No. 20-6338

IN THE SUPREME COURT OF THE UNITED STATES

JAMES H. SMITH

Petitioner,

vs.

BRIAN COOK, Warden

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTIONS PRESENTED

1). Can an attorney demonstrate deficient performance in representing a client while also facing serious criminal charges in the same court.

2). Should a trial court ensure that a defendant understands his confrontation clauses rights before admitting stipulation that violate those rights.

3). Does this Court's decision in Johnson v. Williams, 568 U.S. 289 (2013) require AEDPA deference where the state court misconstrue the petitioner's argument and did not reach the "core" of petitioner's federal claim.

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Petitioner James H. Smith (hereinafter "Smith") respectfully prays that a Writ of Certiorari issue to review the judgement entry of the United States Court of Appeals for the Sixth Circuit entered on April 15, 2020. (App'x A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit dening rehearing en banc is published at Smith v. Cook, 2020 U.S. App. LEXIS 18876. (App'x B). The order affirming the United States District Court is published at Smith v. Cook, 856 F.3d 377 rendered on April 15, 2020, and is attached at (App'x A). The United States District Court Order is published at Smith v. Cook, 2017 U.S. Dist. LEXIS 160910 rendered on Sept. 29, 2017. (App'x C).

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Sixth Circuit was issued on April 15, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review this petition.

CONSTITUTIONAL AND STATUTORY PROVISION

This case invilves the right to effective assistance of counsel and the violation of the right to confront witnesses as gauranteed by the Sixth Amendment to the United States Constitution as it is applied through the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Smith Is Charged with Robbery

Smith was arrested in July 2012, for his alleged participation in the robbery of a Local Red Robin restaurant in Columbus, Ohio, after being found near the scene of the crime with clothes similar to those worn by the robber. Trial Transcript ("Tr.") Vol.5, R.7-6, PageID#1261-72. He was charged with that robbery in an 11-count indictment filed in the Franklin County Court of Common Please (the local Ohio State trial court). Hearing Transcript, R.27-1, PageID#1829-30. Smith retained Javier Armengau, a local criminal defense lawyer, as counsel to defend against those charges. Id. PageID#1833.

Eight months later, in March 2013, Smith was charged in a new 142-count indictment that included 34 counts of aggravated robbery, 34 counts of robbery, 54 counts of kidnapping, 19 counts of having a weapon under disability (i.e., being a felon in possession of a firearm), and one count of tampering with evidence. Indictment,

R.7-1, PageID#70-252. Those charges were based not only on the one robbery for which Smith was originally arrested and charged, but also on 18 other previously unsolved robberies of other restaurants in the Columbus area that had occurred in the five months before Smith was arrested. Id.

Because Smith and his family no longer had funds available to pay for a lawyer, the court appointed Armengau to represent Smith. Hearing Transcripts, R.27-1, PageID#1833-38.

B. Smith's Attorney Is Charged in the Same Court with Rape.

Armengau, however, had serious legal troubles on his own. In April 2013 - less than a month after the new indictment against Smith - Armengau was arrested on charges of gross sexual imposition and public indencency, when a woman who had retained Armengau to represent her son reported to the police that Armengau had forcibly fondled her breast at a meeting in his office. Complaint, State v. Armengau, No. 13-CR-2217 (Franklin Cty. Ct. of Common Pleas filed April 11, 2013); see State v. Armengau, 93 N.E.3d 284, 292 (Ohio Ct. App. 2017).

That accusation opened the floodgates. Within a month, "other accusers began coming forth, leading to an 18-count indictment issued by the Franklin County Grand Jury alleging crimes victimizing five different weman." Armengau, 93 N.E.3d. at 292. Armengau was indicted on May 20, 2013, on six counts of rape, five counts of sexual battery, three counts of gross sexual imposition, three counts of kidnapping, and one count of public indecency, for acts spanning a period from January 1998 through Arpil 2013.

Docket; State v. Armengau, No. 13-CR-2217 (Franklin Cty. Ct. of Common Pleas indictment filed May 20, 2013); see Armengau, 93 N.E.3d 292, 303; Armengau Denies Sexual Assault as Charges added, Columbus Dispatch, May 21, 2013, available at https://www.ohio.com/akron/news/columbus-defense-attorney-arrested-on-sex-charge (last visited Oct. 4, 2018). Those serious charges exposed Armengau to a possible sentence of up to decades in prison. See, e.g., Ohio Re. Code Ann. §2907.02(B)(classifying rape as a first-degree felony); Id. §2929.14 (first-degree felony carries three to eleven years in prison).

According to the first woman to report his conduct, Armengua had not only aggressively fondled her breast in the office, but also unzipped his pants and forced his genitals in front of her face, Armengau, 93 N.E.3d at 292. Another victim testified that Armengau had felt her breast and then masturbated in front of her in his office. Id. at 296. A third victim, a former client, testified that Armengau had coerced her into performing oral sex on multipe occasions. Id. at 294-295. A fourth victim testified that Armengua demanded oral sex in exchange for a promise to help her son, who was Armengau's client; that he had masturbated naked in his office in front of her several times; that he had suggested she perform oral sex on both him and the judge in order to imporve the outcome in her son's case; and that he had finally forced her to perform oral sex on him in an attorney conference room at the courthouse. Id. at 295.

The charges against Armengau were filed in the same local Ohio state court as the charges against Smith, and were initially

assigned to be prosecuted by the same local prosecutor's office. See Docket, State v. Armengau, No. 13-CR-2217 (Franklin Cty. Ct. of Common Pleas entry for May 6, 2013 (showing assignment to Frnaklin County Prosecuting Attorney Ronald O'Brien). Although a special prosecutor from the Ohio Attorney Generals' Office was appointed "to avoid the appearance of either favoritism or bias against the defendant," Notice of Appointment of Special Prosecutor, State v. Armengau, No. 13-CR-2217. Id. Armengau remained convinced that the local prosecutors had a hand in his case.

In deciding to appoint Armengau to represent Smith - a month after Armengau was arrested, but shortly before the full indictment charging him with rape and sexual battery was filed - the trial court acknowledged that Armengau faced a "pending legal matter," and recognized "the effect that might have" on his representation of Smith. Hearing Transcript, R.27-1, PageID#1838. But instead of appointing a different attorney, the trial court merely advised Armengau to "be sure to talk to Mr. Smith about the pending legal matter that you have personally and the effect that might have ... so he understands that." Id. At no point did the trial court itself advise Smith of the charges against Armengau, or the potential conflict of interest that Armengau might face as a defendant in the same court in which he was representing Smith. Nor is there any indication in the record that Armengau actually discussed these critical issue with Smith. Even after the indictment charging Armengau with rape and other serious felonies was filed, the trial court never raised the issue again, and never make any effort to provide Smith with counsel who was not under a pending

felony indictment in the same court.

C. Pretrial Procceedings

From the moment Armengau was appointed, the case against Smith proceeded at lightning speed. In a case with a 142-count indictment, involving 19 separate robberies, the parties proceeded to trial just six months after the indictment was filed, and just three months after the State provided discovery. See Identification of Discovery Provided, State v. Smith, No. 13-CR-1342 (Franklin Ct. of Common Pleas entered Aug. 8, 2013)(setting final pretrial conference for Sept. 11, 2012, and trial for Sept. 23, 2013). The state trial court docket filed in the district court only includes entries dating back to October 2013. Franklin County Court of Common Pleas Docket, R.7-1, PageID#500-504. The full docket is available from the Franklin County Clerk of Courts website https://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/caseSearch. Those dockets are proper subject for judicial notice. See, e.g., Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 738 (6th Cir. 1980). From the filing of the indictment to the first day of trial, that schedule gave Armengau barely ten days per robbery to prepare Smith's defense.

That accelerated timetable was only possible because Armengau agreed to what was in effect a trial by stipulation. In what Armengau later described as a "favor to the prosecution," Tr. Vol.2, R.7-3, PageID#641, Armengau agreed to stipulate to a summary of what occurred at each of the 19 robberies and how various witnesses would have described the prepetrator at each robbery, basen on police interviews of those witnesses. (Tr. Vol.2, R-

3, PageID#637-38; see, e.g., Tr.Vol.2, R-7-3 PageID#580-81, 605-607, 613-15 (same stipulations). As Armengau recognized, these stipulations "negate[d] any opportunity" for the defense "to cross-examine and bring out any inconsistency" in the statements of the absent witnesses. Tr.Vol.2,R.7-3,PageId#547-58. Armengau agreed to sacrifice those key rights in order to "streamline [the case] for trial purposes ... [and] avoid the State going through what would amont to a dog-and-pony show." Id. PageID# 547. Of course, that decision also saved Armengau the extensive time and effort that would have been required to investigate the testimony of those absent witnesses and to prepare to cross-examine them at trial.

Astonishingly, Armengau did not confer at all with Smith regarding the decision to stipulate to the facts of the 19 robberies and the physical descriptions provided by the absent witnesses. Petition,R.1, PageID#6. Despite the extraordinary significance of the stipulations in the case, Armengau never once spoke with Smith about his right to reject those stipulations and insist on confronting all of the witnesses against him, and neither Smith nor Armengau ever signed the written stipulation introduced at tiral. Id. PageID#4, 6. The trial court likewise never advised Smith of his right to confront the witnesses against him, or informed him that the stipulations would deprive him of that right. Id. PageID#4.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Sixth Circuit conflicts with the Court's Clear Precedents.

This Court should accept review of Smith's appeal because the United State Court of Appeals for the Sixth Circuit has decided a import federal question surrounding the Petitioner's Rights to have effective assistance of counsel under this Court's precedents described in Srtickland v. Washington, 466 U.S. 669 (1984). Moreover, the Court of Appeals failed to decide the issue concerning the defendant's rights to understand his confrontation rights. Finally, the Court of Appeals failed to issue forth a decision in Smith's favor due to the district court's misconstruing Smith's federal claims.

1. Can an Attorney Demonstrate Deficient Performance in Respresenting a Client While also Facing Serious Criminal Charges in the Same Court.

The Sixth Amendment gives every criminal defendant the right to "the Assistance of Counsel for his defense." U.S. Const. Amend. VI. As the Supreme Court has long recognized, that guarantee requires the "effective assistance of counsel." See Missouri v. Frye, 566 U.S. 134, 138 (2012)(Emphasis added); see also Strickland 466 U.S. at 686. Smith was denied the right to effective assistance of counsel in at least two ways: because Armengau continued to represent Smith despite a severe conflict of interest that could easily have affected the outcome of the trial, and because Armengau failed to confer with Smith about a plea offer carring a sentence more than 50 years shorted than the one Smith

Smith ultimately received. Because the Ohio Court of Appeals didregarded clearly established Supreme Court precedent in concluding otherwise, the judgment below must be reversed.

A. Smith's Attorney Provided Ineffective Assistance of Counsel by Representing Smith While Under Pending Rape Charges in the Same Court.

To begin with, Armengau provided ineffective assistance throughout the trial court proceedings by representing Smith while Armengau himself was facing criminal charges for rape and sexual assault in the same court. Those criminal charges against Armengau divided his loyalties and caused his representation of Smith to fall below the constitutionally required minimum.

When a defendant asserts that his trial counsel provided ineffective assistance due to a conflict of interest, he must show that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335,348 (1980). A defendant who shows that a conflict of interest actually affected his representation "need not demonstrate prejudice in order to obtain relief." Id. at 349-50. Although the Supreme Court has only had occasion to apply this more lenient standard to conflicts involving multiple concurrent representation, see Mickens v. Taylor, 535 U.S. 162, 175 (2002), it has referred to the underylying principle in broader terms, see, e.g., Strickland, 466 U.S. at 692, and other courts have correctly understood that principle to apply to other conflicts of interest as well. See, e.g.m Reyes-Vejerano v. United States, 276 F.3d 94, 99 (1st Cir. 2002)(applying Sullivan to conflict arising from criminal investigation into counsel); Armienti v. United States, 234 F.3d 820, 824-25

(2nd cir. 2000)(same); cf. Moss v. United States, 323 F.3d 445, 472 (6th Cir. 2003)("It is well-established that a conflict of of interest may arise where defense counsel is subject to a criminal investigation"). To the extent the Sixth Circuit read Mickens as establishing that Sullivan cannot be applied in §2254 cases beyond the multiple-representation context, see Smith v. Hofbauer, 312 F.3d 809 (6th Cir. 2002), Smith respectfully submits that reading is erroneous. Williams v. Taylor, 529 U.S. 362, 407 (2000) (state court unreasonably applies Supreme Court precedent when it "unreasonably refuses to extend [a] principle to a new context where it should apply").

In any event, even under the more stringent Strickland standard, the Ohio Court of Appeals disregarded clearly established Supreme Court precedent by holding that Smith had failed to show ineffective assistance of counsel. Under that well-established test, the Sixth Amendment is violated if (1) defense counsel performed at a level "below an objective standard of reasonableness, and (2) "the deficient performance prejudice the defense." Strickland, 466 U.S. at 687-88. To show prejudice, a defendant need only demonstrate a "reasonable probability" that the deficient performance affected the outcome of the proceedings. Id. at 694. Both prongs of that accepted standard for ineffective assistance are easily met here.

1. Smith's attorney demonstrated deficient performance in representing Smith while also facing serious criminal charges in the same court.

The Ohio Court of Appeals rejected Smith's ineffective assistance

claim solely on the second prong of the Strickland test, by holding that Smith had failed to show prejudice. JA8-9. Because the Ohio Court of Appeals did not address the issue of deficient performance, this Court reviews that question de novo. Rayner v. Mills, 685 F.3d 631, 638 (6th Cir. 2012)("When a state court relied on only one Strickland prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the Strickland prong not relied upon by the state court.").

The deficient performance here is clear. In light of the serious criminal charges for rape and sexual assault that were pending against Armengau, a competent attorney in his position plainly would not have agreed to represent a criminal defendant in the same court. The charges agaisnt Armengua not only made it impossible for him to devote his full time and attention to defending Smith; they also raised an inherent conflict of interest, because Armengau had a strong personal incentive to seek the goodwill of the court and the State even if it meant sacrificing Smith's best interest. See, Reyes-Vejerano, 276 F.3d at 99 (explaining that "a defense lawyer within the sights of a targeted criminal prosecution may find his personal interest at odds with his duty to a client:); Armienti, 234 F.3d at 824-25. A competent attorney would not have agreed to take on a representation given that obvious conflict.

That conflict of interest also led Armengau to make specific choices that fell below the constituional minimum for effective

representation. Although Smith facted a 142-count indictment charging him with involvement in 19 different robberies, see Indictment, R.7-1, PageID#79-252, Armengau agreed to a rapid schedule that gave him only six months to prepare the defense case. See supra pp. 6-7. That hurried timetable forclosed any through investigation or preparation of an adequate defense for Smith - but benefited Armengau personally by ensuring he would have additional time and resources to focus on his own defense. Armengau then compounded the problem by agreeing, as a "favor to the prosecution," Tr.Vol.2,R.7-3,PageID#641, to allow the State to present stipulations summarizing the facts of each robbery and descriptions of the robbery taken from police interviews. That decision to "streamline [the case] for trial purposes" brought Armengau goodwill from the trial court and from the State, but only at Smith's expense, as it "negated any opportunity to cross-examine and bring out any inconsistency" in the testimony of the witnesses. Id. PageID#547-48. Still worse, Armengau made that decision without consulting Smith at all, Petition,R.1,Page ID#6, which underscores how little thought Armengau actuall gave to his client's interest.

Nor did Armengau even seek to hold the State to strict performance of the agreement leading to those stipulations. The State stated on the record that it had agreed that if it was "not able to produce a victim from ... any particular [robbery]," it "would agree to dismiss the charges" as to that robbery. Tr.Vol.6, R.7-7, PageID#1465. But as to one robbery, the only eyewitness testimony is presented was a restaurant manager who was not named as a victim in the indictment, compare Indictment, R-7-1,PageID#105-

12, with Tr.Vol.2,R.7-2,PageID#645-62; and as to the crucial Red Robin robbery, the trial court dismissed the robbery charge naming Mfula (the only testifying eyewitness) as a victim, see Tr.Vol.6, R-7-7,PageID#1489-90. Armengau nevetheless raised no argument whatsoever that the State was required by its agreement to dismiss the charges regarding those robberies - again buying himself goodwill from the State at the expense of his client. Cf. Reyes-Vejerano, 276 F.3d at 99; Armienti, 234 F.3d at 824-25. Given the overriding conflict of interest that Armengau faced - demonstrated by the specific choices he made that favored his own interest over Smith's - the record as a whole clearly shows that Armengau failed to provide the effective assistance guaranteed by the Sixth Amendment.

2. There is at least a reasonable probabilty that the outcome at trial would have been different with competent counsel.

The Ohio Court of Appeals rejected Smith's ineffective assistance claim on the ground that Smith had failed to show prejudice. JA8-9. But it did so only by applying the wrong standard: despite recognizing that Strickland requires only a "reasonable probability" that the deficient performance affected the outcome, JA8; see Strickland, 466 U.S. at 694, the Ohio Court of Appeals set a higher bar, erroneously requiring Smith to show that "the outcome of the trial would have been different if [Armengau] had conducted the trial differently." JA8 (emphasis added). By requiring Smith to show the outcome would have been different (rather than just a reasonable probability that the outcome could have been different), the Ohio Court of Appeals deviated from clearly established Supreme

Court precedent. See Williams, 529 U.S. at 405-06 (state court decision is "contrary to" Strickland under AEDPA if it requires prisoner to show "by a preponderance of the evidence that the result of his criminal proceeding would have been different" (emphasis added)). Because the Ohio Court of Appeals applied the wrong legal standard, this Court should review the prejudice issue de novo. See, Lafler v. Cooper, 566 U.S. 156, 173 (2012) (state court decision that "stat[ed] the incorrect standard" was "contrary to clearly established federal law"); Williams, 529 U.S. at 404-05 (same); Dyer v. Bowlen, 465 F.3d 280, 284 (6th Cir. 2006)(when state-court decision is contrary to clearly established law, federal court "review the merits of the petitioner's claim de novo").

Even applying AEDPA deference, however, the Ohio Court of Appeals decidion would still be unr easonable. That court concluded theat based on the purported similarities among some of the charged robberies, the evidence that Smith was the robber in each case was "overwhelming." JA9. But the jury obviously disagreed, acquitting Smith on all counts related to nearly a third of the robberies charged. Tr.Vol.7,R.7-8,PageID#1656-69. That was for good reason. As explained in more detail below, the evidence presented by the prosecution - which for many of the robberies came down to the fact that the restaurants were robbed by a black man with a mask and a gun around closing time - was insufficient even as to the counts on which the jury convicted, let alone the counts on which it acquitte. See infra Part II.

If Smith had received the effective representation to which

he was constitutionally entitled - including a lawyer who was not facing rape charges in the same court, without an overwhelming interest in securing the goodwill of the court and the State for his own criminal trial - there is at least a reasonable probabilty that Smith would have obtained a different outcome on at least some of the counts of conviction. Competent counsel would have insisted on adequate time to prepare for trial in this complex and fact-intense case; would have been unkikely to accept stipulations covering highly significant facts (and certainly would not have accepted those stipulations without discussing them with Smith); and at least would have insisted that the State abide by its agreement and dismiss the counts for which it failed to produce a victim. Given the contradictory circumstantial evidence on which the prosecution relied for its entire case, effective representation could easily have altered the verdict on one or more of the robberies for which Smith was convicted, removing six years from his sentence for each additional acquittal. See Judgment, R.7-1,PageID#259-65; Tr.Vol.7,R.7-8,PageID#1706-08; JA13. Moreover, the jury may well have been prejudice agaist Smith by the mere fact that his attorney was an accused rapist. Although the Ohio Court of Appeals claimed that fact was "[u]nknown to the jury," JA7, there is nothing in the record to support that conclusion, and charges were widely reported in the local media. See, e.g., Armengau Denies Sexual Assault as Charges Added, supra; Rape Cases not Keeping Lawyer from Practicing. That is more than enough to show prejudice under Strickland.

At a bare minimum, if this Court cannot determine with confidence on the present record whether both prongs of the Strickland test as met, it should vacate the judgment below and remand for an evidentiary hearing. Because the state court decision is not entitled to deference under §2254(d), federal habeas review of the underlying ineffective assistance claim is not limited to the state court recorrd. See Cullen v. Pinholster, 563 U.S. 170, 181-182, 185-86 (2011)(holding that "review under §2254(d)(1) is limited to the record that was before the state court," but that limitation does not apply "where §2254(d)(1) does not bar federal habeas relief"). As such, if this court cannot reverse the judgment below outright on the existing record, it should vacate the judgment and remand for further factual development.

B Smith's Attorney Provided Ineffective Assistance of Counsel by Failing to Confer with Smith Regarding the State's Final Pleas Offer.

The Sixth Amendment right to counsel "extends to the plea-bargaining process." Lafler, 566 U.S. at 162. In negotiating a plea bargain, as at trial, defendant are "entitled to the effective assistance of competent counsel." Id. In particular, defense counsel "has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused," Frye, 566 U.S. at 145, and give the defendant competent advice regarding whether to accept or reject such plea offers, see, Lafler, 566 U.S. at 162-63.

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in

Strickland." Frye, 566 U.S. at 140. In the plea-bargaining context, the prejudice prong of the Strickland test is met by showing a "reasonable probability" that "the outcome of the plea process would have been different with competent advice." Lafler, 566 U.S. at 163. Where (as here) the ineffective assistance of counsel causes a defendant to miss the chance to accept a favorable plea offer, that means showing a reasonable probability that the defendant would have accepted the plea offer, the prosecution would not have withdrawn it, the court would have accepted its terms, and the resulting sentence would habe been less severe than the sentence actually imposed at trial. Id. at 164.

Although Smith specifically raised his claim of ineffective assistance in the plea-bargaining process on direct appeal, see brief, R.7-1, PageID#313-15, the Ohio Court of Appeals never acknowledge that the Sixth Amendment right to counsel applies to the plea-bargaining process or applied the governing principles established in Frye and Lafler to analyze that claim. JA8. In fact, the Ohio Court of Appeals said nothing whatsoever about whether Armengau had provided deficient assistance by failing to advise Smith regarding the State's final plea offer. JA8-9. Instead, the Ohio court focused solely on the secong prong of the Strickland test, finding that Smith had not shown prejidice from any deficient performance. JA8-9.

But in conducting that prejudice inquiry, the Ohio Court of Appeals applied only the standard for ineffective assistance of counsel at trial, rejecting Smith's ineffective assistance claims

because he had not shown that "the outcome of the trial would have been different if defense counsel had conducted the trial differently." JA8. That not only represents the wrong standard for prejudice in the trial context under Strickland, but represents the wrong inquiry entirely in the plea contest under Lafler. As Lafler makes clear, the question in the plea context is whether "the outcome of the plea process would have been different with competent advice" - here, whether that process would have led to a guilty plea with a much lower sentence than the 84 years Smith received at trial. 566 U.S. at 163-64 (emphasis added). The strength of the prosecution evidence at trial - which was the sole factor on which the Ohio Court of Appeals relied in rejecting Smith's ineffective assistance claim - has no bearing on that question. See Id. at 164 (rejecting the argument that "there can be no finding of Strickland prejudice if the defendant is later convicted at a fair trial"). As a result, because the Ohio Court of Appeals did not review the deficient performance issue at all, and violated clearly established Supreme Court precedent by applying the wrong legal standard to the prejudice issue, this Court should agains apply both parts of the Strickland test de novo. Rayner, 685 F.3d at 638; Dyer, 465 F.3d at 284.

As Armengau admitted in open court, he "did not share with Smith ... that the offer was 27 years" and "really ha[d] never sat down to try to talk about it" with him. Tr.Vol.1, R.7-2, Page ID# 534. Even after making that admission, Armengau never requested additional time to discuss the 27-year plea offer with his client. Indeed, as far as the record shows, Armengau and Smith never had any conversation about that plea offer whatsoever. That failure

to discuss the proffered plea deal with Smith was a clear violation of the established duty, recognized by the supreme Court in Frye and Lafler, for competent defense counsel to communicate any plea offer to the defendant and to provide adequate advice regarding such offers. Frye, 566 U.S. at 145; Lafler, 566 U.S. at 162-63. By breaching that duty, Armengau fell well short of providing the "professionally competent assistance" that the Sixth Amendment requires. Buck v. Savis, 137 S.Ct. 759, 775 (2017)(quoting Strickland, 466 U.S. at 690.

To be sure, Smith was made aware of the existence of the 27 year offer in open court on the morning of trial. Tr.Vol.2, R.7-3, PageID#534-35. But the mere fact that the offer was eventually communicated to Smith cannot excuse Armengau's deficient performance in failing to counsel Smith regarding that offer. As Lafler makes clear, the Constitution is not satisfied just because the defendant eventually learns of a plea offer; the Sixth Amendment also requires defense counsel to give competent advice regarding that offer. See Lafler, 566 U.S. at 162-63. Armengau failed to carry out the basic duty here.

That deficient performance also causd Smith severe prejudice. If Armengau had taken the time to properly discuss the State's final plea offer with Smith - as any competent counsel would have - there is at least a "reasonable probability" that Smith would have accepted that offer and obtained a sentence more than 50 years lower than what he ultimately received at trial. Lafler, 566 U.S. at 163-64.

2 The Evidence Was Not Sufficient To Sustain The Verdict.

The Ohio Court of Appeals also unreasonably applied Supreme Court precedent in finding that the minimal circumstantial evidence on which the prosecution relied was sufficient to prove beyond a reasonable doubt that Smith actually committed each of the robberies for which he was convicted. For nearly half a centry, it has been clearly established federal law that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitue the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). If "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," the conviction violates due process. Jackson v. Virginia, 443 U.S. 307, 329 (1979). When the evidence "establishes, at best, 'reasonable speculation'" that the defendant is guilty, it is an unreasonable application of established Supreme Court precedent to permit the conviction to stand. Tanner v. Ykins, 867 F.3d 661, 672 (6th Cir. 2017).

Of the 19 robberies for which Smith was indicted, the prosecution dismissed the charges related to one before trial and another before the jury was instructed, and the jury acquitted on five others. Tr.Vol.7,R.7-8,PageID#1656-69. That left only 12 robberies as to which the State was actually able to obtain a conviction. For each of those 12 robberies, as for all the others, the State was unable to put forward a single eyewitness who could identify Smith as the robber. Instead, the State (and the Ohio Court of Appeals) relied on purported similarities among the various robberies, along with the fact that Smith was arrested near the last robbery, to

conclude that Smith must have committed each one. Those similarities, however, essentially amounted to the fact that the robber in each case was a black man, wearing a mask and carrying a gun, who was robbing a restaurant around the time that it closed. Even the State recognized that evidence was not enough with respect to one of the charged robberies, voluntarily dismissing all of the counts related to that robbery and recognizing that the "similarities" between that crime and the other charged robberies were just a "coincidence." Tr.Vol.1, R.7-2, PageID#513-15; Tr.Vol.7. R.7-8 PageID#1532-33. So too for the other robberies; the purported "similarities" come nowhere near the standard of evidence required by the Constitution to convict Smith of each robbery beyond a reasonable doubt.

In short, the record in this case simply is not sufficient to sustain the verdict as to each robbery of which Smith was convicted. After it arrested Smith near the scene of the last robbery, the State made every effort in its power to tie him to numerous other unsolved robberies that happened to have occurred in the Columbus area in the previous five months. But even taken in the light most favorable to the State - and even despite the ineffectiveness of defense counsel - the evidence at trial never amounted to more than "reasonable speculation" that Smith might have been the prepetrator of those robberies as well. Tanner, 867 F.3d 672. Because clearly established Supreme Court law prohibits any conviction based on such guesswork, the petition should be granted as to each robbery for which the evidence is insufficient.

3. The Trial Court Should Have Ensured That Smith Understood His Confrontation Clause Rights Before Admitting Stipulations That Violated Thoses Rights.

Finally, relief is also warranted because the trial court erred by failing to ensure Smith understood his rights under the Confontation Clause before admitting stipulations that violated thos rights. The Ohio Court of Appeals inexplicably misunderstood this claim, stating that Smith sought to argue that "stipulations in general" violate the Confrontation Clause. JA11. Based on that misunderstanding, it suggested that Smith invited the challenged error by agreeing to the stipulations, and that his claim failed on the merits. But Smith never argued that all "stipulation in general " necessarily violate the Confrontation Clause; he argued only that the trial court was required to ensure that Smith understood his right to confront the witnesses against him before allowing the prosecution to introduce numerous stipulations about how absent witnessws would have testified. See Brief of Appellant, R.7-1, PageID#302-06. Because the Ohio Court of Appeals did not address the claim Smith actually presented, and because its misunderstanding undermined both its procedural analysis and its merits analysis, relief is warranted on this ground as well.

First, on the procedural question, the Ohio court of Appeals held that the arguiement that "stipulations in general" violate the Confrontation Clause "can be classified as falling within the invited error doctrint," because Armengau (without consulting Smith) agreed to the stipulation. JA11. But Smith never sought to make any argument about "stipulations in general" violating the Confrontation Clause. What Smith actually argued is that the trial court erred

by failing to ensure that Smith understood the Confrontation Clause rights he was giving up. see Brief of Appeallant, R.7-1, PageID#302-06. That argument plainly is not barred by the invited error doctrine, as Smith never "invited or induced" the trial court to admit the stipulations at issue without informing him of the rights that those stipulation implicated. Contra JA11 (quoting Lester v. Leuck, 50 N.E.2d 145, 146 (Ohio 1943)). Just as the invited error doctrine does not bar a defendant from claiming that a trial court failed to ensure he understood the rights he was giving up by pleading guilty, see Fed. R. Crim. P. 11(b)(1), or the rights he was giving up by choosing to represent himself, see Faretta v. California, 422 U.S. 806, 835-36 (1975), it does not bar Smith from claiming that the trial court failed to ensure he understood the Confrontation Clause rights he was giving up in the stipulation.

Second, on the merits, the Ohio Court of Appeals addressed only whether stipulations in general violate the Confrontation Clause, and not Smith's actual claim that the trial court erred by failing to advise him on his Confrontation Clause rights. JA11. Because the Ohio court of Appeals failed to address the claim that Smith actually raised, the Sixth Circuit reviews it de novo. See, e.g.m Rice v. White, 660 F.3d. 242, 252 (6th Cir. 2011)("It is well settled that we may review de novo an exhausted federal claim that was not adjudicated on the merits in state court.").

Even under AEDPA deference, however, the result would be the same. As the Supreme Court has made clear, a defendant;'s waiver of his Confrontation Clause rights must be "knowing and intelligent." Schneckloth v. Bustamonte, 412 U.S. 218, 237-38 (1973)(explaining

that "the requirement of a knowing and intelligent waiver has been applied ... to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial," including "the right to confrontation"); see also Minnick v. Mississippi, 498 U.S. 146, 159-60 (1990); cf. Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver requires "an intentional relinquishment or abandonment of a know right or privilege"). Both the Supreme Court and the Sixth Circuit have relied on that standard to determine whether a defendant has made a valid waiver of his Confrontation Clause rights. See Barber v. Page, 390 U.S. 719, 725 (1968); Brookhart v. Janis, 384 U.S. 1, 6-7 (1966); Carter v. Sowders, 5 F.3d 975, 980-81 (6th Cir. 1993).

Because the trial court never advised Smith of his Confrontation Clause rights - and neither did Armengau, who never discussed the stipulations with Smith at all, see Petition, R.1, PageID#6 - any purported waiver of those rights in agreeing to the stipulations was not knowing and intelligent. See, e.g., Iowa v. Tovar, 541 U.S. 77, 81 (2004)(knowing waiver requires "sufficient awarness of the relevant circumstances"). And because Smith never made any Knowing and intelligent waiver of his Confrontation Clause rights, the trial court violated those rights by admitting the challenged stipulation. That clear constitutional error likewise warrants granting habeas relief.

The Sixth Circuit rejected Smith's Confrontation Clause claim, holding that under AEDPA deference, the state cout's decision was not contrary to clearly established Supreme Court precedent. Op.7-15.

The panel recognized that if the Ohio Court of Appeals "did not evaluate the merits" of Smith's Confrontation Clause claim, it should review that claim de novo. Op.7. It likewise recognized that there was a "meaninful distinction" between the claim that the state court addressed and the claim that Smith actually raised. Op.11. But in the panel's view, that distinction showed only that the state court "failed to articulate each step in its reasoning," not that it failed to adjudicate Smith's claim, and so AEDPA deference was still warranted. Op.11.

The panel acknowledged that Smith's contrary position was "not entirely without support in [this Court's] caselaw." Op.10. In fact, the panel recognized that the Court has "twice concluded" in published opinions that AEDPA deference is not warranted if the state court misconstrued the petitioner's arguments and so "did not 'reach the core' of the petitioner's federal claim." Op.10 (citing Campbell v. Bradshaw, 674 F.3d 578,596; Jells v. Mitchell, 538 F.3d 478, 505). But the panel found those cases "hard to reconcile" with the Supreme Court's subsequent decision in Johnson v. Williams, 568 U.S. 289 (2013), which the panel read as requiring AEDPA deference not only when a state court "wholly omits discussion of the federal claim," but also when the state court "imperfectly discusses" the federal claim. Op.8-9 (citing McKinney v. Hoffner, 830 F.3d 363 (6th Cir. 2016)).

The panel also recognized that its decision to apply AEDPA deference made a considerable difference to its analysis. Under that Court's precedent, the panel observed, "a defendant must 'personally waive his right to confront [a witness],' and "the

record must 'show that [the] defendant knew or was advised of his rights' before doing so." Op.14 (bracket in original)(quoting Carter v. Sowders, 5 F.3d 975, 981 (6th Cir. 1993)). As such, applying existing Sixth Circuit ;recedent on de novo review would require vacating Smith's conviction. But because the panel instead applied AEDPA deference, it "focuse[d] only on Supreme Court decision," and considered the court's prior decision of "no moment." Op.14-15.

A. Campbell, Jells, and Numerous Other Cases Confirms That AEDPA Deference Does Not Apply Where a State Court Misconstrues the Relevant Claim.

AEDPA deference applies only "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. §2254(d). Where the state court did not evaulate the petitioner's claim on the merits, a federal court reviews that claim de novo. Op.7; see e.g., Campbell, 674 F.3d at 596.

The Sixth Circuit and others have repeatedly held, a state court decision that misconstrues a petitioner's claim - and so addresses a different claim than the one the petitioner actually raises - has not adjudicated the petitioner's claim on the merits for AEDPA purposes. Campbell illustrates the point. There Campbell claimed the trial court had erred by precluding him from arguing voluntary intoxication as a mitigating factor. 674 F.3d at 596. The state court court, however, "misconstrued Campbell's argument," reading it as a claim that the trial court just failed to instruct on voluntary intoxication. Id. Because the state court misunderstood Campbell's claim and so "did not reach the core of Campbell's argument," it did not adjudicate Cambell's

on the merits, and so the Sixth Circuit reviewed that claim de novo. Id.

So too in Jells, where the petitioner asserted that the prosecution failed to disclose exculpatory evidence until after Jells was convicted. 538 F.3d at 505. But the state court "misconstrued [that] claim," stating that Jells contended certain impeachment evidence should have been provided before trial rather than during trial. Id. Because the state court misunderstood Jell's claim, there was "no state court decision regarding the merits of the claim." and so the Sixth Circuit reviewed it de novo. Id.

Other circuits follow the same rule. See, e.g., Brewster v. Hetzel, 913 F.3d 1042, 1051 (11th Cir. 2019)(no AEDPA deference where state court "recast" petitioner's claim rather than "rul[ing] on the actual claim that [petitioner] presented"); Velazquez v. Superintendent, 937 F.3d 151, 160 (3d Cir. 2019)(no AEDPA deference where state courts "misunderstood" petitioner's claim and so "failed to adjudicate it on the merits"); Henderson v. Cockerell, 333 F.3d 592, 600-01 (5th Cir. 2003)(no AEDPA deference where the state courts "misconstrued" petitioner's claims and so "did not adjudicate the claim on its merits"); Brian R. Means, Federal Habeas Manual §3:7 (Westlaw May 2020)("[A] claim is not deemed to have been adjudicated on the merits for purposes of AEDPA where the state court recast the claim as something other than the actual one presented.") In short, both the Sixth Circuit precedent and the decision of its sister circuits uniformly establish that AEDPA does not apply when a state court misconstrues a petitioner's claim and so fails to address the claim that the petitioner actually

presented.

That established rule should have required the panel to review Smith's Confrontation Clause claim de novo. As the panel recognized, there is a "meaningful distinction" between the claim the state court analyzed here (that "stipulation in general" violate the Confrontation Clause) and the claim Smith raised (that "stiulations to absent eyewitness testimony" require a knowing and voluntary waiver). Op.11. Indeed, that distinction is even more significant than the panel ultimately realized; and discussed below, far from "focus[ing] on a necessary implication of Smith's claim, Op.11, the state court's decision missed the mark entirely. Because the state court plainly misconstrued Smith's Confrontation Clause claim, it did not adjudicate that claim on the merits, and so the panel erred by applying AEDPA deference. Campbell, 674 F.3d at 505.

B. The Panel Erred by Rejecting Campbell and Jells and Applying AEDPA Defference Instead.

The panel acknowledged that Campbell and Jells require applying de novo review where, as here, the state court had misconstrued the petitioner's arguments. Op.10. Its reason for refusing to follow that binding Sixth Circuit precedent only underscores the need for reversal.

The panel began by suggesting Campbell and Jells might no longer be good law, finding those decision "hard to reconcile" with the Supreme Court's later decision in Johnson. Op.10. Johnson, however, said nothing at all about whether AEDPA deference should apply when a state court has "explicitly misconstrued" a petitioner's claim. Instead Johnson addressed a different question entirely:

wherther AEDPA deference applies when a state court "issues an opinion that addresses some issues but does not expressly address the federal claim in question." 568 U.S. at 292. In that situation - where the state court says nothing at all about a properly presented claim - the Supreme Court held that a federal court "must presume (subject or rebuttal) that the federal claim was adjudicated on the merits." Id. at 293. That presumption makes perfect sense, since state courts will "frequently" consider and reject claims without explicitly addressing them in a written opinion - for instance, when the claim is "too insubstantial to merit a discussion." Id. at 298-301.

Neither Johnson nor its reasoning applies here. In this case, the Ohio Court of Appeals did not "reject[]" Smith's Confrontation Clause claim "without expressly addressing that claim." Id. at 301. Instead, the Ohio Court of Appeals did attempt to expressly address Smith's Confrontation Clause claim - but misconstrued it, analyzing a different and meaningfully distinct claim instead. Op.6. Where a state court says nothing about a particular claim, it is wholly reasonable to presume that the court rejected that claim on the merits, since it is "by no means uncommon" for a state court to consider and reject claims without explicit discussion. Johnson, 568 U.S. at 300. That presumption, however, cannot prevail where the state court does attempt to address a claim, but its discussions makes clear that it has misunderstood that claim. In those circumstances, it makes no sense at all to conclude that although the state court expressly misconstrued the petitioner's claim in its opinion, it simultaneously also understood that

that claim correctly and adjudicated it on the merits. Even allowing for a "healthy presumption" that state court normally adjudicate properly presented claims on the merits, Op.10, that presumption cannot prevail when the state court's opinion clearly shows that it has misconstrued the claim.

Put in simply, Johnson said nothing even remotely suggesting that the Supreme Court intended to upend more than a decade of settled law - including an opinion by Johnson's own author, see Chadwick v. Janecka, 312 F.3d 597, 606 (3d cir. 2002) establishing AEDPA deference does not apply when a state court has misconstrued a petitioner's federal claim. Unsurprisingly, both the Sixth Circuit and others have continued to apply that settled rule post-Johnson. See Reddy v. Kelly, 657 F. App'x 531, 541-42 (6th Cir. 2016)(applying de novo review where "the presumption of adjudication is rebutted" because the state court "misconstrued the claim"); Ray v. Maclaren, 655 F. App'x 301, 309-10 (6th. Cir. 2016); see also Velazquez, 937 F.3d at 160; Brewster, 913 F.3d at 1051. The panel's contrary suggestion that Johnson requires AEDPA deference even when the state court explicitly misconstrues a federal claim plainly warrants reversal.

The panel also suggested this case was governed by McKinney v. Hoffner, 830 F.3d 3636 (6th Cir. 2016), but that case is even farther afield. In McKinney, the petitioner was arrested and suggested he wanted counsel; the interviewing officer responded "Well that's fine, but like I said ...", at which point the petitioner interrupted and went on to confess. 830 F.3d at 367. On appeal, the petitioner argued that the officer's intervening statement

constituted interrogation, and so his later statement could not be used to cast doubt on his initial invocation of his rights to counsel. Id. at 376-681 see Smith v. Illinois, 469 U.S. 91 (1984). The state court did not expressly discuss whether the intervening statement constituted interrogation - but it held that the petitioner's earlier and later statements taken together were not an unequivocal invocation, which necessarily implied that it had found the officer's intervening statement was not interrogation (since otherwise it could not have considered the petitioner's later statements at all). 830 F.3d at 368-69. Under those circumstances, the Court properly held that AEDPA deference applied to the state court's implicit holding that the intervening statement was not interrogation. Id.

McKinney (like Johnson) thus involved a state court decision that "did not explicitly address" part of the petitioner's claim but misconstrued it. That alone makes McKinney inapposite. But McKinney is even more distinguishable, as the state court's express holding there necessarily implied that it reached the antecedent holding to which the Sixth Circuit granted AEDPA deference (even though the state court did not explicitly discuss that antecedent holding). 830 F.3d at 368. Nothing similar applies here. The state court's decision on the mischaracterized claim it addressed does not logically imply that it also considered and decided the claim Smith actually raised - in fact, it powerfully indicates the opposite. See Reddy, 657 F. App'x at 541-42 (finding "the presumption of adjudication ... rebutted" where the state court "misconstrued the claim"). The out-of-circuit cases that the

panel cited as applying Johnson are likewise inapposite.

Finally, despite recognizing the "meaninful distinction" between the claim analyed by the Ohio Court of Appeals and the claim Smith had actually raised, the panel suggested the state court might not have "misinterpret[ed] Smith's argument" after all. Op.11. The panel recognized that the state court had framed Smith's claim as asserting that "stipulation in general" automatically violate a defendant's Confrontation Clause rights, when in fact Smith argued only that stipulations to "absent eyewitness testimony" required a knowing and voluntary waiver of those rights (as the Court has held, see Carter, 5 F.3d at 981). Op.11. But according to the panel, "the implication of Smith's argument is that virtually all stipulations (as practiced) would violate the Confrontation Clause," and so the state court's opinion "strongly suggest" it concluded Confrontation Clause rights need not be personally waived. Op.11.

That analysis misses the mark. Smith's Confrontation Clause claim does not imply that "stipulations in general" or "virtually all stipulations (as practiced)" would violate the Confrontation Clause. Most stipulation are to non-testimonial facts - for instance, the existence of a prior conviction, or the weight of a controlled substance - and so do not implicate the Confrontation Clause at all. Crawqford v. Washington, 541 U.S. 36 (2004). Smith's claim only implicates stipulations like the ones on which he was convicted - namely, stipulations about how absent witnesses would have testified against the defendant, a matter at the heart of the Confrontation Clause right. The state court's holding

that "stipulations in general" do not violate the Confrontation Clause thus comes nowhere near strongly suggesting (or even weakly suggesting) that the state court also considered and adjudicated Smith's more limited argument that stipulations to absent eyewitness testimony require a valid personal waiver. On the contrary, the court's explicit misunderstanding of Smith's claim "strongly suggest" it did not adjudicate the claim Smith actually raised.

C. The Issue Presented Is Execptionally Important.

The Sixth Circuit opinion not only conflicts with prior circiut precedent, but does so on a critically important question. The vast defference between de novo review and AEDPA deference makes it crucial for federal courts to have a consistent and uniform standard for deciding whether a claim has been adjudicated on the merits in state court. See Johnson, 568 U.S. at 292 (recognizing the "importan[ce]" of determining "whether a federal claims was adjudicated on the merits"). By holding that AEDPA deference applies even when a state court explicitly misconstrued the relevant claim, the panel opinion has the potential to dramatically affect the outcome in a wide range of cases.

This case itself is a perfect example. As the panel recognized, the Sixth Circuit has previously held that "a defendant must 'personally waive his right to confront [a witness]," and "the record must 'show that [the] defendant knew or was advised of his rights' before doing so." Op.14 (brackets in original)(quoting Carter, 5 F.3d at 981). Under that rule, Smith's conviction violated his Sixth Amendment right to choose whether to confront the witnesses against him, and his effective life sentence would have to be

reversed. But because the panel applied AEDPA deference, that binding Sixth Circuit precedent was "of no moment" in tis analysis- and looking to Supreme Court precedent alone, the panel considered itself compelled to affirm. Op.11-15. That result strikingly illustrates the crucial importance of the dividing line between de novo review and AEDPA deference, and the equally crucial importance of clear and consistent circuit precedent regarding that line. Given the acknowledge tensison between the panel decision here and established Sixth Circuit precedent on that issue, reversal is plainly warranted.

CONCLUSION

WHEREFORE, Smith respectfully prays that the writ of certiorari issue and his case is reversed. To the Court this writ is

Respectfully submitted,

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