

No. 16-577

IN THE
Supreme Court of the United States

ARTHUR EUGENE SHELTON,
Petitioner,

v.

GREG MCQUIGGIN, WARDEN,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**REPLY IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State does not dispute that the circuit courts are divided over the proper standard to apply when deciding whether to hold an evidentiary hearing on a § 2254(d) petition. Nor does the State dispute that, because of the circuit split, a habeas petitioner's ability to seek relief may well turn on the happenstance of what court has jurisdiction to hear his claims. That intolerable inconsistency in the application of federal law merits resolution by this Court.

Petitioners in the First, Sixth, Ninth, and Eleventh Circuits may obtain evidentiary hearings only if they allege facts that are not "conclusory" or "speculative"—for instance, as those courts have explained, where the allegations are *supported* by the existing record. In those jurisdictions, a defendant effectively must already possess some evidence supporting his claim, even if that evidence is beyond his control. Petitioners in the Third, Fifth, and Tenth Circuits, by contrast, may obtain a hearing if they allege facts that, if true, would entitle them to relief, so long as those facts are not *contradicted* by the existing record. Such hearings are precisely what would allow a petitioner to obtain the proof needed to vindicate his constitutional rights. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) ("Ineffective-assistance claims often depend on evidence outside the trial record.").

Arthur Shelton's case illustrates the outcome-determinative effect of the more restrictive rule. Mr. Shelton's trial counsel failed to convey a plea offer to him and, upon conviction, he received a substantially longer sentence. His appellate counsel then failed to

raise an ineffective assistance claim on direct appeal, thus defaulting on that claim unless he can demonstrate ineffective assistance of appellate counsel. To make that showing, Mr. Shelton must establish that his appellate counsel reasonably should have known to bring the ineffective assistance of trial counsel claim on appeal—for example, if trial counsel or trial counsel’s files revealed to appellate counsel the unilateral rejection of the plea offer. Mr. Shelton can do that only with the aid of an evidentiary hearing.

Instead of disputing the existence of a circuit split, the State argues this case is the “wrong vehicle for resolving it.” (Opp. at 13.) That argument is based solely on *Cullen v. Pinholster*, 563 U.S. 170 (2011), but the Sixth Circuit did not refuse Mr. Shelton’s request for an evidentiary hearing because it felt constrained by *Pinholster*. Rather, applying one of the two opposing interpretations of *Schriro*, the court found Shelton’s allegations were “speculati[ve]” and thus did not support a hearing. (Pet. App. 10a.) The dissent, on the other hand, would have adopted the other view of *Schriro* and remanded for an evidentiary hearing. (Pet. App. 11a–12a.)

The Sixth Circuit had no need to consider *Pinholster* because it does not apply to the issue in this case. *Pinholster* limits the scope of review to the record before the state court on the actual habeas claim. It does not preclude an evidentiary hearing on the grounds for excusing a procedural default. Yet that is the issue here: whether Mr. Shelton is entitled to a hearing on the question whether his *appellate counsel* provided ineffective assistance, which would excuse the procedural default for failing to raise the

claim that his *trial counsel* provided ineffective assistance by failing to convey the plea offer.

Moreover, even if *Pinholster* were relevant here, two exceptions to the rule apply to the underlying claim that Mr. Shelton’s trial counsel rendered ineffective assistance: (1) the state court did not adjudicate the trial-counsel claim on the merits; and (2) even if the state court’s decision is construed to be on the merits, that decision was contrary to clearly established federal law. And in any event, the Sixth Circuit denied Mr. Shelton an evidentiary hearing on his appellate-counsel claim by deepening the circuit split on the proper standard. Granting certiorari review would thus have a direct impact on the outcome of this case. Certiorari review is thus warranted.

I. *PINHOLSTER* IS IRRELEVANT BECAUSE APPELLATE COUNSEL’S PERFORMANCE IS NOT THE BASIS FOR THE HABEAS CLAIM.

Pinholster limits a federal court’s review of a habeas petition to the state court record based on the strictures of § 2254(d). *See* 28 U.S.C. § 2254(d) (authorizing habeas relief only if a state court’s adjudication of a constitutional claim (i) “was contrary to, or involved an unreasonable application of, clearly established Federal law,” or (ii) “was based on an unreasonable determination of the facts in light of the evidence”). “This backward-looking language requires an examination of the state-court decision at the time it was made.” *Pinholster*, 563 U.S. at 182.

Mr. Shelton is seeking habeas relief pursuant to § 2254 based on the ineffective assistance of his trial

counsel for failing to convey a plea offer to him. It is that claim to which the limits of § 2254(d) apply.

Before reaching the merits of that claim, however, Mr. Shelton must overcome the procedural default for failing to raise his ineffective assistance of trial counsel claim on direct appeal as required by Michigan Court Rule 6.508(D)(3). “A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.” *Martinez*, 566 U.S. at 10. “[A]n attorney’s errors during an appeal on direct review may provide cause to excuse a procedural default.” *Id.* at 11 (citing *Coleman v. Thompson*, 501 U.S. 722, 754 (1991)); see also, e.g., *McClellan v. Rapelje*, 703 F.3d 344, 347–48 (6th Cir. 2013).

Mr. Shelton argued that the procedural default should be excused because his appellate counsel in state court was constitutionally ineffective in failing to raise on direct appeal his trial counsel’s failure to convey a plea offer. Because this appellate counsel claim is not the basis for his habeas petition, it need not meet the requirements of § 2254(d). *Pinholster*’s reading of the statute to preclude evidentiary hearings in certain circumstances does not apply to Mr. Shelton’s request to proceed free of the procedural default committed by his state appellate counsel.

It is true that Mr. Shelton did assert, as an additional basis for relief from judgment in state court, that his appellate counsel was ineffective for failing to raise various arguments on appeal, including his deficient trial counsel. (Pet. App. 61a–62a.) The state court rejected that argument with the perfunctory statement that appellate counsel cannot be con-

sidered ineffective for failing to raise “meritless arguments.” (*Id.*) To the extent this determination can be considered “on the merits” at all, it depends entirely on the analysis of the underlying claims. And as explained below, the state court’s adjudication of Mr. Shelton’s trial-counsel claim for failing to convey a plea offer was itself not “on the merits,” and was contrary to clearly established federal law in any event. But even if the state court did reject the appellate-counsel *claim* on the merits, it also rejected the argument as a ground for overcoming the state default rule, which is a distinct question and one that *Pinholster* does not govern.

II. *PINHOLSTER*’S LIMITATION ON EVIDENTIARY HEARINGS WOULD NOT APPLY TO MR. SHELTON’S CLAIMS IN ANY CASE.

Even assuming, as the State argues, that *Pinholster* is relevant because of Mr. Shelton’s underlying trial-counsel claim, *Pinholster*’s limitation would not apply here for two reasons: (1) the state court did not adjudicate Mr. Shelton’s ineffective assistance of trial counsel claim on the merits; and (2) if it were on the merits, it was contrary to clearly established federal law.

A. Shelton’s Trial-Counsel Claim Was Not Adjudicated “On The Merits.”

Pinholster’s restriction on reviewing habeas claims based on the record before the state court applies only “[i]f a claim has been adjudicated *on the merits* by a state court.” *Pinholster*, 563 U.S. at 185 (emphasis added).

For example, in *McClellan*, the Sixth Circuit affirmed the propriety of the district court’s evidentiary hearing and its decision to grant habeas relief. 703 F.3d at 345–46, 351. “[T]he state courts declined to reach the merits [of the petitioner’s ineffective assistance claim] because they found procedural default based upon the failure of appellate defense counsel to even raise the Sixth Amendment issue.” *Id.* at 351. Because “there was no decision on the merits concerning ineffective assistance of counsel, the *Cullen v. Pinholster* case does not prohibit the consideration of evidence on the merits in a later federal evidentiary hearing.” *Id.*

Mr. Shelton’s case is no different. The State’s assertion that Shelton does not “even contest” that the state-court adjudication was “on the merits” (Opp. at 11) is incorrect. Mr. Shelton in fact contested this very issue before the Sixth Circuit, pointing out that the state court never engaged in a merits analysis of Mr. Shelton’s trial-counsel claim, but instead applied Michigan Court Rule 6.508(D)(3) to find no “actual prejudice” from failing to raise the issue on direct appeal. (Pet. App. 54a–56a, 62a.) The State’s claim that the court reached an “alternative[]” holding on the merits of the underlying claim (Opp. at 5) is belied by the court’s opinion, which was couched exclusively as a procedural default analysis and was bookended by direct citations to the Michigan procedural rule. (Pet. App. 54a–62a.) The State’s reliance on *Harrington v. Richter*, 562 U.S. 86 (2011), is therefore misplaced. *See id.* at 99 (“[I]t may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication or state-law procedural principles to the contrary.*” (emphasis added)).

The state procedural-default analysis does have as an element an actual prejudice requirement that is similar to the *Strickland* test. (Pet. App. 56a.) But that is not enough to turn the state court’s decision into an “adjudication on the merits.” “[I]f . . . the state standard is *less* protective . . . [o]r . . . quite different from the federal standard, . . . the presumption that the federal claim was adjudicated on the merits may be rebutted . . . for the purpose of showing that the claim should be considered by the federal court de novo.” *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013); *see also Wilson v. Workman*, 577 F.3d 1284, 1299–1300 (10th Cir. 2009) (en banc) (state court that was “explicit in its use of” a state rule and which “create[d] a higher evidentiary burden than the federal standard” did “not constitute an adjudication on the merits” of the petitioner’s *Strickland* claim). Here, the state court imposed a higher burden of proof—preponderance of the evidence (Pet. App. 56a)—than is required under federal law—“reasonable probability” of a plea offer and acceptance, *see Missouri v. Frye*, 566 U.S. 134, 147 (2012) (“defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer”).

“The reasonable-probability standard is not the same as, and should not be confused with, . . . preponderance of the evidence” *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). The distinction between the two standards is critical. “[A] defendant need not establish that the attorney’s deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*.” *Nix v. Whiteside*, 475 U.S. 157, 175 (1986).

Instead, a defendant need only show a “reasonable probability,” which “is a probability sufficient to undermine confidence in the outcome.” *Id.* (quotation omitted). Because the Michigan court imposed the state preponderance of the evidence standard, which is “less protective [than] . . . the federal standard,” its decision cannot constitute an adjudication “on the merits.” *Johnson*, 133 S. Ct. at 1096.

B. Even If The State Court Did Adjudicate Mr. Shelton’s Trial-Counsel Claim “On The Merits,” That Adjudication Was Contrary To Clearly Established Federal Law.

Even if the state court decision were construed as being “on the merits,” an evidentiary hearing is still available if the decision meets the requirements of § 2254(d). “*Pinholster* . . . precludes consideration of evidence introduced in federal court only when determining whether a state court’s adjudication of a claim involved an unreasonable federal-law error.” *Harris v. Haeberlin*, 752 F.3d 1054, 1057 (6th Cir. 2014) (citing *Pinholster*, 131 S. Ct. at 1400). But once a federal court concludes, based on the state court record, that “the state court had unreasonably applied clearly-established federal law,” an evidentiary hearing can then be “ordered as a remedy.” *Id.* at 1057–58. In those circumstances, “*Pinholster* does not bar consideration of the evidence introduced for the first time in the district court” to determine whether to grant habeas relief. *Id.* at 1058 (upholding district court’s consideration of new evidence); see also *Arvelo v. Sec’y, Fla. Dep’t of Corr.*, 788 F.3d 1345, 1348 (11th Cir. 2015) (“If the state court decision was contrary to clearly established federal law, federal

courts are not necessarily limited to the state court record; instead, we may hold an evidentiary hearing and consider new evidence.”); *Sanchez v. Roden*, 753 F.3d 279, 307 (1st Cir. 2014) (“*Pinholster* . . . does not prohibit an evidentiary hearing once a petitioner has successfully shown the state court unreasonably applied federal law.”); *Mosley v. Atchison*, 689 F.3d 838, 853 (7th Cir. 2012) (“*Pinholster* did not instruct lower courts to ignore [new] evidence after determining that a state court’s denial of relief was erroneous under the strict standards of § 2254(d)(1).”).

The state court decision here was “contrary to clearly established federal law” for the same reason it was not an adjudication “on the merits”—it imposed a higher burden of proof than that required by federal law. Applying a preponderance of the evidence standard in place of a reasonable probability standard is contrary to *Strickland* and thus contrary to clearly established federal law under AEDPA:

If a state court were to reject a prisoner’s claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be “diametrically different,” “opposite in character or nature,” and “mutually opposed” to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a “reasonable probability that the result of the proceeding would have been different.”

Williams v. Taylor, 529 U.S. 362, 405–406 (2000) (last quotation of *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *see also id.* at 405 (“A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.”).

The courts of appeals have consistently applied this rule of law to find that a state court decision is contrary to clearly established federal law if, in determining whether a defendant has met the prejudice prong of *Strickland*, the state court decision applies any standard other than reasonable probability. *See, e.g., Hardy v. Chappell*, No. 13-56289, 2017 U.S. App. LEXIS 1555, at *15–16 (9th Cir. Jan. 27, 2017) (state court decision was contrary to clearly established federal law because, although it recited the *Strickland* standard, it applied a “substantial evidence” standard instead of “reasonable probability”); *Paulson v. Newton Corr. Facility*, 703 F.3d 416, 419–21 (8th Cir. 2013) (remanding to district court for initial consideration of whether state court applied a preponderance of the evidence standard contrary to the clearly established reasonable probability standard set forth in *Strickland*); *Leatherman v. Palmer*, 387 F. App’x 533, 536 (6th Cir. 2010) (“A state-court decision is contrary to clearly established federal law if, in spite of the rule in *Strickland*—that a petitioner urging ineffective assistance of counsel need only show a “reasonable probability” of prejudice—a state court required the petitioner to show prejudice by a preponderance of the evidence.” (quoting *Holder v. Palmer*, 588 F.3d 328, 343 (6th Cir. 2009))).

Accordingly, if the state court decision in Mr. Shelton’s case is considered to be “on the merits,” it was contrary to clearly established federal law, because it required him to prove by a “preponderance of the evidence,” rather than only a “reasonable probability,” that there was a plea offer and that he would have accepted it. When a state court commits such an error, a federal court is not constrained by § 2254(d)(1) or the concomitant limitations on evidentiary hearings imposed by *Pinholster*.

* * * * *

For any of these reasons, *Pinholster* does not apply to this case. The federal courts are free to hold an evidentiary hearing on Mr. Shelton’s ineffective assistance claims—particularly, his contention that appellate counsel’s ineffectiveness excused his procedural default—so long as he meets the standard for obtaining such a hearing. This case is an ideal vehicle for resolving the circuit split over that standard. The divided opinion below confirms that Mr. Shelton’s appeal turns precisely on that question.

The State contends that the impact of the split is “limited” because few cases implicate the standard. In fact, however, federal courts have cited *Schriro*’s standard—that a petitioner is entitled to a hearing if the factual allegations, if true, would entitle the petitioner to habeas relief—nearly 900 times since it was announced in 2007. Approximately 600 of those citations came after this Court decided *Pinholster*.

Not only has the question presented divided the courts of appeals, but it is a frequently recurring legal issue that warrants the Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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