

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH T. RICHEY,)
)
)
 Petitioner-Appellant,)
 v.) CASE NO. 01-3477
)
 MARGARET BRADSHAW,)
 Warden,)
)
 Respondent-Appellee.)

PETITIONER-APPELLANT RICHEY'S REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

INTRODUCTION AND SUMMARY OF THE ARGUMENT.....1

ARGUMENT.....3

I. The Supreme Court Remanded to Consider the Limited Question of Whether the State Waived Its Argument Concerning What Evidence Could Properly Be Considered3

II. Even if This Court Addresses the Underlying Question of What Evidence Can be Considered, It Should Reaffirm its Original Ruling7

III. The Remand from the Supreme Court Does Not Encompass Re-Analysis of the Merits of the Claim of Ineffective Assistance of Counsel9

CONCLUSION.....15

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Bradshaw v. Richey</i> , 126 S. Ct. 602 (2005)	1, 2, 4, 11
<i>Harvis v. Roadway Express, Inc.</i> , 923 F.2d 59 (6th Cir. 1991)	6
<i>Holland v. Jackson</i> , 542 U.S. 649 (2004)	6, 13
<i>House v. Bell</i> , 126 S. Ct. 2064 (2006).....	13
<i>Richey v. Mitchell</i> , 395 F.3d 660 (6th Cir. 2005).....	passim
<i>Williams v. Taylor</i> , 529 U.S. 420 (2000).....	2, 7-8, 12
 <u>STATUTES:</u>	
28 U.S.C. § 2254(e)(2).....	passim

The remand of this case from the United States Supreme Court is to address a limited question and was not a direction to reconsider the entirety of the case. Although the Supreme Court's *per curiam* opinion, based on the incomplete record presented on only the petition for a writ of certiorari, is not a picture of clarity, it is clear that the remand is limited.

Respondent, however, contends that the State failed to preserve its objection to the Sixth Circuit's reliance on evidence not presented in state court by failing to raise this argument properly before the Sixth Circuit. Because the relevant errors had not yet occurred, the Sixth Circuit has had no opportunity to address the argument that the State failed to preserve its *Holland* argument. It is better situated to address this argument in the first instance.

Bradshaw v. Richey, 126 S. Ct. 602, 606 (2005) (emphasis added) (citation omitted). In repeatedly referring to the argument for this Court to consider on remand in the singular, the Supreme Court made plain that it was not directing this Court to reconsider its entire ineffective assistance of counsel decision as the State suggests. Rather, the only question remanded is whether the State waived the argument that this Court could not consider the evidence developed during the federal habeas proceeding in finding ineffective assistance of trial counsel. As the State explicitly waived any argument that the evidence cannot be considered when it conceded that “§ 2254(e)(2) does not bar an evidentiary hearing in this case,” State Resp. to Mot. for Evid. Hrg. at 30, the Court should answer this single question by

holding there was a waiver.

If this Court were to conclude that, despite the State's explicit waiver, the remand required it to consider the underlying question whether the new evidence could be considered, the Court should still reconfirm its prior opinion. The State conceded that the new evidence could be considered before the District Court for a simple reason – § 2254(e)(2) does not prohibit a federal court from considering the new evidence because Richey was diligent in attempting to obtain the evidence in state court. *See Williams v. Taylor*, 529 U.S. 420, 435 (2000).

This case returns from the Supreme Court following a *per curiam* decision, based only upon the briefing on the petition for a writ of certiorari. Previously, this Court granted Richey's petition for a writ of habeas corpus on two grounds. *Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005). The Supreme Court reversed on the first ground but vacated and remanded on a narrow question concerning the ineffective assistance of counsel claim. 126 S. Ct. at 606. In finding ineffective assistance, this Court relied upon evidence that Richey first uncovered through discovery allowed by the District Court during the habeas action, including details concerning the qualifications of the "expert" Richey's trial counsel hired to analyze the scientific evidence of arson, counsel's failure to provide the "expert" with

critical information, and counsel's failure to understand that the "expert" did not conduct an independent analysis, among other things. *See* 395 F.3d at 682-88. The Supreme Court did not address the merits of this Court's finding of ineffective assistance of counsel. Rather, that Court merely questioned whether this Court's reliance upon evidence not presented to the state courts in finding ineffective assistance was proper under § 2254(e)(2).

Finally, the State offers no explanation or argument that the limited *per curiam* opinion of the Supreme Court contains any suggestion that this Court should reconsider its entire analysis of the claim of ineffective assistance. This Court need not and should not expand the question actually remanded to address the merits of the claim again. As this Court properly considered all the evidence, it should reaffirm its prior decision.

I. The Supreme Court Remanded to Consider the Limited Question of Whether the State Waived Its Argument Concerning What Evidence Could Properly Be Considered.

The remand of this case from the Supreme Court was to address only the limited question of whether the State waived its objection to the consideration of the evidence first uncovered during the federal habeas proceeding. Respondent-Appellee, throughout the post-remand briefing, attempts to generalize both the reasoning of the Supreme Court and the scope of the remand, but nothing in the opinion itself supports that expansive

interpretation. Thus, Respondent-Appellee argues, without citing any supporting language from the opinion, that the “Supreme Court vacated this Court’s resolution of the ineffective assistance of trial counsel claim principally on the ground that this Court failed to address our various procedural default arguments.” Respondent-Appellee’s Supplemental Brief (“State Supp.”) at 2. And Respondent-Appellee then proceeds, with no explanation for why such an argument is appropriate, to reargue procedural default and the substantive merits of the claim of ineffective assistance of counsel. But the Supreme Court made no mention of the merits of the claim, and remanded only to have this Court address “the argument that the State failed to preserve its *Holland* argument.” 126 S. Ct. at 606.

The State seeks to expand the question actually remanded because the record clearly resolves that question in Richey’s favor. As Richey explained in his Supplemental Brief, the State explicitly waived the argument when it conceded that Richey could have an evidentiary hearing in the District Court. *See* Appellant’s Supplemental Brief at 3-4. None of Respondent-Appellee’s new arguments to the contrary hold up under scrutiny.

First, Respondent-Appellee argues that any argument it made concerning the new evidence was “in the alternative” because the State

pressed its arguments of procedural default. State Supp. at 11-12. This is beside the point. The State’s procedural default arguments were that Richey had waived certain legal arguments by not raising them in compliance with state law. But the question on remand is whether the State waived any objection to what evidence can be considered in analyzing the ineffective assistance claim. On this question, the State never presented any arguments “in the alternative.”

In fact, it was the State itself that first suggested to the District Court that it expand the record to include all discovery taken during the federal habeas proceeding. After the completion of discovery, including depositions taken by Richey and the State, Richey sought an evidentiary hearing to present evidence through live testimony. In opposing Richey’s request, the State argued that an evidentiary hearing was unnecessary because all the evidence had already been developed through deposition testimony and the court could expand the record through Habeas Rule 7. *See* Respondent’s Memorandum in Response to Richey’s Motion for an Evidentiary Hearing (“State Resp. to Mot. for Evid. Hrg.”) at 4 (“Indeed, the discovery process in this case represents an alternative to conducting an evidentiary hearing since that process led to full development of the facts concerning Richey’s claims. The Supreme Court held that discovery and expansion of the record could be

sufficient remedies to construct a record upon which the district court can decide a claim.”) (attached to Appellee’s Memorandum Opposing Richey’s Motion to Strike (“State Mem. Opp. Mot. to Strike”)). The State never argued that this evidence could not be considered at all; the only dispute was *how* the evidence would be presented. Having persuaded the District Court to accept its suggestion to expand the record through Habeas Rule 7, Respondent-Appellee cannot now be heard to complain about the expansion of the record under the invited error doctrine. *See, e.g., Harvis v. Roadway Express Inc.*, 923 F.2d 59, 60-61 (6th Cir. 1991).¹

The State’s second argument, that it could not have anticipated later developments in the law, is similarly unavailing. Before the Supreme Court, the State argued for the first time, citing *Holland v. Jackson*, 425 U.S. 649 (2004), that the federal courts were barred from considering any evidence not first presented to the state courts. Now, the State argues that it could not have made that argument earlier because “*Holland* broke new ground by

¹ Respondent-Appellee presented a different spin on this same argument in opposing Appellant’s Motion to Strike. There, Respondent-Appellee argued that it only conceded an evidentiary hearing was appropriate to consider arguments Richey presented to the District Court. Respondent-Appellee continues by claiming that Richey presented new and different arguments to this Court and that, for those arguments, no waiver was made. State Mem. Opp. Mot. to Strike at 5-6. Again, this argument misunderstands the issue. Respondent-Appellee never complained that any of the evidence considered in analyzing the claim could not be considered. Before this Court, Respondent-Appellee never even cited § 2254(e)(2); Respondent-Appellee thus waived the “what evidence” argument.

applying the strictures of 28 U.S.C. § 2254(e)(2) to Habeas Rule 7 expansions of the record.” State Supp. at 12. But all *Holland* did is say that § 2254(e)(2) applies, and the State had already conceded that even if the statute applied it did not bar consideration of the evidence when it agreed that “§ 2254(e)(2) does not bar an evidentiary hearing in this case.” State Resp. to Mot. for Evid. Hrg. at 30 (emphasis added).² Thus, the decision in *Holland* is irrelevant to the State’s waiver and does not limit this Court’s ability to consider the new evidence.

II. Even if This Court Addresses the Underlying Question of What Evidence Can be Considered, It Should Reaffirm its Original Ruling.

Even if this Court were to conclude that the remand requires it to look beyond the waiver and analyze whether the evidence first uncovered during the federal discovery period can be considered, the Court should still conclude that it can be. As the Supreme Court has explained, § 2254(e)(2) does not apply if a prisoner was “diligent” in attempting to develop the record in state court. “Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the

² Even though *Williams v. Taylor* had not been decided, Richey argued, citing federal appellate authority, that § 2254(e)(2) did not prohibit an evidentiary hearing to consider the new evidence because “Richey’s failure to develop any facts in state court was through no fault of his own.” The State, correctly, agreed.

information available at the time, to investigate and pursue claims in state court.” *Williams v. Taylor*, 529 U.S. 420, 435 (2000). Even if the information could have been discovered through further actions, if the petitioner was diligent in his attempts, § 2254(e)(2) does not prohibit consideration of the evidence during the habeas review. *See Williams*, 529 U.S. at 442-43 (finding petitioner was diligent even though he did not discover relationship between juror and witness that could have been identified through search of publicly available records).

Richey was properly diligent in state court. In the post-remand briefing, Respondent-Appellee seeks to argue, for the very first time, that Richey was not sufficiently diligent during the state court proceedings to meet the standard of § 2254(e)(2). *See State Supp.* at 10. But a review of even the incomplete record demonstrates that Richey was prevented from obtaining the new evidence through no fault of his own.³ As Richey argued before the District Court, and the State conceded at that time, “The Respondent may not rely upon § 2254(e)(2) because Richey’s failure to develop any facts in state court was through no fault of his own.” Richey Mem. In Supp. of Mot. for Evid. Hrg. at 38 (attached to Appellant’s

³ Because the State waived this argument, no record on the issue was developed in the District Court or presented to this Court.

Supplemental Brief as Ex. B). The District Court agreed, A93 (Order Denying Motion for Evidentiary Hearing at 6), and the State never challenged that conclusion before this Court. A review of the state court record confirms that this conclusion was correct. *See, e.g.*, A1041 (seeking “discovery and an evidentiary hearing to establish these constitutional violations” during state court post-conviction proceeding); A2286 (seeking evidentiary hearing); A1090-1105 (denial of request by state courts). All of the evidence considered by this Court in concluding that Richey received ineffective assistance of trial counsel was properly considered; this Court should reaffirm its prior opinion that Richey received ineffective assistance of trial counsel in violation of his constitutional rights.

III. The Remand from the Supreme Court Does Not Encompass Re-Analysis of the Merits of the Claim of Ineffective Assistance of Counsel.

The State maintains that this Court is required to reconsider its entire analysis of the ineffective assistance of counsel claim, but nothing in the Supreme Court’s *per curiam* opinion even remotely suggests that it intended such a sweeping re-review on remand. Indeed, the State does not cite a single passage from the opinion to support its plea for a full reconsideration. Rather than focus on the actual question posed by the Supreme Court on remand (whether “the State failed to preserve its *Holland* argument”), the

State has unilaterally attempted to expand the scope of the remand by re-arguing the entirety of its already-rejected position concerning ineffective assistance of counsel. In its 32-page Supplemental Brief, Respondent-Appellee spends twelve pages re-arguing procedural default and another fifteen pages re-arguing the merits. In this lengthy recitation, the State never contests that it argued to the Supreme Court that “the Sixth Circuit expressly held that Richey had presented his claim to state court (as otherwise the claim would have been procedurally defaulted).” Appellant’s Supplemental Brief at 5 (quoting Reply Brief for the Petitioner to the Supreme Court at 9). Nor does the State disagree that the Supreme Court’s description of the District Court’s ruling or Respondent’s contentions before that Court were inaccurate, and not supported by the record. Finally, the State does not argue that the Supreme Court’s *per curiam* decision addresses, in any way, the propriety of this Court’s prior decision on the merits.

In re-confirming its original analysis on this claim, this Court may take the opportunity to clarify its ruling that there was no procedural default of any part of Richey’s claim of ineffective assistance of counsel.⁴ There

⁴ The Court need not take this action. Given the narrow scope of the remand, it would be appropriate for this Court to simply rule that the State waived any argument concerning reliance on evidence first uncovered during discovery in the federal habeas action and then to re-issue its prior opinion on ineffective assistance of counsel.

has been no dispute that, throughout post-conviction proceedings, Richey has argued that he received constitutionally ineffective assistance of trial counsel. At times, however, the State has attempted to characterize different parts of Richey’s argument as new, in an attempt to assert a claim of procedural default. But this Court saw through the State’s attempt to divide the single ineffective assistance of trial counsel argument into various pieces in order to manufacture such a default. The Court, therefore, properly rejected the claim of procedural default. *See Richey*, 395 F.3d at 682; *id.* at 690 (“I agree with the majority that this issue is not procedurally defaulted”) (Siler, J., dissenting).

Despite the State’s conceding that the claim of ineffective assistance was *not* procedurally defaulted, and this Court’s analysis reaching the same conclusion, the Supreme Court observed that “petitioner contends” that certain portions of the claim of ineffective assistance of counsel were procedurally defaulted because they “were apparent from the trial record but not raised on direct appeal.” 126 S. Ct. at 605-06.⁵ But even on remand, the

⁵ The Supreme Court mistakenly observed that the federal District Court concluded three pieces of Richey’s claim of ineffective assistance of counsel were defaulted. 126 S. Ct. at 605. The Supreme Court, however, cited to the District Court’s discussion of ineffective assistance of appellate counsel, not trial counsel, to support this conclusion. In fact, even the District Court had concluded that two of these three issues were not procedurally defaulted.

State has acknowledged that this is not its position. Rather, the State has argued that, although “[t]his Court then construed our different default arguments as a single assertion that Richey fully presented his claim during the post-conviction proceedings but should have asserted it on direct appeal,” this was not and is not the State’s current contention. Rather, “[w]hile [the State] did make this argument on the fifth factor concerning trial counsel putting Mr. DuBois’ name on the witness list, we did not make this same default argument on the other sub-sections.” State Supp. at 6-7 (emphasis added).

In light of this confusion, this Court may choose to re-confirm that none of Richey’s claim of ineffective assistance of trial counsel has been procedurally defaulted. As this Court explained, even if trial counsel’s errors were plain from the trial court, the prejudice analysis required by *Strickland v. Washington* required consideration of evidence outside the trial record. 395 F.3d at 682-88. As such, the claims were properly raised by Richey during the post-conviction proceedings and there is no procedural default.⁶

⁶ In the alternative, the Supreme Court has held that a petitioner satisfies the “cause” prong of the cause and prejudice standard when he establishes that, despite his diligence in state court, he did not uncover the new evidence considered by the federal courts. *See Williams*, 529 U.S. at 444. This Court has already found prejudice in considering the merits of the ineffective assistance of counsel claim. *Richey*, 395 F.3d at 686-88. In a

In re-confirming its decision on the merits, the Court may also make explicit its finding that Richey rebutted any prior finding by the state post-conviction trial court that DuBois was a qualified expert by clear and convincing evidence, to the extent such a finding is required.⁷ Based upon the new evidence obtained during the federal post-conviction proceeding, this Court made extended observations about the qualifications of the expert retained by Richey’s trial counsel, Mr. DuBois of the firm CTL Engineering.

This Court stated:

CTL sent DuBois, whose formal education was limited to a bachelor’s degree in metallurgical engineering and a partially completed stint in business school. Although accredited in Ohio as an accident reconstructionist, he primarily performed “vehicle accident reconstructions.” He had no accreditations in arson or fire investigations. Moreover, although DuBois was a member of the American Society for Testing Materials, the membership was solely through CTL; DuBois had no individual membership in the group, and he had attended no “seminars or other educational venues sponsored by the ASTM.” Similarly, although DuBois was a member of the International Association of Arson Investigators (“IAAI”), his involvement was limited to receiving quarterly publications in

different alternative, as Richey explained at length in his original merits briefs to this Court, the miscarriage of justice requirement similarly would allow Richey to avoid any procedural default. The Supreme Court has recently re-affirmed this principle. *See House v. Bell*, 126 S. Ct. 2064 (2006). Richey can thus avoid any default.

⁷ This assumes that Richey need rebut this finding by the state post-conviction *trial* court, which was not repeated by the appellate court, the highest state court to address this claim on the merits. The Supreme Court has also assumed that *de novo* review of such findings is appropriate if the federal courts receive and properly rely upon evidence not before the state courts. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004).

the mail, and at the time he was hired by Richey's trial counsel, he had attended no IAAI seminars on fire investigation. Finally, although DuBois had participated in numerous arson investigations with CTL, he did so in a supporting role: "[t]ypically, [he] would review the results [of the investigations] with the chemist who performed the analyses."

DuBois' resume, which trial counsel had received, indicated that he worked as a metallurgical engineer, and that his arson-related training consisted of only two two-day courses, neither of which involved the subject of burn patterns. Both courses were taught by personnel from the State Arson Lab, whose inculpatory conclusions DuBois was hired to review. Moreover, DuBois admitted that he admired Mohamed Gohar—Chief of the State Arson Lab, who oversaw the testing in Richey's case—and he believed that Gohar stayed at the forefront of technology and was "quite authoritative in his field." At the time he was hired, DuBois believed that the state fire marshal's office did a better job of fire sample analysis than his own employer did.

395 F.3d at 666-67. Based upon this extensive new evidence, the Court concluded that DuBois was unqualified to do the job for which he was hired.

DuBois was unqualified for the job because he worked primarily in another field, lacked training to do the job, and came into the litigation believing that the State's experts were more reliable than he was. Moreover, the minimal training he had received came from the very people whose conclusions he was being hired to review.

Id. at 683. The Supreme Court observed that this finding did not include an explicit statement that this Court found the state court finding rebutted by clear and convincing evidence. Importantly, the Supreme Court did not find that the evidence did *not* rebut the state court finding; it merely observed that this Court had not followed the formality of AEDPA. Hence, on remand,

this Court may make explicit what was implicit in its prior opinion – that, based upon the evidence identified during the federal discovery period, Richey has rebutted any state court finding that DuBois was qualified.⁸

CONCLUSION

The scope of remand from the Supreme Court to this Court is narrow. The Court instructed that this Court must determine whether the State waived its argument concerning reliance upon evidence not presented to the state courts. The State’s waiver was explicit. As this Court can rely upon all of the record evidence considered in its original January 25, 2005 decision, the Court should re-confirm its ruling that Richey is entitled to relief on the merits.

⁸ It is also worth noting that, even if this Court were to conclude that the finding had to be and was not rebutted by clear and convincing evidence, that would not result in a change in the final conclusion. The original decision of this Court was explicit that counsel was ineffective not only in hiring an unqualified expert, but also in managing the expert after he was hired. *Richey*, 395 F.3d at 686 (“Furthermore, even if counsel’s initial decision in hiring DuBois was proper, counsel’s ineffective handling of DuBois resulted in prejudice to Richey.”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner-Appellant Richey's Reply Brief was served by Federal Express upon Michael L. Collyer, Esq., Capital Crimes Section, State Office Building, 615 West Superior Avenue, 12th Floor, Cleveland, OH 44113-1899, counsel for Appellee, on this 14th day of July, 2006.

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