

No. 20-

IN THE
Supreme Court of the United States

JOHN WAYNE COLLINS,
Petitioner,
v.

JAMES DAVID GREEN, Warden,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), it provided that deference to the decisions of state supreme courts would apply only when a state supreme court has decided a habeas petitioner's federal constitutional claims "on the merits." This limitation ensures that habeas petitioners are not forced to endure violations of their federal constitutional rights in state proceedings without deliberate review of their federal constitutional claims. Here, petitioner's constitutional claims were not deliberately considered by the highest state court, but AEDPA deference was nevertheless applied. Accordingly, petitioner requests a writ of certiorari to determine

1. Whether *de novo* review instead of deferential review under AEDPA applies where a state supreme court's analysis was not conducted deliberately as a federal constitutional claim?

Even under AEDPA, federal courts may not permit federal constitutional violations in state court proceedings to go uncorrected when they are "contrary to" or an "unreasonable application of" the clearly established law of this Court. Petitioner therefore also requests a writ of certiorari to determine

2. Whether the court of appeals erred by holding that the joinder of two temporally, geographically, and evidentiarily distinct crimes is not contrary to the clearly established law of this Court as set forth in *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)?

PARTIES TO THE PROCEEDING

Petitioner is John Wayne Collins, who was petitioner in the district court and the petitioner-appellant in the court of appeals.

Respondent is James David Green, in his official capacity as Warden of the Eastern Kentucky Correctional Complex where petitioner is held. Respondent, or his predecessor, were the respondent in the district court and respondent-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and therefore has no parent corporation and no stock.

RELATED PROCEEDINGS

Collins v. Green, No. 18-5380 (6th Cir.) (opinion and judgment issued on December 18, 2020; mandate issued January 11, 2021).

Collins v. Green, No. 1:15-CV-00026-GNS-HBB (D. Ky.) (magistrate's report and recommendation issued on November 14, 2017; magistrate's report and recommendation adopted in full, petition for a writ of habeas corpus denied, and limited certificate of appealability issued on March 22, 2018).

Collins v. Kentucky, No. 2008-SC-000107-MR (Ky. Sup. Ct.) (opinion and judgment issued on June 17, 2010).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE STATEMENT	iii
RELATED PROCEEDINGS.....	iv
TABLE OF AUTHORITIES	vii
INTRODUCTION	1
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT	5
A. Factual Background	5
B. Proceedings Below	7
1. Kentucky Trial Court	7
2. Kentucky Supreme Court.....	8
3. District Court Proceedings	11
4. Proceedings On Appeal.....	13
REASONS FOR GRANTING THE PETITION.....	14
I. THE SIXTH CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW	16
A. The Sixth Circuit's Decision Departs From The Decisions Of This Court	16

TABLE OF CONTENTS—Continued

	Page
B. The Sixth Circuit’s Decision Conflicts With Decisions Of Other Courts Of Appeals	24
II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED EVEN IF AEDPA APPLIES.....	26
III. THIS CASE IS A GOOD VEHICLE FOR RESOLVING IMPORTANT LEGAL ISSUES.....	32
CONCLUSION	33
APPENDIX A: Opinion of the United States Court of Appeals for the Sixth Circuit, dated December 18, 2020.....	1a
APPENDIX B: Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky, dated March 22, 2018	23a
APPENDIX C: Findings of Fact, Conclusions of Law and Recommendation of the United States District Court for the Western Dis- trict of Kentucky, dated November 14, 2017.....	43a
APPENDIX D: Memorandum Opinion of the Supreme Court of Kentucky, dated July 10, 2017.....	79a

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>Adorno v. Melvin</i> , 876 F.3d 917 (7th Cir. 2017)	24
<i>Bean v. Calderon</i> , 163 F.3d 1073 (9th Cir. 1998) ..	30, 31, 32
<i>Bradley v. United States</i> , 433 F.2d 1113 (D.C. Cir. 1969)	29
<i>Commonwealth v. Ferguson</i> , 581 S.W.3d 1 (Ky. 2019).....	9, 20
<i>Cone v. Bell</i> , 556 U.S. 449 (2009).....	15
<i>Corbett v. Bordenkircher</i> , 615 F.2d 722 (6th Cir. 1980)	29
<i>Cross v. United States</i> , 335 F.2d 987 (D.C. Cir. 1964)	29
<i>Farrar v. People</i> , 208 P.3d 702 (Colo. 2009).....	26
<i>Farrar v. Raemisch</i> , 924 F.3d 1126 (10th Cir. 2019)	25, 26
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011)	14, 16, 18
<i>Harris v. Thompson</i> , 698 F.3d 609 (7th Cir. 2012)	24, 25
<i>Hollis v. Davis</i> , 941 F.2d 1471 (11th Cir. 1991).....	23
<i>Johnson v. Williams</i> , 568 U.S. 289 (2013)	16, 17, 18, 19, 21
<i>Jones v. Bell</i> , 801 F.3d 556 (6th Cir. 2015).....	23
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	22
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	22
<i>Lee v. Avila</i> , 871 F.3d 565 (7th Cir. 2017)	24

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996).....	27
<i>Muth v. Frank</i> , 412 F.3d 808 (7th Cir. 2005)	19
<i>Pointer v. United States</i> , 151 U.S. 396 (1894)	27, 28
<i>Prescott v. Commonwealth</i> , 572 S.W.3d 913 (Ky. 2019).....	8, 20
<i>Ramirez v. Tegels</i> , 963 F.3d 604 (7th Cir. 2020).....	24
<i>Republican Party of Minnesota v. White</i> , 536 U.S. 765 (2002)	27
<i>Spencer v. State of Texas</i> , 385 U.S. 554 (1967)	27
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	22
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	22
<i>United States v. Fenton</i> , 367 F.3d 14 (1st Cir. 2004)	20
<i>United States v. Foutz</i> , 540 F.2d 733 (4th Cir. 1976)	29
<i>United States v. Frady</i> , 456 U.S. 152 (1982).....	22
<i>United States v. Lane</i> , 474 U.S. 438 (1986)	2, 20, 22, 27
<i>United States v. Scivola</i> , 766 F.2d 37 (1st Cir. 1985)	29
<i>United States v. Wood</i> , 299 U.S. 123 (1936)	17
<i>Welch v. Commonwealth</i> , 149 S.W.3d 407 (Ky. 2004)	9, 21

TABLE OF AUTHORITIES—Continued

	Page(s)
CONSTITUTIONS, STATUTES, AND RULES	
U.S. Constitution	
amend. V	4
amend. VI	4
28 U.S.C.	
§ 1254.....	4
§ 2253.....	12
§ 2254.....	5, 6, 15, 24, 27
Fed. R. App. P. 22	12
Kentucky Rule of Criminal Procedure	
6.18.....	8
9.12.....	8, 19
9.16.....	8

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PETITION FOR A WRIT OF CERTIORARI

John Wayne Collins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

This Court has constructed a careful balance in the relationship between the Antiterrorism and Effective Death Penalty Act and federal courts' duty to ensure that criminal defendants are not forced to suffer violations of their federal constitutional rights in state criminal proceedings. In the decision below, the Sixth Circuit ran afoul of that careful balance in two distinct ways, both to petitioner's detriment.

First, the Sixth Circuit concluded that “the Kentucky Supreme Court’s analysis was not conducted deliberately as a federal constitutional claim,” App. 10a, and nevertheless applied AEDPA deference to petitioner’s federal constitutional claim. Under this Court’s precedents, the Sixth Circuit’s finding and the application of AEDPA deference is incompatible. It is no surprise then that at least two courts of appeal—the Seventh and Tenth Circuits—facing the same legal question on the applicability of AEDPA deference with similar facts reached the opposite conclusion of the Sixth Circuit. Even worse for petitioner, the Sixth Circuit expressly provided that but for AEDPA deference it may have granted petitioner’s habeas petition. App. 22a. More simply put, petitioner remains indefinitely incarcerated despite a likely federal constitutional violation because of the Sixth Circuit’s undue deference to the decision of the Kentucky Supreme Court. Accordingly, petitioner seeks a writ of certiorari to correct the Sixth Circuit’s standard of review error or summary reversal with instructions to review his petition under *de novo* review.

Second, the Sixth Circuit erred by concluding that the Kentucky Supreme Court’s decision on petitioner’s misjoinder claim was not “contrary to” or an “unreasonable application” of this Court’s clearly established law. Petitioner was tried and convicted, over his persistent objections, in a single trial for two unrelated crimes. In *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986), this Court provided that such improper joinder is a Fifth Amendment violation when a defendant is denied his right to a fair trial as a result. The Kentucky Supreme Court never undertook the proper prejudice analysis—a point that was highlighted by three of the seven Kentucky Supreme Court justices in a powerful

dissent. Had the Kentucky Supreme Court conducted the proper analysis, it would have concluded that there was a reasonable probability that the jury would have reached a different verdict if the charges had not been joined into a single trial. Specifically, there is a reasonable probability that instead of being convicted for double murder, petitioner would have been acquitted on one count because the state's case was exceptionally weak and found guilty of a lesser included offense on the other charge. This is so because petitioner would not have been subjected to the spillover effect that resulted from the joinder of a weak case with a stronger case, leaving the jury to believe that he must be guilty of both crimes if he was guilty of one; and petitioner would have been able to exercise his right to testify in his own defense, offering testimony only he could give as to his justification for one of the charges.

Despite the Kentucky Supreme Court's failure to conduct the constitutionally required prejudice analysis, the Sixth Circuit concluded that the state court had not decided the joinder issue "contrary to" or as an "unreasonable application" of this Court's clearly established precedent. That was error. Accordingly, even if the Sixth Circuit correctly applied AEDPA deference, petitioner seeks a writ of certiorari to correct the Sixth Circuit's misapplication of the AEDPA standard.

OPINIONS BELOW

The Sixth Circuit's panel opinion denying habeas relief (App. 1a-22a) is reported at 838 F. App'x 161. The memorandum opinion and order for the United States District Court for the Western District of Kentucky denying habeas relief (App. 23a-42a) is not reported but available at 2018 WL 1440605. The Report & Recommendation of the Magistrate Judge for the

United States District Court for the Western District of Kentucky denying Collins's habeas relief but granting a Certificate of Appealability (App. 43a-78a) is not reported but available at 2017 WL 8293274. The Kentucky Supreme Court's order affirming Collins's conviction (App. 79a-97a) is not reported but available at 2010 WL 2471839.

JURISDICTION

The Sixth Circuit entered its judgment on December 18, 2020, and issued its mandate on January 11, 2021. On March 19, 2020, this Court extended the time for filing a petition for certiorari in all cases to 150 days following entry of judgment. This petition is timely filed on May 17, 2021, 150 days after the entry of the Sixth Circuit's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves petitioner's constitutional rights under the Fifth and Sixth Amendments to the United States Constitution. The Fifth Amendment provides in relevant part:

No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides:

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.

This case involves petitioner's statutory rights to habeas under 28 U.S.C. § 2254(d), which provides:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

A. Factual Background

In the fall of 2004, two murders occurred in Kentucky forty days apart, in two different locations, with no apparent connection between the murder weapons,

and no physical evidence linking the two crimes. Despite the temporal, geographic, and evidentiary distinctions, Petitioner, John Wayne Collins, was charged with both crimes and forced—over his persistent objections—to stand trial on both charges in the same, single trial.

On October 10, 2004, John Collins, Harold Collins (John Collins’s father), Christa Wilson (John Collins’s girlfriend), April Sizemore Collins (Harold Collins’s wife), and Natasha Saylor were at Harold Collins’s home when Stevie Collins (John Collins’s first cousin and Harold Collins’s nephew) came to the house. App. 80a.¹ Stevie Collins was believed by members of the Collins family to have murdered and dismembered his developmentally disabled father (John Collins’s uncle and Harold Collins’s brother). App. 80a-81a. Once Stevie Collins was on the porch, Harold Collins shot Stevie Collins. App. 80a. Stevie Collins did not immediately die from the initial shot. *Id.* Subsequently, in defense of himself, his father, and other bystanders, John Collins, Petitioner here, shot Stevie Collins. App. 80a-81a. Stevie Collins died from the multiple gunshot wounds. App. 80a.

Forty days later, Christa Wilson was found dead from a gunshot wound in a creek. App. 82a. Unlike the Stevie Collins killing, there were no eyewitnesses, no weapon was recovered, and the only evidentiary link between the crime scene and John Collins was a rock

¹ In accordance with § 2254, the facts stated here are as determined by the state court. *See* 28 U.S.C. § 2254(e)(1) (“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.”).

with scraped paint, the source of which was disputed. *Id.*

B. Proceedings Below

1. Kentucky Trial Court

John Wayne Collins was indicted for the murder of Stevie Collins (the “Stevie Collins case”) and later indicted on one count of murder and kidnapping of Christa Wilson (the “Christa Wilson case”). App. 5a. During jury selection in the Stevie Collins case, the prosecution moved to consolidate both indictments under the theory that the crimes were connected and Christa Wilson was murdered in order to cover up John Collins’s role in Stevie Collins’s murder. *Id.* Petitioner moved to sever the trials twice making clear his intent to exercise his Sixth Amendment right to testify in the Stevie Collins case and to exercise his Fifth Amendment right to remain silent in the Christa Wilson case. App. 5a-6a. Both motions were denied. App. 6a. During trial, the prosecution adduced no evidence to support allegations that the crimes were connected. App. 58a (“Something obvious is missing from the Commonwealth’s statement. Proof. If the Commonwealth had supported its theory with testimony and proven it to any extent, then denial of the motion to sever would have been academic. What is more disturbing, the Commonwealth never sought to prove these allegations at trial[.]”)

The jury heard evidence in the Stevie Collins case and the Christa Wilson case in tandem without bifurcation. The evidence in the Stevie Collins case consisted of eyewitness testimony and forensic expert testimony regarding the alleged murder weapon and matching ammunition found in petitioner’s vehicle. App. 3a-4a. In contrast, the evidence in the Christa Wilson case

lacked eyewitness testimony or expert testimony regarding a potential murder weapon—indeed no weapon connected to her killing was ever introduced. App. 4a. The only evidence the jury heard in the Christa Wilson case connecting petitioner to the crime was evidence regarding a paint scrape on a rock near where her body was found that was claimed to have come from petitioner’s car. *Id.* The state and defense experts disputed the genesis of the paint scrape. App. 4a-5a. The prosecution’s evidence was so weak in the Christa Wilson case that the trial court entered a directed verdict on the kidnapping charge. App. 79a.

Despite the pre-trial motions to sever, the trial court did not instruct the jury to consider the evidence of each charge separately. App. 20a. After the joint trial, petitioner was convicted of both charges and sentenced to life imprisonment without parole for a minimum of twenty-five years. App. 6a.

2. Kentucky Supreme Court

On direct appeal to the Kentucky Supreme Court, and as relevant here, petitioner argued that his constitutional rights were violated based on the prejudicial misjoinder of the two murder charges. App. 6a. A closely divided Kentucky Supreme Court denied petitioner’s requested relief. App. 80a.

With respect to the prejudicial misjoinder, the Kentucky Supreme Court analyzed whether the trial court abused its discretion by refusing to sever the two murder charges under the Kentucky Rules of Criminal Procedure—ignoring petitioner’s federal constitutional claims.² App. 83a-88a. The majority began its discus-

² The Kentucky Supreme Court carefully analyzed Kentucky Rules of Criminal Procedure 9.12, 6.18, and 9.16 governing joinder.

sion on the joinder issue by explaining that it would review the trial court’s denial of the motion to sever for “abuse of discretion” consistent with its prior rulings under the Kentucky Rules of Procedure, App. 83a; as opposed to *de novo* review, which the Kentucky Supreme Court has applied to federal constitutional claims in other contexts, *see Prescott v. Commonwealth*, 572 S.W.3d 913, 920 (Ky. 2019) (noting that denial of relief under a Kentucky Rule of Criminal Procedure is reviewed for abuse of discretion, but “[l]egal issues are reviewed *de novo*”); *see also Commonwealth v. Ferguson*, 581 S.W.3d 1, 6 (Ky. 2019) (applying *de novo* review when “reviewing counsel’s performance under” the Sixth Amendment); *Welch v. Commonwealth*, 149 S.W.3d 407, 409-410 (Ky. 2004) (explaining that the court “reviews *de novo* the applicability of the law to the facts found” in a motion to suppress a confession under the “Fifth Amendment of the United States Constitution or Section 11 of the Kentucky Constitution”).

Then, the Kentucky Supreme Court acknowledged that the joinder issues as presented by petitioner “ha[d] not been much addressed in [their] cases,” and turned for guidance to “[t]he federal courts ... under their similar rules of joinder and severance[.]” App. 84a. Relying on some federal decisions interpreting joinder under the Federal Rules of Criminal Procedure, the Kentucky Supreme Court reasoned that petitioner did not show “that his testimony regarding Stevie Collins’s murder was vital, as he was able to assert his justification defense through other witnesses who testified to the victim’s alleged involvement in the murder of [his] uncle,” and that petitioner did not make the requisite “showing of a strong need to refrain from testifying with respect to Christa’s murder.” App. 85a.

Finally, the Kentucky Supreme Court determined that severance was not “required on the ground that the two murders were not sufficiently related” because evidence of the two crimes were admissible in the trial of the other. App. 85a-88a.

With respect to “prejudice,” the crux of the fair trial inquiry under the Fifth Amendment according to this Court’s precedent, the Kentucky Supreme Court noted only that it had previously “recognized that ‘prejudice is a relative term’ and, in the context of a criminal proceeding, means only that which is unnecessary or unreasonably hurtful, given that having to stand trial is, itself, inherently prejudicial.” App. 84a.

The dissent argued that the majority erred in its “conclusion that [petitioner’s] two murder charges were properly tried together” and misconceived the proper operation of the Kentucky Rules of Criminal Procedure. App. 94a. The dissent was particularly concerned that the two cases were tried together when “[t]here [was] no evidence that the Stevie Collins’ murder was in any way connected to the murder of Christa Wilson nearly six weeks later,” and that “[t]he Commonwealth’s theory [was] a mere possible explanation with no evidentiary link that connects together the two murders.” App. 94a-95a; *see also* App. 96a (“Joining [the two murder cases] for trial with no evidentiary connection between them was not authorized by the Rules of Criminal Procedure.”).

The dissent then directly addressed the majority’s prejudice analysis under the Kentucky Rules of Criminal Procedure, finding that petitioner “was deprived of a fair trial by the inherently prejudicial joinder of two crimes that were not closely related in character, circumstance or time.” App. 96a; *see also* App. 96a-97a

(“The premise for the majority’s conclusion that Appellant was not prejudiced by the last-minute decision to try him simultaneously for two murders instead of one rests upon its conception that ‘prejudice is a relative term.’”). For these reasons, three of the seven justices of the Kentucky Supreme Court dissented from the majority opinion in petitioner’s case.

3. District Court Proceedings

Petitioner sought federal habeas review, *pro se*, on several claims, including as relevant here, his claim that his federal constitutional rights were violated by the misjoinder. The magistrate judge believed himself bound to apply AEDPA and did not inquire as to whether the Kentucky Supreme Court’s decision was “on the merits.” App. 49a-51a.

The magistrate judge disagreed with the Kentucky Supreme Court’s conclusion that petitioner had not demonstrated a strong need to remain silent on the Christa Wilson case, but agreed with the Kentucky Supreme Court that petitioner did not demonstrate a strong need to testify in the Stevie Collins case. App. 55a. (“[W]hile Petitioner has satisfactorily demonstrated his need to stay silent with respect to the Christa Wilson murder, he has failed to demonstrate a strong need to testify on his own behalf with respect to the Collins murder.”).

As to prejudice, the magistrate judge concluded that while the “the Kentucky Supreme Court operated under the proper standard,” “[t]he majority’s application of the standard ... raise[d] serious constitutional questions.” App. 57a. The magistrate judge found the Kentucky Supreme Court’s dissent’s arguments to be “well-taken” and after an independent review of the

record concluded that the prosecution's joinder claims were missing "[p]roof." App. 57a-58a; *see also* App. 58a. ("If the Commonwealth had supported its theory with testimony and proven it to any extent, then denial of the motion to sever would have been academic. What is more disturbing, the Commonwealth never sought to prove these allegations at trial[.]"). Indeed, the magistrate judge was so concerned by the prosecution's behavior at trial that he questioned the prosecution's motives for the joinder. *See* App. 59a ("What could explain the decision not to connect the two murders, allegedly part of a common scheme, after telling the judge before trial that Petitioner murdered Christa Wilson to silence her? The explanation for the omission may range from unintentional neglect to something more sinister, but the result is the same: a baseless joinder of charges that may have deprived Petitioner of a fair trial."). Nevertheless, believing himself bound to the deference owed under AEDPA, the magistrate judge concluded that the Kentucky Supreme Court's decision was not an unreasonable application of clearly established federal law. *Id.* But noting that reasonable jurists could disagree with his conclusion, the magistrate judge recommended a limited certificate of appealability on the joinder issue. App. 60a.

The district court adopted the report and recommendation and denied habeas relief. App. 23a. However, recognizing the legal viability of petitioner's misjoinder claim, the district court granted a limited certificate of appealability pursuant to § 2253(c) and Fed. R. App. P. 22(b) on that claim. App. 42a. Petitioner appealed to the Sixth Circuit Court of Appeals.

4. Proceedings On Appeal

On appeal, the Sixth Circuit considered whether the AEDPA deferential standard applied to the Kentucky Supreme Court decision below. App. 9a. The court of appeals “agree[d] [with petitioner’s argument] that the Kentucky Supreme Court’s analysis was not conducted deliberately as a federal constitutional claim[.]” App. 10a. However, the court of appeals determined that the Kentucky Supreme Court “nonetheless identified the required prejudice standard when it said: ‘We review the denial of a motion to sever for abuse of discretion, and we will not grant relief unless the refusal to sever prejudiced the defendant.’” *Id.* The court further explained that “[t]he prejudice analysis was intertwined with language reviewing the denial of the motion to sever pursuant to Kentucky criminal procedure rules, which do not generally implicate federal constitutional issues[.]” *Id.* However, according to the court, the “Kentucky Supreme Court recited and applied the prejudice standard under federal law sufficiently to warrant labeling it an ‘adjudication on the merits’ for purposes of AEDPA.” *Id.*

On the merits of petitioner’s claim, the court of appeals addressed the arguments in two parts: (1) whether petitioner suffered actual prejudice because he wished to exercise his constitutional rights to testify in the Stevie Collins case, but not in the Christa Wilson case; and (2) whether the spillover effect from combining the two unrelated murders resulted in actual prejudice.

1. On the selective testimony argument, the court explained that “[b]ecause other witnesses could have provided ample testimony on Stevie Collins’ reputation for violence and his past interactions with defendant, [it

was] not persuaded that the lack of defendant’s testimony about his state of mind at the time of Stevie’s murder caused defendant prejudice.” App. 17a. Accordingly, the court held that petitioner’s selective testimony argument did not satisfy the requisite prejudice showing. *Id.*

2. The court found petitioner’s spillover effect argument “compelling.” App. 22a. And found “[t]he fact that a curative instruction was not given to the jury compound[ed] the error.” *Id.* Notably, the court provided that “[i]f this were a case on direct appeal, [i.e. under a *de novo* standard of review, petitioner’s spillover argument] would present a very close question.” *Id.* However, the court lamented, “AEDPA compel[led] [the court] to give substantial deference to the Kentucky Supreme Court’s decision, and defendant [did] not surmount[] that hurdle.” *Id.*

Accordingly, the court of appeals affirmed the district court and denied petitioner’s habeas petition. App. 22a. Petitioner now seeks a writ of certiorari from this court to address the legal errors in the court of appeal’s decision below.

REASONS FOR GRANTING THE PETITION

“The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law.” *Harrington v. Richter*, 562 U.S. 86, 91 (2011). That safeguard fails when courts apply more demanding standards of review than those required by law or fail to correct clear violations of law.

A writ of habeas corpus may issue to a prisoner convicted in state court under two different standards: one, under the Antiterrorism and Effective Death Penalty Act (AEDPA), if the state court adjudicates the

petitioner’s constitutional claims “on the merits”; and another, less onerous standard, if the state court fails to deliberate on petitioner’s constitutional claims. *See, e.g., Cone v. Bell*, 556 U.S. 449, 472 (2009) (“Because the Tennessee courts did not reach the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to ‘any claim that was adjudicated on the merits in State court proceedings.’ 28 U.S.C. § 2254(d). Instead, the claim is reviewed *de novo*.”).

Here, the court of appeals determined that “the Kentucky Supreme Court’s analysis was not conducted deliberately as a federal constitutional claim[.]” App. 10a. That finding alone should have excluded petitioner’s habeas petition from AEDPA’s deferential standard of review and triggered *de novo* review. Worsening the error, the court of appeals applied AEDPA deference, and then concluded that if it had applied *de novo* review, petitioner’s habeas petition “would [have] present[ed] a very close question.” App. 22a. Simply put, the court of appeal’s standard of review error is the reason that petitioner’s habeas petition was denied. That error departs from the carefully tailored interpretations of § 2254(d) by this Court and conflicts with the decisions of several courts of appeal. Accordingly, this Court should grant the writ of certiorari as to petitioner’s first question presented or summarily reverse the Sixth Circuit’s decision with instructions to reconsider petitioner’s habeas petition under the appropriate standard of review.

Even if the Sixth Circuit properly adopted AEDPA’s deferential standard of review, it misapplied that standard to the facts here by granting greater deference to the Kentucky Supreme Court’s decision than was warranted. The Kentucky Supreme Court’s analy-

sis was not as protective or robust as the federal constitution requires. Accordingly, it is no surprise that the Kentucky Supreme Court did not conclude that petitioner should not stand trial on both charges in a single trial. The Sixth Circuit should have corrected this error under AEDPA’s “contrary to” or “unreasonable application” command. The Sixth Circuit did not, and petitioner now seeks a writ of certiorari on his second question presented to correct this legal error.

I. THE SIXTH CIRCUIT APPLIED THE WRONG STANDARD OF REVIEW

A. The Sixth Circuit’s Decision Departs From The Decisions Of This Court

The Sixth Circuit’s decision runs afoul this Court’s decisions in *Harrington v. Richter*, 562 U.S. 86 (2011) and *Johnson v. Williams*, 568 U.S. 289 (2013). *Richter* and *Williams* set the interpretive boundaries for § 2254(d)’s “adjudicat[ion] on the merits” requirement. While *Richter* concluded that a claim may be “adjudicated on the merits” by a state court even if the state court does not issue a substantive opinion, 562 U.S. at 98, *Williams* extended the *Richter* presumption to cases where the state court issues an opinion on some claims, but not all of the claims, 568 U.S. at 292-293. Because the Kentucky Supreme Court issued an opinion here, the parameters for “on the merits” adjudications established in *Williams* are more instructive.

In *Williams*, petitioner argued before the California Court of Appeals that both her Sixth Amendment rights and rights under the California Penal Code were violated. 568 U.S. at 295. The California Court of Appeals discussed the substance of her claim—whether a juror was properly dismissed—but “never expressly

acknowledged that it was deciding a Sixth Amendment issue.” *Id.* at 295-296. However, in both the original and revised California Court of Appeals opinions, the California Court of Appeals cited this Court’s decision in *United States v. Wood*, 299 U.S. 123 (1936) discussing the constitutional implications of juror bias. *Williams*, 568 U.S. at 295-296. On habeas review, the Ninth Circuit declined to apply AEDPA deference to the California Court of Appeal’s decision believing it “‘obvious’ that the State Court of Appeal had ‘overlooked or disregarded’ [habeas petitioner’s] Sixth Amendment claim.” *Id.* at 297.

In concluding that the Ninth Circuit erred and should have applied AEDPA deference, this Court explained that “[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.” *Williams*, 568 U.S. at 301. Importantly for the case at bar, this Court also rejected petitioner’s argument that “a state court must be regarded as having adjudicated a federal claim on the merits if the state court addressed ‘the substance of [an] asserted trial error.’” *Id.* (alteration in original). Instead of petitioner’s proffered absolute rule, this court provided a non-exhaustive list of possible situations in which the presumption would be rebutted, including when a state standard is less protective than the federal standard, when the federal constitutional claim has not been adjudicated as a result of sheer inadvertence, and “[w]hen the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court.” *Id.* at 301-303

Here, the Sixth Circuit had sufficient evidence before it to conclude that “the Kentucky Supreme Court’s

analysis was not conducted deliberately as a federal constitutional claim[.]” App. 10a. Under *Williams*, that should have ended the Sixth Circuit’s inquiry regarding the applicability of AEDPA. *Williams* commands courts to apply the rebuttable presumption when the habeas court is unable to discern whether the federal constitutional issue was considered. 568 U.S. at 292-293 (framing the question before the court there as whether AEDPA deference applies when a defendant raises a federal claim, “and a state court rules against the defendant and issues an opinion that addresses some issues but does not expressly address the federal claim in question”). In *Williams*, this Court also adopted *Richter*’s pronouncement that “[t]he presumption [that the state court decided the federal claim] may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.” *Richter*, 562 U.S. at 99-100; *Williams*, 568 U.S. 289, 300-301 (“[W]e see no sound reason for failing to apply the *Richter* presumption in cases like the one now before us.”). Accordingly, it was wholly incongruent with this Court’s decisions in *Williams* and *Richter* for the court of appeals to reach the definitive conclusion that “the Kentucky Supreme Court’s analysis was not conducted deliberately as a federal constitutional claim,” and then to apply AEDPA deference. App. 10a.

Furthermore, the Sixth Circuit’s decision to apply AEDPA deference was not wrong only because it reached a conclusion about the Kentucky Supreme Court’s decision that is incompatible with AEDPA deference. The Sixth Circuit’s decision was also wrong because the rebuttable presumption that the Kentucky Supreme Court adjudicated petitioner’s federal constitutional claims on the merits was in fact rebutted. That the Kentucky Supreme Court did not adjudicate peti-

tioner’s federal constitutional claims on the merits follows from at least three indicators in the Kentucky Supreme Court’s opinion: (1) the Kentucky Supreme Court expressly held that it was deciding petitioner’s claims based on Kentucky Rules of Criminal Procedure, not any substantive statutory or constitutional right; (2) the Kentucky Supreme Court applied an abuse of discretion standard to its review of petitioner’s misjoinder claim, not the *de novo* review it applies to constitutional claims; (3) the prejudice inquiry conducted under the Kentucky Rules of Criminal Procedure is less protective than the constitutional inquiry as the Kentucky Supreme Court’s analysis never inquired as to whether there was a reasonable probability that the outcome of petitioner’s trial would have been different but for the misjoinder.

1. The Kentucky Supreme Court upheld Collins’s convictions in relevant part by holding that the trial court did not abuse its discretion under Kentucky Rule of Criminal Procedure 9.12. App. 83a-88a. The Kentucky Supreme Court did not determine, or purport to determine, whether Collins’s Fifth Amendment right to due process was violated by the improper joinder of the charges. Even Justice Scalia’s more limiting concurrence in *Williams* accepted that a decision on procedural grounds was not a decision on the merits of a constitutional claim. *See Williams*, 568 U.S. at 308 (Scalia, J., concurring) (“An ‘adjudication on the merits’ is ‘best understood by stating what it is not: it is not a resolution of a claim on procedural grounds.’” (quoting *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005))).

It is no consolation that the Kentucky Supreme Court referred to the Fifth Amendment right not to testify in passing. *See Williams*, 568 U.S. at 301 (“[A] provision of the Federal Constitution or a federal prec-

edent ... simply mentioned in passing” may rebut the presumption “that the federal claim was adjudicated on the merits.”). The constitutional right violated by the misjoinder was petitioner’s Fifth Amendment right to a fair trial, *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986), which was never discussed by the Kentucky Supreme Court. The Kentucky Supreme Court’s reference to the Fifth Amendment right to remain silent was merely a backdrop for the selective testimony analysis. App. 84a (“The federal courts, however, under their similar rules of joinder and severance, have noted that, while courts zealously guard a defendant’s Fifth Amendment right not to testify at all, ‘the case law is less protective of a defendant’s right to testify selectively.’ *United States v. Fenton*, 367 F.3d 14, 22 (1st Cir. 2004).”). Accordingly, the Kentucky Supreme Court should be taken at its word that it decided petitioner’s misjoinder claim on the procedural grounds that severance was not required under the Kentucky Rules of Criminal Procedure, not on federal constitutional grounds as required for AEDPA deference to apply.

2. The standard of review the Kentucky Supreme Court applied to the joinder question indicates that it was not resolving a federal constitutional claim. The Kentucky Supreme Court explained that it was resolving the joinder question under an abuse of discretion standard based on a state rule of criminal procedure, App. 83a, but when the Kentucky Supreme Court decides questions of constitutional law it applies a *de novo* standard. See *Prescott v. Commonwealth*, 572 S.W.3d 913, 920 (Ky. 2019) (noting that denial of relief under a Kentucky Rule of Criminal Procedure is reviewed for abuse of discretion, but “[l]egal issues are reviewed *de novo*”); see also *Commonwealth v. Ferguson*, 581

S.W.3d 1, 6 (Ky. 2019) (applying *de novo* review when “reviewing counsel’s performance under” the Sixth Amendment); *Welch v. Commonwealth*, 149 S.W.3d 407, 409-410 (Ky. 2004) (explaining that the court “reviews *de novo* the applicability of the law to the facts found” in a motion to suppress a confession under the “Fifth Amendment of the United States Constitution or Section 11 of the Kentucky Constitution”). The application of the abuse of discretion standard in determining whether Collins’s charges were misjoined clearly rebuts the presumption that the Kentucky Supreme Court decided the issue on the merits of the federal constitutional claim.

The fact that the Kentucky Supreme Court used an abuse of discretion standard as opposed to the *de novo* review standard is not a mere technicality. The dissenting justice of the Kentucky Supreme Court made the effects of this standard of review decision plain—although to make a point about the Kentucky Rules of Criminal Procedure, not the federal constitution—when they noted that the majority “fail[ed] to give appropriate consideration to the more fundamental issue of whether the two charges were properly joined in the first place.” App. 94a.; *see also* App. 86a n.1 (“The dissent’s emphasis on RCr 6.18 misconceives our standard of review. If we reviewed severance rulings *de novo*, then we would indeed begin where the trial court begins.”).

3. As applied by the Kentucky Supreme Court’s majority, the prejudice analysis under the Kentucky Rules of Criminal Procedure is less protective than the analysis demanded by the Fifth Amendment’s due process clause. *Williams*, 568 U.S. at 301 (suggesting that the presumption that the state court adjudicated the federal constitutional claim on the merits may be rebut-

ted when “the state standard is *less* protective” than the federal standard). In *Lane*, this Court explained that “misjoinder ... rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.” 474 U.S. at 446 n.8. In other contexts, this Court has defined that requisite level of prejudice as prejudice sufficient to show a reasonable probability of a different result absent the constitutional violation, also referred to as “actual prejudice.” See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining a fair trial consistent with Fifth Amendment protections on habeas review of a *Brady* violation as one in which there is not “a ‘reasonable probability’ of a different result” absent the constitutional violation); accord *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999) (explaining that a habeas petitioner must demonstrate that a *Brady* violation is material by showing that “the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (defining “actual prejudice” under habeas review of a Fourth and Sixth Amendment violation as “a reasonable probability that the verdict would have been different absent the excludable evidence”); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (explaining that a habeas petitioner is prejudiced by ineffective assistance of counsel when she shows “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”), *United States v. Frady*, 456 U.S. 152, 170 (1982) (defining “actual prejudice” as a “showing, not merely that the errors at his trial created a *possibility* of prejudice,

but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions”).

The courts of appeal are in accord. *See Jones v. Bell*, 801 F.3d 556, 564 (6th Cir. 2015) (A Petitioner shows actual prejudice when he shows that there is a reasonable probability that “the outcome would have been different.”); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (same).

The dissenting justices on the Kentucky Supreme Court believed that the same prejudice analysis compelled by this Court’s decisions for constitutional violations was what was required under the Kentucky Rules of Criminal Procedure. App. 94a (“The Majority focuses on the question of whether the trial erred in ‘refusing to sever the two murder charges.’ In so doing, it fails to give appropriate consideration to the more fundamental issue of whether the two charges were properly joined in the first place.”). The dissenting justices expressly attacked the majority opinion’s prejudice standard, finding it severely lacking. App. 96a-97a (“The premise for the majority’s conclusion that Appellant was not prejudiced by the last-minute decision to try him simultaneously for two murders instead of one rests upon its conception that ‘prejudice is a relative term.’ It completes the analysis with a circular argument and an illusory justification for the joinder.”).

To be sure, the dissenting justices did not themselves claim that the prejudice standard they would have invoked is compelled by the federal constitution. However, that the dissenting justices took issue with the majority’s prejudice standard confirms that a more rigorous prejudice standard was available—one that the majority rejected. For current purposes, the ma-

majority's rejection of that standard is significant because it clarifies that the prejudice standard applied and held by the majority to be compelled by the Kentucky Rules of Criminal Procedure is less protective than the "reasonable probability" standard compelled by the Fifth Amendment.

For these reasons, the presumption that the Kentucky Supreme Court adjudicated petitioner's federal constitutional claims was rebutted by the Kentucky Supreme Court's own opinion and the court of appeals erred by applying AEDPA deference.

B. The Sixth Circuit's Decision Conflicts With Decisions Of Other Courts Of Appeals

The Sixth Circuit's interpretation of § 2254(d)'s "adjudicat[ion] on the merits" requirement is in conflict with decisions in at least the Seventh and Tenth Circuits.

In *Harris v. Thompson*, the Seventh Circuit considered a habeas petition in which the petitioner presented a compulsory process claim under the Sixth Amendment to the Illinois Court of Appeals. 698 F.3d 609, 621-622 (7th Cir. 2012).³ The Illinois Court of Appeals failed to "explicitly address or even acknowledge the existence of the federal constitutional issue." *Id.* at 623. Instead, the Illinois court analyzed the relevant issue "purely as an issue of state evidentiary law, re-

³ The Seventh Circuit decided *Harris* before this Court decided *Williams*, but it remains the law of the Seventh Circuit. *See, e.g., Ramirez v. Tegels*, 963 F.3d 604, 612 (7th Cir. 2020) (relying on *Harris* in its discussion of whether AEDPA applies); *Adorno v. Melvin*, 876 F.3d 917, 921 (7th Cir. 2017) (same); *but see Lee v. Avila*, 871 F.3d 565, 571 n.1 (7th Cir. 2017) (questioning the impact of *Williams* on circuit precedent including *Harris*).

viewing the trial court’s ... determination for an abuse of discretion and harmless error.” *Id.* While the Illinois court acknowledged that the petitioner in *Harris* had asserted that the trial court “violated her constitutional rights,” “the appellate court never identified which constitutional rights were at issue or referred to the Compulsory Process Clause, the Sixth Amendment, or even the Due Process Clause.” *Id.* (emphasis omitted). Furthermore, the *Harris* court explained, the Illinois court “cited no case—state or federal—on the constitutional issue.” *Id.* Accordingly, the Seventh Circuit reasoned that “[t]he appellate court’s silence on the issue fell below even the low threshold a state court decision must meet to qualify as ‘on the merits’ under AEDPA” and applied *de novo* review to petitioner’s claim. *Id.*

Like the Illinois Court of Appeals in *Harris*, the Kentucky Supreme Court failed to “explicitly address or even acknowledge the existence of the federal constitutional issue,” *Harris*, 698 F.3d at 623; decided the relevant legal argument “purely as an issue of state evidentiary law, reviewing the trial court’s ... determination for an abuse of discretion and harmless error,” *id.*; “never identified which constitutional rights were at issue or referred to ... the Sixth Amendment, or even the Due Process Clause,” *id.*; and “cited no case—state or federal—on the *constitutional* issue,” *id.* (emphasis added). In short, the Illinois Court of Appeal’s decision in *Harris* and the Kentucky Supreme Court’s decision here were adjudicated in the same manner, but the Seventh Circuit concluded that such an adjudication was not “on the merits” and the Sixth Circuit reached the opposite conclusion. *Id.* at 623-624.

Similarly, the Tenth Circuit, in *Farrar v. Raemisch* applied *de novo* review to a habeas petitioner’s claims “[b]ecause the Colorado Supreme Court didn’t adjudi-

cate the merits of the constitutional claims[.]” 924 F.3d 1126, 1130 (10th Cir. 2019) (subsequent history omitted). Instead of resolving petitioner’s constitutional claims, the Colorado Supreme Court, later affirmed by the Tenth Circuit, resolved petitioner’s claims solely on the proper standard for a new trial under Colorado law. *See Farrar v. People*, 208 P.3d 702, 709-710 (Colo. 2009). Like the Colorado Supreme Court in *Farrar*, the Kentucky Supreme Court here clarified and decided petitioner’s claims solely on state grounds without deliberating or considering the constitutional claims. Nevertheless, while the Tenth Circuit applied *de novo* review, the Sixth Circuit under similar circumstances did not.

Simply put, the Sixth Circuit took this Court’s commands from *Williams* and *Richter* beyond their permissible boundaries by applying AEDPA deference when it concluded that “the Kentucky Supreme Court’s analysis was not conducted deliberately as a federal constitutional claim,” App. 10a, and when it was evident from the Kentucky Supreme Court’s own opinion that it did not decide petitioner’s misjoinder claim under the federal constitution. For these reasons, petitioner requests that this Court grant a writ of certiorari to determine whether the Sixth Circuit erred by applying AEDPA deference to petitioner’s misjoinder claim or summarily reverse the Sixth Circuit’s decision for review under the proper standard of review.

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED EVEN IF AEDPA APPLIES

If this Court concludes that the court of appeals applied the wrong standard of review, this Court may remand to the court of appeals for further review under the proper standard and need not address the second question presented. However, if this Court reaches the

second question presented, Mr. Collins is entitled to habeas relief even if the Sixth Circuit correctly identified the standard of review.

Under AEDPA, a state prisoner is entitled to habeas relief when the adjudication of his federal constitutional claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. 28 U.S.C. § 2254(d)(1). The Kentucky Supreme Court’s decision was “contrary to, or involved an unreasonable application of” this Court’s clearly established law in *United States v. Lane*, 474 U.S. 438 (1986).

In *Lane*, this Court explained that “misjoinder ... rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.” 474 U.S. at 446 n.8.⁴ Accordingly, it is clearly established by this Court

⁴ It has been well-settled by this Court that prejudicial joinder violates federal law for at least 120 years. In *Pointer v. United States*, this Court “recogniz[ed] as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury[.]” 151 U.S. 396, 403 (1894). This Court has regularly explained that what the Fifth Amendment’s due process clause protects is an accused’s right to those fundamental and established elements of fairness in a criminal trial. See *Spencer v. State of Tex.*, 385 U.S. 554, 563-564 (1967) (noting that “[c]ases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial” (collecting cases)). In determining whether a rule or practice is a part of the constitutional protections embodied by the due process clause, this court has turned to “historical practice” to “determin[e] whether the principle in question is fundamental.” *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (“It is true that a ‘universal and long-established’ tradition of prohibiting certain conduct creates ‘a strong presumption’ that the

that misjoinder violates a petitioner’s constitutional rights when absent the misjoinder there is a reasonable probability that the outcome of the trial would have been different. *See supra* at 21-23 (discussing this Court’s prejudice standard under the Fifth Amendment and other constitutional provisions in the habeas context).

The Kentucky Supreme Court’s decision below was “contrary to” or an “unreasonable application” of this clearly established law. The court of appeals erred in finding otherwise.

Absent the misjoinder, there is a reasonable probability that a jury would not have convicted petitioner for the killing of Christa Wilson because of the spillover effect from the Stevie Collins trial. And if the trials had been properly severed, there is a reasonable probability that petitioner would have been convicted of a lesser included charge instead of murder. This is so because Collins would have exercised his Sixth Amendment right to testify in his own defense, and testified as to his state of mind during the killing of Stevie Collins,

prohibition is constitutional: ‘Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation’s consciousness.’”). That analysis is precisely the analysis that the *Pointer* Court undertook when it determined that it is a “fundamental ... principle” that prejudicial misjoinder is impermissible. 151 U.S. at 403; *see also id.* at 401 (surveying historical cases). Accordingly, it is evident that *Pointer*’s misjoinder rule arises from constitutional due process protections, and there can be no doubt that even before *Lane* this Court’s precedents clearly established that misjoinder may violate the Fifth Amendment.

including whether he thought Stevie Collins was wielding a gun.

These are precisely the types of prejudice that result from improper joinder. *See, e.g., Corbett v. Bordenkircher*, 615 F.2d 722, 724-725 (6th Cir. 1980) (explaining that one of the possible sources of prejudice “which may justify the granting of a severance” is that “the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition” (quoting *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976)); *Bradley v. United States*, 433 F.2d 1113, 1117-1118 (D.C. Cir. 1969) (“Few doctrines are more firmly established than the ‘principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged.’ ... By the same token, ‘criminal propensity’ prejudice will require separate trials of joined offenses where to each its own evidentiary details must be confined.”); *United States v. Scivola*, 766 F.2d 37, 41-42 (1st Cir. 1985) (explaining that one of the “types of prejudice that may result from trying a defendant for several different offenses at one trial” is that “a defendant may wish to testify in his own behalf on one of the offenses but not for another, forcing him to choose between the unwanted alternative of testifying as to both or testifying as to neither”); *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964) (“Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence.”).

In a case, such as here, where petitioner both wished to testify as to one crime and not as to the other, and the evidence on one crime was significantly weaker than that on the other crime, the requisite

prejudice arises not only from the independent constitutional violations, but also from the combined effect of the misjoinder's violation of various constitutional rights.

As discussed *supra* at 21-24, the Kentucky Supreme Court applied a less protective prejudice standard to petitioner's misjoinder claims than the constitution requires. As argued above, this is an indicator that the Kentucky Supreme Court did not decide petitioner's federal constitutional claims on the merits, but it is also a basis for concluding that to the extent the Kentucky Supreme Court purported to be conducting the analysis required by *Lane*—it failed. The Sixth circuit also failed to determine that the Kentucky Supreme Court's weaker prejudice standard is "contrary to" or an "unreasonable application" of this Court's clearly established law.

Furthermore, with respect to the Sixth Circuit's decision on the spillover effect resulting from the misjoinder of the relatively strong evidence in the Stevie Collins trial and the remarkably weak evidence in the Christa Wilson trial, the Sixth Circuit's decision conflicts with a decision of the Ninth Circuit.

In *Bean v. Calderon*, the Ninth Circuit granted habeas relief to a petitioner based on constitutionally prejudicial misjoinder. 163 F.3d 1073, 1086 (9th Cir. 1998). The court found that the joint trial of a strong case with a demonstrably weaker case with no evidentiary connection violated the petitioner's right to a fair trial. *Id.* at 1085-1086. Like the Sixth Circuit in the case at bar, the Ninth Circuit in *Bean* was required to determine whether joinder was permissible under this Court's constitutional standard in *Lane*. *Bean*, 163 F.3d at 1084. The Ninth Circuit reasoned that the join-

der in *Bean* was particularly concerning as a constitutional due process matter because “not only did the trial court join counts for which the evidence was not cross-admissible, but the State repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the *modus operandi* characteristic of Bean’s criminal activities.” *Id.* Furthermore, “[t]he general instructions the trial court issued availed little in ameliorating the prejudice arising from joinder.” *Id.*

As in *Bean*, the cross-admissibility of the evidence on two crimes here is in serious doubt. 163 F.3d at 1084. While the Kentucky Supreme Court, without analysis, reasoned that the evidence of the two crimes would be admissible in the trials of the other, App. 85a-86a, the magistrate judge found that conclusion to “raise[] serious constitutional questions” given his view that the crimes lacked any evidentiary link other than the prosecution’s subjective theory, App. 57a-58a. The Sixth Circuit acknowledged the magistrate judge’s concerns—the same concerns that animated the Kentucky Supreme Court’s dissent—but punted on any additional analysis of cross-admissibility because in its view the Kentucky Supreme Court had done enough to satisfy AEDPA. App. 21a-22a. As in *Bean*, the prosecution here suggested that there was an evidentiary connection between the crimes when none was presented to the jury. App. 57a. And like *Bean*, the jury instruction—or lack thereof here—did not cure the infirmity of the misjoinder. App. 20a (“In addition, the trial court judge did not give any limiting instruction advising the jury to analyze the evidence regarding each murder count separately to reduce the danger of unfair prejudice.”). Accordingly, the Sixth Circuit here, like the Ninth Circuit in *Bean* should have reached the same

legal conclusion that the misjoinder violated habeas petitioner's Fifth Amendment rights under *Lane*.

To be sure, AEDPA did not apply to the habeas petition in *Bean* because petitioner there filed his habeas petition before AEDPA's enactment. 163 F.3d at 1077. However, *Bean* is instructive of *Lane*'s constitutional commands and demonstrates the Kentucky Supreme Court's failure to conduct the requisite analysis. The Kentucky Supreme Court's analytical failures should have compelled a different result from the Sixth Circuit.

III. THIS CASE IS A GOOD VEHICLE FOR RESOLVING IMPORTANT LEGAL ISSUES

On the first question presented—whether a court of appeals may consistent with this Court's precedent conclude that a state court did not deliberately consider a habeas petitioner's federal constitutional claim and nonetheless apply AEDPA deference—there are no barriers to this Court's resolution of this important legal question because the argument against AEDPA review was presented to and decided by the Sixth Circuit. App. 9a-11a. Furthermore, this is not a case in which the habeas petition would have been denied regardless of the standard of review. Here, the Sixth Circuit expressly noted that but for AEDPA deference, it may have granted petitioner's habeas petition. App. 22a (“If this were a case on direct appeal, it would present a very close question. But, AEDPA compels us to give substantial deference to the Kentucky Supreme Court's decision, and defendant has not surmounted that hurdle.”). In short, this is a rare case in which the standard of review is clearly presented and outcome determinative of the merits of petitioner's claim.

As to the second question presented—whether the Sixth Circuit correctly applied AEDPA to petitioner’s misjoinder claim under the Fifth Amendment—this petition presents the rare opportunity for this court to fully explain the constitutional limits of misjoinder under the Fifth Amendment. While many cases concerning joinder are resolved at the Federal Rules of Criminal Procedure level, this case—given its habeas context—may necessarily only be resolved at the constitutional level. This Court has not taken the opportunity to opine on the relationship between misjoinder and the Fifth Amendment right to a fair trial since it decided *Lane* in 1986. In the over 30 years since *Lane* was decided courts have wrestled with the proper boundaries of the Fifth Amendment’s due process clause in the misjoinder context, this petition presents a clean vehicle for this Court to provide much-needed guidance to the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2021