Bess v. Legursky*, 465 S.E.2d 892, 901 n. 10 (W. Va. 1995) (same); *with Diaz v. Comm'r of Corr.*, 6 A.3d 213, 222-23 (Conn. App. Ct. 2010) (refusing to cumulate attorney errors); *Weatherford v. State*, 215 S.W.3d 642, 649-50 (Ark. 2002) (same). This circuit split is a long-standing conflict that merits discretionary intervention.

A cumulative assessment of multiple errors of counsel is consistent with *Strickland* and its progeny. In *Harrington v. Richter*, 562 U.S. 86 (2011), this Court noted that "[W]hile in some instances, 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* at 111. The converse is also true. When a court conducts piecemeal analysis of multiple errors, it ignores the holistic picture of whether a

defendant, in light of all relevant circumstances, received a fair trial. *Strickland* noted that the purpose behind enforcing the Sixth Amendment is a broad one, so "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 696.

A cumulative analysis of attorney error is also consistent with *Strickland's* recognition that given the myriad of possible ways an attorney can effectively or ineffectively represent a client, hard and fast formulaic rules for assessing attorney error and prejudice are not sound:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, an act or omission that is unprofessional in one case may be sound or even brilliant in another.

Id. at 693. Given the broad and flexible nature of the *Strickland* framework, courts should avoid unfairly parsing each claim of ineffective assistance into separate components, and instead address the overall effect of an attorney's multiple errors on the client's right to a fair trial. *See Goodman v. Bertrand*, 467 F.3d 1022, 1023-24 (7th Cir. 2006) ("the cumulative effect of trial counsel's errors sufficiently undermines our confidence in the outcome of the proceeding. Rather than evaluating each error in isolation, as did the Wisconsin Court of Appeals, the pattern of counsel's deficiencies must be considered in their totality."). Contrary to the Eighth Circuit, this Court has remarked, "it will generally be appropriate for a reviewing court to

assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel has rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986); *see also Strickland*, 466 U.S. at 688 ("... in **any** case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.") (emphasis added).

Like counsel's broken promise during opening statement, this Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), held that the substance of arguments of counsel were also relevant to the *Strickland* calculus. Justice O'Connor's opinion noted that defense counsel promised the jury that Mr. Wiggins had "a difficult life;" "[d]uring the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history." *Id.* at 515. "Counsel told the sentencing jury 'you're going to hear that Kevin Wiggins has had a difficult life,' App. 72, but never followed up on this suggestion." *Id.* at 536. Because the Eighth Circuit's opinion conflicts with *Wiggins* and the views of other circuits, certiorari should be granted.

Because the jury deadlocked on punishment and rejected three of the four aggravating factors alleged by the State, this mistake by the panel was outcome determinative. The sole aggravating factor found by the jury was directed at McLaughlin's depravity of mind. Counsel's failure left the jury without any expert testimony on the key question in the penalty phase: was McLaughlin's well-established mental illness directly impacting him at the time of the crime? Counsel

promised the jury they would hear an answer to this question from Dr. Caruso, but Dr. Caruso never testified.

II.

THE EIGHTH CIRCUIT MISAPPLIED *HARRINGTON V. RICHTER* IN ITS APPLICATION OF THE *STRICKLAND* PREJUDICE TEST.

Respondent relies on language from *Harrington v. Richter*, 562 U.S. 86 (2011) in contending that the Eighth Circuit did not erroneously reformulate the *Strickland* prejudice test to the detriment of Petitioner. However, in a different passage, *Harrington* reiterated that demonstrating prejudice under *Strickland* "does not require a showing that counsel's actions 'more likely than not altered the outcome[.]'" *Id.* at 111-112. The Eighth Circuit, in determining prejudice, required McLaughlin to meet a more onerous burden to establish prejudice than either *Strickland* or *Harrington* requires, holding that "we agree with the State that Dr. Peterson's testimony would not result in a different verdict." *McLaughlin v. Precythe*, 9 F.4th 819, 831 (8th Cir. 2021).

This Court's opinion in *Richter* primarily addressed the application of the AEDPA to the review of state court adjudications. *Id.* at 100. *Richter* mandated that the AEDPA permits the reversal of a state court ruling only when the state court decision was so lacking that there was no possibility for fair-minded disagreement. *Id.* at 103.

Richter also addressed the application of *Strickland* to a claim of ineffective assistance of counsel. In doing so, the court in *Richter* stated that: "prejudice exists only when correcting the alleged error would have produced a substantial likelihood

of a different result." *Id.* at 111-112. Viewing this language from *Richter* in conjunction with its paramount focus upon the standard of review provisions of the AEDPA, it is clear that *Richter* only allows a federal court to grant relief if, but for counsel's deficient performance, a different trial outcome was reasonably likely, and that likelihood must be "substantial not just conceivable." *Id.* at 112.

However, as noted earlier, the Eighth Circuit went a step further by requiring Petitioner to establish, that, but for counsel's errors, a different verdict would have been reached. This recalibration of the *Strickland* prejudice test is not justified by any language in the *Richter* opinion and is clearly contrary to *Strickland* and its progeny. The fact that the *Harrington* decision did not alter the *Strickland* prejudice test is also underscored by this Court's *per curiam* opinion in *Andrus v. Texas*, 140 S. Ct. 1875 (2020). In *Andrus*, the Court did not modify its articulation of the *Strickland* prejudice test with any of the above-cited language from *Richter* requiring a prisoner to establish a substantial likelihood of a different result in order to prevail. *Id.* at 1887.

The interplay between *Richter* and *Strickland* has sewn confusion among lower courts and requires discretionary intervention. In fact, there are at least two pending petitions for certiorari in capital 2254 cases filed by condemned prisoners that allege that two other federal courts of appeals are applying an unduly onerous test for prejudice that does not comport with *Strickland*. *See Canales v. Davis*, No. 20-7065; *Bolin v. Broomfield*, No. 21-7794.

III.

CERTIORARI REVIEW IS APPROPRIATE TO CORRECT EGREGIOUS ERRORS COMMITTED BY LOWER COURTS IN CAPITAL CASES.

The only argument that Respondent could muster in opposing this Court's review of Question three in the underlying petition was that this question involves mere error correction, a practice that is not favored under Rule 10. Respondent's position is belied by an examination of this Court's practices in reviewing capital cases.

For instance, in *Kyles v. Whitley*, 514 U.S. 419 (1995), the majority in that case was criticized by Justice Scalia's dissenting opinion for improperly engaging in error correction, notwithstanding the flawed reasoning employed by the Fifth Circuit in denying relief on Curtis Kyles' *Brady* claim. Id. at 456-459 (Scalia, J., dissenting). As a result of this Court's determination that certiorari review was warranted, Curtis Kyles was ultimately exonerated. If Respondent's position here had prevailed in that case, Curtis Kyles would now be dead instead of free.

This Court's *per curiam* decision in *Hinton v. Alabama*, 571 U.S. 263 (2014), falls into the same category. Respondent's position would have also required this Court to turn a blind eye to a clear injustice arising from the Alabama Courts' failure to correctly apply the *Strickland* test during Mr. Hinton's state habeas appeals. Anthony Ray Hinton was exonerated in 2015.

This Court has also not been reluctant to issue *per curiam* reversals in habeas corpus cases. These decisions are common in state-on-top petitions that allege that a federal court of appeal has misapplied the standard of review provisions of the

AEDPA in granting a prisoner habeas relief. *See e.g. Shinn v. Kayer*, 141 S. Ct. 517 (2020). For the reasons noted in the underlying petition, this case also involves an egregious error by the court of appeals in its application of *Strickland* to the facts of this case. It is clear that the district court correctly applied the law and reached a just result and that the Eighth Circuit's contrary position is an aberration. This Court must intervene to prevent a clear injustice.

IV.

CERTIORARI SHOULD BE GRANTED TO REVIEW QUESTION FOUR IN THE UNDERLYING PETITION BECAUSE THE COURT OF APPEALS' DECISION IGNORED THE PLAIN LANGUAGE OF THE AEDPA.

Just last week, this Court held that the statutory language of AEDPA is controlling. Indeed, this Court looked askance at arguments from a habeas petitioner who urged this Court to circumvent the plain language of a habeas corpus statute:

> Here, however, §2254(e)(2) is a statute that we have no authority to amend. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court cannot decline to give it effect." *McQuiggin*, 569 U. S., at 402 (Scalia, J., dissenting); see also *Ex parte Bollman*, 4 Cranch 75, 94 (1807) (Marshall, C. J., for the Court).

Shinn v. Ramirez, No. 20-1009, --- S. Ct. ----, 2022 WL 1611786 at * 10 (May 23, 2022). This Court in *Shinn* stated: "[w]e have no power to redefine" (*id.)* and "we lack authority to amend §2254(e)(2)'s clear text." *Id.* at * 11.

Under *Shinn*, Respondent's concession that the Eighth Circuit applied § 2254(d) to the Missouri Supreme Court's analysis of a distinct claim is dispositive. If this Court had no "power" or "authority" to redefine the AEDPA in *Shinn,* the Eighth

Circuit should be held to the same standard, meaning here committed the same transgression.

The Eighth Circuit found that *Strickland* prejudice could not be established because of the state habeas court's adjudications of a different exhausted claim involving trial counsel's failure to call Dr. Peterson as a penalty phase witness was not unreasonable or contrary to clearly established federal law under the standard of review provisions of § 2254(d)(1). *McLaughlin*, 9 F.4th at 832-833. However, because there was never an adjudication on the merits of the Dr. Caruso claim in state court, the provisions of § 2254(d) do not apply, and de novo review is appropriate. *See* § 28 U.S.C. 2254(d) (noting that AEDPA's limitations upon relief only apply to claims that were "adjudicated on the merits in State court proceedings."). The Eighth Circuit erred in redefining and exercising its authority to amend § 2254(d).

V.

THIS CASE SHOULD BE REMANDED TO THE EIGHTH CIRCUIT COURT OF APPEALS IN LIGHT OF *SHINN v. RAMIREZ*, No. 20-1009, --- S. Ct. ----, 2022 WL 1611786 (May 23, 2022)

Recently, this Court announced its decision in *Shinn*. Because the Eighth Circuit Court of Appeals, as well as the parties, addressed the issue of counsel's ineffectiveness prior to this decision, several issues regarding the consideration of evidence inside and outside the state court record now are at issue in the wake of *Shinn*. This case should be remanded so that the Eighth Circuit Court of Appeals, as well as the parties, may assess the issue of counsel ineffectiveness in light of this

Court's pronouncement in *Shinn*, especially in light of the Eighth Circuit's improper evasion of the express terms of § 28 U.S.C. 2254(d) as discussed in Question IV.

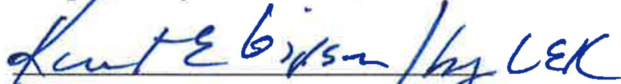
Shinn addressed the issue of factual development of *Martinez* claims and more specifically, the availability or interplay of evidence related to the *Martinez* cause exception and the underlying merits. *See Shinn*, 2022 WL 1611786 at *4 ("The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with § 2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record."). A remand is appropriate so that the Eighth Circuit Court of Appeals, and the parties, can properly brief *Shinn's* application to McLaughlin's *Martinez* claim.

This Court should remand as it did in *Stirling v. Stokes*, No. 21-938, 2022 U.S. LEXIS 2612 (May 31, 2022).

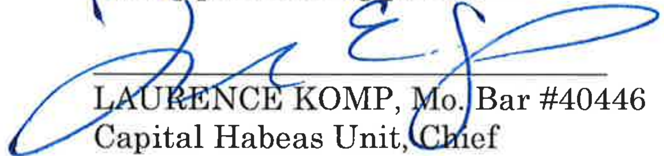
CONCLUSION

The petition for a writ of certiorari should be granted, or in the alternative, the case should be remanded to the Eighth Circuit Court of Appeals for reconsideration in light of *Shinn v. Ramirez.*

Respectfully submitted,



KENT E. GIPSON*, Mo. Bar #34524
121 E. Gregory Boulevard
Kansas City, Missouri 64114
816-363-4400 / fax 816-363-4300
kent.gipson@kentgipsonlaw.com



LAURENCE KOMP, Mo. Bar #40446
Capital Habeas Unit, Chief
PAULA HARMS, Az. Bar #022489
Assistant Public Defender
Federal Public Defender,
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, MO 64106
Laurence_Komp@fd.org
Paula_Harms@fd.org

COUNSEL FOR PETITIONER

**Counsel of Record*