No. ___

IN THE
Supreme Court of the United States

RICHARD BROWN, Superintendent,
Wabash Valley Correctional Facility,

Petitioner,

v.

TROY R. SHAW,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a claim of ineffective assistance of appellate counsel, a state appellate court's holding that an omitted state law issue ultimately lacked merit precludes a federal habeas court from later finding either deficient performance or prejudice relating to that omission under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), and 28 U.S.C. § 2254(d).

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PETITION FOR WRIT OF CERTIORARI

Richard Brown, Superintendent of the Wabash Valley Correctional Facility, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that reversed the district court's denial of Shaw's petition for a writ of habeas corpus and ordered the issuance of a writ unless the State granted Shaw a new direct appeal within 120 days.

OPINIONS BELOW

The judgment of the United States District Court for the Southern District of Indiana granting a petition for writ of habeas corpus is unreported and is reprinted in the Appendix at 26A. The Seventh Circuit's opinion is reported at *Shaw v. Brown*, 721 F.3d 908 (7th Cir. 2013), and is reprinted in the Appendix at 1A. The opinion of the United States District Court for the Southern District of Indiana is unreported and is reprinted in the Appendix at 28A. The Indiana Supreme Court's denial of transfer on Shaw's petition for post-conviction relief is referenced at *Shaw v. State*, 915 N.E.2d 983 (Ind. 2009), and is reprinted in the Appendix at 39A. The Indiana Court of Appeals' opinion affirming the denial of post-conviction relief is reported at *Shaw v. State*, 898 N.E.2d 465 (2008), and is reprinted in the Appendix at 40A. The state trial court's order denying post-conviction relief is unreported and reprinted in the Appendix at 52A. The Indiana Court of Appeals' opinion on Shaw's direct appeal is

unreported and is reprinted in the Appendix at 73A. The state trial court's sentencing order is unreported and is reprinted in the Appendix at 78A. The Seventh Circuit's denial of rehearing *en banc* is unreported and is reprinted in the Appendix at 81A.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on July 24, 2013. Pet. App. 1A. A petition for rehearing was denied on August 28, 2013. Pet. App. 81A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Indiana Code § 35-34-1-5(b), (c) (1982)

> (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 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.

Indiana Code § 35-34-1-5(b), (c) (2007)

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

(1) up to:

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

(B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors; before the omnibus date; or

(2) before the commencement of trial;

if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy 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.

STATEMENT

Background

In 2000, Troy Shaw was hired to sell magazine subscriptions with a traveling sales team led by Eric Werczynski. Pet. App. 3A. On June 5, 2000, the sales team traveled to Fort Wayne, Indiana, where Werczynski rented several motel rooms for the group. *Id.* Werczynski encountered and confronted Brett King, an uninvited stranger, in one of these motel rooms. *Id.* King fled the motel, but Werczynski ordered his employees to "Get the motherfucker!" *Id.* Following his command, employees Steven Johnson and Chris Starling chased King and knocked him into a ditch. *Id.* Shaw, along with several other employees, joined Johnson and Starling in punching and kicking King. *Id.* at 42A. At one point during the attack, Shaw "football kicked" King in the face, causing King to go limp. *Id.* Shaw continued kicking and beating King after he went limp. *Id.* Shaw and the other perpetrators left King lying in the ditch, where he eventually died as a result of multiple blows to his head. *Id.*

The attackers fled before police arrived, but police later charged Johnson, Shaw, and Benjamin Brooks, another sales team member, with aggravated battery. Pet. App. 3A. Shaw denied being present during the attack, but Johnson and Brooks admitted participating and told authorities

that Shaw had been the most aggressive attacker. *Id.* Johnson and Brooks pled guilty to involuntary manslaughter and agreed to testify against Shaw in exchange for eight-year sentences, with five and one-half of those years suspended. *Id.* at 4A.

The trial court set the omnibus date—which must be between 45 and 75 days after the initial hearing, Ind. Code § 35-36-8-1(a)(2)—for July 31, 2000. Pet. App. 42A. The State moved to amend the information after the omnibus date to charge Shaw with murder rather than aggravated battery. Pet. App. 42A. Shaw's trial counsel objected because Indiana Code Section 35-34-1-5 (1982) limited prosecutors' ability to substantively amend pending charges within 30 days of the omnibus date. Pet. App. 4A. The court granted the State's motion to amend the charges and granted Shaw a two-month continuance to prepare a defense against the murder charge. Pet. App. 6A, 42A.

At trial, both Johnson and Brooks testified that Shaw viciously kicked King in the head numerous times. Pet. App. 6A. Shaw testified that he was asleep while the others were attacking King, but the jury found Johnson and Brooks to be more credible and found Shaw guilty of murder. *Id.* The trial court sentenced him to 60 years in prison. *Id.* at 75A.

Gregory Miller represented Shaw on direct appeal. Pet. App. 6A. Miller challenged the

sufficiency of the evidence placing Shaw at the murder scene but did not challenge the timeliness of the amendment to the charge. *Id.* at 6A-7A. Under Indiana law, an appellate court considers the evidence in the light most favorable to the verdict and will affirm the verdict unless no "reasonable trier of fact" could have found the defendant guilty beyond a reasonable doubt. *Jackson v. State*, 925 N.E.2d 369, 375 (Ind. 2010). The Indiana Court of Appeals affirmed Shaw's conviction. Pet. App. 7A.

Background of this Lawsuit

Approximately four years after Shaw's direct appeal, the Indiana Supreme Court revisited the issue of untimely amendments to criminal charges in *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). In *Fajardo*, the trial court allowed the prosecution to add an additional count of child molestation to the information after the omnibus date. *Id.* at 1203. The Indiana Supreme Court reversed, holding that, "[b]ecause the challenged amendment in this case sought to modify the original felony information in matters of substance, it was permissible only up to thirty days *before* the omnibus date," under the statute, irrespective of prejudice to the defendant. *Id.* at 1208. The Indiana legislature, however, quickly repudiated *Fajardo*'s holding by amending the statute to allow non-prejudicial, substantive amendments any time before trial. *See* Ind. Code § 35-34-1-5(b) (2007).

Also in 2007, Shaw filed a petition for post-conviction relief in the Allen Superior Court asserting ineffective assistance of appellate counsel.[1] Pet. App. 43A. Shaw argued that Miller rendered deficient and prejudicial performance by not challenging the timeliness of the amended information. *Id*. at 46A. Miller testified that he believed there was no case law to support the timeliness issue at the time of Shaw's direct appeal. *Id*. at 49A.

The trial court agreed and rejected Shaw's petition, citing "a consistent series of Indiana decisions" that "allowed even amendments of substance to be filed after the statutory deadline, so long as the defendant could still be given adequate time to prepare a defense. Pet. App. 66A (citing *Thacker v. State*, 556 N.E.2d 1315, 1318 (Ind. 1990); *Townsend v. State*, 753 N.E.2d 88, 92-95 (Ind. Ct. App. 2001); *Tripp v. State*, 729 N.E.2d 1061, 1064-65 (Ind. Ct. App. 2000); *Charles Davis v. State*, 714 N.E.2d 717, 720-22 (Ind. Ct. App. 1999); *Rita v. State*, 663 N.E.2d 1201, 1206-07 (Ind. Ct. Ap. 1996), *aff'd in relevant part*, 674 N.E.2d 968 (Ind. 1996); *Todd v. State*, 566 N.E.2d 67, 69-71 (Ind. Ct. App. 1991); *Dwayne Davis v. State*, 580 N.E.2d 326, 327 (Ind. Ct. App. 1991); *State v. Gullion*, 546 N.E.2d 121, 122-23 (Ind. Ct. App. 1989)).

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[1] Shaw also alleged ineffective assistance of trial counsel in the state courts, but did not raise it in his federal habeas claim. Pet. App. 43A.

The Indiana Court of Appeals affirmed, holding that Miller's performance was not deficient because the timeliness issue was not a valid claim at the time of Shaw's direct appeal. Pet. App. 50A-51A. Citing the same cases as the trial court, the Court of Appeals explained that "at the time of Shaw's appeal," Indiana courts routinely upheld untimely amendments and indeed "there appeared to be no case law in which a court had invalidated any amendment." *Id.* at 49A.

The Indiana courts acknowledged "scattered *dicta*" that an untimely "substantive" amendment—*i.e.*, an amendment that would require defenses other than those available under the original charge—could be invalidated; but also observed that even those cases rejected relief where the defendant suffered no prejudice from a late "substantive" amendment. Pet. App. 49A, 66A-67A (citing *Haak v. State*, 695 N.E.2d 944, 952 (Ind. 1998); *Wright v. State*, 593 N.E.2d 1192, 1197 (Ind. 1992); *Sharp v. State*, 534 N.E.2d 708, 714-15 (Ind. 1989)). Here, said the Court of Appeals, the trial court had delayed the trial two months following amendment to permit trial counsel to prepare, so there was no prejudice from the late amendment, even if it could be deemed substantive. Pet. App. 49A-50A.

Shaw sought transfer to the Indiana Supreme Court, again alleging ineffective assistance of counsel for Miller's failure to challenge the

timeliness, but the Indiana Supreme Court denied his petition to transfer. Pet. App. 39A.

After the Indiana Supreme Court declined discretionary review, Shaw filed a federal habeas corpus petition in the Southern District of Indiana under 28 U.S.C. § 2254(d)(1), arguing that the Indiana Court of Appeals unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), to his ineffective assistance of appellate counsel claim. Pet. App. 10A. The district court denied Shaw's petition, holding that the Indiana Court of Appeals did not unreasonably apply *Strickland*'s deferential standard when the court of appeals held that the doctrinal support for a timeliness argument in Indiana during that time was so weak that no lawyer was obligated to make it. *Id*. at 11A.

The Seventh Circuit, however, held that Miller's decision to pursue a "frivolous" sufficiency argument over what *it* deemed a "materially stronger" timeliness argument constituted deficient performance that prejudiced Shaw. Pet. App. 13A-15A. According to the Seventh Circuit, Miller's brief "was the equivalent of filing no brief at all" because he challenged only the sufficiency of the State's evidence. *Id*. at 15A. The Court then applied the more lenient *Robbins* standard for cases in which appellate counsel actually files no brief (*see Smith v. Robbins*, 528 U.S. 259, 288 (2000)); found, contrary to the Indiana Court of Appeals' holding, that the timeliness issue was valid at the time of Shaw's

direct appeal; and held that Miller provided deficient performance for failing to challenge the timeliness issue. Pet. App. 15A-17A, 20A-21A.

Turning to *Strickland*'s prejudice inquiry, the Seventh Circuit explained that Shaw's claim "does not turn on the ultimate outcome in the state courts; it depends only on the relative strength of [the unraised] argument over the one counsel chose," and held that Shaw was prejudiced because in its opinion the timeliness issue was "clearly stronger" than the sufficiency issue. Pet. App. 14A, 22A, 25A. The Seventh Circuit vacated the district court's decision and ordered the district court to issue a writ unless the State granted Shaw a new direct appeal within 120 days. *Id*. at 25A.

REASONS FOR GRANTING THE PETITION

In the decision below, the Seventh Circuit second-guessed the Indiana Court of Appeals as to the viability, at the time of Shaw's direct appeal, of appealing a supposedly untimely amendment of Shaw's criminal information. The Seventh Circuit's essentially *de novo* review of that issue infects its analysis of both whether Shaw's appellate counsel was constitutionally deficient, *see* Pet. App. 16A-17A, and whether any such deficiency was prejudicial, *see* Pet. App. 21A-23A. In so doing, the Seventh Circuit crossed into the exclusive turf of state appellate courts when it held that the timeliness-of-amendment issue was indeed viable, *contra* state

court resolution of that very issue. If left undisturbed, the decision below will invite federal habeas courts to second-guess state court interpretations of state law. Certiorari is warranted because the decision below is contrary to Supreme Court precedent as well as decisions of other circuits. The Court should reaffirm the rule of deference to state court resolution of state law questions.

I. The Decision Below Conflicts With Decisions of Other Circuits That Defer to State Court Determinations of State Law When Addressing *Strickland* Claims

In order to find both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the Seventh Circuit conducted its own independent analysis of state law as it existed at the time of Shaw's direct appeal. It attempted to reconcile the Indiana Court of Appeals' various holdings and dicta by opining that the Indiana Supreme Court's opinion in *Sharp v. State*, 534 N.E.2d 708 (Ind. 1989), was limited to amendments that did not change the offense charged—a standard never articulated by an Indiana court. Pet. App. 22A-23A. According to the Seventh Circuit, attorney Miller could have argued that *Sharp* did not apply because the amendment here changed the charged offense, and that the Indiana courts would then have decided Shaw's case along the lines that the Indiana Supreme Court later decided *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007). Pet. App. 23A-24A.

("*Fajardo* itself offers some insight into what the state supreme court would have done in the period before the amendment."). In short, while the Indiana Court of Appeals said that the timeliness issue was a certain loser, the Seventh Circuit re-evaluated Indiana law, rejected the state court's conclusion, and found both deficient performance and prejudice because it deemed the timeliness issue stronger than the sufficiency issue.

The Seventh Circuit's refusal to defer to the Indiana appellate court's determination of state law when it comes to evaluating *Strickland* prejudice conflicts with habeas decisions from at least two other circuits.

First, in *Paredes v. Quarterman*, No. SA-05-CA-870-FB, 2007 WL 760230, at *6 (W.D. Tex. Mar. 8, 2007) the petitioner alleged that his counsel was ineffective for failing to object to the prosecution's allegedly untimely request for a jury shuffle. The state habeas trial court, however, concluded as a matter of state law that the requested jury shuffle was timely, such that there was no *Strickland* violation or prejudice. *Id.* at *7 ("[T]he state habeas trial court concluded further this aspect of petitioner's ineffective assistance claim satisfied neither prong of the *Strickland* test."). The Fifth Circuit affirmed denial of the writ notwithstanding protestations that the state courts were incorrect about timeliness, explaining that it "must" defer to the Texas state court's determination that the

prosecution's jury shuffle request at issue was timely. *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009). Paredes, the court said, could not demonstrate constitutional deficiency or prejudice under *Strickland* because "[h]is counsel did not act deficiently by failing to raise a meritless objection . . . [and] the failure to make a meritless objection could not have prejudiced Paredes." *Id.*

Second, the Eleventh Circuit concluded that counsel could not be deemed deficient—much less prejudicially so—for failing to assert an evidentiary objection that Alabama courts had already deemed meritless. *Callahan v. Campbell*, 427 F.3d 897, 931-32 (11th Cir. 2005). The Alabama Court of Criminal Appeals concluded that the counsel did not render deficient performance for failing to raise the issue, and did not even address *Strickland*'s prejudice prong. *Callahan v. State*, 767 So.2d 380, 386-87 (Ala. Crim. App. 1999). According to the Eleventh Circuit, to find deficient performance, it "would have to conclude the state court misinterpreted state law," which it would not do. *Callahan*, 427 F.3d at 932. It went on to say that Callahan also could not establish prejudice because the state court had already determined that the objection at issue would not have been successful. *Id. See also Overstreet v. Wilson*, 686 F.3d 404, 407 (7th Cir. 2012) (finding the state court's determination that a state law argument had no merit was "dispositive" and refusing to address the *Strickland* performance and prejudice analysis).

The decision below cannot be reconciled with *Paredes* and *Callahan*. Quite plainly, the Seventh Circuit concluded that in at least some circumstances it is appropriate to reconsider how state courts would have resolved a state law issue if it had only been pressed by counsel. By re-evaluating the merits of an unappealed state law issue and resolving it contrary to state court precedent, the Seventh Circuit has departed not only from Supreme Court precedent but also from the holdings of at least two circuits. The decision below thus presents and highlights an issue warranting the Court's intervention.

II. A State Appellate Court's Holding That an Omitted State Law Issue Ultimately Lacked Merit Precludes a Federal Habeas Court From Later Finding Deficient Performance or Prejudice From That Omission

Not only did the Seventh Circuit impermissibly override state court determination of state law at the time of Shaw's direct appeal; it did so in a way that underscores why state, not federal, courts are the "ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

1. The establishment of constitutionally deficient appellate counsel requires proof that an omitted issue was "clearly stronger" than issues raised on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). To establish prejudice from constitutionally deficient

counsel requires proof that, had counsel not committed constitutional error, there would have been a "reasonable probability" of success on appeal. *Id.* at 285; *see also Strickland*, 466 U.S. at 694. To satisfy the prejudice standard, moreover, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011).

What is more, when it comes to federal review of state convictions, the already-deferential *Strickland/Robbins* standard is buffered even further. Federal courts may grant a writ of habeas corpus only when a state court decision upholding a conviction (or sentence) is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This is a "highly deferential standard" that requires federal courts to afford state courts "the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005) (internal quotations and citations omitted). In all instances, principles of federalism dictate that a federal court must defer to a state court's decision of its own law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" because "[t]he standards created by *Strickland* and § 2254(d) are both highly deferential . . . and when the two apply in tandem,

review is doubly so." *Richter*, 131 S.Ct. at 788 (internal quotations and citations omitted). When AEDPA applies, the petitioner must prove that the state court did not just issue an incorrect or erroneous holding, but one that fair minded jurists must agree was objectively unreasonable when it found that counsel's performance fell within the "wide range" of professional competence and that there was no reasonable possibility of a different outcome—findings that are already afforded deference even when AEDPA does not apply. *See id.* at 786; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

In sum, to prevail on his ineffective assistance of appellate counsel claim—which rested entirely on Indiana law at the time of his direct appeal—Shaw had to show that, taking as correct the Indiana Court of Appeals' determination that Shaw's untimeliness issue was meritless as a matter of state law, no fair-minded jurist could say that the Indiana Court of Appeals arrived at a reasonable conclusion that (1) Shaw's omitted untimeliness claim was not "clearly stronger" than his sufficiency of the evidence claim, and (2) there was no substantial likelihood of a different result if Shaw had raised the untimeliness issue.

2. Shaw's claim, in other words, had to be a non-starter. Yet the Seventh Circuit ruled for Shaw on the two questions enumerated above by finding the Indiana Court of Appeals wrong about Indiana law at the time of Shaw's direct appeal, wrong about how

Shaw's direct appeal would have been decided, and wrong about the effect of subsequent developments in Indiana law. Pet. App. 49A.

The Seventh Circuit held that failure to raise the timeliness issue on appeal was constitutionally deficient performance because such a claim would have been "solidly based" and "clearly stronger" than the only issue that was raised—namely sufficiency of the evidence. *Id.* at 18A, 20A. Furthermore, the Seventh Circuit found prejudice *not* because there was a substantial likelihood that the outcome would have been different had Shaw raised the timeliness challenge, but only because, again in its view, a timeliness challenge would have been "stronger" than a sufficiency-of-the-evidence challenge. *Id.* at 22A ("Shaw's theory does not turn on the *ultimate outcome in the state courts*; it depends only on the relative strength of this argument over the one counsel chose." (emphasis added)).

First, of course, once the Indiana Court of Appeals held that there was "no case law" supporting the timeliness issue, the Seventh Circuit was in no position to contradict that conclusion by deeming the theory "solidly based" and "clearly stronger" than sufficiency of the evidence on its way to finding deficient performance.

But even aside from the deference owed the Indiana courts on habeas review, the Seventh Circuit's prejudice analysis plainly conflicts with the

Strickland/*Harrington* standard, which concerns the *absolute* strength of the omitted issue, not its strength relative to *other* issues. *Richter*, 131 S.Ct. at 787-88 ("[A] challenger must demonstrate a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*." (emphasis added) (internal quotation and citation omitted)). Yet only by subverting *Strickland* and *Harrington* did the Seventh Circuit find a way to override the Indiana Court of Appeals' holding that there was no deficient performance or prejudice. The Seventh Circuit, that is, used its newly contrived question of comparative strength to override the Indiana court's determination of state law.

Again, the Seventh Circuit declared that Indiana's appellate courts would have rejected an untimely amendment to Shaw's charging documents that altered the crime charged. Pet. App. 22A-23A. Not only had no Indiana court so declared, but numerous Indiana appellate cases, including two of the three cited by the Seventh Circuit, affirmed an untimely amendment that substituted one charged offense for another. *See, e.g.*, *Kindred v. State*, 540 N.E.2d 1161, 1170 (Ind. 1989) (substituting attempted theft for theft); *Haymaker v. State*, 528 N.E.2d 83, 86 (Ind. 1988) (substituting a prior theft conviction for a prior burglary conviction in a habitual offender charge); *Townsend*, 753 N.E.2d at 92-95 (substituting recklessly making unreasonable noise for tumultuous conduct); *Todd*, 566 N.E.2d at

68-70 (substituting operating a vehicle while intoxicated and refusing a chemical test for refusing an implied consent test).

The decision below also wrongly surmised that, had Shaw appealed the timeliness issue, it would have given the Indiana Supreme Court occasion to reach the holding it ultimately reached in *Fajardo*. Yet even if the Indiana Supreme Court had been inclined to decide a case along *Fajardo*'s lines as early as 2003, Shaw's would not have been that case. The *Fajardo* Court affirmed the distinction between amendments of form and of substance articulated in *Shaw* and held that amendments of form did not constitute reversible error either before or after *Fajardo*. *Fajardo*, 859 N.E.2d at 1205-06. Shaw's case is materially different. *Fajardo* involved a classic substantive amendment where the State added a separate act of child molesting not included in the original charging information. *Id.* at 1207-08. Here, the amendment was strictly formal. It changed only the precise charges—from aggravated battery to murder—and did not charge additional criminal conduct. Pet. App. 42A. Shaw's defense—an alibi—is equally applicable to the original battery charge as it is to the amended murder charge, and Shaw's evidence—that he was sleeping—would apply equally to either charge.

As such, the amendment here was one merely of form, which would have provided Shaw with no relief before or after *Fajardo*. Indeed, only one year

before Shaw's direct appeal, the Indiana Supreme Court declined to review an Indiana Court of Appeals decision permitting untimely amendment of the charged offense. *Laughner v. State*, 769 N.E.2d 1147, 1158 (Ind. Ct. App. 2002), *trans. denied*, 783 N.E.2d 701 (Ind. 2002).

Fajardo is isolated among Indiana cases. As the Seventh Circuit acknowledged, "no Indiana appellate court ever had invalidated an amendment under the 1982 law" before *Fajardo*, Pet. App. 5A, and the Indiana General Assembly quickly repudiated *Fajardo*'s holding by amending the statute to conform with pre-*Fajardo* interpretations of the statute. *Id*. at 23A.

As it is well-established that counsel cannot be ineffective for failing to foresee changes in the law, *see, e.g.*, *Strickland*, 466 U.S. at 689, so too it must be true that counsel cannot be ineffective merely because he did not purchase the proverbial winning lottery ticket—the one or two cases ever decided in a jurisdiction that would have provided his client relief. Yet that is precisely what the Seventh Circuit did here in holding that counsel was ineffective for not making arguments that first succeeded four years *after* Shaw's appeal.

In all events, when the Indiana Court of Appeals concluded that raising the claim would not have changed the outcome of Shaw's appeal because Indiana case law did not support the claim, that

should have been the end of the matter. *Singleton v. State*, 889 N.E.2d 35, 41-42 (Ind. Ct. App. 2008) (reaching the same conclusion on the viability of a timeliness challenge as *Shaw II*). Under 28 U.S.C. § 2254, the Seventh Circuit should have deferred to that holding and abandoned any effort to find deficient performance for failing to raise a losing issue, much less that Shaw was prejudiced by counsel's choice. *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010).

III. Federal Court Override on State Law Issues is a Continuing Problem in Many Habeas Contexts

Certiorari is warranted in this case for another systemic reason. Unfortunately, despite the Court's repeated directives to the contrary, federal habeas courts still frequently succumb to the temptation to override state courts on matters of state law.

The Court has repeatedly held that federal habeas courts cannot reevaluate state court interpretations of state law. *See, e.g.*, *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011); *Corcoran*, 131 S. Ct. at 16; *Richey*, 546 U.S. at 75-76; *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Hicks v. Feiock*, 485 U.S. 624, 629 (1988). A federal habeas court cannot even speculate as to whether the state court correctly applied state law. *Cone*, 543 U.S. at 455. Instead, a federal habeas court is bound by a state appellate

court's determination of state law, especially where, as here, the intermediate appellate court determined the contours of state law and the state's high court declined to exercise discretionary review. *Feiock*, 485 U.S. at 629-30.

Yet, the Seventh Circuit's decision is only the most recent in a line of cases that pay lip service to this Court's pronouncements while continuing to impermissibly reinterpret state law. *See, e.g.*, *Heard v. Addison*, 728 F.3d 1170, 1177-79 (10th Cir. 2013) (rejecting the Oklahoma Court of Criminal Appeals' interpretation of Oklahoma law); *Walker v. McQuiggan*, 656 F.3d 311, 323 (6th Cir. 2011) (Cook, J., dissenting) (criticizing the majority for reevaluating Michigan state law); *Sarausad v. Porter*, 503 F.3d 822, 823-24 (9th Cir. 2007) (Callahan, J., dissenting from denial of rehearing *en banc* and criticizing the majority for reevaluating Washington state law), *rev'd sub nom.*, *Waddington v. Sarausad*, 555 U.S. 179 (2009).

Sarausad is particularly noteworthy. There, the Ninth Circuit "not only misinterpret[ed] Washington law but also refus[ed] to accord the Washington courts the required deference required by well established precedent and basic principles of federalism." *Sarausad*, 503 F.3d at 823 (Callahan, J., dissenting). In so doing, it violated the "long-standing principles of deference and comity between the federal courts and the state courts," which mandate that a federal court defer to a state

appellate court's interpretation of state law because "federal courts [] lack the expertise [and] . . . authority to rewrite or reinterpret state law." *Id.*

In the six years since *Sarausad*, this Court has had three occasions to revisit the issue. In two, it held that federal courts must defer to state court interpretations of state law. *Swarthout*, 131 S. Ct. at 861; *Corcoran*, 131 S. Ct. at 16. In the third, the Court vacated the judgment on other grounds and remanded. *Howes v. Walker*, 132 S. Ct. 2741 (Mem.) (2012) (ordering the Sixth Circuit to reconsider in light of *Parker v. Matthews*, 132 S. Ct. 2148 (2012)). But as the Seventh Circuit has shown in this case, as the Tenth Circuit exhibited in *Heard*, and as the Sixth Circuit demonstrated in *Walker*, the circuits continue to disregard this Court's directives on handling state law issues in the context of AEDPA claims.

Federal court deference to state court determinations of state law is a basic principle of federalism, and is particularly important in the habeas context where "§ 2254(d) dictates a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cone*, 543 U.S. at 455 (internal quotations and citations omitted).

For this reason, certiorari is warranted so the Court can reaffirm the deference federal courts owe to state courts on issues of state law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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