

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

**SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF *CERTIORARI* TO
BRING TO THE COURT'S ATTENTION THE ORDER AND CONCURRING
OPINION FROM THE DENIAL OF *EN BANC* REVIEW IN *ISSA V.*
*BRADSHAW***

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December 18, 2018

Petitioner, Edward Mitchell, files this supplemental brief to bring to the Court's attention the order and concurring opinion from the denial of rehearing *en banc* in *Issa v. Bradshaw*, 904 F.3d 446 (6th Cir. 2018).

SUPPLEMENTAL ARGUMENT

In his petition for a writ of *certiorari*, Mr. Mitchell cited the Sixth Circuit ruling in *Issa* as reflecting a conflict with the Third Circuit on the construction of Section 2254, that is, whether it requires an examination of the state-court decision when it was made. As here, one of the issues in *Issa* involved the application of *Crawford v. Washington*, 541 U.S. 36 (2004), to a state court ruling that preceded it by many years. The Sixth Circuit held that *Crawford* did not apply because it's not retroactive and because under Section 2254 a federal court applies the governing law when the state court rendered its decision. *See Issa*, 904 F.3d at 453-54 & n.2. In so holding, the panel in *Issa* declined to follow several earlier opinions, including one the Third Circuit expressly relied on in the decision under review, which reached a holding directly contrary to the Sixth Circuit.

The Sixth Circuit denied rehearing on December 13, 2018, cementing the split among the circuits on the timing of what constitutes “clearly established law.” This much Judge Sutton acknowledged in his concurring opinion. *See Issa*, No. 15-4147, 2018 WL 6566751, at *4 (6th Cir. Dec. 13, 2018). And while, as Judge Sutton also noted, the particular *Crawford* issue is of limited repetition, *see id.*, the effect of the change in the definition on the broader question — the construction of Section 2254's language — will recur. Moreover, as Judge Sutton emphasized, “[f]rom time

to time, it's worth letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worth correcting." *Id.* at *5.¹

CONCLUSION

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

Respectfully submitted,

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¹ This Court could, of course, hold Mr. Mitchell's case pending a *certiorari* filing in *Issa* by the Attorney General of Ohio, thereby allowing consideration of two sides of the same question.