No. 18-

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD MITCHELL,

Petitioner,

v.

SUPERINTENDENT DALLAS SCI; ATTORNEY GENERAL PENNSYLVANIA; DISTRICT ATTORNEY DAUPHIN COUNTY,

Respondents

On Petition for a Writ of *Certiorari* to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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November 21, 2018

QUESTION PRESENTED

The Petitioner, Edward Mitchell, was convicted of murder and sentenced to life imprisonment by a state trial court in 2001 based on testimony that, all agree, was introduced in direct violation of the constitutional standards governing the rights of confrontation and cross-examination, as defined in then-controlling decisions of this Court. A co-defendant in Mr. Mitchell's case, who was convicted based on the same testimony at the same trial, sought and was granted habeas relief given that violation. Mr. Mitchell sought the same relief on the same basis. His petition was denied by the court of appeals, however, on grounds that the testimony at issue – although constitutionally inadmissible at the time of trial – would now be admissible under the intervening change in constitutional law effected by *Crawford v. Washington*, 541 U.S. 36 (2004).

The question presented is whether the habeas statute, which has for more than a century been interpreted to require a federal court to evaluate the state court ruling based solely on "clearly established law" at the time when it was rendered, as held in *Greene v. Fisher*, 565 U.S. 34, 44 (2011), can be reinterpreted by a circuit court to allow application of a decision by this Court issued long after the state court ruling, when it serves to deny relief that would otherwise obtain based on the law in existence at the time of the last adjudication on the merits.

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Edward Mitchell.

The Respondents, the appellees below, are the Superintendent of the State Correctional Institution at Dallas, Pennsylvania, the Attorney General of the Commonwealth of Pennsylvania, and the District Attorney of Dauphin County.

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PETITION FOR A WRIT OF *CERTIORARI*

The Petitioner, who was denied habeas corpus relief under 28 U.S.C. § 2254 from his state court judgment of conviction and sentence, petitions this Court for a writ of *certiorari* to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Court of Appeals opinion is reported at 902 F.3d 156, and is reproduced in the appendix to this petition. (Petitioner's Appendix ("Pet. App.") 1a-16a). The opinion of the district court is not officially reported, but may be found at 2017 WL 3725503 and is reproduced in the appendix, (Pet. App. 17a-29a). The Magistrate Judge's report and recommendation may be found at 2016 WL 9548858, and is reproduced in the appendix. (Pet. App. 30a-95a).

JURISDICTION

The Court of Appeals for the Third Circuit issued its opinion on August 23, 2018. (Pet. App. 2a). This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

INTRODUCTION

This case presents the issue of whether the habeas corpus statute, Section 2254, precludes the use of new decisions by this Court when they may benefit a defendant, while permitting their use when they may serve to deny a defendant relief. The Third Circuit, in a precedential opinion, says that it does. That holding not only conflicts with this Court's opinions and the opinions of other circuits, it violates elementary notions of fairness, producing an unconscionable result.

The prosecution charged Mr. Mitchell, and his codefendants, Karim Eley, and Lester Eiland with second-degree murder, robbery, and conspiracy to commit robbery, and tried them three times. The first trial ended in a mistrial after the jury was unable to reach a verdict. The second trial ended in a mistrial after a police witness recited Eley's name while reading a statement by Mitchell. The third trial ended with a conviction of Mitchell, Eley, and Eiland. The central proof against Mitchell and Eley was their presence near the scene of the crime and statements made by Eiland to two jailhouse informants.

Eley obtained habeas relief in the Third Circuit in 2013, claiming that the admission of Eiland's statements to the jailhouse informants violated *Bruton v. United States*, 391 U.S. 123 (1968). *See Eley v. Erickson*, 712 F.3d 837, 857 (3d Cir. 2013). Mitchell raised the same legal issue in exactly the same posture, but his case moved more slowly than Eley's, and the district court denied Mitchell relief based on *Crawford v. Washington*, 541 U.S. 36 (2004), which was decided after the state court decisions and years before the Third Circuit decided *Eley*. The Third Circuit affirmed,

reasoning that Mitchell cannot show that he is *currently* held in violation of an existing right based on the jailhouse informants' testimony. Eley was freed five years ago, but Mitchell is serving life.

A writ of *certiorari* should be granted so that this Court may resolve a circuit split, clarify this critically important area of the law and – as importantly – correct the manifest injustice done to the Petitioner.

STATEMENT OF THE CASE

A.

Petitioner, Edward Mitchell and his co-defendants, Karim Eley, and Lester Eiland, were convicted of murder and conspiring to rob a taxicab driver based on their presence near the scene and incriminating statements Eiland made to jailhouse informants. But before that crime occurred, a similar one happened hours before at the same location.

Around 8:30 p.m. on July 4, 2001, Jermaine Velez climbed into a car with three men, who stopped at the intersection of Hummel and Kittatinny Streets in Harrisburg, Pennsylvania. Velez brandished a small caliber handgun, directed the driver to a different location, where he committed a robbery. Police charged Velez with robbery, among other offenses, and he ultimately pleaded guilty. *See* (C.A. at 261).[1]

At 5:21 a.m. the next day, July 5, Harrisburg City police responded to a call of a "man with a gun near a taxicab" at the intersection of Crescent and Kittatinny

[1] "C.A." refers to the Appendix submitted in the Court of Appeals.

Streets in Harrisburg. *See* (Pet. App. at 33a). Arriving at the intersection, police observed a taxicab stopped and resting against the car in front of it, and they encountered a white male, Miguel Guerrero, who advised that there was someone in the vehicle. *See* (C.A. at 134, 142, 937-38). No one else was in the area. *See id.* Inside the taxicab was the victim, Angel DeJesus, who was in the driver's seat, slumped toward the middle of the passenger seat, and suffering from a head injury. *See id*.

Mr. DeJesus did not survive his wounds. An autopsy revealed that the cause of death was three gunshot wounds from close range to Mr. DeJesus' head and neck area. *See* (Pet. App. at 38a). The pathologist opined that someone in the rear of the vehicle shot Mr. DeJesus and he fell onto the passenger side. *See id*.

Mr. DeJesus' fiancée advised the police that her fiancé was an independent taxicab driver and that he had a black valise or pouch in which he kept his money, but that it was not among his personal effects.[2] *See* (C.A. at 153-54). A police forensics officer examined the taxicab, collecting three .25 caliber bullet casings. *See* (C.A. at 163, 165, 166). But Mr. DeJesus' black valise was not recovered. *See* (C.A. at 163, 167). A forensics officer also processed the taxicab for fingerprints and, although he lifted many prints, they did not match those of Mitchell, Eiland, or Eley. *See* (C.A. 242-43).

[2] Mr. DeJesus had cocaine in his system, and the defense sought to introduce such proof as part of an argument that the missing money may have been spent on drugs, particularly since there was at least one known drug dealer in the vicinity, Rufus Hudson. *See* (C.A. at 158-59). The prosecution successfully moved to exclude this evidence, and the trial court agreed, unless the defendants assented to allowing evidence of their drug usage or trafficking. *See id*.

B.

Although at first unable to find anyone willing to come forth with information respecting the shooting, subsequently the police identified some witnesses. In this regard, Guadalupe Fonseca explained that he saw three African-American men standing by the taxicab, one man went inside the front passenger side of the vehicle, he heard two shots, and then after the man exited, he heard another shot. *See* (Pet. App. at 34a). Mr. Fonseca saw the men leaving along Hummel Street. *See* (C.A. at 171). Mr. Fonseca could not otherwise identify the three men, acknowledging that one of them could have been a woman and that he could not see the driver of the taxicab. *See* (Pet. App. at 34a). When the police arrived, Mr. Fonseca saw a Hispanic male, Elias Contreras, speaking to the police. *See id*. And when he came to the police station to provide a statement, Mr. Fonseca suggested that he saw Mr. Contreras there as well. *See id*.

Another witness, Francesco Ramirez-Torres, was in the area of the crime between 5:00 and 5:30 a.m. to pick up people for work. *See* (Pet. App. at 36a). One of the individuals whom Mr. Ramirez-Torres picked up, Elijio Contreras,[3] advised that there was a problem with the taxicab, he had heard shots, and when they pulled near the taxicab, Mr. Contreras observed that the driver was bleeding. *See* (Pet. App. at 36a-37a). Mr. Ramirez-Torres then placed the emergency response call to 911.

Jennifer McDonald was also in the area of the shooting shortly before 4:30 a.m., having walked to an "all night store." *See* (Pet. App. at 35a). On the way back home,

[3] Whether this individual is the same person as referenced in the paragraph above became an issue later in the trial.

she encountered Mitchell, Eley, and Eiland. She knew them and noticed that they were standing on the corner of Kittatinny and Hummel Streets. *See id*. Down a short way from the corner and across the street, Ms. McDonald saw a group of Hispanic males. *See id*. Ms. McDonald also noticed the taxicab, which she described "as coming down the street as [she] was going up." (C.A. at 190). Ms. McDonald turned to walk up Kittatinny Street, encountered a friend, spoke with her briefly, and as she went to open a gate, she heard a loud metal sound. *See* (C.A. at 190, 193). Turning to look behind her, she saw the taxicab stopped at a stop sign with its brake lights on. *See id*. She did not see Mitchell, Eley, or Eiland near the taxicab, nor did she see anyone running. *See* (C.A. at 191, 194, 198). And she heard no gunshots, although she acknowledged that people in that area often fire guns on the Fourth of July. *See* (Pet. App. at 35a). Finally, Ms. McDonald noted that there was an abandoned house near the intersection of Kittatinny and Hummel Streets, and everyone who "hung out" used it as a place to congregate, including Mitchell, Eley, and Eiland. *See* (Pet. App. at 36a).

About one and one-half months after the shooting, Harrisburg City Police interviewed Rufus Hudson at the local prison. *See* (C.A. at 205). Mr. Hudson was a suspect in the murder of Mr. DeJesus. *See* (C.A. at 208). At the time, authorities had charged Mr. Hudson, in an unrelated matter, with an attempted homicide, aggravated assault, carrying a firearm without a license, unlawful delivery of a controlled substance, simple assault, recklessly endangering another person, fleeing and eluding the police, and possession of a small amount of marijuana. *See* (C.A. at

203-04, 208). Hudson stated the he had been in the area of the crime during the early morning hours of July 5, 2000, driving around with a friend, Amanda Weikel, and smoking marijuana. *See* (Pet. App. at 36a). Mr. Hudson said he encountered the victim, Mr. DeJesus, and that Ms. Weikel got out of their vehicle to talk briefly to him. *See id*. During his trips through the area, Mr. Hudson claimed to have seen Mitchell, Eley, and Eiland at the intersection of Kittatinny and Hummel Streets. *See id*. Around 5:00 a.m., Mr. Hudson stated that he saw Mitchell, Eley, and Eiland run across Hummel Street away from the taxicab and in the direction of the abandoned house and into an alleyway. *See id*. As Mr. Hudson reached the intersection of Kittatinny and Hummel, he saw the taxicab parked on the corner, but he did not stop or return to the area. *See* (C.A. at 203).

Ultimately, the police searched the abandoned house on Hummel Street. *See* (C.A. at 216). During the search, the police recovered a shotgun under a mattress in the living room area and found another shotgun in a second floor closet. *See* (C.A. at 216, 256). They did not find a .25 caliber handgun, ammunition, or casings. *See* (C.A. at 222). Although they did not realize it at the time, Harrisburg Police had seized the murder weapon during the arrest of another individual in March 2001. *See* (Pet. App. at 46a).

The police also interviewed Mitchell and his co-defendants. For his part, Mitchell stated that he was with two other individuals at Kittatinny and Elm Streets between 12:00 a.m. and 1:30 a.m. on July 5th, and that they were firing guns in the air, in particular, two shotguns, a .380 handgun, a .38 handgun, and a 9 millimeter

handgun. *See* (C.A. at 248). After they were finished, Mitchell said that they took the guns to a house on Hummel Street where they placed one of the shotguns under a mattress and stored the other on the second floor. *See id*.

Apart from the police interviews, two jailhouse informants provided information to the prosecution about statements made by Eiland. The first, Matthew LeVan, who was incarcerated for a sexual assault, claimed that he saw Eiland jumping up and down during a news broadcast about the murder exclaiming, "That was me; that was me." (Pet. App. at 38a). Mr. LeVan maintained that Eiland said that he was the triggerman and was bragging about it to everyone on the block. *See id*. Mr. LeVan also related the following about a conversation that he had with Eiland:

> A. He said about the sawed-off shotgun was used and a .380 pistol, and there was two other guns used and one was hidden in a brick close to where it happened at.
>
> Q. Did he say what kind of crime it was?
>
> A. Homicide
>
> Q. Or began as?
>
> A. Homicide – no, it was a robbery.
>
> Q. Did he say what happened?
>
> A. **He said they – they, as in whoever was with him** – he didn't say the names of those people – when he went up to them, **it was supposed to be a robbery, and he was – he's the one that shot him, but he didn't mean to do it. It was the other two's idea** or something like that, in that sense.

> Q. Did he say anything about one of the firearms and what was done with one of the firearms?
>
> A. One of the firearms that was used was hidden in a brick next to where it happened.
>
> Q. Did he say what kind of area that was?
>
> A. In an alley.

(C.A. at 225) (emphasis added); (Pet. App. at 38a). Later in his testimony during cross-examination, Mr. LeVan agreed that Eiland's statement was to the effect that "it began as a robbery, **but because of peer pressure it became a homicide**." (C.A. at 230) (emphasis added). Mr. LeVan also claimed to have overheard another individual, who was not Mitchell or Eley, confess to being involved in the shooting of Mr. DeJesus. *See* (Pet. App. at 39a). This other confession, according to Mr. LeVan, was in Spanish. *See id*. Mr. LeVan wrote at least six letters to the Dauphin County District Attorney's Office, seeking release from prison, stating that he would do anything to help, describing himself as "a good inside source," and an "informant or a cop." (Pet. App. at 40a); (C.A. at 227-28, 233-35).

The other jailhouse informant was Eiland's cellmate, Steven Taylor. *See* (Pet. App. at 40a). Mr. Taylor was in prison for two counts of possessing a controlled substance with the intent to deliver, criminal conspiracy, and possession of a controlled substance. *See* (C.A. at 239). Mr. Taylor maintained that, during conversations with Eiland, he said "*they*" were trying to pin a homicide on him and he admitted to trying to rob a cabdriver, and that something went wrong, somebody made a mistake, and somebody ended up dead. *See* (Pet. App. 40a).

The defense argued that one of the Hispanic individuals in the area committed the crime and, in support, counsel noted that the 911 call mentioned a gun, even though no one saw one, and then there was the Spanish confession overheard by Mr. LeVan. *See* (C.A. at 301, 305, 316, 335, 338). The defense also challenged how the pathologist explained the shooting, maintaining that it did not square with the physical evidence or Mr. Fonseca's description. *See* (C.A. at 333-35). Finally, the defense argued that the prosecution should have brought in Elijio Contreras-Hernandez, who prompted the 911 call by Francesco Ramirez-Torres. *See* (C.A. at 342-43).

The jury found Mitchell guilty of second-degree murder, acquitted him of the conspiracy to commit murder, and found him guilty of robbery and conspiracy to commit robbery. *See* (Pet. App. at 45a). In September 2001, the trial court sentenced Mitchell to a life term of imprisonment on the second-degree murder count, a consecutive indeterminate term of 7 to 20 years for the robbery count, and another consecutive term of 4 to 12 years for the conspiracy to commit robbery count. *See id*.

C.

Mitchell appealed, asserting that the admission of the statements of his non-testifying co-defendant, Eiland, at trial violated his Sixth Amendment rights to confrontation and cross-examination as defined by the United States Supreme Court in *Bruton*. *See* (Pet. App. at 47a-48a).

While the direct appeal was pending, the Harrisburg City Police realized that they had in their possession the .25 caliber pistol used to commit the murder. *See*

(Pet. App. at 46a). The trial court held evidentiary hearings, during which it was revealed that the police confiscated the firearm from Rasheen Davis at the time of his arrest in March 2001. *See id*. Rasheen Davis explained that he had obtained the gun from his brother, Rashawn, in September 2000, a couple of months after the murder. *See id*.

Rashawn Davis provided a statement to the police, sharing that he had given the gun to his brother, Rasheen, in 2000, 2001. *See* (Pet. App. at 46a-47a). The trial court precluded the defendants from admitting this statement during the hearing, finding that it was hearsay and did not qualify as a statement against penal interest. *See* (C.A. at 525-40). When advised of the potential criminal consequences of testifying, Rashawn declined to testify. *See* (Pet. App. 47a). The trial court denied the request for a new trial, viewing the possession of the murder weapon by another as irrelevant and finding Rasheen Davis to be lacking credibility. *See id*.

As to the Sixth Amendment *Bruton* claim, the Superior Court held that a violation only occurs when the implication arises from the face of the statement and not from linkage with other evidence, and "[n]one of Eiland's statements referred to [Mitchell] or directly implicated him in any way." *See* (C.A. at 562). The Court issued its opinion in September 2003. *See* (C.A. at 557).

Mr. Mitchell's initial post-conviction claim centered upon a statement given by Laura Weikel to the police, in which she claimed that James Blackwell had confessed to her that he had killed the cab driver. *See* (Pet. App. at 49a). Mr. Blackwell denied making such a statement, asserting that Ms. Weikel had accused him because he had

agreed to testify against her in a federal drug prosecution. *See* (C.A. at 649). The Court denied relief, reasoning that Ms. Weikel's hearsay statement would not have compelled a different result. *See* (Pet. App. at 49a).

While the proceedings involving Laura Weikel's statement were pending, an investigator for Eley obtained a statement from Eugene Whitaker, stating that he was at the murder scene with Jermaine Velez (the individual who committed the earlier robbery at the same location) and James Blackwell, and that Blackwell shot Mr. DeJesus. *See* (Pet. App. at 51a-52a). The trial court denied relief, finding that the evidence at trial was compelling, and the authenticity of Mr. Whitaker's statement was doubtful. *See* (C.A. at 874). The Superior Court agreed with the trial court's assessment. *See* (Pet. App. at 53a).

Mitchell's final post-conviction petition raised an after discovered evidence argument based on a statement by Rufus Hudson, in which he claimed to have fabricated part of his trial testimony. *See Commonwealth v. Mitchell*, 782 MDA 2014, 2015 WL 7726738, at *2 (Pa. Super. Jan. 12, 2015). At the evidentiary hearing, Mr. Hudson testified that he did not see Mitchell with a gun or running from the scene of the murder. *See id*. at *4. Mr. Hudson claimed that the investigating detective, who molded his testimony, had coerced his trial testimony. The court found Mr. Hudson's recantation lacking credibility and that it would not likely have led to a different verdict. *See id*. at *4.

D.

Mitchell filed a habeas corpus petition, alleging a violation of his Sixth Amendment rights under *Bruton*. While Mitchell's habeas petition was pending, the Third Circuit granted relief to Eley based on the same Sixth Amendment claim. *See Eley*, 712 F.3d at 857. The District Court acknowledged that Mitchell had satisfied Section 2254(d)(1), that is, that the Pennsylvania Superior Court's decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court. *See* (Pet. App. at 22a). Having done so, the District Court reasoned that Mitchell's claim is reviewed *de novo* and so subject to the Supreme Court's more recent ruling, *Crawford,* which changed the scope of the Confrontation Clause. *See* (Pet. App. at 23a). Focusing on Section 2254(a), the District Court said that Mitchell must also demonstrate that he was *currently* in custody in violation of federal law. *See* (Pet. App. at 25a-26a). According to the District Court, Mitchell could not satisfy this requirement, as his *current custody* is measured by *Crawford*. *See id*.

On appeal, the Third Circuit held that Mitchell had satisfied the necessary showing under Section 2254(d) that the Pennsylvania Superior Court unreasonably applied clearly established federal law by refusing to sever Mitchell's case from the co-defendants and allowing Eiland's out-of-court statements to implicate Mitchell. *See* (Pet. App. at 11a). And the Court found that "the error substantially influenced the jury's verdict." *Id*. But the Court reasoned that Section 2254(a) provides a second merits standard that requires a petitioner to prove a violation of an existing right,

that is, that his *current custody* violates the Constitution. *See* (Pet. App. at 12a). The Court thus concluded that Mitchell was not held in violation of an existing right since, under *Crawford*, the jailhouse informants' testimony would now be admissible at a retrial. *See* (Pet. App. at 12a, 14a-15a).

REASONS FOR GRANTING THE PETITION

No one disputes that the trial court violated Mitchell's Sixth Amendment rights by allowing the admission of the co-defendant, Eiland's, hearsay statements to two jailhouse informants, which incriminated Mitchell and Eley. *See Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156, 162 (3d Cir. 2018). Nor is there any dispute that the constitutional "error 'substantially influenced the jury's verdict.'" *Id*. (quoting *Eley,* 712 F.3d at 861). Indeed, these reasons informed the decision to grant Eley habeas relief. *See Mitchell*, 902 F.3d at 161; *Eley*, 712 F.3d at 859. To avoid granting Mitchell the same relief that Eley received, the Third Circuit interpreted Section 2254(a) as setting forth a secondary merits requirement that kicks in after a petitioner satisfies the standard in Section 2254(d).

But this construction is inconsistent with the statutory text, its history, this Court's decisions, and the decisions of other circuits. And in Mitchell's case and others similarly situated, the Third Circuit's opinion results in a rule in which habeas petitioners cannot rely on new decisions by this Court when they may benefit from them, while precluding the use of the law in existence at the time of the state court decision when it too may be beneficial.

a. The Third Circuit's construction of Section 2254 is contrary to the statutory text and its history.

A federal court's jurisdiction to entertain a writ of habeas corpus requires that the individual be in custody in violation of the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a). And while Congress has amended the habeas corpus statute many times, including, most significantly, under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the jurisdictional language has remained essentially the same for more than 150 years. *See Williams v. Taylor*, 529 U.S. 362, 374-75 (2000). The "in custody" requirement allows a federal court to exercise subject matter jurisdiction. *See Meleng v. Cook*, 490 U.S. 488, 494 (1989) (*per curiam*). It also limits habeas relief to claims involving a severe restraint on personal liberty. *See Hensley v. Mun. Court*, 411 U.S. 345, 351 (1973). As a jurisdictional condition, custody is both the first thing a petitioner must show and a federal court must consider. *See Lackawanna Co. Dist. Atty v. Coss*, 532 U.S. 392, 401 (2001); *see also Bailey v. Hill*, 599 F.3d 976, 978 (9th Cir. 2010). Mitchell made this showing – he is serving a life sentence that he claims, and the Third Circuit found, was secured in violation of the then-controlling decisions defining his Sixth Amendment rights to confrontation and cross-examination.

The remaining sections of Section 2254 address the manner and merits, in other words, how a federal court exercises its duty to decide constitutional questions. *See Williams*, 529 U.S. at 378. These are the provisions that ADEPA affected. *See id*. But there's nothing in Section 2254's language or structure that says once a petitioner has established an entitlement to relief under Section 2254(d), the court

returns to the jurisdictional language for a secondary merits analysis. Yet that is exactly what the Third Circuit did here. And by doing so, the Third Circuit has added a requirement to the habeas statute that Congress did not include, and has done so for the sole purpose of denying Mitchell the relief granted his co-defendant.

b. The Third Circuit's opinion conflicts with this Court's opinions and the opinions of other circuits defining what constitutes "clearly established law" for purposes of habeas relief.

When, as here, there is a state court decision on the merits, review is governed by Section 2254(d). Under that Section, relief is appropriate where the state court decision is "contrary to or involved an unreasonable application of, clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1). This Court has defined "clearly established federal law" as "the governing legal principle or principles set forth by the Supreme Court *at the time the state court renders its decision*." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (emphasis added).

More recently, this Court has explained that review under Section 2254(d) is limited to the record before the state court, and the provision's "backward-looking language *requires an examination of the state-court decision at the time it was made*." *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170 (2011)) (emphasis added). Thus, Section 2254(d) requires the federal courts to examine the state court decision against this "Court's precedents as of the time the state court renders its decision." *Id.* (emphasis added). Here, this Court issued *Crawford* after the Pennsylvania Superior Court had decided Mitchell's case. *Compare* (C.A. at 557) with *Crawford*, 541 U.S. at 36.

Other circuits have followed this Court's construction of Section 2254. For example, in *Issa v. Bradshaw*, 904 F.3d 446 (6th Cir. 2018), the Sixth Circuit addressed the admissibility of a co-defendant's out-of-court statements to friends in a murder trial. Applying the standard from *Ohio v. Roberts*, 448 U.S. 56 (1980), to the out-of-court statements, as opposed to *Crawford*, the Sixth Circuit explained that *Crawford* is not retroactive. *See Issa*, 904 F.3d at 454. And at the time of Issa's trial, *Roberts* governed. *See id.* at 453.

To avoid this Court's construction of Section 2254(d), the Third Circuit grafted a forward-looking standard onto the jurisdictional language in Section 2254(a). *See Mitchell*, 902 F.3d 163, 164. This new standard conflicts with this Court's precedent, the decisions of other circuits, and finds no support in Section 2254's language, structure, or history.

c. The Third Circuit's interpretation of Section 2254(a) substitutes a legal fiction in place of a constitutional violation.

There is no dispute that Mitchell received a constitutionally unfair trial based on the then-controlling authority. The parties also agree that this constitutional violation was prejudicial. Yet the rule that the Third has conjured up assumes a decision not yet in existence, *Crawford*, can be applied surgically and retrospectively. *See Mitchell*, 902 F.3d at 163-64. But the retrospective application of *Crawford* to absolve a clear constitutional error under *Bruton* and its progeny, is artificial and unmoors the case from the reality of how it would have unfolded had *Crawford* existed at the time.

For instance, the evidence linking Mitchell and Eley to the crime was limited to testimony that they had been seen in the area, and Eiland's hearsay admissions to jailhouse informants.[4] Had *Crawford* applied, there would have been a merit-worthy basis for a severance, since without *Bruton's* rule limiting the spillover incrimination from Eiland's statements, a joint trial would have been unfairly prejudicial. *See, e.g., Commonwealth v. Young*, 397 A.2d 1234, 1237 (Pa. Super. 1979) (explaining that, where redaction is impossible or would work prejudice, the court should either grant a defense motion to sever or forbid any use of the confession). Moreover, if only testimonial hearsay (statements to law enforcement) fell within the Confrontation Clause, counsel may have challenged Eiland's statements to LeVan as testimonial because of his relationship with law enforcement. *See* (C.A. at 227-28, 233-35).

Finally, the Third Circuit's conclusion that the jailhouse informant testimony would be admissible at a re-trial, *see* (Pet. App. at 15a), fails to apprehend that the only reason Eiland's statements were admissible is because they were his admissions. *See* Pa. R.E. 803(25). At a re-trial, the prosecution would have to call Eiland as a witness.

[4] Parenthetically, this Court has stressed that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986). Yet here, the incriminating statements did not come through a police officer, but jailhouse informants, the most unreliable of witnesses. *See generally Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose.").

CONCLUSION

For all these reasons, this Honorable Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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November 21, 2018