Case No. 18-1181

IN THE SUPREME COURT OF THE UNITED STATES

TIM SHOOP, Warden, Petitioner,

v.

AHMAD FAWZI ISSA, Respondent.

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

CAPITAL CASE – NO EXECUTION DATE

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

I

Does the firmly established Federal constitutional law, as it exists at the time of a defendant's trial, determine whether his conviction was constitutionally obtained, and thus whether the prisoner is held, "in violation of the Constitution or laws or treaties of the United States"?

Can new Federal constitutional law be retroactively applied to deny habeas relief under 28 U.S.C. §2254 when the defendant's Federal constitutional rights were violated under the firmly established Federal law governing at the time of his trial?

Can a conviction and resulting custody obtained through the failure of the state court to reasonably apply the governing Federal law at trial, become constitutional because the law changes?

Can a conviction and resulting custody obtained through the failure of the state court to reasonably apply the governing Federal law at trial, become constitutional because the law changes when the defendant has possible challenges to the use of the same evidence under the new constitutional regime?

Can a conviction and resulting custody be found constitutional by the application of new law when the defendant never had the opportunity to present his defense, craft his objections, and plan his trial strategy with notice of what the new law would be or would require?

Does the state have a finality interest in preserving a conviction obtained in violation of the firmly established Federal law that governed at the time of trial?

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Statement of the Case

Petitioner Warden Shoop has omitted the facts and circumstances relevant to the admission of the hearsay statements at issue in this matter. They are as follows.

On November 22, 1997, in Hamilton County, Ohio, Andre Miles murdered Maher and Ziad Khriss. Miles admitted that he committed the double murder. RE44-1, Miles' Testimony Linda Khriss Trial, PAGEID#734-35, 735-36,758.

Respondent Ahmad Issa, who has always denied any involvement with the deaths, was convicted for the aggravated murder of Maher Khriss and was sentenced to death on a murder for hire death specification that accompanied that charge. Issa's conviction and death sentence are based entirely on the hearsay testimony of Bonnie Willis and her brother Joshua Willis. The Willises told the police, and later testified in Issa's trial, that Miles told them that Issa hired him on behalf of Linda Khriss, Maher Khriss's wife, to kill Maher Khriss. Issa, Miles, and Linda Khriss were each indicted – Issa and Khriss for the aggravated murder of Maher Khriss: Miles for the aggravated murders of both Khriss brothers.

Linda Khriss was tried first. She testified that there was no murder for hire scheme. She denied that she had ever contacted Issa about doing any harm to her husband. RE8, Khriss Testimony Linda Khriss Trial, PAGEID #4929. On May 20, 1998, Miles testified for the State in Linda's trial under an agreement that if he testified truthfully, the State would inform the court in Miles' death penalty trial of his co-operation. RE44-1, Miles' Testimony Linda Khriss Trial, PAGEID#740-41,

#744. Miles testified that he never spoke to Joshua and/or Bonnie Willis about Maher Khriss's murder. *Id.* at PAGEID#735-36. Linda Khriss was acquitted.

For Issa's trial, the State offered Miles' use immunity but withdrew the offer the day before Miles was to testify. RE229-3, Tr. Tran., PAGEID#9505-06. The next day, Miles was brought from the jail to the courtroom but when he took the witness stand, he refused to testify. Miles did not assert his right to remain silent and made no reference to the Fifth Amendment. The trial judge did not require Miles to explain his refusal and did not order him to testify. *Id.* at PAGEID#9504-09.

Miles was represented but the State failed to contact his counsel when it withdrew his immunity. Miles' defense counsel only managed to make it to the court room because they went to the jail to meet with Miles and he was gone. RE229-3, Tr. Tran., PAGEID#9509. When Miles' counsel tried to find out what was going on, the prosecutor "didn't have time for me." *Id.* at #9510.

The prosecutor observed that Miles had not asserted his Fifth Amendment rights and argued that persistent refusal to testify makes a witness unavailable under Ohio Evid. Rule 804(A)(2). *Id.* at PAGEID#9508. The court then found that Miles was unavailable. *Id.* at PAGEID#9510-11. A finding of unavailability was required in order to use the Willises' testimony. Under Ohio law, the hearsay could be admitted only if the purported declarant was unavailable. Ohio Evid. R. 804.

The State moved to introduce the hearsay accounts, from Bonnie and Joshua Willis, of Miles' statements, allegedly made to them, that implicated Issa as the middle man in the murder for hire of Maher Khriss. *Id.* at PAGEID#9568. The

defense objected that the use of the evidence would violate Issa's rights under the "confrontation-clause" and urged that there were not "sufficient indicia of trustworthiness." *Id.* at PAGEID#9641.

The hearsay statements (what the Willises said Miles said about Issa) were admitted. *Id.* at PAGEID#9666.

The prosecutor described the Willises' statements as "the cornerstone of this case," RE229-3, Tr. Tran., PAGEID#10017, and told the jury, in assessing the State's case, to "look at . . . Bonnie and Josh's statements because that's where you get the statements of Andre Miles." *Id.* at PAGEID#10013.

Post-trial Proceedings

On direct appeal, the Ohio Supreme Court found the hearsay statements were admissible under Ohio Evid. Rule 804(B)(3) and the state and federal constitutions. *State v. Issa*, 93 Ohio St.3d 49, 57-58 (2001).

In Federal habeas proceedings Issa challenged the Ohio Supreme Court's decision that the admission of the Willises hearsay did not violate his Confrontation Clause rights. U.S. Const. amend. VI. In addressing the issue, the District Court ruled that *Crawford v. Washington*, 541 U.S. 36 (2004), is inapplicable to Issa's case. RE218, Order, PAGEID#4635. The Warden did not challenge the application of *Ohio v. Roberts*, 448 U.S. 56 (1980) by objecting to the Magistrate's Corrected Report and Recommendation, RE146, R &R, PAGEID #3069-71, or in his opposition to Issa's objections. RE149, Warden's Resp., PAGEID#3223.

On appeal to the Sixth Circuit, the Warden took the position that *Crawford* is inapplicable saying, "Because Issa's case pre-dated *Crawford v. Washington*, 541 U.S. 36 (2004), *Lilly* and *Roberts* set forth the applicable standard." Doc. 30, Warden's Brief, p. 43.

After *Crawford v. Washington*, 541 U.S. 36 (2004), the Circuit twice held that pre-*Crawford* Confrontation Clause claims are to be decided under *Ohio v. Roberts*, 448 U.S. 56 (1980), which was the law in effect when the claim arose. The panel in *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) ruled:

> Given our decision to order that the writ be granted on the basis of pre-*Crawford* law, we find it unnecessary to address whether *Crawford* announced a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,"

(emphasis added). Thus, in *Fulcher* the writ was granted on a *Roberts* claim post-*Crawford*, necessarily deciding that Fulcher was held in violation of the constitution due to the *Roberts* violation, without regard to whether the writ would also have to be granted under *Crawford*. The panel in *Stallings v. Bobby*, 464 F.3d 576, 581–84 (6th Cir. 2006)(emphasis added), followed suit and held:

> The question, however, is not whether the testimony could be introduced at trial post-*Crawford*, but whether it was admissible under clearly-established Supreme Court precedent at the time the petitioner's conviction became final in 2002, which was some two years prior . . . *Crawford.*

The same reasoning was followed in *Smith v. Bagley*, 642 Fed. Appx. 579, 584 (6th Cir. 2016).

Ignoring circuit precedent, in 2008, a panel decided *Desai v. Booker*, 538 F.3d

424 (6th Cir. 2008), which contrarily holds that even if testimony was admitted in violation of *Roberts*, habeas relief will not be granted unless the evidence would also be inadmissible under *Crawford* in a future re-trial. *Id.* at 428, also see *Jackson v. McKee,* 525 F.3d 430, 438 (6th Cir. 2008), and *Doan v. Carter*, 458 F.3d 449, 457 (6th Cir. 2008). A question about *Desai* was posed by the court during oral argument. Issa responded with a Fed. R. App. Pro. Rule 28(j) letter. Doc. 48. The Warden did not raise this issue.

The decision of one panel of the Circuit cannot overrule the decision of another panel. Issa's panel followed this rule and said:

> Because our analysis in *Desai*, *Doan*, and *Jackson* occurred after we had already established the applicable format for analyzing this issue in *Fulcher* and *Stallings*, the format in *Fulcher* and in *Stallings* controls our analysis here. . . . We therefore do not consider *Crawford* when the state court erred in its application of the then-governing decision in *Roberts*.

Decision, p.7, n2; 6 Cir. R. 32.1(b). "When a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002). The Sixth Circuit granted Issa a conditional writ of habeas corpus.

REASONS FOR DENYING THE PETITION

I. Petitioner Waived the Issue Upon Which He Seeks Review

The Warden now argues that Issa's case should have been decided under *Crawford v. Washington.* The Warden did not raise this issue in the District Court or the Court of Appeals. Instead, the Warden affirmatively represented in his Sixth Circuit brief that "Because Issa's case pre-dated *Crawford v. Washington*, 541 U.S. 36 (2004), *Lilly* [*v. Virginia*, 527 U.S. 116 (1999)] and *Roberts* set forth the applicable standard." Doc. 30, Warden's Brief, p. 28, ECF p. 43.

When the magistrate judge issued his report and recommendations saying that *Ohio v. Roberts*, 448 U.S. 56 (1980) was the applicable law, the Warden did not object and did not argue that *Crawford* controlled. By failing to raise the issue, the Warden waived it. By taking the position in his Sixth Circuit briefing that *Crawford* did not apply to Issa's Confrontation Clause claim, the Warden has forfeited the right to take a contrary position to attack the Sixth Circuit's decision now.

II. There is No Compelling Reason to Grant Certiorari in This Case

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Warden's primary argument for granting certiorari is the claim that there is a circuit split on whether a person held in custody pursuant to an unconstitutionally obtained conviction is "in custody in violation of the Constitution or laws or treaties of the United States" when the "clearly established Federal law" that was violated at trial changes in a way that would allow the

previously unconstitutional process to be applied in a new trial. 28 U.S.C.§ 2254(a) and 28 U.S.C.§ 2254(d).

The Sixth Circuit determined in *Fulcher v. Motley*, 444 F.3d 791 (6th Cir. 2006) and *Stallings v. Bobby*, 464 F.3d 576 (6th Cir. 2006) that the constitutionality of a conviction is determined under the Federal law that governs at the time of trial. It applied that standard in deciding Issa's case. Pet. App. p. 10a-11a. As a result, Issa's pre-*Crawford* Confrontation Clause claim was decided under *Roberts*. The Warden argues that this decision and three other cases demonstrate that there is a split among the circuits warranting a grant of certiorari in this case.

In *Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008), Fratta hired two men to murder his wife Both of the hired co-defendants made statements to law enforcement officers during custodial interrogation and one co-defendant made statements to his girlfriend. The admission of the hearsay accounts of these statements was challenged. Finding that Fratta's conviction became final before *Crawford* was decided, the Fifth Circuit applied *Roberts* to both the custodial and acquaintance statements and affirmed the District Court's grant of the writ. *Id.* at 490, 501-03. In doing so, the court necessarily decided that Fratta was "in custody in violation of the Constitution" under 28 U.S.C. §2254(a).

In *Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156 (3rd Cir. 2018) *cert. denied sub nom Mitchell v. Mahally*, 2019 U.S. LEXIS 1720, 203 L. Ed. 2d 417 (March 4, 2019), Mitchell argued that denial of a motion to sever his trial from his co-defendants', and the use in their joint trial of a hearsay account of one co-

defendant's confession to a jailhouse informant, "violated his confrontation rights" under *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998). Mitchell's co-defendant had earlier pursued the same claims and was granted habeas relief when the Third Circuit found that the "state court's order denying a motion to sever the trials was contrary to federal law clearly established by *Bruton*, *Richardson*, and *Gray*." *Eley v. Erickson*, 712 F.3d 837, 859 (3rd Cir. 2013). In Mitchell's case, the Third Circuit found that the state court had "unreasonably applied what was then clearly established federal law when it upheld the trial court's ruling refusing to sever Mitchell's trial." *Mitchell*, 902 F.3d at 162. Even so, it denied the writ, finding under *Crawford*, that the statements of a co-defendant made to a jailhouse informant, that were introduced at the joint trial, were not testimonial and "would be admissible under current constitutional standards at a retrial notwithstanding the previous Confrontation Clause error." *Id.* at 164.

In *Holland v. Florida*, 775 F.3d 1294 (11th Cir. 2014) *cert. denied* 136 S. Ct. 536 (Nov. 30, 2015), the Florida Supreme Court upheld the denial of Holland's demand to represent himself. Holland challenged the denial in habeas. The circuit court found that, "The Florida Supreme Court did not base its denial of Holland's *Faretta* claim on a finding of incompetence. Instead, it concluded that Holland was not deprived of the right to self-representation because, considering his mental condition, Holland did not make a knowing and voluntary waiver of the right to counsel. *Id.* at 1312. The court also found that *Indiana v. Edwards*, 554 U.S. 164

(2008), which was decided after Holland's conviction was final and allowed consideration of the defendant's competency in deciding whether to permit self-representation, offered an alternative basis for denying the writ saying, in "light of *Indiana v. Edwards*, Holland is not being held in violation of the Constitution." *Id.* at 1313-14.

The limited number of cases that the Warden claims illustrate the circuit split and the differences among them show that there is no compelling reason to grant certiorari in this case. Only the Sixth Circuit's decision in *Issa* and the Fifth Circuit decision in *Fratta* address directly the admission of pre-*Crawford* non-custodial hearsay and those decisions are consistent. Each court found that *Roberts* was the governing Federal law at the time of the defendants' trials and thus that *Roberts* had to be applied in assessing a Confrontation Clause violation through the admission of hearsay. Each granted habeas relief under that standard.

Mitchell addressed the question of whether a joint trial had violated *Bruton v. United States*, 391 U.S. 123 (1968) and found that the failure to severe the trials would no longer present a constitutional violation because hearsay testimony of a co-defendant's confession implicating the defendant would be admissible at the defendant's re-trial under *Crawford*. Though *Mitchell* does apply *Crawford* retroactively to deny habeas relief where the severance of co-defendants' trials was denied, it is not squarely on point. To the degree that *Mitchell* appears to create a circuit split, it is a single case that presents circumstances not likely to recur. Mitchell's crime was committed in July 2000 and his trial was in 2001. 902 F.3d at

160. *Crawford* was decided in 2004. Nearly fifteen years have passed and few cases in which *Crawford* was not the controlling law still have a viable path to federal review as nearly all will be beyond state and federal deadlines for seeking review.

In *Holland,* the Eleventh Circuit found that the error alleged had not occurred – the court had denied self-representation because Holland had failed to make a knowing and voluntary waiver. Its "alternative" ruling that would have denied relief under *Indiana v. Edwards* was speculative *dicta,* that could only apply if its actual holding that the defendant had failed to make a knowing and voluntary waiver was invalid. *Holland* does not address a Confrontation Clause issue and the matter claimed to create a circuit split is *dicta.*

The claimed split in circuit authority is not compelling. Moreover, any perceived split will heal itself. This Court has held that "[C]learly established Federal law" under § 2254(d)(1) is the law in effect when the state court renders its decision. *Lockyer v. Andrade,* 538 U.S. 63, 71-72 (2002). And in *Cullen v. Pinholster,* 563 U.S. 170, 182 (2011) the Court said "State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" And in assessing habeas error the court must determine whether a constitutional error has a "substantial and injurious effect or influence **in determining the jury's verdict.**" *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993) quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946). A constitutional error that impacted a jury's verdict, as Issa's did, cannot be repaired by the application of new law.

This Court held in *Whorton v. Bockting,* 549 U.S. 406 (2007), that *Crawford* is

not retroactively applicable to collateral proceedings. In *Adams v. Zamora*, 549 U.S. 1261 (2007) the question presented was "Whether *Crawford* applies retroactively in federal habeas corpus proceedings, under *Teague* [*v. Lane*, 489 U.S. 288 (1988)] or 28 U.S.C. § 2254(d), to a state court decision rendered prior to *Crawford*?" See *Adams v. Zamora*, 2005 U.S.S.C. Briefs LEXIS 2365. A GVR order issued in light of *Whorton v. Bockting*. On remand, the case was decided under *Roberts*. *Zamora v. Adams*, 256 Fed. Appx. 90, 91 (2008) *cert. denied* 554 U.S. 905 (2008).

III. The Sixth Circuit Correctly Found A Constitutional Violation

The Warden argues that the Sixth Circuit Court of Appeals did not find a constitutional violation, but it did, and it said so. The Sixth Circuit found that the admission of the unreliable hearsay statements at issue in Issa's case "violated the Confrontation Clause under the governing Supreme Court law and was not harmless." Pet. App. 27a.

The Warden assumes throughout his argument that an unconstitutional conviction obtained in violation of "clearly established Federal law, as determined by the Supreme Court of the United States" becomes constitutional if the clearly established Federal law changes. Underlying this assumption are several false premises. First, the Warden presumes without analysis, that a state conviction obtained in violation of the constitution, can be made constitutional, not by re-trial but by the retroactive application of new law by a reviewing Federal court. This undermines the firmly established principle that the trial is the main event. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). The law under which a trial is

conducted is the law by which its fairness and the constitutionality of any resulting conviction must be judged (with the exception of later recognized watershed rules). To adopt the Warden's position is to invite the courts and prosecutors to circumvent the applicable "clearly established Federal law" on the chance that it will change and validate the unconstitutional conviction in the future. It invites the kind of "sandbagging" rejected by this Court in *Sykes* by allowing the government to engage in the kind of conduct used in Issa's case to manipulate the trial process to get a conviction using unconstitutional methods in the hope that the law will change. *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977)

The Warden's argument that, when a defendant's conviction was unconstitutional at the time he was tried, the conviction becomes constitutional when the "clearly established Federal law" violated at trial, subsequently changes and thus, the Warden theorizes, the defendant is no longer being held in violation of the constitution under 28 U.S.C. § 2254(a) because he would, presumably, be convicted again in a re-trial in which he would be subject to the new law, undermines the incentive to toe the constitutional mark. But this Court's decisions in *Lockyer v. Andrade*, *Cullen v. Pinholster*, and *Adams v. Zamora* necessarily rejected this approach by requiring that the law at the time of trial must determine constitutionality. And because constitutional error must be assessed in light of its impact on the jury, *Brecht v. Abrahamson,* 507 U.S. at 623, allowing a retroactive fix for what influenced the jurors undermines the right to a jury trial.

Second, the Warden's view that a conviction obtained under standards that

are unconstitutional at the time of trial can ever be viewed as constitutional defies the basic requirements of notice and fairness. The test of constitutionality must be tied to the trial the defendant underwent. Defense counsel cannot craft objections or adopt trial strategy when the standard against which those things will be judged is subject to change and thus unpredictable. The duty to make appropriate objections and make reasonable strategic decisions becomes a moving target if a change in the law can retroactively determine constitutionality. A fundamental component of Due Process is notice. U.S. Const. amend. XIV. The defendant is entitled to notice of the evidentiary standards applicable at his trial. This Court rejected *ex post facto* application of new evidence rules by prohibiting application of new rules "which altered the legal rules of evidence and received less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender." *Carmell v. Texas*, 529 U.S. 513, 524-25 n12 (2000). The *ex post facto* prohibition applies whether the rules are changed by statute or judicial decision. *Bouie v. Columbia*, 378 U.S. 347, 352 (1974).

The clearly established Federal law in effect at the time of Issa's trial, *Ohio v. Roberts*, 448 U.S. 56 (1980), "conditions the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." *Crawford*, 448 U. S. at 66. Now the *Roberts* constitutional framework has been removed and the requirement of particularized guarantees of trustworthiness abandoned as a legal threshold for admissibility. This change clearly allows "different testimony" than was previously admissible and

lessens the legally required quality of the evidence that can be admitted. Knowing at the time of trial what rules and procedures govern the trial is critical to presenting a defense. The "Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Part of a complete defense is making proper objections and preserving the record for future review. A meaningful opportunity to do so hinges on knowing what rules and constitutional standards govern the trial.

Third, the Warden presumes that the evidence that should have been excluded under *Roberts* is necessarily admissible under *Crawford*. This ignores the fact that the trial court never made that decision. In Issa's case, the government caused the declarant to be "unavailable" by withdrawing an immunity agreement just before the witness was to testify and not advising Miles' counsel or giving them a chance to consult before Miles was brought to court. Miles' purported statements could be excluded under *Crawford* due to the State's manipulation of Miles' availability. On re-trial the court could find that the governments' machinations brought the hearsay within the ambit of *Crawford*. *Crawford* does not define "testimonial" and does not preclude Confrontation Clause exclusion of non-testimonial statements, 541 U.S. at 53, 68, but recognizes that one evil to be avoided is the "involvement of government officers" in the production of evidence that cannot be tested by the accused through confrontation at his trial. *Id.* It is possible that the trial court would find that the government's manipulation of the witness's availability violated the Confrontation Clause in other ways. See *Douglas*

v. Alabama, 380 U.S. 415, 419 (1965), *Motes v. United States*, 178 U.S. 458, 474 (1900). The fact that *Roberts* was the controlling law determined how Issa's challenge was made at the time of trial and the kind of evidence that was used to support it. In a re-trial the focus could and would change. Assuming what would happen on re-trial is not a constitutionally sound substitution for a real trial.

The state court never had the opportunity to make the ruling that the Warden assumes must follow from the change in law. That assumption is unfounded. Under the new and different case law, defense objections and the evidence used to support them would be different. Issa never had a chance to challenge the evidence under the new law. The trial court never had a chance to assess whatever argument Issa would make under *Crawford*. The state court should have the first opportunity to determine admissibility, as it will in a new trial. And Issa should have an opportunity to present his object to the use of the Willis hearsay under the law that will be applied to him. *Crawford* does not define "testimonial" and does not preclude Confrontation Clause exclusion of non-testimonial statements, 541 U.S. at 53, 68, but recognizes that one evil to be avoided is the "involvement of government officers" in the production of evidence that cannot be tested by the accused through confrontation at his trial. *Id.* Miles testified in Linda Khriss's trial that he did not make the statements attributed to him. The government orchestrated Miles' unavailability at Issa's trial. At a new trial, the statements attributed to Miles may be excluded under *Crawford*.

The constitutional law, as it exists at the time of a defendant's trial, determines whether the conviction was constitutionally obtained, and thus whether the prisoner is held, "in violation of the Constitution or laws or treaties of the United States." Post-trial changes in the constitutional law cannot make a previously unconstitutional conviction valid. Assuming that the new law, *Crawford*, necessarily will result in admission of the same evidence usurps the state court's opportunity to make that decision and denies Issa the opportunity to present his defense under the law that will govern his case. A conviction unconstitutionally obtained cannot be repaired by the retroactive application of new law.

IV. *Teague v. Lane* and *Lockhart v. Fretwell* are Not Undermined.

The Warden argues that not requiring the habeas petitioner, who has established that his conviction is based on an unreasonable application of clearly established Federal law or an unreasonable determination of fact under 28 U.S.C. 2254(d), to also demonstrate that he would not again be convicted under the new law, undermines the holdings of *Teague v. Lane*, 489 U.S. 288 (1988) and *Lockhart v. Fretwell*, 506 U.S. 364 (1993). But *Teague* and *Fretwell* address situations in which the state court properly applied a constitutional rule of law at the time of trial and a subsequent decision of this Court changes the rule that was properly applied. *Teague* and *Fretwell* apply to protect a state process that was constitutionally correct when the defendant was tried and thus the resulting conviction was constitutional when rendered. *Teague*, 489 U.S. at 310 (non-retroactivity protects states from having to "marshal resources in order to keep in

prison defendants whose trials and appeals conformed to then existing constitutional standard")(emphasis added), *Fretwell*, 506 U.S. at 372 (non-retroactivity keeps the State from being "penalized for relying on 'the constitutional standards that prevailed at the time the original proceedings took place.'")(emphasis added). When the state court failed to follow the Federal constitutional law to begin with, it can have no legitimate interest in maintaining finality of the judgment and *Teague* does not protect the original unconstitutional State action.

The considerations underlying *Teague* and *Fretwell* have no application in Issa's case. The Sixth Circuit found that the Ohio Supreme Court failed to follow the firmly established law that governed Confrontation Clause violations at the time of Issa's trial. The Warden's position that the new law, *Crawford*, should be applied retroactively to save a state decision that did not follow the firmly established Federal law governing at the time of Issa's trial, undermines the purpose of *Teague*:

> "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."

Teague, 489 U.S. at 306 (emphasis added).

> "Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to *forc[e] trial and appellate courts . . . to toe the constitutional mark*'"

Id. at 306-07 (emphasis added).

Allowing the retroactive application of new constitutional decisions to save a conviction that does not rest upon a correct application of the clearly established Federal law in force at the time of conviction would have the opposite effect. It would invite courts and prosecutors to circumvent the law in effect at the time of trial on the chance that a change in the law will make the unconstitutional conviction sound after the fact. Rather than requiring trial and appellate courts to toe the constitutional line, it would encourage them not to do so.

The Warden cites three cases, *Delgadillo v. Woodford*, 527 F.3d 919, 927-28 (9th Cir. 2008), *Flamer v. Delaware*, 68 F.3d 710, 725 n.14 (3d Cir. 1995) (Alito, J.); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir. 1993) as the basis for another claimed conflict among the circuits. *Delgadillo* addressed whether a state habeas court was bound by *Teague* and found that *Danforth v. Minnesota*, 552 U.S. 264 (2008) holds that it is not. *Flamer* addressed whether a telephone call to ask about "representation" had invoked the right to counsel. *Free* involved the retroactive application of new law on the admissibility of victim impact evidence. Each of these cases makes reference to *Teague* being for the benefit of the State and not the Defendant without mentioning that *Teague* protects the finality of state decisions that "conformed to then-existing constitutional standard." *Teague*, 489 U.S. at 310. The Sixth Circuit in Issa's case found that the state court had failed to conform to the then existing constitutional law. There is no conflict among the circuits

The Sixth Circuit's decision to use *Roberts* to judge the constitutionality of

the conviction under which Issa is held is not in conflict with *Teague* because 1) *Teague* is about cases in which the governing law was correctly applied at the time of trial but later changed in a way that if retroactively applied would void the conviction and 2) the Sixth Circuit's decision supports the rationale of *Teague* that applying the law in effect at the time of trial provides an incentive for the courts to abide by the law governing at the time of trial.

V. The Sixth Circuit Correctly Applied the Standards of 28 U.S.C. § 2254(d)

The Warden disagrees with the Sixth Circuit's decision and argues that the Ohio Supreme Court used many factors to assess the reliability of the statements Miles purportedly made to the Willises. The Warden argues that the panel was wrong when it determined that the Ohio Supreme Court's assessment of the indicia of reliability failed to include consideration of the totality of the circumstances. However, review of the single paragraph in which the determination was made, shows that the state court considered only the fact that Miles purportedly made his statements to friends rather than police and its assumption that Miles had no reason to lie.

The circumstances the Ohio Supreme Court found to be indicative of reliability were:

> Miles was not talking to police as a suspect when he made the out-of-court statement. Miles's confession was made spontaneously and voluntarily to his friends in their home. Moreover, Miles had nothing to gain from inculpating appellant in the crime. In fact, by stating that appellant had hired him to kill Maher, Miles was admitting a capital crime, *i.e.*, murder for hire. Furthermore, Miles's statement was clearly not an attempt to

> shift blame from himself because he was bragging about his role as the shooter in the double homicide.
> We therefore find that the circumstances surrounding the confession did "'render the declarant [Miles] particularly worthy of belief.'"

State v. Issa, 93 Ohio St.3d 49, 61 (2001), Pet. App. P. 314a-315a. In this list there is a single indication of reliability regarding Miles' statements implicating Issa: that Miles had nothing to gain by identifying Issa. The court supported its view saying that "by stating that appellant had hired him to kill Maher, Miles was admitting a capital crime." *Id.* But identifying Issa was not what subjected Miles to a possible death sentence; it was the fact that he did the killing for hire. Who hired him was irrelevant to death eligibility. Ohio Rev. Code §2929.04(A)(2). Thus, the single indication of the truthfulness of Miles's statements implicating Issa was an assumption, supported by no facts, that Miles had nothing to gain by doing so. The absence of an observable reason to lie about a co-defendant is not an indication of reliability. Indicia of reliability must demonstrate "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

The other factors mentioned by the Ohio Supreme Court are refuted by the record. The conversation was not spontaneous. Miles called Bonnie Willis and arranged to meet with her so he would not have to talk on the phone. *Id.* at PAGEID#9661. He then went to the Willis home and purportedly made remarks implicating Issa during the planned conversation. *Id.* at 9661-62. Miles may have spoken voluntarily, but he had a motive to make the situation look acceptable to Bonnie and Joshua - he needed them to let him keep the gun in their backyard.

Issa was a known figure in the neighborhood, employed at the local SaveWay store, and involved in a flirtation with Bonnie Willis significant enough for her to have given him her pager number and to return his calls. RE229-3, Tr. Tran. Bonnie Willis., PAGEID#9577, #9654-55. Miles' mention of Issa, assuming it happened at all, may have been for the purpose of enhancing his own credibility by his claimed association with Issa. Moreover, the record shows that Miles was "bragging" and was known not to be truthful. Pet. App. 20a-22a.

The Ohio Supreme Court relied on the absence of "circumstances suggesting that Miles fabricated the story the Willises said he told, or that he was under some compulsion to implicate Issa when he made his statements" as indicia of reliability. RE218, Order, PAGEID#4636. There is nothing in the record that affirmatively demonstrates that Miles had reason to tell the truth about Issa.

All of the information the court relied on came from the Willises. The Willises had reason to lie. Bonnie Willis admitted that she was afraid she was in trouble for allowing Miles to hide the murder weapon in their backyard. RE229-3, Trial Transcript, PAGEID#9690. She drove Miles to the SaveWay on the day of the murders. *Id.* at 9657-59. Joshua Willis had been invited to participate in the killings, was afraid of Miles, and had allowed Miles to hide the gun in the family's backyard. *Id.* at PAGEID #9740, 9754, 9762, 9763. Moreover, both Bonnie and Joshua's statements were made to the police, where they had reason to shift blame to others and away from themselves.

The Willises' testimony was also the only evidence directly linking Issa to the aggravated murder charge. The balance of the State's case was based on weak circumstantial evidence that 1) Issa had had a gun that was **like** the one used to

kill Maher Khriss, RE229-3, PAGEID#9441, #9484 2) that ammunition to fit such a gun, but that **did not match** the ammunition used in the Khriss murder, was found in Issa's apartment, RE229-2, Trial Transcript, PAGEID#9321, #9330, 3) that Issa did not have an alibi for 25 to 35 minutes on the evening when the shooting took place, RE229-3, Trial Transcript, PAGEID#9460, 4) that Issa did not seem surprised when Bonnie Willis told him that Miles had hidden the murder weapon in her backyard and that, after she did so, Issa told her to tell Miles not to come to the SaveWay store because the police were investigating, *Id.* at PAGEID#9665, and 5) that **after** the murder investigation was underway, Issa asked that friends not mention the gun he owned or the gap in his alibi. *Id.* at PAGEID#9434-35, #9472. Without the Willis hearsay, there was no connection to Issa, no evidence tying him to the murder of Maher Khriss, and no evidence connecting him to the murder-for-hire death specification.

The Sixth Circuit's decision includes a lengthy and detailed analysis of the record that identifies the totality of the circumstances surrounding Miles' alleged statements to the Willises. Pet. App. 2a–7a, 19a-26a. The Warden's disagreement with it is not a compelling reason to grant certiorari. Sup. Ct. R. 10.

VI. Equitable Factors

The Warden urges that the Court should grant review of this capital case to "reaffirm the importance of following its precedent—and perhaps to encourage the Sixth Circuit to police itself at the *en banc* stage, so that this Court need not reverse egregious errors again and again and again." Petition, p. 32. First, as is addressed

above, there is no egregious error in the Sixth Circuit's decision in Issa's case. The court corrected an injustice and the State has the opportunity to conduct a constitutional re-trial. Second, the Warden's dissatisfaction with the Sixth Circuit's history with this Court does not provide a compelling reason for granting certiorari. Sup. Ct. R. 10.

The Warden argues evidence submitted in the federal district court's pre-*Cullen v. Pinholster*, 536 U.S. 170 (2011) evidentiary hearing. Petition, p, 12. *Pinholster* precludes use of that evidence and Issa objects to the Warden's use of it here as he did in the court below. Doc. 36, Reply Brief, p. 27, ECF p.33.

Judge Merritt wrote a concurring opinion in Issa's case. Pet. App. 27a-31a. In it he found that Issa should also be granted habeas relief because his trial counsel were ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to call the acquitted Linda Khriss as a witness in Issa's trial. Khriss would have testified as she did at her own trial that she never hired Issa to kill her husband and that there was no murder-for-hire scheme. Even if the Sixth Circuit's *Roberts/Crawford* holding were rejected, the Sixth Circuit's conditional grant of the writ of habeas corpus should be sustained on the basis of this ineffective assistance of counsel claim.

CONCLUSION

For all the reasons set out above and in the interest of justice, the petition should be denied

Respectfully submitted,

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