No. 08-1470

In The
Supreme Court of the United States

MARY BERGHUIS
Petitioner,

v.

VAN CHESTER THOMPKINS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether the U.S. Court of Appeals for the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Sixth Circuit failed to afford the State court the deference it was entitled to under 28 U.S.C. § 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins's guilt allowed the State court to reasonably reject the claim.

PARTIES TO THE PROCEEDING

Petitioner is Mary Berghuis, Warden of the West Shoreline Correctional Facility in Michigan. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. This brief refers to Petitioner as the State of Michigan, because the State represents the interests of the warden here.

Respondent is Van Chester Thompkins, a prisoner in a State correctional facility in Michigan. Respondent was the petitioner-appellant in the Sixth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The decision of the Sixth Circuit, *Thompkins v. Berghuis,* reversing the district court's denial of habeas corpus relief is reported at 547 F.3d 572 (6th Cir. 2008). Pet. App. 1a-37a. The decision of the Michigan Court of Appeals affirming Thompkins's conviction is unpublished. Pet. App. 74a-82a.

JURISDICTION

On February 24, 2009, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that Michigan asked the Sixth Circuit to rehear was entered on November 19, 2008. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, including the relevant provisions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), are reproduced in the Joint Appendix. J.A. 1a-2a.

STATEMENT OF THE CASE

Van Chester Thompkins was convicted of first-degree murder, assault with intent to commit murder, and related firearms offenses after a jury trial that occurred in Oakland County, Michigan. Thompkins was sentenced to mandatory life imprisonment without the possibility of parole. His State court appeal asserted, among other claims, that his statement to police was admitted at trial in violation of *Miranda*, and that his trial counsel was ineffective for failing to request a jury instruction that limited the jury's consideration of evidence that his co-defendant, Eric Purifoy, had been previously acquitted of the murder. The Michigan Court of Appeals rejected both claims on the merits. It found that Thompkins's statement to police was properly admitted at trial because Thompkins had waived his *Miranda* rights and had never invoked them. The State court also found that Thompkins was not prejudiced by his counsel's failure to request the jury instruction because the evidence of his co-defendant's acquittal was not used improperly.

In the subsequent federal habeas corpus action, the district court similarly rejected both claims. The Sixth Circuit reversed. It found that the State court unreasonably determined the facts and unreasonably applied Supreme Court precedent. Specifically, it found that Thompkins never waived his *Miranda* rights because his "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights." Pet. App. 29a. With respect to the ineffective assistance of counsel claim, the Sixth Circuit found "given that Thompkins's central strategy at trial involved pinning the blame on Purifoy, that his jury

heard evidence . . . that Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France." Pet. App. 35a.

1. The State court challenge to the admissibility of Thompkins's statement to police.

Prior to his trial, Thompkins filed a motion to suppress "all oral and written statements by the defendant at the time of and subsequent to his arrest." The motion alleged, among other things, that the police continued to question Thompkins after he exercised his right to silence. The prosecutor denied the allegation, and the trial court set the matter for an evidentiary hearing.

Southfield Police Department Detective Christopher Helgert was the only person to testify at the hearing. J.A. 4a. He explained that Thompkins was taken into custody in Ohio a little over a year after the crime. J.A. 7a. Helgert drove down to Ohio with his partner to interview Thompkins. J.A. 7a-8a, 15a.

The interview started at 1:30 p.m. and the officers departed from the jail at 4:15 p.m. J.A. 8a, 9a-10a, 11a-12a, 15a-16a. Helgert introduced himself to Thompkins and told him that they were required to advise him of his rights before they talked to him. J.A. 8a-9a, 11a-12a, 13a-14a. Helgert then read a "Notification of Constitutional Rights" form to Thompkins. J.A. 8a. Helgert had Thompkins read right No. 5 on the form to establish that he could read, and then Helgert read out loud the first four rights. J.A. 8a, 9a-10a, 12a-13a. A

photocopy of the rights form was admitted as an exhibit. J.A. 8a-9a.[1]

Thompkins verbally indicated that he understood his rights by saying "yes," but he refused to sign or initial the form. Later during the interview he refused to touch the pen and pad of paper placed in front of him. J.A. 9a-10a, 11a.[2] Thompkins never indicated to Helgert that he wanted counsel, that he was unwilling to talk to Helgert, or that he was invoking any of his rights. J.A. 9a-10a. Helgert perceived that Thompkins's only unwillingness was "to sign anything." J.A. 13a-14a, 15a.

Helgert and his partner then attempted to persuade Thompkins to waive his rights and make a statement:

> We approached it more on the basis that he was involved and that we were there, you know, this was his opportunity to explain his side. Everybody else, including co-defendants, had given their version and this was his chance to explain his version of events. [J.A. 10a.]

This approach lasted for about two-hours and fifteen minutes. J.A. 9a-10a, 15a-17a. The repeating theme was: "This is your chance to provide your version. Eric Purifoy's provided a version, witnesses have

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[1] The notification of rights form, which was introduced at the evidentiary hearing and at trial in State court, was not made part of the record in the federal habeas corpus proceedings in federal court. With the agreement of counsel for Thompkins, this form is attached to this brief for the convenience of this Court. *See* Attachment to Merits Brief, p. 60.

[2] At trial, Helgert testified that he no longer recalled Thompkins explicitly indicating that he understood the warnings. J.A. 148a.

provided versions, you know, what happened out there. Maybe those boys drew down on you." J.A. 16a-17a.

The detectives were not asking questions but were making statements and waiting for a response. Thompkins shared limited verbal responses. J.A. 10a, 17a-18a. He was not verbally communicative or cooperative, and "much of the time" he remained silent. J.A. 17a-20a. There were times, however, that Thompkins did respond. J.A. 21a. "Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent." J.A. 21a. "He sat there and listened to our speech, if you will, most of the time." J.A. 22a. "Sometimes it would be a word or two. A 'yeah' or a 'no' or 'I don't know.'" J.A. 23a. And sometimes "he would look up and make eye-contact." J.A. 24a. Helgert understood these non-verbal responses to be a limited form of engagement in the conversation. J.A. 24a.

Thompkins "never indicated to [Helgert] that he was going to exercise his right to remain silent." J.A. 19a, 20a-21a. He never said "I am not saying anything" or "I'm not talking to you." J.A. 21a, 22a. And Thompkins never indicated that he wanted the questioning to end. J.A. 22a. Helgert then tried another strategy:

> I finally looked at him, and I asked him, tried to take a different tact, I guess what I call a spiritual tact, whether or not he believed in God. He made eye-contact with me for one of the few times that he did for the interview. I saw his eyes well up with tears. He answered me orally and said, 'Yes.'

> I asked if he had prayed to God? And he said 'Yes.'
>
> And I asked him if he had asked God to forgive him for—I believe the words were, and I quoted them in my report verbatim "shooting that boy down." And he answered, 'Yes.' [J.A. 10a-11a.]

This statement was put into evidence at trial. J.A. 153a (Helgert). The only other statement Thompkins made after this exchange was "I ain't writing nothing down." J.A. 11a-12a.

In its written opinion denying the motion to suppress, the trial court found that Thompkins "never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with, 'I don't know.' Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights." J.A. 28a (Trial Court Opinion, May 10, 2002).

On direct appeal in the Michigan Court of Appeals, Thompkins continued to argue that his statement was inadmissible because he had implicitly invoked his right to remain silent by failing to answer the officers' questions. The Michigan Court of Appeals – which rendered the last reasoned State court opinion on the issue – found the record demonstrated that Thompkins "continued to talk with the officer, albeit sporadically. He answered questions with brief responses, or by nodding his head, but never said he did not want to talk or that he was not going to say anything." The Michigan Court of Appeals concluded that Thompkins voluntarily waived his *Miranda* rights

and never invoked them. Pet. App. 75a. The Michigan Supreme Court denied leave to appeal. Pet. App. 73a.

2. The trial and State court appeal.

On January 10, 2000, at around 9:00 p.m., Samuel Morris and Frederick France were driving through the parking lot of a strip mall located in suburban Southfield, Michigan. A group of men exited from a delicatessen and began to cross in front of them. J.A. 62a (France). Morris, the driver, slowed his car to allow the group to walk past. J.A. 62a (France). One of the men, later identified by France as Thompkins, stared the pair down as he crossed in front of the car. He continued to stare at them as he walked backwards to his own parked van. J.A. 63a-65a (France). The two groups yelled challenges at each other, and then Morris began to drive away. J.A. 67a-69a (France); J.A. 33a-34a (Biesley). The weather was clear and the strip mall lot was well lit, J.A. 34a-35a (Szabo); J.A. 38a-39a (Graves), so France got a good look at the face of the man who stared at him. J.A. 61a-62a, 63a-66a, 86a-88a, 99a-101a (France):

> I had seen them, [Thompkins] was staring at me when he first walked out of the building. When he walked out and walked in front of the car, around the car and to the back I was still staring at him, directly in this face.
>
> And, then when he rolled up to us I looked and it was the same guy that was staring at us, which is him. [J.A. 88a-89a (France).]

Thompkins's van, driven by Eric Purifoy, caught up and pulled along side Morris's car. The two vehicles

stopped in front of a Rite-Aid pharmacy in the strip mall. J.A. 165a-167a (Purifoy). Morris's driver's side window was lined-up with the front passenger side window of the van. J.A. 41a-42a (Graves); J.A. 69a-71a (France). Thompkins, sitting in the front passenger seat of the van, asked Morris, "what you say, big dog?" J.A. 40a-41a, 45a (Graves); 71a-72a (France); J.A. 169a (Purifoy). He then produced a .45 caliber semi-automatic handgun and fired numerous shots at Morris's car. J.A. 72a-74a (France).

France was struck by a bullet with each step as he attempted to flee into the Rite-Aid. J.A. 73a-76a (France). Morris was shot to death. J.A. 73a (France); J.A. 52a-59a (Pacris). Morris was struck four times, with one bullet fatally damaging his liver, kidney, heart, and lung. J.A. 52a-57a (Pacris). The angle of the wounds was consistent with Morris falling or lunging away from the shooter. J.A. 60a-61a (Pacris).

Before trial, France positively identified Thompkins as the shooter from a photograph taken from a surveillance camera. J.A. 105a-106a (Schneider). The delicatessen had a surveillance camera from which still photographs were generated depicting the group of men who left it immediately before the shooting. J.A. 101a-104a (Schneider). One of the photographs – blown up to poster size for the jury – indisputably depicted Thompkins and Eric Purifoy. J.A. 107a (Schneider); J.A. 112a-113a (Stephens); J.A. 138a (Helgert); J.A. 173a (Purifoy).

France, who was recovering from his wounds in the hospital the day after the shooting, immediately and with certainty, identified Thompkins as the shooter and Purifoy as the driver from this photograph. J.A. 76a-82a

(France); J.A. 103a-105a (Schneider). The officer who showed him the photograph testified that:

> [France] immediately pointed to the first individual in the photograph. Pointing at him saying, 'he was the shooter.' He then went left to right pointing at the second individual saying, 'he was the driver.' And he couldn't identify the third individual. [J.A. 105a (Schneider).]

Accordingly, many essential details of the crime were not seriously disputed at trial. There was no question that the shots came from Thompkins's van. J.A. 33a-34a (Biesley); J.A. 35a-38a (Szabo); J.A. 38a-42a, 43a-45a (Graves); J.A. 47a-52a (Rube); J.A. 66a-74a (France). And the fact that Purifoy and Thompkins were correctly identified as occupants of the van was essentially uncontested in light of the surveillance photographs and positive identification and recovery of Thompkins's van. The defense theory was that Purifoy was the shooter and that Thompkins was merely present in the van. J.A. 204a (Defense closing).

Purifoy saw the photograph from the delicatessen on television and identified himself, Thompkins, and another man, Myzell Woodward, as appearing in it. J.A. 173a (Purifoy). Purifoy contacted the Southfield Police Department and then turned himself in. J.A. 138a (Helgert); 173a-177a (Purifoy). Thompkins, on the other hand, stripped his van, hid it behind a house, changed his identity, and fled to Ohio. J.A. 108a-110a (Farquhar); J.A. 137a, 142a-144a (Helgert).

While Thompkins was still at large, Purifoy was tried on charges of first-degree murder based on the theory that he aided and abetted the shooter,

Thompkins. J.A. 139a-141a (Helgert); J.A. 177a (Purifoy). France testified at Purifoy's trial that Purifoy was the driver of the van and that Thompkins was the shooter. J.A. 82a-85a, 99a (France). At Thompkins's trial, without objection, the prosecutor asked Purifoy the outcome of his trial, and Purifoy answered: "I was acquitted of the murder charge and found guilty on weapons charges." J.A. 177a-178a (Purifoy). Purifoy testified that he received a six-to-ten year sentence, and that he had an appeal pending. J.A. 177a-178a (Purifoy). Purifoy testified that no immunity or promises were given to him in exchange for his trial testimony against Thompkins, but a letter noting his cooperation would be sent to the Department of Corrections. J.A. 178a (Purifoy).

Helgert testified more specifically that Purifoy was acquitted of the murder and assault charges, and convicted of having a concealed weapon in a motor vehicle. J.A. 140a-141a (Helgert). Helgert explained that Purifoy subsequently pled guilty to two counts of felony-firearm and one count of felon in possession of a firearm under an aider and abettor theory. J.A. 140a-141a (Helgert).

The fact of Purifoy's trial was used by the prosecutor to put into context letters that were sent from Purifoy to Thompkins after Purifoy's case ended and Thompkins was arrested. The letters contained statements by Purifoy to Thompkins claiming that they were both innocent. J.A. 178a-179a (Purifoy). Some letters expressed disappointment that Thompkins's family was regarding Purifoy as a "snitch" and a "rat." J.A. 179a-180a (Purifoy). One letter offered to send a copy of Purifoy's trial transcript to Thompkins to prove that he did not place the blame on Thompkins for the crime. J.A. 180a (Purifoy). Purifoy testified that in none

of the letters he received back from Thompkins did Thompkins accuse Purifoy of having mixed-up the roles by claiming that Purifoy knew in truth that Thompkins was the driver and Purifoy was the passenger. J.A. 180a-182a, 187a-188a (Purifoy). The letters and responses thus tended to rebut any argument by the defense that Thompkins was the driver and Purifoy the passenger/shooter.

The prosecutor suggested in examining Purifoy that some of the letters appeared to give Thompkins a trial strategy whereby Thompkins should claim that both he and Purifoy hit the floor when the gun-fire started and that perhaps Woodward was the shooter as Woodward was already facing capital murder charges for a different crime in Ohio. J.A. 182a-189a (Purifoy). Defense counsel attempted to use the same letters to impeach Purifoy's credibility and to suggest that Purifoy made-up a story about the incident and wanted to place the blame for the shooting on either Thompkins or Woodward. J.A. 190a-193a (Purifoy).

Before Ohio police officers were finally able to capture Thompkins, he led them on a foot chase. J.A. 118a-123a (Damschroder). Even after he was apprehended, he gave the officers a false name and false identification documents and never admitted his true identity to the Ohio authorities. J.A. 130a-132a (Parrish); J.A. 118a-123a (Damschroder).

Purifoy's testimony largely tracked that of the eyewitnesses' but added the fact that Thompkins was holding a pistol immediately after the shooting. Purifoy testified at Thompkins's trial that he was the driver and Thompkins was the passenger, and his account of the incident was consistent with that of France and the other eyewitnesses. J.A. 162a-170a (Purifoy). Purifoy

described how he, Thompkins, and Woodward left the delicatessen and walked to Thompkins's van. He said that he drove, Thompkins sat in the front passenger seat, and Woodward sat in the back. J.A. 164a (Purifoy). Purifoy, however, testified that at the critical moment – when the shots started to ring out – he happened to be bent over adjusting the radio. J.A. 167a-168a (Purifoy). He claimed that Thompkins was holding a pistol after the shooting, but he did know whether the shots came from the victims or from Thompkins. J.A. 170a-172a, 178a-179a (Purifoy). After the shots Thompkins asked Purifoy, "What the hell [are] you doing? Pull off." Purifoy pulled the van slowly out of the lot and drove off. J.A. 169a-172a (Purifoy).

A friend of Thompkins, Omar Stephens, came forward to authorities while he was being held on an unrelated matter in Wayne County, Michigan. J.A. 154a-156a (Helgert). Stephens testified that while watching a news report about the shooting on television, he recognized Thompkins from the delicatessen photograph. J.A. 112a-113a (Stephens). He asked Thompkins during a telephone conversation about what had happened and Thompkins told him, "he had popped them n-----s up," because they "got into it." J.A. 114a (Stephens).

Thompkins never mentioned Purifoy during the telephone conversation with Stephens and never attempted to blame Purifoy. J.A. 115a (Stephens). Stephens knew Thompkins to carry a .45 automatic pistol. J.A. 116a-117a (Stephens). Stephens also described how Thompkins told him that he had to abandon his van after the incident but first sold the stereo and gold rims. J.A. 115a-116a (Stephens). This was corroborated by the actual condition of the van when it was discovered by the police.

The prosecutor started his closing argument with the fact that Purifoy had been tried under an aider and abettor theory:

> Ladies and Gentleman, this is a case about the relationship between these two people.
>
> At Eric Purifoy's trial the Jury had to find, in order to find him guilty of First Degree Murder, that he drove up to that Rite-Aid and sat there, thereby assisting Van Thompkins.
>
> He sat there and he watched Van Thompkins and allowed Van Thompkins to shoot somewhere between seven and ten shots and then he calmly drove away. That is what they had to find to find him guilty. [J.A. 201a-202a.]

The prosecutor then used this fact to explain why Purifoy testified that he did not see the shooting itself. The prosecutor suggested the testimony was false:

> So what does he do? He twists it and indicates he hits the floor. Because, by hitting the floor he doesn't know what is going on.
>
> Is that believable? Did Eric Purifoy's Jury make the right decision? I'm not here to judge that. You are not bound by what his Jury found. Take his testimony for what it was, a twisted attempt to help not just an acquaintance but his tight buddy. [J.A. 202a.]

At no point did the prosecutor suggest that the fact of Purifoy's acquittal could be used to infer Thompkins's guilt, or that the jury had an obligation to find Thompkins guilty because someone had to pay, and it could no longer be Purifoy. If anything, the counter-inference was more plausible: if the theories at the two trials were the same, then the result should also be the same – both should be found *not* guilty. The prosecutor's comments were designed to counter this inference.

In Thompkins's closing argument, his counsel focused on the possibility that it was Purifoy who was the shooter and that there was no evidence to justify a finding that Thompkins was guilty under an aiding-and-abetting theory: "he's either the shooter or he is not guilty. And there is no evidence whatsoever that he is the shooter." J.A. 205a. On rebuttal the prosecutor disagreed, and he suggested that even if the jury believed Purifoy to be the shooter, that they convict Thompkins on an aiding-and-abetting theory. J.A. 205a-206a.

The trial court instructed the jury at least four times that "You must decide what the facts of this case are. This is your job and nobody else's." J.A. 207a, 208a-209a, 228a. It instructed them on the presumption of innocence. J.A. 207a-208a. And it instructed them regarding the prosecutor's burden to prove Thompkins's guilt by proving each element of the offense beyond a reasonable doubt. J.A. 207a-208a. It also cautioned the jury regarding Purifoy's testimony:

> A witness says that he took part in a crime that the defendant is charged with committing.

> The witness has already been convicted out of the charges arising out of the commission of that crime. Such a witness is called an accomplice. You should examine accomplice's testimony closely and be very careful in accepting it.
>
> You may think about whether an accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor using an accomplice as a witness.
>
> You may convict the defendant based only on the accomplice's testimony, if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
>
> * * *
>
> In general you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. [J.A. 213a-214a.]

The court instructed the jury on the elements of aiding and abetting in addition to the ordinary elements of the charged crimes. J.A. 216a-217a. The jury found Thompkins guilty of first-degree murder, assault with intent to commit murder, and related firearm charges.

In addition to the *Miranda* claim discussed above, Thompkins alleged in his State court appeal that his counsel was ineffective for failing to seek a special jury instruction that informed the jury that the evidence of

Purifoy's acquittal could only be used to assess Purifoy's credibility based on his motives and not as substantive evidence.

As part of the direct appeal process, Thompkins's appellate counsel filed a motion for a new trial, alleging among other claims, the ineffective assistance of counsel claim at issue here. The trial court issued an opinion and order denying the motion without a hearing. The opinion noted that Thompkins was required to "show a reasonable probability that, but for the errors, the result of the proceeding would have been different." J.A. 235a (Opinion Denying Motion For New Trial). The trial court went on to find: "[h]owever, the court does not find that, but for the errors, the results of the proceeding would have been different." J.A. 236a (Opinion Denying Motion For New Trial).

The claim was renewed in the Michigan Court of Appeals. The court stated that "[t]o establish a claim of ineffective assistance of counsel, the burden is on the defendant to show that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment and the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Pet. App. 79a. The court "agree[d] with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." Pet. App. 80a. The Michigan Supreme Court denied leave to appeal. Pet. App. 73a.

3. Federal habeas proceedings.

Thompkins raised his *Miranda* and ineffective assistance of counsel claims, as well as others, in his federal habeas petition. Pet. App. 40-42a. The district court denied the petition without holding a hearing. With respect to the *Miranda* claim, the district court found that "[t]he record does not establish that Petitioner clearly and unequivocally invoked his right to remain silent after Helgert advised him of his *Miranda* rights." Pet. App. 67a. The district court noted that Thompkins did participate in the conversation with Helgert by nodding his head or responding "yeah," "no," or "I don't know" in response to the dialogue. Pet. App. 67a. The district court found that the refusal to sign the waiver form, provide a written statement, and to answer some questions, did not constitute an unequivocal assertion of his right to remain silent. Pet. App. 68a.

The district court also rejected Thompkins's ineffective assistance of counsel claim. The court found that "effective counsel would have requested such an instruction[.]" Pet. App. 63a. But it concluded that the introduction of evidence regarding Purifoy's convictions did not render Thompkins's trial fundamentally unfair. Pet. App. 63a.

The Sixth Circuit reversed on both issues. With respect to the *Miranda* claim, the court found that the State court adjudication of the claim involved both an unreasonable application of the facts and an unreasonable application of clearly established federal law. Pet. App. 16a, 22a. The Sixth Circuit found that the record did not support the Michigan Court of Appeals' determination that Thompkins interacted with Helgert but showed that he was silent for two hours and forty-five minutes. Pet. App. 24a. The Sixth Circuit also found

that the Michigan Court of Appeals unreasonably determined that Thompkins waived his rights. It found that Thompkins's persistent silence in the face of questioning unequivocally indicated that he did not wish to waive his right to remain silent. Pet. App. 29a.

The Sixth Circuit likewise reversed the district court's denial of the ineffective assistance of counsel claim. The Sixth Circuit accepted the district court's finding that counsel performed deficiently by failing to request a jury instruction limiting consideration of Purifoy's acquittal to his credibility. Pet. App. 34a. The Sixth Circuit then found that the failure to request the instruction was prejudicial as well. It found that Thompkins's central strategy at trial was to blame Purifoy for the murder. It concluded that evidence of Purifoy's acquittal "likely exerted powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted for killing Morris and shooting France." Pet. App. 35a.

SUMMARY OF ARGUMENT

Congress has instructed the federal courts that habeas corpus relief must be denied to State prisoners unless the State court acted unreasonably in light of this Court's clearly established pronouncements. In this case, the Sixth Circuit exhibited a readiness to attribute error that is inconsistent with the presumption that State courts know and follow the law. The Sixth Circuit found two independent bases for granting habeas relief and reversed a murder conviction where none of the previous four courts reviewing the matter found any errors warranting relief. In setting aside the murder conviction, the Sixth Circuit misapplied *Miranda* and *Strickland* and mistakenly determined that the Michigan Court of Appeals' application of those cases was unreasonable. The decision of the Sixth Circuit should be reversed.

Miranda and its progeny protect a criminal defendant's right against self-incrimination by requiring the police to inform a suspect of the protections afforded by the Fifth Amendment before interrogating him in a custodial setting. The prosecution may only introduce a statement where a suspect has waived these rights. *Butler* makes clear that the prosecution may overcome the presumption against waiver where the suspect acknowledges his rights, does not invoke them, and engages in a course of conduct that implies waiver, such as by voluntarily answering questions. The Michigan Court of Appeals here reasonably applied this principle where the police informed Thompkins of his rights, he acknowledged his rights, participated sporadically in the interview, and then he impliedly waived them by voluntarily answering questions that incriminated him. The Sixth Circuit's determination that more was necessary to obtain a waiver of Thompkins's rights is not required by this Court's precedents. Michigan did not

unreasonably apply *Miranda* and *Butler*. In order to reject the Michigan ruling, the Sixth Circuit made adverse factual findings, and did not defer to the findings of the State courts. But there is no clear precedent from this Court that required the Sixth Circuit to reject the finding that Thompkins had impliedly waived his rights by expressly acknowledging them after being warned and voluntarily answering questions in which he incriminated himself. There was no Fifth Amendment violation.

Strickland provides that the deficient performance of counsel requires relief only where it resulted in prejudice. The Sixth Circuit's determination that the Michigan courts were unreasonable was predicated on a fundamental misunderstanding of this Court's precedent. The Sixth Circuit's analysis of prejudice rested on the possibility that Thompkins's jury determined that Purifoy could not have been the shooter since he was acquitted, and that this undermined Thompkins's theory of innocence. But Purifoy was charged as an aider and abettor in his case, and the previous jury rejected the same theory that was being advanced at this trial: Purifoy as the driver and Thompkins as the shooter. No one claimed that Purifoy was the shooter in the first trial so his acquittal did not impeach Thompkins's theory here. The Sixth Circuit also relied on the possibility that Thompkins's jury might have disregarded its oath and instructions and convicted Thompkins out of vengeance and the desire to see *someone* pay for the crime. But that is not the sort of speculative prejudice that *Strickland* was aimed at avoiding. And the proposed instruction would have had no bearing on the jury verdict in light of the overwhelming evidence of Thompkins's guilt. The State court did not act unreasonably in denying this claim. There was no Sixth Amendment violation.

ARGUMENT

I. The Michigan Court of Appeals did not act unreasonably in rejecting Thompkins's *Miranda* claim.

The Sixth Circuit erred in finding that the Michigan courts unreasonably rejected Thompkins's Fifth Amendment claim. This error is predicated on two mistakes.

First, the Sixth Circuit failed to abide by two limitations imposed by AEDPA. Under 28 U.S.C. § 2254(d)(2) and (e)(1), the Michigan State courts' factual determinations were entitled to deference. The record supported the findings of the Michigan courts that Thompkins acknowledged his rights, "sporadically" participated in the interview, and that he voluntarily answered questions. And under 28 U.S.C. § 2254(d)(1), a federal court may only grant relief where a State court decision is contrary to or involved an unreasonable application of clearly established Supreme Court precedent. This Court has not clearly established that a court must reject the finding of an implied waiver when a suspect acknowledges his rights, does not invoke them, sporadically participates in a police interview, and then voluntarily answers questions.

Second, under a proper reading of *Miranda* and *North Carolina v. Butler,* the prosecution may carry its burden of rebutting the presumption against waiver where the police have provided the in-custody suspect his rights under *Miranda,* the suspect expressly acknowledges those rights but does not invoke them, and then voluntarily answers questions. In that situation, a suspect has been afforded "[t]he primary protection" of *Miranda,* namely, being "adequately advised of his

rights and given an opportunity to exercise them."[3] This is what occurred here. The Michigan Court of Appeals was not unreasonable in reaching this conclusion.

For this reason, the police may properly ask questions of an in-custody suspect after providing that suspect with his rights under *Miranda* where the suspect expressly acknowledges those rights, and the suspect does not invoke them. This rule of conduct is consistent with *Miranda* and reflects the practice of the police in obtaining implied waivers under *North Carolina v. Butler*.

Finally, the Michigan Court of Appeals reasonably determined that Tompkins did not invoke his right to be silent. Even if his conduct is viewed as an equivocal assertion of his right to remain silent, the police would have no obligation to cease questioning. The rule in *Davis v. United States* should apply to the equivocal assertion of a right to remain silent just as it does to an equivocal assertion of the right to an attorney.

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[3] *Davis v. United States,* 512 U.S. 452, 461 (1994)("primary protection"); *Miranda v. Arizona,* 384 U.S. 436, 496 (1966)("adequately advised . . .").

A. Thompkins impliedly waived his right to remain silent and his right to an attorney.

1. The Michigan courts were not unreasonable in concluding that Thompkins waived his rights under Miranda *when he acknowledged his rights, did not invoke them, engaged in some limited verbal and non-verbal communications, and then voluntarily answered questions.*

The Sixth Circuit was sitting in review in habeas corpus, and was limited to this Court's clearly established precedent under 28 U.S.C. § 2254(d) in reviewing whether there was a valid implied waiver. But this Court has not provided clear guidance about whether the conduct at issue here would constitute a waiver. In other words, there is no clearly established law from this Court that requires a court to reject a finding of an implied waiver where a suspect acknowledges his rights, does not invoke them, participates in the interview in a limited way, and then voluntarily answers questions. In order to overcome this barrier to relief, the Sixth Circuit rejected the Michigan courts' factual determinations and instead found that Thompkins was silent during the interview. The record, however, supports the findings of the Michigan courts.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend V. This amendment was made applicable to the States by the Fourteenth Amendment in *Malloy v. Hogan.*[4] The

[4] *Malloy v. Hogan,* 378 U.S. 1, 8 (1964).

protection against self-incrimination has been implemented by the procedures required by this Court in its decision in *Miranda v. Arizona.*[5]

In *Miranda,* this Court concluded that there are two necessary components to protect this Fifth Amendment right. First, prior to any questioning, an in-custody suspect must be informed of his right to remain silent, that anything he says may be used against him in court, that he has the right to an attorney, and that one will be appointed for him if he is unable to afford one.[6] Second, the individual may knowingly and intelligently waive these rights, and the prosecution may not introduce any statement from a suspect at trial "unless and until such warnings and waiver are demonstrated by the prosecution[.]"[7]

Moreover, under *Miranda,* the prosecution has the burden of proving admissibility.[8] This Court characterized as "fundamental" the requirements of warnings and a waiver before the admission of a suspect's statement.[9] The waiver must be voluntary, knowing, and intelligent.[10] This means that the waiver must be a product of a free and deliberate choice, and not the product of deception, and that it was made with an awareness of the nature of the right being abandoned and the consequences of abandoning it.[11] This Court in *Colorado v. Connelly* further explained that the State

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[5] *Miranda,* 384 U.S. at 436.
[6] *Miranda,* 384 U.S. at 479.
[7] *Miranda,* 384 U.S. at 479.
[8] *Miranda,* 384 U.S. at 475.
[9] *Miranda,* 384 U.S. at 476.
[10] *Colorado v. Spring,* 479 U.S. 564, 573 (1987); *Moran v. Burbine,* 475 U.S. 412, 421 (1986).
[11] *Spring,* 479 U.S. at 573; *Moran,* 475 U.S. at 421.

need "prove waiver only by a preponderance of the evidence."[12]

In *Miranda,* this Court then outlined the requirements for proof of a valid waiver once a suspect had been informed of his rights. It termed this a "heavy burden" that is carried by the prosecution.[13] A valid waiver "will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."[14]

In *North Carolina v. Butler,* however, this Court clarified that the waiver need not be expressly given, but may be implied.[15] Of course, this Court reiterated that the "prosecution's burden is great" and also stated that "[t]he courts must presume that a defendant did not waive his rights."[16] *Butler* also reiterated that "mere silence" was not enough, but stated that silence "coupled" with both an understanding of one's rights and a "course of conduct indicating waiver" might support the conclusion that there has been a waiver.[17] In other words, the waiver may be "inferred from the actions and words of the person interrogated."[18] This Court noted that the question of waiver must be examined in light of the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the suspect.[19]

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[12] *Colorado v. Connelly,* 479 U.S. 157, 168 (1986).
[13] *Miranda,* 384 U.S. at 475.
[14] *Miranda,* 384 U.S. at 475.
[15] *North Carolina v. Butler,* 441 U.S. 369, 373 (1979).
[16] *Butler,* 441 U.S. at 373.
[17] *Butler,* 441 U.S. at 373.
[18] *Butler,* 441 U.S. at 373.
[19] *Butler,* 441 U.S. at 374-375, citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

The facts of the *Butler* case are important to identifying what "course of conduct" implicates this implied-waiver standard. In *Butler*, the suspect acknowledged his rights, refused to sign the waiver at the bottom of the advice-of-rights form, but agreed to speak with the police. He "said nothing when advised of his right to the assistance of a lawyer" and then made an inculpatory statement.[20] By remanding the matter to the North Carolina Supreme Court for it to review in light of the proper standard, this Court left open the possibility that such conduct would constitute a waiver even though the suspect had said nothing about waiving his right to counsel.

In the wake of *Butler*, many lower courts, including federal circuits and state supreme courts, have held that a suspect who acknowledges his rights and does not invoke them, who is not subject to coercion, and who answers questions voluntarily has impliedly waived his rights under *Butler*.[21] An apparent minority of courts,

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[20] *Butler,* 441 U.S. at 373.

[21] *See*, e.g., *United States v. Velasquez,* 626 F.2d 314, 320 (3rd Cir. 1980)("We hold that on this record Pauline's subsequent willingness to answer questions after acknowledging that she understood her *Miranda* rights is sufficient to constitute an implied waiver under *Butler*."); *United States v. Cardwell,* 433 F.3d 378, 389-390 (4th Cir. 2005)("Because Hinson had been fully informed and indicated his understanding of his *Miranda* rights, his willingness to answer Agent High's question is as clear an indicia of his implied waiver of his right to remain silent as we can imagine."); *United States v. Nichols,* 512 F.3d 789, 798 (6th Cir. 2008)("Thus, a failure to invoke one's right to remain silent – after being informed of and indicating an understanding of that right – functions as the equivalent of a waiver."); *United States v. Binion,* 570 F.3d 1034, 1041 (8th Cir. 2009)("Since Binion had been informed of his rights and had neither invoked his Fifth Amendment privilege nor requested an attorney, his decision to volunteer an incriminating response was an intelligent waiver of that right."); *United States v. Washington,* 462 F.3d 1124, 1134 (9th Cir. 2006)("Washington takes the curious

in contrast, have found that there was no waiver despite the acknowledgement of rights and the voluntary answering of questions.[22]

Since *Butler,* this Court has not delineated what course of conduct would be sufficient to manifest such an implied waiver. In the absence of such guidance, the decision of the Michigan courts on this issue cannot be an unreasonable application of clearly established Supreme Court precedent. This Court's decisions regarding what constitutes "clearly established" precedent support this conclusion. For example, in *Wright v. Van Patten,* this Court in a per curiam opinion examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[23] The State courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States v. Cronic* and

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position that the FBI agents should have construed his statement, 'I agree to listen,' to mean that the agents were not permitted to talk to Washington. . . . A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."). *See also* generally 2 W. LaFave, J. Israel, N King & O. Kerr, Criminal Procedure § 6.9(d)(3d 2007), p. 831 ("But what if the defendant expresses an understanding of the *Miranda* warnings he has received and thereafter an incriminating statement is obtained from him? In the language of *Butler,* does this amount to a showing of 'an understanding of his rights and a course of conduct indicating waiver'? Several courts have answered this question in the affirmative.")(listing cases, including state supreme court decisions).

[22] See 2 LaFave, et al, Criminal Procedure, § 6.9(d)(3d 2007), pp. 831-832 ("There is, however, authority to the contrary."), citing *United States v. Christian,* 571 F.2d 64 (1st Cir. 1978); *Kansas v. Baker,* 2 Kan. App. 2d 395; 580 P.2d 90 (1978). *See also United States v. Wallace,* 848 F.2d 1464, 1475 (9th Cir. 1988).

[23] *Wright v. Van Patten,* 552 U.S. 120, 121 (2008).

granted habeas relief.[24] This Court reversed because there was no established Supreme Court precedent on this point – "No decision of this Court, however, squarely addresses the issue in this case."[25] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[26]

Similarly, in *Carey v. Musladin*, another habeas case, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[27] This Court initially noted that it had examined possible error in the conduct of trials based on state-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, this Court concluded that there was no clearly established Supreme Court law for the State court to apply.[28] The same point is applicable here.

There is no clearly established precedent from this Court that required the State court to conclude that Thompkins's conduct was not an implied waiver. Thompkins acknowledged his rights but did not invoke them, sporadically participated in the interview by providing a few responses, and then voluntarily answered questions that incriminated him. He waived his rights when he incriminated himself armed with the knowledge that he was under no obligation to answer questions. The Michigan Court of Appeals reasonably concluded that he waived his rights. There is no

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[24] *Wright,* 552 U.S. at 122; *United States v. Cronic*, 466 U.S. 648 (1984).
[25] *Wright,* 552 U.S. at 125.
[26] *Wright,* 552 U.S. at 125-126.
[27] *Carey v. Musladin,* 549 U.S. 70, 72 (2006).
[28] *Musladin,* 549 U.S. at 76-77.

precedent from this Court that requires a different result. Moreover, there is no basis for concluding that its decision was not merely erroneous, but was objectively unreasonable.[29]

The Sixth Circuit reframed the issue by rejecting the Michigan courts' factual findings and concluding instead that Thompkins was silent throughout the interview. This is not a case where a suspect remained silent. Not only had he provided a few responses during the interview, *but he had expressly acknowledged his rights at the outset of the interrogation.* The record supported the findings of the Michigan courts. The Sixth Circuit should have deferred to the State courts' findings.

At the outset of the interview, the police provided Thompkins his rights under *Miranda.* Using the notification form, Detective Helgert had Thompkins read out loud his right under the fifth point from the form that he had the right to remain silent and the right to speak with an attorney J.A. 8a-10a, 146a. In this way, Detective Helgert was able to confirm that Thompkins could read. Detective Helgert then read to Thompkins the four traditional rights under *Miranda*, i.e., that he had the right to remain silent, that anything he said can be used against him, that he had a right to an attorney before answering any questions, and that if could not hire an attorney, one would be appointed to represent him. J.A. 8a-10a, 146a.

Detective Helgert then explained that he believed that he asked Thompkins whether he understood his rights and that he thought that Thompkins answered with a verbal "yes." J.A. 9a-10a. From this testimony,

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[29] *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

the state trial court adopted the express acknowledgement as a factual finding. J.A. 28a ("the evidence showed that the detectives read [Thompkins] his rights, and that he responded that he understood them"). Detective Helgert explained that he had attempted to get Thompkins to sign the form, but that Thompkins refused:

> We didn't start interrogating him, but we did tell him, because we believed it was necessary for him to waive his Rights. We would advise him of his Rights, we would like him to sign the Form and indicate that in writing so we could more easily move forward and document that and then let him tell his side of the story. [J.A. 14a.]

Although Thompkins did not sign the acknowledgement form, he never stated that he wanted an attorney, that he was unwilling to talk, or that he was invoking his rights. J.A. 9a-10a.

At this point, Detective Helgert began to speak with Thompkins and to talk with him about the shooting, indicating that the police had spoken to Eric Purifoy and that this was his opportunity to tell his side of the story. J.A. 9a-10a. The interview lasted a total of approximately two-hours and forty-five minutes. J.A. 8a-12a, 15a-16a. Detective Helgert gave a candid description of the interview, in which he did most of the talking, characterizing it as "nearly a monologue," J.A. 17a, but said unambiguously that Thompkins "continued to talk with us very sporadically." J.A. 9a. Despite the fact that Thompkins was "largely silent," he did provide responses during the interview:

> Q And, you said there were times that he responded, correct?
>
> A Yes.
>
> Q And, his response for what, to engage you in conversation, or simply say something to the effect that 'I'm not talking to you.'
>
> A Never 'I'm not talking to you.' Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the words, 'I don't know' was quite prevalent. [J.A. 21a.]

These responses were only a few words long, "a 'yeah', or a 'no', or 'I don't know.'" J.A. 23a. Thompkins never asked for the interview to stop.

After two hours and fifteen minutes, Detective Helgert changed his approach and asked him whether he believed in God. J.A. 10a, 16a-17a. Thompkins then made eye contact, his eyes welled up with tears, and he answered "yes." J.A. 11a. And when asked whether he prayed for forgiveness for "shooting that boy down," he answered "yes." J.A. 11a.

Based on this record, the Michigan Court of Appeals rightly found – consistent with the state trial court – that after Detective Helgert informed Thompkins of his rights under *Miranda,* that Thompkins "verbally acknowledged that he understood those rights" and that he thereafter "continued to talk with the officer, albeit sporadically," by "answer[ing] questions with brief responses, or by nodding his head[.]" Pet. App. 75a. The

Michigan Court of Appeals determined that Thompkins did not say he did not want to talk, but rather that he waived his rights in voluntarily answering the questions of Detective Helgert. Pet. App. 75a-76a. The factual determinations underlying this conclusion were reasonable, and should have been accepted by the Sixth Circuit.

This is true whether this issue is examined under 28 U.S.C. § 2254(d)(2) or (e)(1). Under (d)(2), Thompkins had the burden of showing that a decision was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"; while under (e)(1), Thompkins had the burden of overcoming "the presumption of correctness" applied to the factual determinations of the State court with clear and convincing evidence. In *Wood v. Allen* (08-9156), currently pending before this Court, the relationship between these two provisions is at issue. Under either provision, the finding that Thompkins acknowledged his rights and participated on some occasions during the interview are predicate facts entitled to AEDPA deference.[30]

In rejecting the factual findings of the Michigan courts as "objectively unreasonable" under (d)(2), the Sixth Circuit asserted that Thompkins "was silent" during the entire interview:

> Contrary to the state court's statement, the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes. [Pet. App. 24a.]

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[30] *Miller v. Fenton,* 474 U.S. 104, 112 (1985)("subsidiary factual questions, such as . . . whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254(d) presumption")(now § 2254(e)).

The Sixth Circuit also asserted that "Thompkins's persistent silence" in the face of questioning sent the "unequivocal" message that he did not wish to waive his rights. Pet. App. 29a.

But these factual assertions are contradicted by the record. Thompkins was not merely silent after he was informed of his rights. Rather, Thompkins expressly acknowledged his rights, which in *Butler* was a significant fact. And then Thompkins provided some responses even if few in number during the interview, including answering "yeah," and "no," and saying "I don't know" in respond to Detective Helgert's inquiries. J.A. 23a. The Sixth Circuit was wrong to completely discount these facts.

The Sixth Circuit noted that the questions to which Thompkins responded were "unidentified" and concluded that "without the context" there was not adequate support for the conclusion that "Thompkins's conduct indicated a waiver of his rights." Pet. App. 25a, 27a. But *Butler* did not require this. There was no evidence on the record from *Butler* that the in-custody suspect had said anything about waiving his right to an attorney. He had indicated a willingness to talk after having refused to sign the waiver, but "said nothing when advised of his right to the assistance of a lawyer."[31]

The suggestion from *Butler* is that he may have impliedly waived his right to counsel because otherwise he would not have agreed to speak. The decision to agree to speak with the officers is inconsistent with the exercise of his right to have an attorney present. Consequently, this might have been an implied waiver.

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[31] *Butler,* 441 U.S. at 370-371.

The same is true here. Thompkins had acknowledged that he had a right to remain silent and he could exercise that right at any time. The decision to answer direct questions about his belief in God and about his prayer for forgiveness for his criminal conduct was inconsistent with the exercise of his right to remain silent. In this way, his course of conduct indicated that he was waiving his right to remain silent.[32]

In the absence of its unsupported factual findings, the Sixth Circuit would have no authority to revisit the decision of the Michigan courts because even though this Court has stated that "mere silence" is inadequate, it is clear under *Butler* that an acknowledgement of one's rights followed by answering questions might signify a waiver.

Thus, accepting the factual determinations of the Michigan courts as is required by AEDPA, the ruling by the Michigan courts that there was an implied waiver is not an unreasonable application of this Court's precedent. The presumption of non-waiver from *Butler* was overcome by the fact that Thompkins acknowledged his rights, did not invoke them, participated sporadically but voluntarily during the interview, was not coerced by the police, and then with knowledge of his rights, answered their questions and incriminated himself. The ruling that he waived his right to remain silent and to have an attorney was not unreasonable.

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[32] As the lower federal courts have noted, the decision to answer some questions but not others does not constitute an invocation of one's right to remain silent, but rather a limited waiver of those rights. *See*, e.g., *United States v. Eaton,* 890 F.2d 511, 514 (1st Cir. 1989)("Rather, he simply says that whether he will 'waive his rights and answer' depends on the questions asked. The district court found a knowing, voluntary 'waiver.' The law permits a 'selective' waiver.").

2. The Sixth Circuit decision was also predicated on a legal error – it failed to recognize that an in-custody suspect who has been properly instructed on his Fifth Amendment rights and has acknowledged them impliedly waives them when he elects to voluntarily answer questions.

The fatal legal error of the Sixth Circuit decision was to fail to understand *Miranda* in light of this Court's decision in *Butler*. The core of *Miranda* is the police obligation to inform a suspect of his rights so that the suspect is able to make a knowing decision about whether to exercise these rights. This is accomplished where (1) the warnings are properly given; (2) the suspect acknowledges these rights; and (3) the suspect has an opportunity to exercise these rights. After the prosecution proves these three points, a suspect who voluntarily answers questions has waived his right to remain silent and his right to speak with his attorney.

In rejecting the conclusion that a valid waiver can arise from the "silence of the accused after warnings are given" or from "mere silence,"[33] this Court seeks to ensure that the provision of the rights does not become an empty ritual that does not guarantee that the suspect is aware of his rights and can act on them. Thus, when the suspect either acknowledges his rights or makes expressly clear that he understands them after the rights have been provided, the interests underlying *Miranda* and its protection of the Self-Incrimination Clause of the Fifth Amendment are secured.

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[33] *Miranda,* 384 U.S. at 475; *Butler,* 441 U.S. at 373.

The paramount holdings of *Miranda* relate to the procedural safeguards that must be employed to protect a person's right against self-incrimination: an in-custody suspect must be warned of his rights before being questioned; the suspect must be given an opportunity to knowingly and intelligently waive these rights and agree to answer questions and make a statement; and the prosecution must provide evidence of warnings and waiver before it may introduce evidence obtained from this process.[34]

The overarching theme of *Miranda* was the need to inform a suspect of his rights at the outset of the interrogation to ensure that any "statements were truly the product of free choice."[35] The protective procedures were necessary to dispel the inherently coercive environment created by custodial police interrogation:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[36]

This is the reason for the procedural safeguards.

In reaffirming *Miranda,* this Court in *Dickerson v. United States* held that *Miranda* established constitutional rules governing the admissibility of statements made during custodial interrogation.[37] In rejecting the basic challenge to the decision, this Court provided a narrow description of the "core ruling" of *Miranda*:

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[34] *Miranda,* 384 U.S. at 478-479.
[35] *Miranda,* 384 U.S. at 457.
[36] *Miranda,* 384 U.S. at 458.
[37] *Dickerson v. United States,* 530 U.S. 428, 431 (2000).

> If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.[38]

As noted in *Davis v. United States,* "[t]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves."[39] The statement introduced here was not unwarned. Just as the defendant in *United States v. Westover,* the companion case to *Miranda,* Thompkins here was also "adequately advised of his rights and given an opportunity to exercise them."[40] The prosecution did not violate Thompkins's right against self-incrimination under *Miranda* by introducing his statement here.

The controlling principles of *Miranda* are met where the ability of an in-custody suspect to make a voluntary choice to speak with the police is not compromised. This Court in *Oregon v. Elstad* permitted the admission of a statement for an in-custody suspect who was given his rights under *Miranda* and waived these rights, but only after the police had already briefly questioned him and received an incriminating response without providing any warnings.[41] Where this same posture was presented in *Missouri v. Seibert,* this Court distinguished *Elstad* because the violation did not arise from "good faith" but rather from a police tactic to

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[38] *Dickerson,* 530 U.S. at 443-444.
[39] *Davis,* 512 U.S. at 460 (1994).
[40] *Miranda,* 384 U.S. at 496.
[41] *Oregon v. Elstad,* 470 U.S. 298, 300, 318 (1985).

circumvent *Miranda*.[42] In rejecting the "two-stage interrogation" tactic, the plurality opinion in *Seibert* noted that the practice was designed to render the *Miranda* warnings "ineffective" by waiting until the suspect has already confessed before providing the rights so that the suspect would no longer view the rights as "genuine."[43] There was nothing about the interrogation process here that rendered the provision of Thompkins's *Miranda* rights meaningless.

More significantly, the decision of the Sixth Circuit failed to recognize how this Court's decision in *Butler* fundamentally expanded the basis for finding a valid waiver under *Miranda*. In *Miranda,* this Court stated "[n]o effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given."[44] In *Butler,* however, this Court held that a suspect who understood his rights, refused to sign a waiver form, but who agreed to speak with the police and then made a statement may have impliedly waived his right to counsel even though he said nothing about waiving his right to counsel.[45] Although the prosecution maintains the burden and must overcome the presumption, the Sixth Circuit decision was not sensitive to the "course of conduct" that might establish such an implied waiver in light of the purposes of *Miranda.*

The ruling of the Michigan Court of Appeals that Thompkins waived his right to remain silent and his right to an attorney when he voluntarily answered questions after expressly stating that he understood his

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[42] *Missouri v. Seibert,* 542 U.S. 600, 611, 615-616 (Souter, J., plurality opinion), 620 (Kennedy, J., concurring) (2004).
[43] *Seibert,* 470 U.S. at 611, 613 (Souter, J., plurality).
[44] *Miranda,* 384 U.S. at 470.
[45] *Butler,* 441 U.S. at 373, 375-376.

rights is consistent with the general rule that waivers must be voluntary, knowing, and intelligent. The evident concern underlying *Miranda* in its statement that a waiver cannot be presumed from "silence" is that the police will present the rights without the suspect having a real opportunity to elect whether to waive these rights. The key is that the suspect's rights be voluntarily relinquished.[46] This is what makes the express acknowledgement of the rights so critical for the *Miranda* inquiry. When a suspect receives the warnings, expresses understanding of the rights (knowing that any statement "may be used against you") and then voluntarily answering questions without invoking these rights, such a course of conduct will ordinarily constitute an implied waiver of these rights. Such was the case here.

This was also the basis of the federal district court's decision to deny Thompkins habeas relief. Pet. App. 67a-68a. This conclusion dovetails the analysis of many of the lowers courts under *Butler* as already noted.[47] The suspect in many of these cases immediately answered questions;[48] whereas here Thompkins did not immediately voluntarily answer questions, but provided responses sporadically during the interview before answering the questions about the fact that he prayed for forgiveness. But this difference is immaterial where Thompkins was expressly aware of his rights and knew

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[46] *See Miranda*, 384 U.S. at 476.

[47] *See* n 21 above.

[48] *See,* e.g., *Pennsylvania v. Bomar,* 573 Pa. 426; 826 A.2d 831, 843 (2003)("In light of the facts of record that appellant twice expressed his understanding of the *Miranda* rights, freely answered the questions posed to him immediately thereafter, and at no point indicated his unwillingness to participate in the interrogation without an attorney present, the record supports the trial court's finding that appellant knowingly and voluntarily waived his *Miranda* rights.").

that he could end the interview at any time. Once the rights are in fact understood, and will be honored where exercised, the "inherent pressures of the interrogation atmosphere" described in *Miranda* are dispelled.[49] Because Thompkins expressly knew that he could end the interview at any time, the fact that he did not do so but voluntarily answered questions incriminating himself indicated his decision to forgo his rights. The prosecution overcame the presumption that he did not waive his rights.

As a corollary point to the fact that there was no violation of Thompkins's rights under *Miranda,* the police also did not act improperly in continuing the interview after providing him his rights even though he did not expressly waive his rights. This conclusion follows from this Court's decision in *Butler*.

This Court in *Miranda* did not hold that the police could only engage in interrogation after the suspect had waived these rights. Rather, *Miranda* required that the warnings and waiver were necessary "prerequisites" to the admission of a suspect's statement at trial.[50] In explaining the process after the warnings, this Court stated that a suspect could invoke his right to remain silent, which would stop the questioning:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, *at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment

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[49] *Miranda,* 384 U.S. at 468.
[50] *Miranda,* 384 U.S. at 476.

> privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.[51]

The unstated point here is that the police may begin its interrogation after the provision of warnings, but the prosecution only may introduce a statement after it establishes that a waiver occurred.

This Court in *Miranda* did not require that the waiver be obtained before the police begin asking questions. In its statement of its holding, *Miranda* only states that the suspect must "be warned prior to any questions" – not that the suspect must be warned and waive his rights before any questioning. A majority of this Court has not required more since then.[52] The central point of *Miranda* is that regardless of when the questioning occurs, a statement may only be introduced when the in-custody suspect has been provided his rights and waived these rights.[53]

This point is clear from this Court's holding in *Butler*. In determining that a waiver may be implied from the suspect's acknowledgement of his rights and a "course of conduct" that indicates waiver, it is clear that the police may ask questions in the absence of an express waiver.[54] This is because in some cases "waiver can be

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[51] *Miranda,* 384 U.S. at 473-474 (emphasis added; footnote omitted).
[52] A *plurality* of this Court, however, indicated in obiter dictum that *Miranda* required the obtaining of a waiver before beginning questioning in *Missouri v. Seibert,* 542 U.S. 600, 608 (2004) (Souter, J., plurality opinion)(stating the "failure to give the prescribed warnings and obtain a waiver of rights *before* custodial questioning generally requires exclusion of any statements obtained.").
[53] *Elstad*, 470 U.S. at 308-309; *See also Seibert,* 542 U.S. at 619-620 (Kennedy, J., concurring).
[54] *Butler,* 441 U.S. at 373.

clearly inferred from the actions and words of the person interrogated." [55] There was no indication that the police acted improperly in *Butler* by moving forward with the interrogation of the suspect in the absence of an express waiver of his right to an attorney. In fact, this Court suggested that the police acted properly:

> There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver.[56]

Thus, the police may continue an interview with a suspect, once a suspect is warned of all his rights and he acknowledges them but the suspect does not expressly waive his rights. A rule that police are barred from asking a suspect questions absent an express waiver is irreconcilable with the holding in *Butler*.

The decision in *Miranda* was intended to provide "concrete constitutional guidelines" to follow.[57] As evidenced by the decision of the lower courts, it is common for law enforcement officers to inform a suspect of his rights and, once the suspect acknowledged those rights, continue the interview and begin questioning even where there was no express waiver of those rights. That is what occurred in *Butler* with respect to the suspect's right to counsel – he was questioned even

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[55] *Butler,* 441 U.S. at 373.
[56] *Butler,* 441 U.S. at 374 (emphasis in original).
[57] *Miranda,* 384 U.S. at 441-442.

though he had said nothing about waiving that right. The same is true here with regard to his right to remain silent. There was nothing improper with the police conduct.

B. Thompkins did not invoke his right to remain silent.

The Michigan courts here rejected the claim advanced by Thompkins that his conduct constituted invocation of his right to remain silent by his conduct. Pet. App. 75a; J.A. 28a. There is no clearly established precedent from this Court that requires a different result.

In determining that the Michigan courts were objectively unreasonable in concluding that Thompkins had waived his right to remain silent and his right to counsel, the Sixth Circuit did not reach the issue about whether Thompkins may have invoked his right to remain silent by his post-warning conduct. Pet. App. 29a. There was no such invocation. Even if interpreted as an equivocal assertion, there was no obligation for the police to cease questioning.

The question whether an in-custody suspect has waived his rights under *Miranda* is distinct from the inquiry whether he has invoked this right.[58] Under *Miranda,* once the in-custody suspect requests to remain silent or requests counsel, the police must honor this request either by ceasing questioning or by providing counsel.[59]

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[58] *Smith v. Illinois,* 469 U.S. 91, 98 (1984).
[59] *Miranda,* 384 U.S. at 473-474.

The issue arises about what must occur if the request to remain silent or for counsel is equivocal. This Court has not previously answered this question for the right to remain silent. Regarding the right to counsel, this Court stated in *Davis v. United States* that the "suspect must unambiguously request counsel" or otherwise there is no obligation to cease questioning.[60] *Davis* specifically rejected the idea that the police must obtain clarification before continuing with an interrogation:

> But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.[61]

This Court has not previously addressed whether this standard would apply for an equivocal assertion of a suspect's right to remain silent. Many circuits, though, have ruled that the analysis in *Davis* would apply to both the right to an attorney and the right to remain silent.[62] This Court should expressly adopt the *Davis* standard here insofar as Thompkins claims that he invoked his right to remain silent through his conduct. At the very least, the fact that the lower courts have applied *Davis* to the right to remain silent confirms the lack of clearly established precedent from this Court on this point.

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[60] *Davis,* 512 U.S. at 459.

[61] *Davis,* 512 U.S. at 462.

[62] *See Bui v. DiPaolo,* 170 F.3d 232, 239 (1st Cir. 1999)("[E]very circuit that has addressed the issue squarely has concluded that *Davis* applies to both components of *Miranda*: the right to counsel and the right to remain silent.").

As already noted, Thompkins acknowledged his rights under *Miranda* after having read out loud that he had the right to decide to remain silent and a right to talk with a lawyer at any time. J.A. 8-11a, 146a. Although he remained "largely silent," Thompkins did sporadically answer with verbal and non-verbal responses. J.A. 9a-10a, 17a-24a. Thompkins neither requested an attorney, nor did say that he wished the interview to end. J.A. 19a-22a. Near the end of the interview, he voluntarily answered the questions that he believed in God and that he prayed for forgiveness for shooting the boy. There was no request that he remain silent or for the interview to end. The police had no obligation to cease questioning.

This conclusion is consistent with the concurring opinion by Justice Kennedy in which he stated that "[w]here a required *Miranda* warning has been given, a suspect's later confession, made outside counsel's presence, is suppressed to protect the Fifth Amendment right of silence *only* if a reasonable officer should have been certain that the suspect expressed the unequivocal election of the right."[63] The police conduct was proper. The Michigan courts were not unreasonable in ruling that Thompkins had not invoked his right to remain silent.

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[63] *Texas v. Cobb,* 532 U.S. 162, 176 (2001)(Kennedy, J., concurring) (emphasis added).

II. The Michigan Court of Appeals did not act unreasonably in rejecting Thompkins's ineffective assistance of counsel claim under *Strickland v. Washington*.

The Michigan Courts did not unreasonably apply this Court's precedent in denying Thompkins's ineffective assistance of counsel claim. Thompkins contends that he was prejudiced by his counsel's failure to ask for a jury instruction prohibiting the jury from considering Purifoy's acquittal for anything other than his credibility. The Sixth Circuit agreed and reasoned that the evidence Purifoy was acquitted likely exerted a "powerful influence" on the jury to convict Thompkins to ensure that someone would be held accountable for the crime in light of the fact that Purifoy was not. Pet. App. 35a. The Sixth Circuit also reasoned that the jury might have drawn an inference that because either Purifoy or Thompkins was the shooter and Purifoy was acquitted, that therefore Thompkins must be guilty. Pet. App. 35a. But Thompkins's jury knew that Purifoy was tried under an aiding-and-abetting theory – not is the shooter – and so there is no reasonable danger that it determined his guilt by process of elimination.

Moreover, the jury was correctly instructed that it had the sole responsibility to determine the facts, and it must acquit Thompkins unless it was convinced of his guilt beyond a reasonable doubt. Consistent with the standard established by this Court in *Strickland v. Washington*,[64] the Michigan Court of Appeals found that Thompkins had not demonstrated prejudice because "the record does not disclose an attempt to argue [Purifoy's] conviction for an improper purpose." Pet. App. 80a. The decision is not unreasonable because it must be

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[64] *Strickland v. Washington*, 466 U.S. 668 (1984).

presumed that the jury followed its instructions and did not make illogical inferences, and because the strong evidence of Thompkins's guilt was not undercut by evidence that Purifoy had been acquitted. The Sixth Circuit erred in granting habeas relief on this claim.

A. The State court decision finding no *Strickland* prejudice is entitled to substantial deference under 28 U.S.C. § 2254(d).

Section 2254(d) of AEDPA affords the State court adjudication of constitutional claims considerable deference. The Court interpreted the unreasonable application prong of § 2254(d)(1) in *Williams* as requiring habeas courts to defer to State court applications of federal law that are not objectively unreasonable.[65] In *Rompilla v. Beard*, this Court stated that an "unreasonable application" occurs when a State court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case."[66]

This Court has consistently drawn a distinction between State court decisions applying a broad constitutional standard and ones that apply a narrow rule. Where a standard is at issue, State court decisions are given greater leeway:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity.

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[65] *Williams*, 529 U.S. at 412.

[66] *Rompilla v. Beard*, 545 U.S. 374, 380 (2005), quoting *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (internal quotes omitted).

> The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.[67]

In *Knowles v. Mirzayance*, the Court held that ineffective assistance of counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard."[68]

The Michigan court was entitled to substantial leeway in resolving the question whether Thompkins was prejudiced by his counsel's failure to seek the special jury instruction.

B. The *Strickland* standard requires a reviewing court to assume that the jury reasonably, conscientiously, and impartially applied the jury instructions in determining whether counsel's actions prejudiced the defense.

A claim of ineffective assistance of counsel is governed by *Strickland v. Washington*.[69] To establish ineffective assistance, a defendant must demonstrate that counsel's performance was objectively unreasonable and that he was prejudiced by counsel's action or inaction.[70]

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[67] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).
[68] *Knowles v. Mirzayance*, 556 U.S. ___; 129 S. Ct. 1411, 1420 (2009).
[69] *Strickland,* 466 U.S. at 668.
[70] *Strickland,* 466 U.S. at 687- 688; *Williams*, 529 U.S. at 412.

The defendant bears the burden of affirmatively proving prejudice.[71] It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.[72] The defendant must show that there is a reasonable probability that the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[73]

But the "reasonable probability" standard requires a reviewing court to make certain assumptions and disregard forms of speculative prejudice. A defendant has no entitlement to the benefit of a lawless decision-maker.[74] A reviewing court must also assume that the jury "reasonably, conscientiously, and impartially" applied the standards for which it was instructed.[75] The reviewing court "must exclude the possibility of arbitrariness, whimsy, caprice, [and] nullification."[76] That is, the possibility that a jury might disregard its oath and instructions is not the sort of prejudice protected by the right to the effective assistance of counsel.

C. The State court decision in this case applied the correct standard.

The Michigan court applied the correct test. In deciding Thompkins's claim, the state trial court stated that it must determine whether counsel's performance fell below an objective standard of reasonableness, and if so, whether but for the errors there is a reasonable

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[71] *Strickland,* 466 U.S. at 693.
[72] *Strickland,* 466 U.S. at 693.
[73] *Strickland,* 466 U.S. at 694.
[74] *Strickland,* 466 U.S. at 695.
[75] *Strickland*, 466 U.S. at 694-695.
[76] *Strickland,* 466 U.S. at 694-695.

probability that the result of the proceeding would have been different. J.A. 233a-235a (Opinion and Order Denying Motion for New Trial).

The Michigan Court of Appeals stated that Thompkins was required to show that "counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Pet. App. 79a. The State court cited the Michigan Supreme Court's decision in *People v. Mitchell*, as authority for the standard.[77] And *Mitchell,* in turn, cites to *People v. Pickens*,[78] where the Michigan Supreme Court held that the Michigan Constitution did not justify a more restrictive standard than the United States Constitution and adopted the *Strickland* test. The *Mitchell* decision quotes directly from *Strickland:*

> [T]he deficient performance [must have] prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. [*Strickland* at 687.][79]

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[77] *People v. Mitchell*, 454 Mich. 145; 560 N.W.2d 600, 606 (1997); habeas relief subsequently granted in *Mitchell v. Mason*, 257 F.3d 554 (6th Cir. 2001) and reaffirmed in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003).

[78] *People v. Pickens*, 446 Mich. 298; 521 N.W.2d 797 (1994).

[79] *Mitchell,* 560 N.W.2d at 606.

While the reference to a "fair trial" without explicit reference to the "reasonable probability" standard is similar to the problem this Court faced in *Williams v. Taylor*, this case is distinguishable.[80] In *Williams*, the Virginia Supreme Court had explicitly eschewed the "reasonable probability" standard. To the contrary, the *Mitchell* decision – relied on by the Michigan court in the present case – correctly observed that the "test requires the greatest level of factual inquiry into the actual conduct of the defense *and its effect on the outcome of the trial*," and then it quoted directly from *Strickland*.[81]

D. The State court application of the *Strickland* prejudice standard was not objectively unreasonable.

The Michigan Court of Appeals reasonably concluded that Thompkins was not prejudiced by his counsel's failure to request the special instruction for two reasons.

First, *Strickland* does not allow for the possibility of a lawless decision-maker.[82] And Thompkins's claim of prejudice relies on the possibility that the jury disregarded logic, its oath, and its instructions and convicted Thompkins so that *someone* was made to pay for the crime. The *Strickland* standard excludes such hypothetical forms of prejudice.

Second, the strong, mutually corroborating, evidence of Thompkins's guilt was not affected by counsel's alleged error. There was no reasonable

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[80] *Williams*, 529 U.S. at 393-394.
[81] *Mitchell*, 560 N.W.2d at 606 (emphasis added).
[82] *Strickland*, 466 U.S. at 695.

probability that the result of the trial would have been different had the special instruction been requested.

1. The alleged prejudice is based on the unwarranted assumption that the jury might have disregarded logic, its oath, its instructions, and the parties' arguments.

Thompkins cannot demonstrate that he was prejudiced by the failure of his counsel to request a limiting instruction on the permissible use of Purifoy's acquittal because no prejudice occurred. Thompkins's jury was aware that Purifoy had been tried under an aiding-and-abetting theory. France testified at Thompkins's trial that he asserted during Purifoy's trial that Thompkins was the shooter and Purifoy was the driver. J.A. 99a. Purifoy and Helgert also testified that Purifoy had been tried under an abetting-and-abetting theory. J.A. 139a-141a, 177a. No logical inference can be drawn from Purifoy's acquittal as an aider and abettor to Thompkins's guilt. The jury could only have based its guilty verdict on Purifoy's acquittal if it had reasoned that either Thompkins or Purifoy must have been the shooter, and if the other jury found that Purifoy was not the shooter, then Thompkins must be. But once the jury was informed from the testimony of France, Purifoy, and Helgert that Purifoy was charged only with being an aider and abettor based on the same theory that was being presented to Thompkins's jury, that inference was not logically available. Purifoy's acquittal as an aider and abettor says nothing about Thompkins's guilt as the shooter. In other words, because the Purifoy jury was never asked to find that Purifoy was the shooter, his acquittal does not contradict the claim that he was the shooter.

This inference of guilt by process of elimination was also prevented by the jury instructions. The jury was properly instructed multiple times regarding its exclusive role as the fact-finder. These instructions prevented it from giving any weight to the other jury's determination about Purifoy's culpability. The jury was also instructed that the prosecutor carried the burden of proving Thompkins's guilt beyond a reasonable doubt, and that it must acquit Thompkins if the burden of proof was not met. This instruction prevented it from finding Thompkins guilty merely so *someone* would be held accountable for the crime. The instruction regarding the burden of proof prevents a jury from convicting a defendant out of blind vengeance.

Strickland instructs that in determining whether counsel's actions prejudiced a criminal defendant, a reviewing court must assume that the jury reasonably, conscientiously, and impartially applied the standards for which it was instructed. The reviewing court must exclude the possibility of arbitrariness, whimsy, caprice, and nullification on the part of the jury.[83] The Sixth Circuit ignored this limiting principle, basing its finding of prejudice on its speculation that the jury might have disregarded its jury instructions and held Thompkins responsible for the crime because Purifoy had not been:

> [T]hat Purifoy had been acquitted of murder likely exerted a powerful influence on the jury to convict Thompkins of murder. If the jury did not convict Thompkins, the jury knew that no one would be convicted of killing Morris and shooting France. Most importantly, in the absence of a limiting instruction, the jury

[83] *Strickland*, 466 U.S. at 694-695.

> could well have believed that it was entirely proper to weigh Purifoy's acquittal as significant evidence that Thompkins must have been the shooter. [Pet. App. 35a.]

This line of speculation evinces a fundamental misapplication of the facet of the *Strickland* prejudice prong that excludes speculative forms of prejudice. The Sixth Circuit gave weight to the possibility that the jury ignored multiple instructions that it was the sole trier of fact and that the prosecutor had the burden to prove Thompkins guilty with evidence to convince it beyond a reasonable doubt. The Sixth Circuit instead assumed that the jury likely held Thompkins responsible solely because if it acquitted him no one would be made to pay for the murder. But a defendant has no entitlement to the benefit of a lawless decision-maker.[84] If it is fair to entertain the possibility that the jury ignored its instructions regarding its exclusive role as fact-finder and the prosecutor's burden of proof, then a special instruction would have provided no additional protection. If the general instructions were ignored, then there is no reason to believe that a special instruction would have been heeded either. The jury was duty-bound to follow all of its instructions. This speculative form of potential prejudice caused by the evidence of Purifoy's acquittal cannot and would not have been avoided with yet another jury instruction.

Nor did either party suggest the worrisome and illogical inference that Purifoy's acquittal pointed to Thompkins's guilt as the principal. Rather, Purifoy's prior trial and acquittal was only used as a means of assessing his credibility as a witness, the source of his

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[84] *Strickland,* 466 U.S. at 695.

knowledge about the facts of the case, and to put into context the written correspondence Purifoy sent to Thompkins after Purifoy's trial. The prosecutor suggested that if Thompkins truly was the driver, he would have said so in his return letters to Purifoy where Purifoy confirmed that Purifoy was the driver. Defense counsel used the correspondences to attack Purifoy's credibility and suggest that he was attempting to place the blame first on Thompkins and then on Woodward. The prosecutor *never* used the result of Purifoy's trial to draw an inference that if Purifoy was found not guilty then Thompkins must have been the shooter.

Even if Purifoy's acquittal of murder could have been considered as substantive evidence by Thompkins's jury, it does not make it more likely or not that Thompkins was the shooter. It does not speak to the issue. If anything, the opposite inference could have been drawn: if the prosecutor asserted consistently in both trials that Purifoy was the driver and Thompkins was the shooter, then Thompkins's jury could infer his innocence from Purifoy's jury's decision to acquit after the same theory was put forward to them. In any event, the prosecutor specifically discouraged the drawing of any such improper inference by informing the jury that they were not bound by what Purifoy's jury did.

The Sixth Circuit was also troubled by the jury instruction that allowed the jury to convict solely based on the testimony of an accomplice. The Sixth Circuit reasoned that when this instruction is added to Purifoy's testimony that he was acquitted, it yields the reasonable probability that Thompkins was convicted based only on Purifoy's acquittal. But the instruction was read out of context. The instructions did not allow for the inference of Thompkins's guilt from Purifoy's acquittal because it instructed the jury only that: "You may convict the

defendant based only on the accomplice's testimony, if you believe the testimony *and it proves the defendant's guilt beyond a reasonable doubt."* J.A. 214a (emphasis added). The fact of Purifoy's acquittal as an aider and abettor does not allow for a logical inference of Thompkins's guilt at all, let alone allow for such an inference beyond a reasonable doubt.

Lastly, while the State of Michigan is aware that *Lockhart v. Fretwell* did not supplant the *Strickland* prejudice standard, it informs the analysis in this case. In *Fretwell*, a death penalty case, counsel failed to assert a defense to an aggravating factor that was based on an incorrect understanding of the law. This Court held that a "counsel's failure to make an objection in a State criminal sentencing proceeding – an objection that would have been supported by a decision which subsequently was overruled – [does not] constitute[] 'prejudice' within the meaning" of *Strickland*.[85] This Court concluded that to "hold otherwise would grant criminal defendants a windfall to which they are not entitled."[86] If a criminal defendant cannot point to the failure of his counsel to gain a *benefit* from a lawless decision-maker to establish prejudice, so too he cannot point to the failure of his counsel to *prevent* the possibility of harm from a lawlessness decision-maker. A prejudice standard that must account for such speculation is no standard at all because "virtually every act or omission of counsel would meet that test."[87]

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[85] *Lockhart v. Fretwell*, 506 U.S. 364, 366 (1992).
[86] *Fretwell*, 506 U.S. at 366.
[87] *Strickland,* 466 U.S. at 693.

2. Counsel's alleged error had no impact on the strong evidence of Thompkins's guilt.

Strickland also instructs that the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt, and to answer this question the Court must consider the totality of the evidence before the jury.[88] *Strickland* recognizes that some factual findings will have been unaffected by the errors and will have had an isolated, trivial effect. The unaffected findings must be taken as a given.[89]

The evidence strongly indicating Thompkins's guilt would not have been affected by the addition of the special jury instruction. The most damaging evidence was the surviving victim's positive identification of Thompkins as the shooter. J.A. 77a-83a, 88a-89a, 103a-107a. The surviving victim's eyewitness identification testimony in this case was supported by the photograph taken from the delicatessen's surveillance video. This photograph indisputably depicted Thompkins and Purifoy as the men involved in the altercation. J.A. 107a, 112a-113a, 138, 200a-201a. Therefore, the only question was whether France correctly identified Thompkins as the shooter and Purifoy as the driver. But the jury saw for themselves how dissimilar the two men appeared. J.A. 81a-82a. And France had a good eye-to-eye contact with Thompkins and was certain of his identification. J.A. 88a-89a. The special jury instruction would have had no impact whatsoever on this lynch-pin evidence. Whether the jury felt bound by Purifoy's jury's determination that he was not guilty as an aider and

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[88] *Strickland*, 466 U.S. at 695.
[89] *Strickland*, 466 U.S. at 695-696.

abettor has no relevance to the jury's determination whether France correctly picked Thompkins as the shooter and Purifoy as the driver.

Additionally, Thompkins's abandoned van was identified as the van involved in the shooting. J.A. 137a, 142a-144a. It had distinctive gold rims that he removed before he abandoned it. He confessed that he was the shooter to Stephens. J.A. 113a-115a. Stephens account of the confession included Thompkins's statement that he stripped and abandoned his van after the crime, a detail that was therefore corroborated. J.A. 115a-117a. Of course, Thompkins also admitted to the police that he prayed for the boy he shot down. J.A. 153a. And finally, his flight from Michigan, change of identities, and refusal to admit his true identify ever to the Ohio authorities, point to his culpability. J.A. 121a-132a. None of these items are undermined by the failure to give the special jury instruction. Because the weight of the prosecutor's case was unaffected by the alleged deficient performance of defense counsel, there is no reasonable probability that the jury would have had a reasonable doubt regarding guilt had the instruction been given.

The Michigan Court was owed substantial deference to its conclusion that Thompkins was not prejudiced by his counsel's failure to seek an instruction that specifically limited the jury's use of Purifoy's acquittal. And given the facts that (1) the only conceivable prejudice is one that entertains the possibility of a lawless jury; (2) the feared inference would have been an illogical one to draw; and (3) the alleged error had no impact on the evidence that proved Thompkins's guilt, the State court's decision cannot be characterized as objectively unreasonable, and habeas relief should have been denied.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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Dated: December 2009

ATTACHMENT

NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE A RIGHT TO TALK TO A LAWYER BEFORE ANSWERING ANY QUESTIONS AND YOU HAVE THE RIGHT TO HAVE A LAWYER PRESENT WITH YOU WHILE YOU ARE ANSWERING ANY QUESTIONS.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH ONE.
5. YOU HAVE THE RIGHT TO DECIDE AT ANY TIME BEFORE OR DURING QUESTIONING TO USE YOUR RIGHT TO REMAIN SILENT AND YOUR RIGHT TO TALK WITH A LAWYER WHILE YOU ARE BEING QUESTIONED.

DO YOU UNDERSTAND EACH OF THESE RIGHTS THAT I HAVE EXPLAINED TO YOU? _____

SIGNATURE _____ DATE/TIME _____

Δ read 5 alond; 1-5 read by CA to Δ.
Δ asked to initial 1-5, refused 1s/ "I'm not going to sign anything."

This shortened. See narrative report

00-1489 M. Δ Van Thompkins

OFFICER/WITNESS C.A. Sgt / David Dawley,
2/20/01 1330

ORIGINAL IN RED