No. 20-8063

In the Supreme Court of the United States

DARIUS THERIOT, PETITIONER

v.

BOB VASHAW, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this case present a good vehicle for this Court to answer Theriot's question concerning the interplay between plain-error review in state court and the imposition of a procedural default on federal habeas review, where Theriot could not demonstrate cause and prejudice to excuse his procedural default and he would nonetheless lose on the merits of his constitutional claims?

2. Are the circuits truly divided on whether a constitutional claim is defaulted on habeas review when the state courts reviewed the claim for plain error, given that most of the circuits use the same approach, with only one circuit disagreeing, and the Sixth Circuit falls into that majority?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. The petitioner is Darius Theriot, a Michigan prisoner. The named respondent, Bob Vashaw, was the warden of the correctional facility in which Theriot previously resided. The acting warden of Theriot's current facility is Becky Carl.

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The district court's opinion and order denying Theriot's habeas petition is not reported but is available at 2019 WL 7020689. See also Pet. App. 8a–44a. The Sixth Circuit's opinion affirming the district court's denial of habeas relief is reported at 982 F.3d 999. See also Pet. App. 1a–7a. The Sixth Circuit's order denying Theriot's petition for rehearing en banc is not reported. But see Pet. App. 45a.

The Michigan Court of Appeals' opinion affirming Theriot's convictions but remanding for resentencing is not reported but is available at 2013 WL 6703494. See also Pet. App. 47a–54a. The Michigan Supreme Court's order denying Theriot's application for leave to appeal is reported as a table decision at 849 N.W.2d 373. See also Pet. App. 46a. The Michigan Court of Appeals' opinion affirming Theriot's amended sentence is not reported but is available at 2016 WL 3429852. The Michigan Supreme Court's order denying Theriot's subsequent application for leave to appeal is reported as a table decision at 888 N.W.2d 103.

JURISDICTION

The State accepts Theriot's statement of jurisdiction as accurate and complete and agrees that this Court has jurisdiction over the petition.

STATUTORY PROVISION INVOLVED

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), provides, in relevant part:

> 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.

INTRODUCTION

Theriot failed to object on constitutional grounds to the exclusion of two pieces of evidence at his state trial for the murder of Sharee Dukes and her unborn child. Contemporaneous objection at trial ensures that appellate courts have a record to review. Without such a record, reviewing courts are left with two options: to hold that the defendant forfeited review of his claim on appeal, or to conduct a more limited review under the plain-error doctrine. Michigan courts, like many others, follow the latter approach.

That is what the Michigan Court of Appeals did in this case. While Theriot raised evidentiary objections in the trial court to the exclusion of evidence of his reaction after the shooting and self-serving excerpts from his jail phone calls, he did *not* object under his constitutional right to present a defense. Consequently, the Michigan Court of Appeals applied plain-error review to the constitutional claims on direct appeal, from which the court concluded that Theriot was not entitled to relief. Thus, the Sixth Circuit, on habeas review, held that Theriot's constitutional claims were procedurally defaulted and that he failed to demonstrate any reason to excuse the defaults.

Theriot takes issue with the enforcement of the procedural defaults, asserting that the Sixth Circuit "automatically" enforced the defaults without making an individualized determination that the Michigan Court of Appeals' decision rested on a state procedural rule rather than the merits of the constitutional claims. He contends that the Sixth Circuit should have instead reached the merits of his claims.

But Theriot's vehicle suffers from multiple defects. First, he may have escaped the procedural defaults had he established that good cause and actual prejudice

existed to excuse the defaults. But, as the Sixth Circuit noted, his arguments on those points left much to be desired. In fact, he did not even assert cause for one of his claims and offered only a truism for prejudice. Moreover, because the Michigan Court of Appeals *also* rendered decisions on the merits of Theriot's constitutional claims, Theriot could not prevail under the exceedingly high standard under AEDPA, 28 U.S.C. § 2254(d), even if the default was excused.

Theriot attempts to legitimize his claim by pointing to a circuit split on this issue. But he fails to appreciate two points on that front. First, the circuits largely agree with one another on this topic, holding that plain-error review does indeed constitute a procedural default. The Sixth Circuit falls into that majority, with only the Ninth Circuit employing a different approach. So, any alleged split has not been and will not be impactful. And second, the Sixth Circuit's enforcement of a procedural default in the face of plain-error review is not "automatic," as Theriot contends.

Thus, this Court should deny certiorari because Theriot's claim is insubstantial and unworthy of this Court's review.

STATEMENT OF THE CASE

The Michigan Court of Appeals accurately summarized the facts adduced at trial as follows:

> This case arises from a drive by shooting. Defendant Theriot drove the vehicle from which defendant Matthews shot an AK–47, killing a pregnant woman and injuring three others.
>
> * * *
>
> Defendant Theriot admitted to getting the gun, which he illegally owned, of his own free will. One witness testified that defendant Theriot made the decisions on where to go that night, and he intentionally drove his truck to the house and slowed down when he drove by it. Defendant Theriot was quoted as saying, "don't worry about it, we'll get them later, we'll take care of it in our own time," after four men associated with the victims had confronted defendant Theriot and his friends. After the shooting, defendant Theriot wiped the gun clean of prints, and he was the last person seen with the gun. He also urged witnesses not to snitch and to lie for him.

People v. *Matthews*, No. 308640, 2013 WL 6703494, at *1, 4 (Mich. Ct. App. Dec. 19, 2013).[1]

A jury convicted Theriot of second-degree murder; three counts of assault with intent to murder; assault of a pregnant woman causing miscarriage, stillbirth, or death; and possession of a firearm during the commission of a felony (felony-firearm). The trial court originally sentenced him as a second-habitual offender to 45-to-80 years' imprisonment for his second-degree murder and assault-with-intent-to-murder convictions; 10-to-15 years for his assault-of-a-pregnant-woman conviction; and a consecutive two-year term for his felony-firearm conviction.

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[1] The Michigan Court of Appeals issued a joint opinion for both Theriot and his codefendant, Devon Matthews. The opinion thus bears Matthews' name.

Following his conviction and sentence, Theriot filed a claim of appeal in the Michigan Court of Appeals. He challenged three aspects of his conviction: (1) exclusion of evidence of his reaction after the shooting, raised under evidentiary rules and the rights to present a defense and to confrontation; (2) exclusion of additional excerpts of his recorded jail phone calls, again raised under evidentiary rules and the right to present a defense; and (3) his sentencing as a second-habitual offender. The Michigan Court of Appeals determined that Theriot had not preserved his right-to-present-a-defense claims and thus reviewed them for plain error affecting his substantial rights. *People* v. *Matthews*, No. 308640, 2013 WL 6703494, at *2–4 (Mich. Ct. App. Dec. 19, 2013). With respect to the confrontation claim, the Court of Appeals noted that because Theriot failed to provide sufficient argument in his brief, the claim was abandoned. *Id.* at *2 n.1, 4 n.3. Ultimately, the Court of Appeals affirmed Theriot's convictions but remanded for resentencing, given that the prosecution agreed that Theriot should not have been sentenced as a second-habitual offender. *Id.* at *6.

Theriot subsequently filed an application for leave to appeal in the Michigan Supreme Court, in which he raised the first two claims he raised in the Michigan Court of Appeals. The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed by the Court. *People* v. *Theriot*, 849 N.W.2d 373 (Mich. 2014) (unpublished table decision).

Upon resentencing, the trial court amended Theriot's sentence to 35-to-45 years' imprisonment for his second-degree murder and assault-with-intent-to-murder convictions, but the court maintained his previous sentences for 10-to-15 years for his

assault-of-a-pregnant-person conviction and the consecutive two-year term for his felony-firearm conviction. The Michigan Court of Appeals affirmed the amended sentence. *People* v. *Theriot*, No. 325973, 2016 WL 3429852, at *1 (Mich. Ct. App. June 21, 2016). And the Michigan Supreme Court declined further review. *People* v. *Theriot*, 888 N.W.2d 103 (Mich. 2017) (unpublished table decision).

Theriot thereafter filed his federal habeas petition. He initially raised the claims concerning his rights to present a defense and to confrontation regarding his reactions after the shooting and the right to present a defense concerning the additional excerpts from the jail phone calls. (10/16/15 Pet., R. 1, Page ID #4, 6.) The State opposed the petition, noting that Theriot's claims were procedurally defaulted, meritless, and harmless. (4/26/16 Resp., R. 9, Page ID #153, 164–88.)

Theriot subsequently obtained a stay from the district court while his resentencing appeal was pending in the state appellate courts. (12/15/16 Order, R. 19, Page ID #2243–44.) After his resentencing, Theriot returned to federal court with an amended habeas petition, which included his recently exhausted sentencing claim. (3/8/17 Am. Pet., R. 23.) The State timely responded and again requested that habeas relief be denied. (6/27/17 Supp. Resp., R. 26.)

The district court denied the amended petition. (12/20/19 Op. & Order, R. 30, Page ID #2489–90.) The court first addressed Theriot's claim that his rights to present a defense and confrontation were violated because the state trial court precluded evidence of Theriot's reaction after the shooting. (*Id.* at Page ID #2498–99.) The district court bypassed any procedural default and proceeded directly to the merits. (*Id.*

at Page ID #2499–2500.) The district court noted that the Michigan Court of Appeals reasonably concluded that Theriot was not prevented from presenting a complete defense. (*Id*. at Page ID #2506–07.) The district court outlined the record facts that supported the Michigan Court of Appeals' decision and noted that Theriot was allowed to testify to his reaction. (*Id*. at Page ID #2507–08.) Accordingly, the district court concluded "that fairminded jurists could disagree on the state court's determination that permitting Theriot to introduce evidence from prosecution witnesses that he was surprised by the shooting would have been cumulative to his live testimony." (*Id*.) The district court further concluded that any error under the right to present a defense or confrontation was harmless, as supported by the record. (*Id*. at Page ID #2509–12.)

The district court then addressed Theriot's second right-to-present-a-defense claim regarding the exclusion of excerpts from his jail phone calls. (*Id*. at Page ID #2512.) The district court again bypassed the procedural default and went to the merits. (*Id*. at Page ID #2513.) The district court determined that the Michigan Court of Appeals' rejection of this claim on the merits was objectively reasonable because Theriot could (and did) still testify about what he meant on the phone calls without introducing inadmissible hearsay from the calls themselves. (*Id*. at Page ID #2519–20.) Theriot therefore was not deprived of the right to present a defense. (*Id*. at Page ID #2520.)

Despite the district court's findings, the court granted Theriot a certificate of appealability on these claims. (*Id*. at Page ID #2524.)

The Sixth Circuit chose a different route by analyzing the procedural defaults, on two bases. *Theriot* v. *Vashaw*, 982 F.3d 999, 1002 (6th Cir. 2020).

First, the right-to-present-a-defense claims were not preserved under Michigan's contemporaneous-objection rule and thus reviewable only for plain error. *Id*. at 1003. Theriot had objected at trial only under Michigan's evidentiary rules, not on constitutional grounds, and an objection on one ground could not preserve review on a different ground. *Id*. (citing *People* v. *Bulmer*, 662 N.W.2d 117, 118 (Mich. Ct. App. 2003)). The Sixth Circuit further held that the Michigan Court of Appeals enforced that rule against Theriot "because a state appellate court's review for plain error is enforcement of a procedural rule." *Id*. at 1004 (citing *Hinkle* v. *Randle*, 271 F.3d 239, 244 (6th Cir. 2001)). Moreover, Michigan's contemporaneous-objection rule is " 'an adequate and independent state ground for foreclosing federal review.' " *Id*. (quoting *Taylor* v. *McKee*, 649 F.3d 446, 451 (6th Cir. 2011)).

Second, Theriot's confrontation claim was defaulted because he abandoned it on direct appeal by failing to adequately brief the claim. *Id*. at 1005 (citing *People* v. *Harris*, 680 N.W.2d 17, 21 (Mich. Ct. App. 2004)). That procedural rule was an independent and adequate state ground to preclude federal review and the Michigan Court of Appeals enforced the rule against Theriot. *Id*.

Having established that Theriot defaulted his claims, the Sixth Circuit addressed whether the defaults could be excused by cause and prejudice.[2] *Id*. at 1004–

[2] While demonstrating that failure to review the defaulted claim will result in a fundamental miscarriage of justice can also excuse a default, the Sixth Circuit did not

05 (citing *Williams* v. *Bagley*, 380 F.3d 932, 966 (6th Cir. 2004), which in turn cited *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991)). But Theriot failed to meet his burden on several fronts. He did not assert cause and prejudice for his right-to-present-a-defense claim regarding the jail phone calls and thus the Sixth Circuit held that he forfeited that issue. *Id.* at 1004. Further, for his other right-to-present-a-defense claim regarding his reaction, Theriot only argued that his trial counsel *may* have *eventually* raised an objection on constitutional grounds but that the trial court "short-circuited" any opportunity to do so. *Id.* The Sixth Circuit rejected that explanation because it was speculative, and "petitioner's trial attorney went back and forth with the trial court for nearly ten transcript pages without making an objection in constitutional terms." *Id.* Finally, with respect to the confrontation claim, the Sixth Circuit had no basis on which to excuse the default because Theriot was again "inexplicably silent" on cause and prejudice. *Id.* at 1005.

And because the claims were procedurally defaulted, without plausible excuse, there was no need for the Sixth Circuit to reach the merits of the claims. *Id.* at 1002. The Sixth Circuit thus affirmed the denial of habeas relief. *Id.* at 1006.

The Sixth Circuit further denied rehearing. Pet. App. at 45a.

This Court should similarly deny relief given that this case is an abysmal vehicle for the procedural-default issue Theriot presents, and the circuit split to which he points is not as defined or prevalent as he asserts.

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analyze that exception because Theriot "d[id] not advance this theory for excusing a procedural default." *Theriot*, 982 F.3d at 1004 n.3.

REASONS FOR DENYING THE PETITION

I. This case presents a poor vehicle for this Court to address the procedural-default question because Theriot cannot prevail in the absence of a default.

Before addressing the merits of Theriot's question presented regarding procedural default, this Court should consider the integrity of this case as a proper vehicle for that question. And in that vein, it falls short in two respects. First, part of the reason the Sixth Circuit enforced the procedural defaults in this case is because Theriot made little to no argument on the cause-and-prejudice exception to excuse a default. Second, a merits review of Theriot's right-to-present-a-defense claims would not entitle him to habeas relief where the Michigan Court of Appeals adjudicated the claims on the merits and AEDPA deference would preclude relief. Thus, this Court should decline certiorari on this vehicular basis alone.

A. Theriot failed to avoid the procedural defaults by presenting negligible arguments—if any, as with one of the claims—on good cause and actual prejudice.

The Sixth Circuit did not simply decide that Theriot's right-to-present-a-defense claims were procedurally defaulted and leave them at that. Theriot may have escaped the defaults if he demonstrated one of the two exceptions for procedural default. But he hardly even *asserted* such grounds, let alone established them.

A State prisoner who fails to comply with a State's procedural rule waives the right to federal habeas review absent a showing of (1) cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or (2) a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 748–50. The latter exception is

easily dismissed in this case given that Theriot "d[id] not advance this theory for excusing a procedural default." *Theriot*, 982 F.3d at 1004 n.3.

But cause-and-prejudice does not save Theriot, either. To establish cause, a petitioner must show that some external impediment frustrated his ability to comply with the state's procedural rule. See, e.g., *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). One recognized reason includes attorney error rising to the level of ineffective assistance of counsel. *Edwards* v. *Carpenter*, 529 U.S. 446, 451–52 (2000); *McCleskey* v. *Zant*, 499 U.S. 467, 493–94 (1991).

The problem in this case, however, is that Theriot made no attempt at all to excuse one of his defaults, and a scant attempt with respect to the other. As an initial matter, with respect to the "right-to-present-a-defense claim that concerns the jail house telephone call recording excerpts, [Theriot] offer[ed] *no argument* about cause or actual prejudice . . . ." *Theriot*, 982 F.3d at 1004 (emphasis added). The Sixth Circuit thus concluded that Theriot "forfeit[ed] this issue." *Id.* (citing *Williamson* v. *Recovery Ltd. P'ship*, 731 F.3d 608, 621 (6th Cir. 2013)). That approach comports with this Court's precedent because federal courts sitting in habeas "have no obligation to act as counsel or paralegal to *pro se* litigants," *Pliler* v. *Ford*, 542 U.S. 2251, 231 (2004), or "attorneys representing the State," alike, *Day* v. *McDonough*, 547 U.S. 198, 209 (2006). Indeed, habeas courts are not required to sua sponte raise or argue procedural defenses that do not affect jurisdiction, such as procedural default. *Trest* v. *Cain*, 522 U.S. 87, 89 (1997); see also *Day*, 547 U.S. at 209 (holding that habeas courts "are permitted, but not obliged, to consider, sua sponte, the timeliness of a state

prisoner's habeas petition."). Thus, there was no reason to excuse the procedural default for Theriot's right-to-present-a-defense claim regarding his jail phone calls.

With respect to the other default, regarding the demeanor evidence, Theriot offered but one, weak argument: that " 'the [state] trial court's refusal to permit counsel to finish making a complete record with regard to his objection to the exclusion of testimony about Mr. Theriot's demeanor following the shooting.' " *Theriot*, 982 F.3d at 1004 (quoting Theriot's brief on appeal). The Sixth Circuit rejected Theriot's assertion because his trial counsel "went back and forth with the trial court for nearly *ten transcript pages* without making an objection in constitutional terms." *Id*. (emphasis added). Moreover, "the argument that trial counsel would have eventually made the constitutional objection is speculative, and Theriot offer[ed] nothing to bring it out of the realm of sheer possibility." *Id*. The Sixth Circuit therefore held that Theriot fell short of demonstrating that an objective, external factor prevented him from complying with the state's contemporaneous-objection rule. *Id*.

No case from this Court compels a different result. Theriot might have a leg to stand on if the trial court had not allowed him to raise an objection at all or had limited his objection to only a few words or points. But that was not the case. If counsel was going to raise a constitutional argument, he had plenty of opportunity to do so. Nor did Theriot ever challenge his counsel's effectiveness under the Sixth Amendment in this regard in either state or federal court. The only ineffective-assistance-of-counsel claim Theriot has ever raised concerns his counsel's performance at

sentencing. (12/20/19 Op. & Order, R. 30, Page ID #2489, 2520–23.) Consequently, Theriot could not establish cause to excuse his second default, either.

What is more, even if Theriot had managed convincing arguments for cause, he did not establish actual prejudice. Again, he failed to assert any prejudice for his claim regarding the jail phone calls, and his argument on the demeanor claim was "perfunctory," at best. *Theriot*, 982 F.3d at 1004–05. He only asserted that the prejudice from the trial court's "short-circuiting" of his eventual constitutional argument was "plain and palpable." *Id*. at 1005. This Court has similarly refused to decide questions "based on such scant argumentation." *Turner Broadcasting System*, *Inc.* v. *F.C.C.*, 520 U.S. 180, 224 (1997).

In sum, Theriot's claims were barred from habeas review not simply because they were defaulted, but because Theriot failed to establish any reasons to excuse the defaults. As such, this case presents a poor vehicle for this Court to decide the question presented.

B. A merits analysis benefits the State, not Theriot, because the Michigan Court of Appeals adjudicated Theriot's constitutional claims on the merits, triggering AEDPA deference.

There are two components to the federal courts' review of Theriot's claims: (1) the procedural defaults, and (2) the merits. Without the procedural defaults, Theriot is left with review on the merits. But he should be careful what he wishes for.

In this case, the Michigan Court of Appeals *also* reviewed Theriot's right-to-present-a-defense claims on the merits. *Matthews*, 2013 WL 6703494, at *4, 5–6. AEDPA deference thus applies, meaning that Theriot can achieve habeas relief in

only exceedingly limited ways. He must show that the Michigan Court of Appeals' adjudications either resulted in decisions that were contrary to, or involved unreasonable applications of, clearly established Federal law as determined by this Court, or were based on an unreasonable determination of the facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(d). That is, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington* v. *Richter*, 562 U.S. 86, 101 (2011) (internal citation and quotation marks omitted). Theriot cannot prevail under this standard.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986) (cleaned up). Accordingly, "[j]ust as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Rock* v. *Arkansas*, 483 U.S. 44, 55 (1987).

But the right to present a defense is not absolute—it may bow to state rules of evidence and procedure. *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998); *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988) (holding that evidence that is incompetent, privileged, or otherwise excluded by the rules of evidence may be constitutionally precluded). For example, "well-established rules of evidence permit trial judges to

exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U.S. 319, 326 (2006). "[T]he proposition that the Due Process Clause guarantees the right to introduce all relevant evidence is simply indefensible." *Montana* v. *Egelhoff*, 518 U.S. 37, 42 (1996).

Further, "[d]ue process does not require that a defendant be permitted to present any defense he chooses," and "states are allowed to define the elements of, and defenses to, state crimes." *Lakin* v. *Stine*, 80 Fed. App'x 368, 373 (6th Cir. 2003) (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 484–87 (2000), and *McMillan* v. *Pennsylvania*, 477 U.S. 79, 84–86 (1986)). A federal court may not "reexamine state-court determinations of state-law questions." *Estelle* v. *McGuire*, 502 U.S. 62, 67–68 (1991).

In this case, the Michigan Court of Appeals reasonably held that neither the exclusion of the demeanor evidence nor the jail phone-call excerpts deprived Theriot of his right to present a defense, and that any errors were harmless. *Matthews*, 2013 WL 6703494, at *2–4.

Turning first to the demeanor evidence, Theriot claims that his counsel was not allowed to ask various witnesses about Theriot's reactions and statements after the shooting. But those few questions—even assuming the witnesses' answers would have been beneficial to the defense—would have only marginally *added to* his defense, not *established* the defense in the first place. Despite the evidence that Theriot retrieved the AK-47, put it in the bed of his truck with Matthews, and drove by the victims' house at a slow pace when the shooting occurred, Theriot contended at trial

that he did not know Matthews would shoot into the group of people at the victims' home. (11/29/11 Trial Tr., R. 10-9, Page ID #707, 716–20; 11/30/11 Trial Tr., R. 10-10, Page ID #846–47; 12/6/11 Trial Tr., R. 10-13, Page ID #1414, 1503–04, 1549, 1558–60.) Theriot's counsel spent nearly his entire closing arguing that there was a lack of evidence of a plan to kill anyone or that Theriot intended a shooting and offered alternative explanations for the evidence presented. (*Id.* at Page ID #1548–68.)

Indeed, as the Michigan Court of Appeals noted, Theriot was still able to present evidence that "he was scared after the shooting based on how he sped off and jerked the truck," and he was "able to ask the witnesses whether anyone encouraged [him] to get the gun and drive by the house," and whether he "ordered or encouraged defendant Matthews to shoot." *Matthews*, 2013 WL 6703494, at *4. Not to mention, Theriot testified to his own reactions after the shooting—including surprise—which further contributed to his defense. (12/5/11 Trial Tr., R. 10-12, Page ID #1380–81; 12/6/11 Trial Tr., R. 10-13, Page ID #1427–28.) Thus, Theriot was merely limited, harmlessly, *in the extent* to which he could present his defense. That did not go so far as to infringe his constitutional right to present a defense.

The same is true with respect to the jail phone-call excerpts. Again, the Michigan Court of Appeals denied that claim on the merits and found any error to be harmless. *Matthews*, 2013 WL 6703494, at *4–6. This is a textbook example of how the right to present a defense bows to state evidentiary rules. Theriot essentially sought to circumvent the state hearsay rules vis-à-vis his right to present a defense—a maneuver explicitly barred by this Court. See *Scheffer*, 523 U.S. at 308; *Taylor*, 484

U.S. at 410. The prosecution permissibly presented inculpatory statements from the recordings under Mich. R. Evid. 801(d)(2). Theriot attempted to rebut those statements with exculpatory ones, but the state hearsay rules precluded him from doing so because they constituted impermissible hearsay under Mich. R. Evid. 802. Indeed, the rule relied upon by the prosecution, sub-rule 801(d)(2), explicitly operates in only one direction, as does the federal equivalent. See Fed. R. Evid. 801(d)(2) (dictating that the statement at issue must be "offered *against* an opposing party," (emphasis added)). And, again, Theriot availed himself of the opportunity to further his defense by testifying to what he meant on the phone calls. (12/6/11 Trial Tr., R. 10-13, Page ID #1422–25.)

To be clear, Theriot sought to admit his *own* statements from the phone calls in an attempt to mitigate the prosecution's excerpts. Thus, it did not matter whether the jury heard Theriot's explanations through the recording or his own live testimony. In fact, his live testimony had *more* potential to mitigate his statements because the jury could see his demeanor and hear his testimony in-person, rather than simply through a recording. And yet, the jury still convicted him. Accordingly, Theriot's right to present a defense was not violated in this instance, either, and the Michigan Court of Appeals' conclusion was therefore reasonable.

C. Any errors were also harmless.

The jury convicted Theriot as an aider-and-abettor because it was overwhelmingly evident that he intended and was complicit in the shooting. Any errors in the exclusion of the demeanor or jail call evidence were therefore harmless.

Theriot was part of the initial altercation with the men who approached his group, precipitating the shooting. (11/29/11 Trial Tr., R. 10-9, Page ID #694.) Theriot then said, "[L]et's go," and everyone got into his truck to leave. (*Id*. at Page ID #701.) Theriot drove them to his house where he retrieved his AK-47 with a drum magazine and put it in the bed of his truck, as he admitted in his own testimony at trial (claiming it was for protection). (*Id*. at Page ID #707; 12/6/11 Trial Tr., R. 10-13, Page ID #1414, 1503–04.) After getting the gun, Theriot said, "I got something for them," "Don't worry about it, we'll get them later," and, "We'll take care of it on our own time." (11/29/11 Trial Tr., R. 10-9, Page ID #709, 711–12.)

As the driver, Theriot decided to go back to the neighborhood where the initial altercation took place and slowed down, if not stopped, as he passed the victims' house. (*Id*. at Page ID #716–20; 11/30/11 Trial Tr., R. 10-10, Page ID #846–47.) Matthews shot the AK-47 at the house from the bed of Theriot's truck. (11/30/11 Trial Tr., R. 10-10, Page ID #847.) The shots struck several people and killed Sharee Dukes, who was approximately five months pregnant—she was shot five times. (*Id*. at Page ID #853; 12/5/11 Trial Tr., R. 10-12, Page ID #1327, 1331, 1340.)

Theriot then sped off, back to his house. (11/29/11 Trial Tr., R. 10-9, Page ID #721.) There, Theriot's cohorts plucked the spent shell casings from the bed of Theriot's truck while Theriot took his AK-47 back into the house where he and Matthews wiped off their fingerprints. (*Id*. at Page ID #723–25.)

Theriot and Matthews also threatened their group not to talk, both personally and through proxies. They warned that snitches would be hurt; to "lay low" and not

to talk to the police; to "take the Fifth" or claim not to remember anything; and to claim that Theriot got mad at Matthews after the shooting. (11/29/11 Trial Tr., R. 10-9, Page ID #726; 12/1/11 Trial Tr., R. 10-11, Page ID #1103, 1185–88; 12/6/11 Trial Tr., R. 10-13, Page ID #1430–31.) Indeed, on his jail calls, Theriot called himself "the motherf***ing enforcer." (11/29/11 Trial Tr., R. 10-9, Page ID #712.)

The jury rejected Theriot's testimony that he did not know Matthews would shoot at the victims in finding him guilty. (12/6/11 Trial Tr., R. 10-13, Page ID #1414; 12/7/11 Trial Tr., R. 10-14, Page ID #1619.)

This was all compelling evidence that Theriot aided and abetted Matthews' firing on the victims' house, resulting in the deaths of Sharee Dukes and her unborn child, and the injuries to the other victims. A few self-serving questions about any alleged surprise after the shooting or what Theriot meant on his jail phone calls would have done little to undermine this evidence. In short, Theriot's inextricable involvement in this crime—and his resulting culpability—were not lost on the jury.

* * *

While this would be a strong result even on de novo review, it is a nearly unassailable one under AEDPA. Theriot had to show that the Michigan Court of Appeals' decisions lie beyond *any* fairminded disagreement. *Richter*, 562 U.S. at 101. This bar falls just short of "imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id*. at 102. This Court has even cautioned that "[i]f this standard is difficult to meet, that is because it was meant to be."

Id. Indeed, the district court denied Theriot's claims on the merits, and the Sixth Circuit did not indicate any disagreement with the district court's conclusion.

Accordingly, even if the defaults were excusable or absent altogether, Theriot would not be entitled to habeas relief. As such, this vehicle isn't going anywhere, and certiorari should be denied.

II. Any circuit split has not percolated for years, and, in any event, the Sixth Circuit's approach falls in line with the majority of circuits that apply procedural default to a state court's plain-error review.

Theriot attempts to capture this Court's attention by pointing to a circuit split. But he fails to appreciate that most of the circuits, including the Sixth, stand unified on this front, with only the Ninth Circuit operating differently. Nor does this supposed split arise with any regularity. Moreover, the Sixth Circuit's application of procedural default in the context of state-court plain-error review is not absolute, as Theriot contends. In fact, the Sixth Circuit specifically disclaims any categorical approach. Certiorari should thus be denied for these reasons as well.

A. Theriot misconstrues the breadth and proliferation of any split amongst the circuits.

To begin, the "split" to which Theriot points is not as defined as he purports. He alleges two camps. First, there are the circuits where "a state court's decision to review a claim for plain error automatically insulates the claim from federal habeas review." (Pet. at 13.) He places the Third, Fourth, Sixth, and Seventh Circuits into that camp. (*Id*.) And second, there are the circuits that "endorse a case-by-case approach in determining whether a state court's review of a federal claim for plain error

constitutes an independent state ground." (*Id.* at 14.) Into that camp, Theriot places the Second, Ninth, and Tenth Circuits.[3] (*Id.*)

That is not quite right, however. A closer look reveals that the circuits largely *agree* with one another, with only one circuit (the Ninth) holding to the contrary and two circuits (the Fifth and the Eighth) remaining neutral on the subject:

> These rules typically invoke "plain error" review of alleged constitutional violations, or pleading requirements to weed out "facially implausible" or "frivolous" claims, in order to mitigate the effects of procedural default. The circuits are split on whether these exceptions negate an otherwise independent state-law ground. The First, Third, Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits hold that such exceptions do not ordinarily deprive state court rulings of their "independent" character. The Ninth Circuit disagrees, the Eighth has reached inconsistent results, and the Supreme Court's teachings are inconclusive.

Rocha v. *Thaler*, 619 F.3d 387, 403–04 (5th Cir. 2010) (footnotes omitted) (citing *Lynch* v. *Ficco*, 438 F.3d 35, 45 (1st Cir. 2006); *Campbell* v. *Burris*, 515 F.3d 172, 178 (3d Cir. 2008); *Daniels* v. *Lee*, 316 F.3d 477, 487 (4th Cir. 2003); *Gulertekin* v. *Tinnelman-Cooper*, 340 F.3d 415, 423 (6th Cir. 2003); *Rodriguez* v. *McAdory*, 318 F.3d 733, 736 (7th Cir. 2003); *Gardner* v. *Galetka*, 568 F.3d 862, 884 (10th Cir. 2009); *Julius* v. *Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988); *Walker* v. *Endell*, 850 F.2d 470, 474–75 (9th Cir. 1987); *Toney* v. *Gammon*, 79 F.3d 693, 699 (8th Cir. 1996); *Hornbuckle* v. *Groose*, 106 F.3d 253, 257 (8th Cir. 1997)).

Moreover, the circuits' treatment of plain-error review in the procedural-default context more accurately operates as a continuum, rather than the black-and-

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[3] Theriot's argument and citations on this point closely track the discussion of this issue in the Federal Habeas Manual. See Brian R. Means, Federal Habeas Manual § 9B:26 (West 2021).

white dichotomy Theriot alleges. As the Fifth Circuit noted in *Rocha*, most of the circuits hold that plain-error review does not "*ordinarily* deprive state court rulings of their 'independent' character," such that a procedural default *may* ensue. *Id*. at 404 (emphasis added).

In essence, procedural default and merits review can exist in harmony. For instance, the Seventh Circuit has noted that "even if the state court's review in applying a procedural rule is 'entangled' with the merits, that 'entanglement' is not sufficient to compromise the procedural default." *Rodriguez*, 318 F.3d at 735–36 (citing *Carey* v. *Saffold*, 536 U.S. 214, 226 (2002)). This is because "the state court's holding must 'depend[] on a federal constitutional ruling' in order to open it up for habeas review." *Id*. at 736 (citing *Stewart* v. *Smith*, 536 U.S. 856, 860 (2002)). Yet, a federal habeas court may still review the merits if, for example, doing so would promote judicial economy. See *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997).

Lastly, even if a true split did exist, it has not proliferated into any level of maturity that requires intervention from this Court. A Westlaw search revealed that the last time any federal circuit court has apparently discussed this disagreement was in 2010 in *Rocha*. Before that, it was the Third Circuit in 2008 in *Campbell*. No cases in the last decade have addressed or even alluded to this split. If the Court is interested in this issue, the more prudent course would be to review a case in which the Ninth Circuit—the apparent outlier among the circuits—reasserts its position and fails to enforce a procedural default. This case is not the one in which to grant certiorari.

And, again, it is important to keep in mind that even if Theriot's case were to be reviewed on the merits, AEDPA deference applies, and he would lose.

Thus, the purported split is a non-starter and does not warrant review.

B. The Sixth Circuit does not employ a "per se" approach to enforcement of procedural default when a Michigan appellate court applies plain-error review to a constitutional claim.

Theriot's characterization of the Sixth Circuit's plain-error approach to procedural defaults as "invariabl[e]," "blanket," "per se," or "automatic[]," rather than on a case-by-case basis, is incorrect. (See Pet. at 11–13.)

Habeas courts must follow a particular framework for analyzing potential procedural defaults. That is, "absent showings of cause and prejudice, federal habeas relief will be unavailable when (1) a state court has declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." *Walker* v. *Martin*, 562 U.S. 307, 316 (2011) (cleaned up). The Sixth Circuit indeed follows that test, including "actual enforcement" of the state procedural rule. See, e.g., *Bickam* v. *Winn*, 888 F.3d 248, 251 (6th Cir. 2018) (outlining the three-part test); see also *Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985) (noting that "the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.").

And enforcement of a default is not automatic any time a state procedural rule is or could be invoked. For example, the Sixth Circuit declines to enforce a procedural default if the state courts did not "actually enforce" the state procedural rule. See

Lovins v. *Parker*, 712 F.3d 283, 297 (6th Cir. 2013) ("Accordingly, because the Tennessee state courts did not 'actually enforce' a state procedural rule in denying Lovins relief, the procedural default doctrine does not bar federal habeas review of the merits of Lovins's *Blakely* claim."); see also *Durr* v. *Mitchell*, 487 F.3d 423, 432–33 (2007) ("Although Durr could have presented the claim on direct appeal, because the state courts did not 'actually enforce' the procedural rule requiring presentation of claims on direct appeal, the procedural default doctrine is not applicable.").

The Sixth Circuit also holds that plain-error review constitutes *both* a procedural default *and* a review on the merits. In fact, the Sixth Circuit recently resolved an intra-circuit dispute on this very issue, looking to the earliest holding that "AEDPA applies to a state court's plain-error analysis if it 'conducts any reasoned elaboration of an issue under federal law.' " *Stewart* v. *Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017) (quoting *Fleming* v. *Metrish*, 556 F.3d 520, 531 (6th Cir. 2009)). The court even noted that, "[i]f that weren't enough, our sister circuits sing with one voice on this issue—relying, in part, on *our* earlier decision." *Id*. (emphasis in original, citing *Lee* v. *Comm'r*, *Ala. Dep't of Corr*., 726 F.3d 1172, 1207–10 (11th Cir. 2013); *Rolan* v. *Coleman*, 680 F.3d 311, 319–21 (3d Cir. 2012); and *Douglas* v. *Workman*, 560 F.3d 1156, 1177–79 (10th Cir. 2009)).

Further, over twenty years ago, the Sixth Circuit held that "when the record reveals that the state court's reliance upon its own rule of procedural default is misplaced, we are *reluctant* to conclude *categorically* that federal habeas review of the purportedly defaulted claim is precluded." *Greer* v. *Mitchell*, 264 F.3d 663, 675 (6th

Cir. 2001) (emphasis added). And the *Greer* holding has not lain dormant. The Sixth Circuit has applied it in numerous cases to reject a procedural default and instead proceed to the merits of the constitutional claim. See *Brown* v. *Curtin*, 661 F. App'x 398, 410 (6th Cir. 2016); and *Smith* v. *Jenkins*, 609 F. App'x 285, 291–92 (6th Cir. 2015); *Amos* v. *Renico*, 683 F.3d 720, 727 (6th Cir. 2012); *Post* v. *Bradshaw*, 621 F.3d 406, 423–24 (6th Cir. 2010); *Richey* v. *Bradshaw*, 498 F.3d 344, 359–60 (6th Cir. 2007); *Lin Scott* v. *Rose*, 436 F.3d 587, 592 (6th Cir. 2006); *White* v. *Mitchell*, 431 F.3d 517, 527 (6th Cir. 2005); *Hill* v. *Mitchell*, 400 F.3d 308, 314 (6th Cir. 2005).

Thus, the Sixth Circuit *may* reach the merits of a claim reviewed for plain error in the Michigan state courts, especially where denial on the merits may be a simpler and more economic resolution of the claim. See *Lambrix*, 520 U.S. at 525. As with exhaustion, a federal court sitting in habeas may *deny* a defaulted claim on the merits, but it may not *grant* habeas relief unless and until the petitioner overcomes the procedural default. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

There is a practical consequence to consider as well. If Theriot's contention were to hold true—that plain-error review obligates a federal court to conduct a merits review rather than enforcing a procedural default—it would render plain-error review meaningless. Plain error provides what some courts have called a "safety valve," to avoid the "serious injustice" of precluding review of a constitutional claim

altogether. See *Rocha*, 619 F.3d at 403. This allows at least limited review and is precisely why it operates as *both* a merits analysis *and* a procedural bar on habeas.

Hence, the Sixth Circuit's approach to plain-error review in this and any other habeas case is not all-or-nothing, and there is no dispute requiring this Court's intervention.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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