NO. 18-6845

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

REPLY BRIEF OF PETITIONER

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REPLY ARGUMENT

Respondents do not dispute that the Third Circuit's opinion contradicts this Court's opinions interpreting the statute, the opinions of other circuits, and the statutory text in Section 2254(a) of Title 28 of the United States Code. Instead, Respondents argue the very point at issue, that is, that a change in the state of the law after the trial and appeal should apply retroactively to bar relief. Rather than counseling against review, Respondents' merits argument underscores the need for this Court to address the issue, and to affirm the bedrock principle that a person who is imprisoned in violation of his or her constitutional rights cannot be denied relief just because the violation *might* have been avoided under an intervening change in law.

This Court and other circuits have consistently held for decades that he relevant measure of Section 2254(d)(1)'s reach is this Court's precedent at the time of the state court's decision. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003). At the time of Petitioner's trial, the admission – during a joint trial – of an incriminating statement implicating a co-defendant violated the confrontation rights of the defendant who did not make the statement. *See Bruton v. United States*, 391 U.S. 123, 128 (1968). And this rule applied to out-of-court statements made by a co-defendant to a jailhouse informant. *See, e.g., Eley v. Erickson*, 712 F.3d 837, 858-60 (3d Cir. 2013); *United States v. Veltmann*, 6 F.3d 1483, 1500 (11th Cir. 1993). There is thus no doubt that Petitioner's conviction, and resulting sentence of life incarceration, violated his constitutional rights.

The Third Circuit nevertheless concluded, as Respondents now argue, that the subsequent ruling of this Court in *Crawford v. Washington*, 541 U.S. 36 (2004), holding that only "testimonial hearsay" falls within the purview of the Confrontation Clause, should be applied to deny Petitioner relief, even though *Crawford* was issued *after* Petitioner's trial and conviction. But this Court has explicitly refused to apply *Crawford* retroactively to cases on collateral review because it represents a "new rule." *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). The basis for this conclusion lies in the language of Section 2254(d)(1), which does not authorize relief for later changes in the law that favor a defendant's claim. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011). Respondents argue, however, that the courts can retroactively apply *Crawford* when it favors the prosecution as opposed to a defendant.

This case presents a perfect vehicle for addressing whether Section 2254 is capable of such a construction. *Crawford* has been held by this Court to be not retroactively applicable to cases on collateral review; yet, the Third Circuit has held to the contrary that in this circumstance – when *Crawford*'s application might have obviated a constitutional defect in a prior trial – it *is* and indeed precludes the petitioner from securing relief. This case offers the perfect opportunity for this Court to decide this important issue, and to resolve the split between the holding of the Third Circuit and that of this Court and other circuits. [1]

[1] The Sixth Circuit recently rejected the same argument Respondents advance here, applying *Ohio v. Roberts*, 448 U.S. 56 (1980), and observing that *Crawford* is not retroactive. *See Issa v. Bradshaw*, 904 F.3d 446 (6th Cir. 2018), *reh'g denied en banc*, 910 F.3d 1072. It appears likely that the Attorney General of Ohio will seek further review in this Court, thereby presenting the other side of the issue presented here.

CONCLUSION

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

Respectfully submitted,

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