No. 13-897

In the Supreme Court of the United States

RICHARD BROWN, SUPERINTENDENT,
WABASH VALLEY CORRECTIONAL FACILITY,
Petitioner,

v.

TROY R. SHAW,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

MICHAEL K. AUSBROOK
P.O. Box 1554
Bloomington, IN 47402
(812) 322-3218
mausbrook@gmail.com

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

QUESTION PRESENTED

Whether the court of appeals correctly concluded that respondent was denied effective assistance of counsel under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), when appellate counsel's sole argument on direct appeal was a sufficiency-of-the-evidence claim that the court of appeals found "so weak that pursuing it was the equivalent of filing no brief at all" (Pet. App. 15A) and appellate counsel failed to raise an issue under Indiana law that a decision of the Indiana Supreme Court had stated was meritorious and the Indiana Supreme Court decided in favor of the criminal defendant in a subsequent case—and that would have reduced the charge against respondent from murder to aggravated battery.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The court of appeals correctly determined that this is a "rare" case in which appellate counsel's deficient performance constituted ineffective assistance under *Strickland* v. *Washington*, 466 U.S. 668 (1984).

The sole argument presented on appeal was a challenge to the sufficiency of the evidence, accompanied by the concession that the evidence could support either conviction or acquittal. As the court of appeals recognized, that argument was "dead on arrival": the concession by respondent's counsel "that the evidence could support either conviction or acquittal" made the sufficiency-of-the-evidence argument "so weak that pursuing it was the equivalent of filing no brief at all." Pet. App. 15a.

Appellate counsel did not raise a challenge to the amendment of the charge against respondent—which replaced aggravated battery with a murder charge (increasing the potential sentence three-fold)—even though the amendment was made seventeen months after the Indiana law deadline for substantive amendments, an Indiana Supreme Court decision specifically stated that a substantive amendment made after the deadline was "impermissible," and the issue had been raised by respondent's trial counsel.

The Indiana Court of Appeals concluded that the failure to raise this issue did not constitute inadequate performance under *Strickland*, but the Seventh Circuit found that application of *Strickland* unreasonable, stating that "[f]airminded jurists * * * can conclude only that [appellate counsel's] perfor-

mance fell short of what *Strickland v. Washington* and *Smith v. Robbins* require, and that the Indiana appellate court's conclusion to the contrary was an unreasonable application of Supreme Court precedent." Pet. App. 20a-21a.

Petitioner's principal argument is that the court of appeals was precluded from applying *Strickland* because the underlying legal issue (the permissibility of the amendment) is grounded in state law. The court of appeals properly rejected this argument, which has not been endorsed by any court of appeals: "The state's argument that * * * this kind of comparative assessment is out of bounds, if accepted, would foreclose federal review of almost any ineffectiveness claim that rests on an attorney's mishandling of a state-law issue, no matter how egregiously deficient the attorney's performance." Pet. App. 13a. There is no reason for review by this Court.

A. Factual Background

Shortly after graduating from high school in rural Ohio, respondent Troy Shaw, then eighteen years old, took a job as a traveling magazine salesman. ROA 150. His mother warned him not to join the traveling sales team, but the company's recruiter promised Shaw that he would see fifty states in fifty weeks and Shaw liked the idea of traveling with other young people. *Ibid.*

The team arrived in Fort Wayne, Indiana, on June 5, 2000. Eric Werczynski, the leader of the sales team, and Shaw's boss, had rented a block of rooms at the Value Lodge motel. ROA 132. Werczynski discovered an individual, Brett King, sleeping in one of the rooms that Werczynski had rented. Werczynski

confronted him, and a fight broke out between the trespasser and Werczynski. *Ibid.*

The fight spilled out of the hotel room into the hallway where, as respondent Shaw later testified at trial, King swung a beer bottle at Shaw. ROA 174. Fellow employees told Shaw that the fight was "none of his business" and directed him go to his room; Shaw testified that he went to his room and fell asleep. *Ibid.*

Werczynski ordered two other salesmen, Steven Johnson and Ben Brooks, to attack King. ROA 132. They chased King into a nearby drainage ditch, where they proceeded to kick him. ROA 124. King died from the beating that he received. ROA 133. His body was found the next morning. *Ibid.*

When the investigation began, Johnson and Brooks claimed that respondent Shaw was with them in the ditch. ROA 132-133. Four days after King's death, respondent Shaw, Brooks, and Johnson were each charged with aggravated battery, punishable by up to twenty years in prison under Ind. Code Ann. § 35-50-2-5.

Facing twenty years in prison, Brooks and Johnson eventually both agreed to testify that they saw Shaw kick the deceased "several times" and deliver what they perceived to be the fatal blows. ROA 124. In exchange, the State reduced the charges against the pair to involuntary manslaughter, with the majority of prison time suspended. ROA 124. Both men received two-and-one-half year sentences.

B. The State's Motion To Amend The Information

Shortly after Brooks and Johnson agreed to testify against respondent Shaw, the State moved to amend the charges against Shaw, replacing the charge of aggravated assault, which carried a twenty-year maximum sentence, Ind. Code Ann. 35-50-2-5, with a charge of murder, which carried a sixty-five year maximum, Ind. Code Ann. 35-50-2-3. See ROA 152-153.

Shaw's counsel objected to the amendment, arguing that Section 35-34-1-5 of the Indiana Code[1] re-

---

[1] The 1982 version of Section 35-34-1-5, in effect at the time of Shaw's indictment and trial, reads in relevant part:

> (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 of 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.

quired the State to file all requests for substantive amendments of a criminal information no later than thirty days before the "omnibus date"—the date for various procedural deadlines under Indiana state law.[2] Because the trial court had previously designated July 31, 2000, as the omnibus date, and the amendment was not sought until December 2001—seventeen months later—Shaw's counsel argued that the amendment was untimely. ROA 172,176-177.

Shaw's counsel explained that substantive amendments could not be advanced after the thirty-day pre-omnibus deadline, as the Indiana Supreme Court had recently instructed lower courts. *Haak* v. *State*, 695 N.E.2d 944 (Ind. 1998). As *Haak* had phrased it, substantive amendments "may not occur after specified times in advance of the omnibus date." *Id.* at 951. The state's high court had emphasized that "if the amendment was of substance, or prejudicial to the defendant even if of form, it was impermissible under the statute." *Ibid.*

> (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 the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense.

Ind. Code Ann. § 35-34-1-5 (West 1982).

[2] The purpose of the omnibus date in Indiana criminal procedure "is to establish a point in time from which various deadlines [for trial procedures under Indiana law] are established." Ind. Code Ann. § 35-36-8-1.

The trial court nonetheless permitted the amendment. ROA 121. The court delayed the trial, allowing respondent just an additional two months to prepare a defense against the murder charge. ROA 121.

Brooks and Johnson testified against respondent at trial. ROA 124-125. Brooks' one-time cellmate, Timothy King, testified that Brooks had stated during a phone call that Werczynski (the leader of the magazine-sales team) had "stomped" Brett King to death. ROA 125-126.

Shaw was found guilty on the murder charge and sentenced to 60 years in prison. ROA 122.

C. Direct Appeal

Shaw's new appellate counsel raised only a single argument on appeal—a challenge to the sufficiency of the evidence that led to respondent's conviction. Pet. App. 2a. But his brief "conce[ded] that the evidence could support either conviction or acquittal," even though Indiana's courts view the evidence in the light most favorable to the prosecution in evaluating sufficiency claims. Pet. App. 15a. As the Seventh Circuit observed, respondent Shaw's appellate counsel thus "made a single argument that any reasonable lawyer would have recognized as dead on arrival." *Ibid*. Shaw's conviction was affirmed in May 2003.

Shaw's counsel did not raise the argument that Indiana's procedural rules barred the State's untimely amendment of the information to substitute the murder charge. He later stated that "he could not recall whether he had considered raising the issue, or even whether he had realized that the Charging In-

formation had been amended" to charge Shaw with murder. Pet. App. 10a.

D. State Post-Conviction Proceedings

Shaw filed a *pro se* petition for post-conviction relief in state court alleging ineffective assistance of counsel. ROA 172.

While Shaw's petition was pending, the Indiana Supreme Court again addressed the time limits on amendments to a criminal information, reaffirming its statements in the 1998 *Haak* decision. *Fajardo* v. *State*, 859 N.E.2d 1201, 1208 (Ind. 2007), held that a substantive amendment "was permissible only up to thirty days before the omnibus date." Because the amendment in *Fajardo* "was not sought by the State * * * until seven days *after* the omnibus date," the defendant's "objection should have been sustained and the amendment denied." *Ibid.* Because of the improper change to the felony information, the proper remedy was vacating the defendant's conviction. *Ibid.*

Notwithstanding the decisions in *Haak* and *Fajardo*, the state trial court denied Shaw's petition for post-conviction relief. ROA 185.

The Indiana Court of Appeals affirmed, holding that the performance of Shaw's appellate lawyer was not deficient, because it was "reasonable" under *Strickland* for Shaw's appellate counsel to conclude that the *Haak* timeliness argument might be unsuccessful. Pet. App. 49a-50a. The court stated that the statements in *Haak* were dictum and observed that lower courts had rendered contrary decisions prior to the ruling in *Fajardo*. *Ibid.*

The Indiana Supreme Court denied review. Pet. App. 39a.

E. Federal Habeas Proceedings

Shaw then sought relief under 28 U.S.C. § 2254, in the United States District Court for the Southern District of Indiana. The district court denied the petition. Pet. App. 35a.

The court of appeals unanimously reversed, holding that the Indiana Court of Appeals had unreasonably applied this Court's decision in *Strickland*. Pet. App. 20a-21a.

At the outset, the court of appeals rejected petitioner's argument that the state appellate court's rejection of the ineffective assistance claim precluded a federal court from assessing the reasonableness of appellate counsel's performance. It explained that respondent "is not asking (and has no reason to ask) that we second-guess an Indiana court on the meaning of Section 35-34-1-5," but was arguing only that "a competent lawyer in Indiana should have recognized that there was a state statute under which relief for his client was possible and would have pursued that theory on appeal." Pet. App. 13a.

The court stated that it could assess the federal-law question whether "the validity of the state's effort to amend the indictment would have been materially stronger than the frivolous sufficiency-of-the-evidence point that [respondent's appellate lawyer] raised" without adjudicating the ultimate merits of the omitted state-law issue. Pet. App. 13a. "The state's argument that even this kind of comparative assessment is out of bounds, if accepted, would foreclose federal review of almost any ineffectiveness claim that rests on an attorney's mishandling of a

state-law issue, no matter how egregiously deficient the attorney's performance." *Ibid*.

The court of appeals found the performance of Shaw's appellate counsel deficient because "any reasonable lawyer would have recognized" that the argument challenging the sufficiency of the evidence was "dead on arrival." Pet. App. 15a. The lawyer's "concession that the evidence could support either conviction or acquittal" made the sufficiency-of-the-evidence argument "so weak that pursuing it was the equivalent of filing no brief at all." *Ibid*.

As for the *Haak*/*Fajardo* timeliness of amendment issue, the Seventh Circuit concluded that it was "beyond question" that "a claim challenging the validity of the amended information would have been 'obvious' at the time of Shaw's direct appeal * * * ." Pet. App. 16a. The court also concluded that this argument "had a better than fighting chance at the time of [Shaw's] 2002 appeal considering the text of Section 35-34-1-5 and the 1998 statement in *Haak* that 'if the amendment was of substance . . . it was impermissible under the statute' from 30 days before the omnibus date." Pet. App. 17a (quoting *Haak*, 695 N.E.2d at 951). The court observed that, in addition to the decision in *Haak*, the Indiana Supreme Court's rulings in *Wright* v. *Indiana*, 593 N.E.2d 1192, 1197 (Ind. 1992), and *Sharp* v. *Indiana*, 534 N.E.2d 708, 714 (Ind. 1989), "both include declarations that a charging document cannot be amended to change the 'identity of the offense' after the deadline in Section 35-34-1-5." Pet. App. 17a.

Although the Seventh Circuit, citing comity concerns, refrained from determining whether Shaw would have prevailed under state law, the court emphasized that "it is necessary only to conclude that

the amendment issue was clearly stronger than the sufficiency argument, and we have no trouble coming to that conclusion based on both the language of the statute and the Indiana Supreme Court's *Haak* decision." Pet. App. 18a. See also Pet. App. 14a (citing both *Smith* v. *Robbins*, 528 U.S. 259, 288 (2000), and Seventh Circuit precedent).

On the basis of these determinations, evaluated with the "extra layer of deference" to state courts that the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), requires, the Seventh Circuit held that this was a "rare case[ ]" in which the appellate counsel's performance was so deficient that it was constitutionally ineffective. Pet. App. 15a. Counsel "was faced with two potential arguments, one undeniably frivolous and the other solidly based on a state statute and reinforced by the Indiana Supreme Court's pronouncement in *Haak*." Pet. App. 20a. "[I]n the face of this choice," counsel "opted for the hopeless sufficiency challenge." *Ibid.*

The panel then turned to *Strickland*'s second consideration—whether Shaw was prejudiced. The court once again took pains not to "resolv[e] any issue of state law," noting that nothing in the opinion was "telling the Indiana judiciary how it should approach this issue." Pet. App. 21a. The panel observed, however, that the disputed amendment to Shaw's felony information "increase[d] the possible sentence more than threefold," Pet. App. 22a, and that "neither the Indiana appellate court nor the trial court suggested that the amendment was not substantive." Pet. App. 23a. Ultimately, the court held that "fairminded jurists must agree that Shaw has demonstrated prejudice: he had a reasonable chance

of success on appeal but for [his appellate lawyer's] deficient performance." Pet. App. 25a.

In light of its conclusions under *Strickland*, the Seventh Circuit vacated the federal district court's judgment and ordered the writ, but only if Indiana's state court declined to permit Shaw a new direct appeal to pursue the *Haak*/*Fajardo* claim, which had not been considered on the merits by any Indiana court.

ARGUMENT

The court of appeals' unanimous fact-bound decision does not warrant review by this Court. Contrary to petitioner's repeated suggestions, no state court has decided whether the amendment of the information here violated Indiana law—the Indiana Court of Appeals applied *Strickland*'s federal-law standard in ruling that appellate counsel's performance was not inadequate. That determination did not bar the Seventh Circuit from reaching a different conclusion with respect to that federal-law question, after deferring appropriately to the state court's ruling. And the court of appeals' decision was plainly correct on the facts of this case, where appellate counsel advanced a sufficiency-of-the-evidence argument that was "dead on arrival" rather than the challenge to the information amendment grounded firmly in decisions of the Indiana Supreme Court. The certiorari petition should be denied.[3]

---

[3] We note that the certiorari petition was filed by the Superintendent of Indiana's Wabash Valley Correctional Facility, but respondent is currently incarcerated at the Indiana State Prison, which is overseen by a different individual.

A. The State Court Of Appeals Did Not Hold That The Issue Respondent's Counsel Failed To Raise On Direct Appeal Lacked Merit.

Petitioner's entire argument—from his Question Presented onward—rests on the wholly erroneous assertion that the Indiana Court of Appeals held nonmeritorious the issue Shaw's counsel did not raise on direct appeal: whether Indiana's time limit for amendments of a criminal information barred the addition of the murder charge against Shaw. See, *e.g.*, Pet. i (referring to the "state appellate court's *holding* that an omitted state law issue ultimately lacked merit") (emphasis added).

But the Indiana court did not make any such determination. Rather, the court applied *Strickland*'s reasonableness standard to hold that "in light of the case law at the time, it was reasonable for counsel to conclude that he would not succeed on that argument." Pet. App. 50a. That holding addresses a question of federal law: the reasonableness under *Strickland* of the failure to advance the argument challenging the amendment of the information. The state court reviewed appellate counsel's performance in light of the legal landscape at the time. *Ibid.* It neither reached the underlying merits of Shaw's *Haak/Fajardo* argument nor held that the amendment to the information here was valid as a matter of state law.

Petitioner's assertion that "the Seventh Circuit crossed into the exclusive turf of state appellate courts" (Pet. 11) is thus wrong on two counts. First, the Indiana appellate court did not address the merits of Shaw's argument, but rather addressed the federal-law question whether appellate counsel's de-

cision to raise the sufficiency-of-the-evidence issue rather than the timeliness of the amendment of the information constituted inadequate performance. Second, the Seventh Circuit limited its analysis to that very same federal-law issue.

B. The Court Of Appeals' Fact-Bound Determination That Appellate Counsel's Performance Was Deficient Does Not Warrant Review.

The only question even potentially present in this case is whether a federal habeas court assessing the reasonableness of defense counsel's performance under *Strickland* is bound by a state court's determination of the reasonableness issue whenever the claim of deficient performance turns on a state-law issue—or whether the state court's determination is subject to the same deferential standard that a federal habeas court applies to other state-court determinations of federal law.

There is no reason for this Court to address that issue in this case. Petitioner has not identified a single federal appellate decision holding that federal habeas courts may never question a state court's application of *Strickland* merely because the assessment of counsel's performance turns on questions of state law. And the Seventh Circuit properly determined that under the facts of this case, appellate counsel's performance was deficient under *Strickland*.

1. *There Is No Conflict Among The Courts Of Appeals.*

The question whether counsel's performance was ineffective under the Sixth Amendment is, of course, a question of federal law, governed by this Court's

decision in *Strickland*—regardless of whether the legal question underlying the ineffectiveness claim involves state or federal law.[4] Although a federal habeas court must accord the deference required by AEDPA to all state-court determinations, including state-court applications of *Strickland*'s reasonableness standard, the federal court is not precluded from disagreeing with the state-court ruling.

As the court of appeals explained in rejecting petitioner's contrary argument, petitioner's contention would "foreclose federal review of almost any ineffectiveness claim that rests on an attorney's mishandling of a state-law issue, no matter how egregiously deficient the attorney's performance"—but "[i]t is well established that a defense attorney's failure to raise a state-law issue can constitute ineffectiveness." Pet. App. 13a.

---

[4] See *Goff* v. *Bagley*, 601 F.3d 445, 464 (6th Cir. 2010) ("If [*Strickland* is satisfied], then Goff's constitutional right to the effective assistance of counsel on appeal has been violated, regardless of the fact that counsel's underlying failure is a matter of state law."); *Mason* v. *Hanks*, 97 F.3d 887, 894 (7th Cir. 1996) ("Whether Terrell's testimony amounted to inadmissible hearsay presents a question of state law, of course; but this poses no impediment to Mason's claim of ineffectiveness. * * * [T]he constitutional right at stake here is the right to the effective assistance of counsel on appeal, and in that context we may consider the state, as well as the federal issues that the petitioner's counsel did not pursue."); *Jones* v. *Stotts*, 59 F.3d 143, 145 n.2 (10th Cir. 1995) ("[T]he errors raised to support a claim of ineffective assistance may assert either federal law or state law violations."); *Mayo* v. *Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("The claim whose omission forms the basis of an ineffective assistance claim may be either a federal-law or a state-law claim, so long as the 'failure to raise the state * * * claim fell outside the wide range of professionally competent assistance.'").

To be sure, federal courts are bound by state court constructions of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). And the federal court must "defer to state-court precedent concerning the questions of state law underlying the defendant's ineffectiveness claim." Pet. App. 12a. But review by a federal court is not foreclosed when, as here (see page 12, *supra*), the state court based its decision on federal law—in particular, whether appellate counsel's failure to raise a legal issue was unreasonable under the constitutional standard for effectiveness set forth in *Strickland*.

The distinction—between a federal court's reassessment of a state court's determination that a state-law claim would fail on the merits (which is not permissible) and a state court's determination whether counsel's failure to raise an issue was unreasonable under the *Strickland* standard (as here)—is illustrated by the decisions that petitioner claims conflict with the holding below. See Pet. 13. The federal courts in both cases refused to find deficient performance based on state-law grounds that the state courts had rejected on the merits—and therefore differ completely from the issue presented here.

In *Paredes* v. *Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009), the defendant argued in a federal habeas petition that his prior appellate counsel was ineffective for failing to advance on appeal the issue of whether the prosecutor's shuffle of the jury wheel was unlawful. But the state habeas court had squarely held that the jury wheel shuffle was timely as a matter of state law. *Ibid.*

Similarly, in *Callahan* v. *Campbell*, 427 F.3d 897, 931-932 (11th Cir. 2005), the defendant's lawyer

refrained from objecting when the defendant's prior statements were read into the record. In a subsequent federal habeas proceeding, the defendant alleged that his lawyer was ineffective for failing to object when the damaging statements were read into the record. The federal court of appeals held that Alabama courts had expressly rejected the defendant's argument in a prior stage of the defendant's own case. *Id.* at 932 (noting that the state court "already answered the question of what would have happened had [counsel] objected to the introduction of [defendant's] statements * * *—the objection would have been overruled"). Granting the defendant the relief he sought would have required the federal court to "to conclude the state court misinterpreted state law." *Ibid.* And the Eleventh Circuit, of course, declined this invitation.

Here, by contrast, the Indiana Court of Appeals did *not* hold meritless Shaw's claim that the information amendment was untimely—and it could hardly do so in light of the Indiana Supreme Court's statements in *Haak* and other cases[5], and its subsequent holding in *Fajardo*. The only question addressed by the Indiana Court of Appeals was whether Shaw's appellate counsel acted reasonably in failing to advance the argument. That question is one of federal law, informed by an assessment of the state-law precedents extant at the time. The state court's

---

[5] The court of appeals observed that, in addition to the decision in *Haak*, the Indiana Supreme Court's rulings in *Wright* v. *Indiana*, 593 N.E.2d 1192, 1197 (Ind. 1992), and *Sharp* v. *Indiana*, 534 N.E.2d 708, 714 (Ind. 1989), "both include declarations that a charging document cannot be amended to change the 'identity of the offense' after the deadline in Section 35-34-1-5." Pet. App. 17a.

determination of that federal law question does not preclude a federal court from reaching a different conclusion.

Finally, contrary to petitioner's suggestion, there is no "line of cases that pay lip service to this Court's pronouncements while continuing to impermissibly reinterpret state law." Pet. 23. Two of the cases that petitioner cites for this proposition carefully considered the underlying state court decision and found that the state court had unreasonably applied *federal law*. See *Heard* v. *Addison*, 728 F. 3d 1170, 1175-1179 (10th Cir. 2013) (finding an unreasonable application of *Strickland* where the state court impermissibly relied on hindsight to justify counsel's decision); *Walker* v. *Hoffner*, 534 Fed. App'x. 406, 410-413 (6th Cir. 2013), cert. denied, 134 S. Ct. 1025 (2014) (concluding that the state court applied the incorrect prejudice standard, which asked the defendant to prove that counsel deprived him of a reasonably likely chance of acquittal).[6] And in the third, this Court corrected the error made by the lower court in deciding the reasonableness of the Washington courts' application of federal law. *Waddington* v. *Sarausad*, 555 U.S. 179, 191-192 (2009).

There simply is no conflict among the courts of appeals presented by this case.

---

[6] Petitioner also cites *Walker* v. *McQuiggan*, 656 F.3d 311 (6th Cir. 2011). See Pet. 23. But the judgment in that case was vacated by this Court and remanded for reconsideration in light of *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012). See *Howes* v. *Walker*, 132 S. Ct. 2741 (2012) (Mem). On remand a new defendant was added and the Sixth Circuit corrected its prior error—which was entirely unrelated to the issues in the present case—and granted the writ. *Hoffner*, 534 Fed. App'x. at 415.

2. The Court Of Appeals Properly Applied Strickland *To The Particular Facts Of This Case.*

The Seventh Circuit correctly rejected petitioner's argument that it was "entirely prohibited from evaluating the Indiana appellate court's assessment of Shaw's claim." Pet. App. 12a. As the court of appeals explained:

> Shaw is not asking (and has no reason to ask) that we second-guess an Indiana court on the meaning of Section 35-34-1-5. Shaw is making a simpler point: a competent lawyer in Indiana should have recognized that there was a state statute under which relief for his client was possible and would have pursued that theory on appeal.

Pet. App. 13a.

The court went on to analyze that federal-law question—whether appellate counsel's decision to pursue a sufficiency challenge and omit the amendment issue was reasonable under *Strickland*—by examining the comparative strength of the two claims, at the time of Shaw's direct appeal, from the perspective of a competent lawyer. Its determination that appellate counsel's performance violated the *Strickland* standard was clearly correct.

First, the Seventh Circuit properly applied a comparative standard in assessing the performance of appellate counsel. A lawyer need not, indeed should not, present an appellate court with every nonfrivolous claim. *Jones* v. *Barnes,* 463 U.S. 745, 751-753 (1983). He or she should "select[] the most promising issues for review." *Id.* at 752.

When the arguments advanced by the appellate lawyer are significantly weaker than the arguments omitted, counsel's performance is constitutionally deficient. *See Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1985) ("when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Other courts of appeals also employ this comparative approach in determining whether appellate counsel fell below the objective standard of reasonableness. See, *e.g.*, *Cargle* v. *Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) (holding that "'we look to the merits of the omitted issue,' * * * generally in relation to the other arguments counsel did pursue" (quoting *Neill* v. *Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001); *Mapes* v. *Coyle*, 171 F.3d 408, 427 (6th Cir. 1999) (using a multi-factor test which included determining whether "the omitted issues [were] clearly stronger than those presented"); *Mayo* v. *Henderson*, 13 F.3d 528, 533 (2d. Cir 1994) (holding that "a petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker").

Indeed, this Court in *Smith* v. *Robbins*, cited the comparative approach with apparent approval. 528 U.S. 259, 288 (2000) (citing the Seventh Circuit's "clearly stronger" test favorably for the proposition that habeas petitioners may succeed on a *Strickland* claim based on counsel's failure to raise a particular claim).

Second, the Seventh Circuit correctly concluded that, on the facts of this case, appellate counsel's performance was constitutionally deficient.

As the court of appeals observed, appellate counsel "was faced with two potential arguments, one undeniably frivolous and the other solidly based on a state statute and reinforced by the Indiana Supreme Court's pronouncement in *Haak*." Pet. App. 20a.

The sufficiency-of-the-evidence argument raised by Shaw's lawyer conceded that there was "conflicting testimony" as to whether Respondent was involved in the murder. Pet. App. 7a. But Indiana law had long held that "to present error on the ground of insufficiency of evidence, one must show that there is a complete failure of evidence on a material issue." *Partlow* v. *State*, 166 N.E. 651, 653 (Ind. 1929). Thus, the brief that counsel submitted was, as the panel below concluded, "the equivalent of filing no brief at all." Pet. App. 15a.

It is not surprising that the state appellate court's opinion on Shaw's direct appeal easily rejected this argument. It observed that "Shaw [through his counsel] contends the testimony of the witnesses is conflicting as to whether he was present when King was beaten to death," and went on to recognize the fatal flaw in that argument: "However, we cannot reweigh the evidence or judge the credibility of the witnesses." Pet. App. 77a (citing *Love* v. *State*, 761 N.E.2d 806, 810 (Ind. 2002)).

The challenge to the amendment of the information, by contrast, was grounded directly in the text of Section 35-34-1-5 and the Indiana Supreme Court's statement in *Haak* that "if the amendment [to a felony information] was one of substance * * * it was impermissible under the statute" if made after the deadline. 695 N.E.2d at 951. See also note 4, *supra* (citing other Indiana Supreme Court decisions embracing this proposition).

And the court of appeals was entitled to consider the fact the argument was ultimately successful in *Fajardo*. If Shaw's appellate counsel had raised the argument, that favorable decision could well have occurred in his case rather than in *Fajardo*.

Certainly there is every reason to believe that upgrading a battery charge to a murder charge was a "substantive" change, not a matter of form. Significantly, petitioner never suggested to the Indiana Court of Appeals that the amendment here was not substantive—and "neither the Indiana appellate court nor the trial court suggested that the amendment was not substantive." Pet. App. 23a.

Nor could the State have advanced such an argument. The pre-*Fajardo* state-law standards for categorizing a change as "substantive" also mandate the conclusion that the amendment here was substantive, and therefore impermissible. See, *e.g.*, *Sides* v. *State*, 693 N.E.2d 1310, 1313 (Ind. 1998) (amendment not substantive because no new defenses would apply); *Wright* v. *State*, 593 N.E.2d 1192, 1197 (permitting the amendment because it did not "change the theory of the case or the identity of the offense charged," nor did it prejudice "the substantial rights of the defendant"); *Cornett* v. *State* 536 N.E.2d 501, 505 (Ind. 1989) (assessing whether an amendment would "change[] the theory of prosecution or the character of the offense"); *Souerdike* v. *State*, 102 N.E.2d 367, 368 (Ind. 1951) (whether the defendant could have been convicted of the offense without the amendment).

And the decisions finding amendments permissible involved changes to an information dramatically less significant than upgrading the offense from bat-

tery to murder. *Brown* v. *State*, 728 N.E.2d 876, 880 (Ind. 2000) (correcting date of the offense is permissible, because "the amendment does not affect any particular defense"); *Cornett* v. *State*, 536 N.E.2d 501 (Ind. 1989) (correcting county name); *Chambers* v. *State*, 540 N.E.2d 600 (Ind. 1989) (adding a factual statement of the law); *Brooks* v. *State*, 497 N.E.2d 210 (Ind. 1986) (adding "deadly" before "weapon"); *Graves* v. *State*, 496 N.E.2d 383 (Ind. 1986) (changing "bodily injury" to "serious bodily injury").

The Seventh Circuit could not find "any published case in which a charge had been elevated to murder from something lesser after the statutory deadline passed." Pet. App. 19a.

Indiana law prohibited untimely substantive amendments. Appellate counsel could have advanced a very strong argument that the untimely substitution of a murder charge for an aggravated battery charge in Shaw's information constituted an impermissible substantive amendment under Indiana law.

Any cursory search of Indiana law on this subject would have illuminated this point, revealing the best and most obvious argument to make on appeal. Appellate counsel missed this point; indeed, he could not recall whether he even was aware of the argument. See page 6, *supra*. Appellate counsel's incompetence is compounded by the fact that trial counsel preserved this argument for appeal—drawing attention to it even if appellate counsel had exercised no diligence whatsoever.

In sum, counsel failed to advance an issue for appeal that was both "obvious" and "clearly stronger" than the claim that he actually presented. *Smith*,

528 U.S. at 288. And that choice deprived Shaw of effective assistance of counsel.

C. The Court Of Appeals' Prejudice Determination Is Correct.

Petitioner's arguments regarding the court of appeals' prejudice determination are based entirely on his challenge to the deficient performance determination: he contends that there was no prejudice because the state courts found the omitted issue nonmeritorious. As we have explained, no such decision has been rendered. See pages 11-12, *supra*.

The prejudice element of the *Strickland* analysis asks whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. If Shaw's appellate counsel had raised the *Haak*/*Fajardo* issue, there is at least a reasonable probability—and, given the result in *Fajardo*, a strong likelihood—that the State's amendment of the information would have been found improper and, as in *Fajardo*, the conviction would have been vacated. By any test, that qualifies as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Indeed, the Seventh Circuit twice reached that very conclusion. Pet. App. 11a (stating the test under *Strickland* as whether "there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'"); Pet. App. 21a ("*Strickland* requires us to ask whether there is 'a reasonable probability that, but

for [his lawyer's] unprofessional errors, the result of [Shaw's direct appeal] would have been different'").[7]

The panel applied *Strickland* faithfully and concluded that Shaw had suffered prejudice.

The court of appeals' adherence to *Strickland* and its appropriate deference to Indiana's courts is confirmed by the remedy that the court of appeals prescribed: an opportunity for Shaw to obtain a decision on the merits by the Indiana state courts regarding the argument that his appellate counsel failed to raise. The merits of the issue thus remain in the hands of the state courts—all that the Seventh Circuit has held is that Shaw is entitled, at a minimum, to the state-court decision he would have had in the absence of his counsel's deficient performance.

CONCLUSION

The petition for a writ of certiorari should be denied.

---

[7] The Seventh Circuit also stated that "[p]rejudice exists * * * if counsel bypassed a nonfrivolous argument that, if successful, would have resulted in the vacation of Shaw's conviction." Pet. App. 21a. But the court's use of "nonfrivolous" on this one occasion has no significance given its multiple statements regarding the strength of the omitted argument discussed in the text—as well as the obvious fact that an argument subsequently *found to be correct* by the Indiana Supreme Court must have had a reasonable probability of success at the time of Shaw's appeal.

Respectfully submitted.

MICHAEL K. AUSBROOK
P.O. Box 1554
Bloomington, IN 47402
(812) 322-3218
mausbrook@gmail.com

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

APRIL 2014