No.

IN THE
SUPREME COURT OF THE UNITED STATES

ALI AL-MAQABLH,

***Petitioner*,**

v.

DANIEL CAMERON,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CASE NO. 20-5435

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. SLAUGHTER
Counsel of Record
P.O. Box 32
WESTPORT, KY 40077
502-225-5889
attny4u2@hotmail.com

Counsel for Petitioner,
ALI AL-MAQABLH

QUESTIONS PRESENTED

i. When enacted the AEDPA, did Congress intend to grant habeas petitioners, who surmount AEDPA's strict standards, a complete habeas relief, or just the opportunity to have their conviction reviewed by a federal habeas court? If the latter, what does this sort of "past-AEDPA-bar" review look like when it involves a due process claim under *Jackson v. Virginia*, 443 U.S. 307 (1979)? Does a review of this sort involve a question of law, facts, or a mixed question of law and facts?

ii. Can habeas reviewing courts act as a court of first instance, affirm the denial of habeas relief on alternative grounds, conduct an independent review of unpreserved issues, interpret state law, overlook the state supreme court's rulings, and foreclose the opportunity on a petitioner to appeal?

PARTIES TO THE PROCEEDINGS BELOW

Ali Al-Maqablh was the habeas Petitioner in the United States District Court for The Eastern District of Kentucky and the Appellants in the U.S. Court of Appeals for the Sixth Circuit.

The Kentucky Attorney General was the Respondent in the United States District Court for The Eastern District of Kentucky and the Appellee in the U.S. Court of Appeals for the Sixth Circuit.

STATEMENT OF JURISDICTION

On October 13, 2021, this Court extended the time for filing all certiorari petitions to December 19, 2021. See File No. 21A70; Order dated October 13, 2021. This Court has jurisdiction under 28 U.S.C. §1254 (1).

OPINIONS BELOW

The Order of the Court of Appeals for the Sixth Circuit in *Al-Maqablh v. Temple* (March 4, 2021) affirming the denial of habeas relief is unpublished and attached herein as Appendix A. The Order of the Court of Appeals for the Sixth Circuit in *Al-Maqablh v. Temple* (August 10, 2021) Granting Certificate of Appealability is unpublished and attached herein as Appendix B. The Order of the United States District Court of Appeals for the Eastern District of Kentucky in *Al-Maqablh v. Temple* (March 23, 2021) Adopting the Magistrate Recommendations

and denying habeas relief is unpublished and attached herein as Appendix C. The Recommended Dispositions of the Magistrate Judge to the U.S. District Judge in *Al-Maqablh v. Temple* (March 23, 2021) recommending denying habeas relief is unpublished and attached herein as Appendix D. The Opinion of the Kentucky Circuit Court (as the State Appellate Court) in *Al-Maqablh v. Commonwealth* (June 13, 2018) is unpublished and attached herein as Appendix E. The Order of the Court of Appeals for the Sixth Circuit in *Al-Maqablh v. Temple* (July 21, 2021) denying rehearing *en banc* is unpublished and attached here as Appendix F. The Opinion of the Kentucky Court of Appeals in *Morgan v. Commonwealth* (January 5, 2001) interpreting Kentucky Revised Statue 519.04 is unpublished and attached herein as Appendix G.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

State Cases

Federal Statutes

State Statutes

Constitutional Authorities

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ali Al Maqablh ("Maqablh") respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit and summarily reverse it.

INTRODUCTION

This is a habeas appeal involving nothing but constitutional rights vindication. The Petitioner, in this case, is not currently incarcerated, and this petition involves no social cost. This case, however, is one of the most unique cases in the history of habeas law where the state charged and convicted a citizen for "committing" not only a perfectly legal but also a mandatory act of reporting a minor child's injuries. These convictions involved no state agency as a complaining witness and no factual predicates under which a person can be found guilty under the unaltered text of the statute.

The only way a person can be convicted of a crime of this sort is to select an inapplicable statute, alter its text to fit whatever testimony and evidence produced, which is what the state trial court did in this case. Similarly, the only way a conviction of this sort can be upheld on appeal is by selecting an inapplicable precedent and misapplying it to the facts, which is what the state appellate court did in this case.

On a petition for habeas relief, the U.S. District Court saw no constitutional issues with these practices and discounted them as errors of state law. The Sixth Circuit disagreed and Granted a Certificate of Appealability to address this issue. However, a different panel viewed the case differently. Relying on the state's version of the law, altering the text of the inapplicable statute, and abdicating its reviewing responsibilities, the Sixth

Circuit affirmed the denial of habeas relief even after concluding that a constitutional violation has occurred.

In this habeas case, the Sixth Circuit has issued a unique ruling: it held that the state court's ruling was "contrary to" and at the same time compliant with *Jackson v. Virginia*, 443 US at 326 (1979). The Sixth Circuit followed a nebulous approach that this Court has not recognized in arriving at this conclusion.

STATEMENT OF THE CASE

Petitioner Ali Al-Maqablh, a Kentucky resident, saw injuries on his child's face and reported them to Kentucky's Cabinet of Health and Family Services [CHFS] as mandated by Kentucky law. After determining the validity of Al-Maqablh's report, the CPS opened an investigation to determine the cause of these injuries. Meanwhile, an aggrieved individual, not the CPS, pressed retaliatory charges against Al-Maqablh in a state court alleging that the report was false. Being displeased with these charges, Al-Maqablh filed a *pro se* federal civil rights action against the prosecutor, a police officer, and the individual who pressed the charges. During the pendency of the state charges, a federal judge screened Al-Maqablh's civil complaint and allowed it to proceed. See *Maqablh v. Heinz*, No. 3:16-CV-289-JHM, 2016 WL 7192124, (W.D. Ky. Dec. 12, 2016). As a result, the prosecution in that rural Kentucky district was extraordinarily disturbed and decided to induce an artificial conviction.

On trial, and after the prosecution failed to produce *any* incriminating evidence, Al-Maqablh moved for a directed verdict of acquittal. Still, the trial court denied his motion claiming that it lacked the authority to issue directed verdicts. On sentencing, the trial court recognized the lack of evidence and explained the evidence-lacking conviction due to Al-Maqablh's colorful language during his testimony.

On direct appeal, the state appellate court recognized Al-Maqablh's position as "correct" by reasoning that the trial lacked the authority to weigh the evidence or direct a verdict of acquittal, thereby affirming both the conviction and the trial court's reasoning. Order, App. E at 2. Al-Maqablh then sought and failed to obtain discretionary review from state appellate courts.

On July 9, 2019, Al-Maqablh filed a federal habeas petition claiming due process violations and arguing that the State Appellate Court's decision violates the constitution of the United States. Glossing over the facts, a magistrate judge in the Eastern District of Kentucky recommended denying Al-Maqablh's petition. Appendix D. Al-Maqablh countered the Magistrate's findings and recommendations with a fierce objection. Adopting the Magistrate's recommendations but not findings, the District Judge denied Maqablh's *due process* claim holding that the state court's ruling was an issue of state law. See Sixth Circuit characterization of the District Court's Ruling. Order, App. B at 4. The District Judge also denied Al-Maqablh a Certificate of Appealability (COA). Order, Appendix C at 21-22. Following that, Al-Maqablh

sought a COA from the Sixth Circuit Court of Appeals. Faulting the District Court's findings, the Sixth Circuit found that the state court's ruling was contrary to clearly-established federal law and granted a COA. Appendix B at 4.

On appellate review, a different panel within the Sixth Circuit held that the state court was contrary *Jackson v. Virginia*, 443 US, *supra*. Still, it affirmed the denial of a habeas petition on an entirely different ground. See Order, App. A; *Maqablh v. Temple, No. 20-5435* (Unpub., 6th Cir. 2021). Besides altering the text of the inapplicable statute, the panel shifted Al-Maqablh's due process claim from a question of law to a question of facts. Specifically, the panel found that the state court's decision "was contrary to established federal law" and, consequently, it reviews the merits of the claim *de novo,* citing its own precedent in *Dyer v. Bowlen* (465 F.3d 280, 284 (6th Cir. 2006). *Id* at 4. Under that precedent, which a case resolving an *ex post facto* question, the Sixth Circuit independently interpreted state law, independently conducted a factual inquiry, improperly applied *Jackson's* test, and framed the conviction in light of that inquiry before affirming the denial of Al-Maqablh's petition as meritless. *Id.*

The Sixth Circuit acted without authority when it interpreted Kentucky law, and its interpretations bear no resemblance to those of state court. The Sixth Circuit ultimately replaced the state court's opinion with one of its own after concluding that the state court's opinion is contrary to *Jackson*.

Al-Maqablh challenged these issues via an application for a rehearing *en banc*, which the Sixth Circuit denied. App. F. This petition follows.

REASONS FOR GRANTING THE PETITION

I. FEDERAL COURTS DO NOT ALWAYS CONSIDER MEETING THE AEDPA STANDARD TO BE SUFFICIENT FOR HABEAS RELIEF AND RESORT TO DEDUCTION WHEN MET WITH A HABEAS CASE THAT DEFEATS THE AEDPA STANDARD

Most federal courts do not consider defeating AEDPA's nearly insurmountable bar a sufficient ground for the habeas relief spelled out in 2254(d). Instead, these courts treat it as a mere qualification for a habeas review. See, e.g., *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008); *Mosley v. Atchison*, 689 F.3d 838, 844 (7th Cir. 2012); *Salts v. Epps*, 676 F.3d 468, 480 (5th Cir. 2012).

Because most habeas petitions do not pass AEDPA's rigid bar, federal habeas courts do not encounter the dilemma of having to resolve a "past-AEDPA-bar" question. Consequently, the AEDPA bar produced a scarcity of circuits' opinions to advise district courts on what approach a habeas court takes in such cases. Absent clear standards, circuit courts continue to search within each other's and this Court's rulings for clues.

Despite its ruling in *Magana*, 263 F.3d 542, *supra*, the Sixth Circuit grants habeas relief upon meeting the AEDPA standards on a case-by-case basis. See, e.g., *Nash v. Eberlin*, 258 F. App'x 761, 765 (6th Cir. 2007). Other circuits often find it challenging to decide factual issues under the AEDPA

standards and restrictions. The Fifth Circuit has struggled with this issue more than any other court. Divided upon itself, the Fifth Circuit debated the proper standard of review following a determination under the "contrary to" clause of 2254(d)(1) in *Salts*, 676 F.3d, *Supra*. Ultimately, the winning majority resorted to interpretations of 28 U.S.C. § 2254(a) and this Court's analyses in *Williams v. Taylor*, 529 U.S. 362 (2000), and those of sister circuit courts. See *Id*. citing 28 U.S.C. § 2254(a), *Williams* at 395–96, and *Barker v. Fleming*, 423 F.3d 1085, 1094–95 (9th Cir.2005). Notably, the Fifth Circuit misquoted this Court in *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) to hold that "a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review [under] § 2254(a)." *Salts* at 480. The Fifth Circuit described AEDPA's bars as a "relitigation bar," the overcoming of which is necessary but insufficient to win habeas relief. *Id*. The Fifth Circuit explained that once petitioners overcome that bar, they must still "show, on *de novo* review, that [he is] 'in custody in violation of the Constitution or laws or treaties of the United States.'" *Id*. (quoting 28 U.S.C. § 2254(a)).

The Ninth Circuit held that same, explaining that if a state prisoner can satisfy Section 2254(d)(1)'s "contrary to" clause or its "unreasonable application" clause, the federal habeas court must then review the state prisoner's claim *de novo*. *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008).

The Seventh Circuit generally follows the same approach with some degree of variability. See, e.g., *Mosley v. Atchison*, 689 F.3d 838 (7th Cir. 2012).

In the case at bar, the Sixth Circuit quoted its own precedent in *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006) to conduct a *de novo* review for a claim that defeated the AEDPA bar. *Dyer* is a progeny of *Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001), a Sixth Circuit precedent that relies on clues the Court derived from *Williams*.

Likewise, the Ninth Circuit repeatedly points to this Court's precedents in *Lafler v. Cooper*, 132 S.Ct. 1376, 1389–90 (2012) and *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, (2007) to derive its clues. See *Frantz*, 533 F.3d 724, *supra*, and *Runningeagle v. Ryan*, 686 F.3d 758 (9th Cir. 2012). While the *de novo* review is the desired process by most habeas applicants, without this Court's guidance, it allows for a standardless sweep in which federal habeas courts are permitted to pursue their personal predilections.

That ill-defined standard produced the standardless sweep and the paradoxical ruling exemplified by this case. Here, the Sixth Circuit found the state court's opinion to be contrary to, and in compliance with, *Jackson v. Virginia.* In arriving at this paradox, the Sixth Circuit resolved a due process claim, presented under 28 U.S.C. § 2254(d)(1) as "contrary to" *Jackson v. Virginia* and paradoxically decided the merits of the claim as in the context of the sufficiency challenge defined by the same precedent.

This Court has addressed a similar paradox involving the post-AEDPA application of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). See *Davis v. Ayala*, 576 U.S. 257, 270 (2015). In *Davis*, this Court has explained that while both

Brecht and AEDPA are preconditions of habeas relief, "a federal habeas court need not 'formal[ly]' apply both" because "the *Brecht* test subsumes the limitations imposed by AEDPA." *Id.*

In the case at bar, the Sixth Circuit application of the AEDPA and *Jackson* 443 U.S., *supra*, fits within the parameters described in *Davis*. Under *Jackson*, a sufficiency test is an already doubly deferential standard. It requires viewing the evidence in the light most favorable to the prosecution *and* asking whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt.

In applying the "most favorable to the prosecution" standard, the Sixth Circuit prejudicially adopted, verbatim, the prosecution's incorrect interpretations of state law. See Order, APP. A at 5-7. Not only that, but the Sixth Circuit also rejected the state court's interpretations of state law and relied entirely on thin favor of the prosecution.

In applying the "guilty beyond a reasonable doubt" standard, the Sixth Circuit refused to resolve the elements of the crime under the proper Kentucky statute claiming that it involves "an issue of state law not cognizable on federal habeas review," applied a state case law to one of the charges in an *ex post facto* manner, and resolved the elements of the crime according to its own interpretations of state law. *Id.* Yet, when a reviewing court, as in this case, adds an extra layer of deferential review, the habeas review becomes a mere formality.

As mentioned above, the Sixth Circuit applies the AEDPA deferential standard on certain occasions but not always. Likewise, the Sixth Circuit grants habeas relief under AEDPA's deferential standard on a case-by-case basis. In *Nash*, 258 F. App'x 761, *Supra*, the Sixth Circuit resolved a habeas question under See28 U.S.C. § 2254(d)(1) without conducting a *de novo* review. The Court's decision rested on the following grounds.

> A conviction is not supported by sufficient evidence if a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In this habeas proceeding, however, we are not allowed to conduct a *de novo* review of the Ohio state court's application of that rule. Instead, we must review its sufficiency of the evidence decision under the highly deferential standard set by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under that statute, Nash can only be granted habeas relief if the Ohio Court of Appeals made an unreasonable application of the *Jackson* standard. See28 U.S.C. § 2254(d)(1); *Getsy v. Mitchell*, 495 F.3d 295, 315-316 (6th Cir. 2007) (en banc). Thus, it is not our duty to determine whether a rational trier of fact could have found that Nash committed the essential elements of felonious assault beyond a reasonable doubt. That was the job of the Ohio Court of Appeals. The task for this court is to determine whether it was objectively unreasonable for the Ohio Court of Appeals to conclude that a rational trier of fact, after viewing the evidence in the light most favorable to the state, could have found that Nash committed the essential elements of felonious assault beyond a reasonable doubt. See *McFowler v. Jaimet*, 349 F.3d 436, 447 (7th Cir. 2003). Applying even this very deferential standard mandated by AEDPA, we conclude that Nash's conviction for felonious assault cannot stand. *Nash*, 258 F. App'x at 765.

In offering guidance as to the standard of such a "past-AEDPA's-bar" review, this Court explained that "[a] federal court must [ ] resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551

U.S. 930, 953 (2007). Still, these rulings contain no solid guideline to help courts avoid resorting to deductions and repeated searches for clues.

II. CONGRESS INTENDED TO GRANT HABEAS RELIEF UNDER THE "CONTRARY TO" CLAUSE OF §2254(D)(1) BECAUSE IT INVOLVES A QUESTION OF LAW.

Congress enacted subsection §2254(d)(2) to resolve habeas claims involving factual issues. In practice, factual disputes presented on a habeas petition are only challengeable under that subsection and the constraints of subsection (e)(1). Federal courts typically grant habeas relief upon initial review when presented with a valid sufficiency claim under §2254(d)(2). *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting 28 U.S.C. § 2254(d)(2)).

The application of the "contrary to" clause of §2254(d)(1) does not require the same fact-bound sufficiency inquiry in a federal habeas court. In *Nash*, 258 F. App'x, Supra, the Sixth Circuit resolved a *Jackson* question under the unreasonable clause of §2254(d)(1). *Id.* at 765. Here, the Sixth Circuit insisted that the case is only resolvable via the sufficiency test.

Al-Maqablh presented his due process claims under the "contrary to" clause of §2254(d)(1), which is a question of law. See *Williams*, 529 U.S. at 412-13 (2000). The plain text of the AEDPA and this Court's ruling in *Williams* demonstrate that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.*

Furthermore, when a federal habeas court reviews subsection §2254(d)(1), it should examine the last state appellate court's opinion, not that of the state trial court. See *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018). The Sixth Circuit recognizes this law and applies it in some cases.

> "The task for this court is to determine whether it was objectively unreasonable for the [state appellate court] to conclude that a rational trier of fact, after viewing the evidence in the light most favorable to the state, could have found that [the petitioner] committed the essential elements of [the crime] beyond a reasonable doubt." *Nash*, 258 F. App'x, at 765.

Congress enacted Subsection §2254(e)(1) to place the burden of proof entirely on the petitioner, warning that the "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1).

If Congress intended to permit a factual inquiry under Subsections 2254(d)(1), it would have enacted a restraining subsection identical to 2254(e)(1). Consequently, subsections 2254(d)(2) and 2254(e)(1) would be utterly redundant if subsection (d)(1) also permits inquiries into the basic facts. Additionally, if relitigating the facts was allowed under subsection (d)(1), the burden of factual disputes would shift to the state to prove that the evidence presented at trials meets the reasonable-doubt standard. But the AEDPA was enacted to precisely curb these issues. See *Williams,* 529 US at 375-90. Therefore, subsection (d)(1) shows that Congress intended to preserve the state

court's effort in fact-finding and to limit factual inquiries on habeas review. Accordingly, under subsection (d)(1), a federal habeas court may not disturb the facts as established by the state court's direct review. Unfortunately, the Sixth Circuit's independent factual inquiry and selection of inapplicable facts beyond the scope of jury instructions and statute of limitations was contrary to *Williams* and the AEDPA itself, especially for an issue presented under subsection (d)(1).

III. CONGRESS LIMITED §2254(D)(1)'S APPLICATION TO RESOLVING QUESTIONS OF LAW

The Petitioner submits that sufficiency questions are fundamentally fact-bound. However, based on the plain text of the AEDPA, this Court's decisions in *Lockyer v. Andrade,* 538 US 63 (2003), and *Yarborough v. Alvarado,* 541 US 652 (2004), the Petitioner contended that under the "contrary to" clause of subsection (d)(1), the only issue is a legal one: whether the state court's decision was contrary to well-established federal law. This clause is remarkably different from its sister, the "unreasonable application" clause. Under that clause, the function of habeas courts is to determine whether the state court identified the correct constitutional standard but unreasonably applied it to the facts established at state trial. *Williams*, 529 U.S. at 413.

"[W]here a habeas petitioner challenges the factual basis for a state court's decision, we may grant relief only if it was '"based on an unreasonable

determination of the facts in light of the evidence presented in the State court proceeding.'" *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (quoting 28 U.S.C. § 2254(d)(2)).

Notwithstanding the clear text of subsection (d)(1), many circuit courts, including the Sixth Circuit, review the record *de novo* to decide if the facts support a due process claim involving *Jackson*. See Circuit Split, *infra*. But Congress enacted the AEDPA so federal habeas courts can determine whether the state court's decision was "contrary to" established "law" with deference given to the facts as specified by the state courts. 28 U.S.C. §2254(d)(1). This Court's decisions in *Lockyer* and *Yarborough* validate this point.

In *Yarborough*, this Court explained that it "cannot grant relief under AEDPA by conducting [its] own independent inquiry into whether the State court was correct as a *de novo* matter... Relief is available under 2254(d)(1) only if the State court's decision was objectively unreasonable." *Yarborough,* 541 US at 665-66*,* citing *Williams v. Taylor,* 529 US 362 (2000) and *Lockyer v. Andrade, supra,* 538 US at 71. Therefore, the Sixth Circuit's factual inquiry flies in the face of the AEDPA and this Court's precedents. On this basis, the Petitioner seeks a ruling from this Court for future analyses under 28 U.S.C. §2254(d)(1).

IV. THERE IS A CIRCUIT SPLIT REGARDING THE STANDARD OF REVIEW FOR HABEAS CORPUS DUE PROCESS CLAIM UNDER §2254(D)(1) BASED ON *JACKSON V. VIRGINIA.*

This Court is presented with an opportunity to clarify a federal habeas court's function when reviewing a due process claim involving *Jackson*, 443 U.S. under subsection 2254(d)(1). This Court is also presented with an exceptional opportunity to differentiate this subsection's functions from those of subsections (d)(2) and (e)(1) because circuit courts are divided on these issues.

Since this Court rendered its opinion in *Williams,* 529 US 362, *Supra,* circuit courts have been issuing conflicting opinions, occasionally among themselves, as to the standard of review under Subsection 2254(d)(1). These conflicting opinions are a result of inconsistent interpretations of *Williams* as to the standard of review under 28 U.S.C. §2254(d)(1) as compared to §2254(d)(2) and (e)(1). This split becomes even more complicated when the issue involves a due process claim under *Jackson*, 443 U.S., *supra.*

The First, Fourth, Fifth, and Eighth Circuit Courts limit their inquiries to the legal application of *Jackson* to the facts. See *Kater v. Maloney,* 459 F.3d 56, 67-68 (1st Cir. 2006); *Williams v. Ozmint,* 494 F.3d 4 78, 489 (4th Cir. 2007); *Martinez v. Johnson,* 255 F.3d 229, 243-244 (5th Cir. 2001); *Skillicorn v. Luebbers,* 475 F.3d 965, 977-978 (8th Cir. 2007).

The Second, Third, and Seventh Circuit Courts review the record evidence independently and apply the *Jackson* standard *de novo. Policano v. Herbert,* 507 F.3d 111, 116 (2nd Cir. 2007); *Robertson v. Klem, 580 F.3d 159 (3rd Cir. 2009); Johnson v. Bett,* 349 F.3d 1030, 1034 (7th Cir. 2003). The Sixth

and Ninth Circuit Courts are divided among themselves, and their opinions vary. Compare, for example, *Tinsley v. Million,* 399 F.3d 796, 815 (6th Cir. 2005) with *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006) and *Goldyn v. Hayes,* 444 F.3d 1062, 1065 (9th Cir. 2006) with *Garcia v. Carey,* 395 F.3d 1099, 1102-1106 (9th Cir. 2005).

Notably, in *Garcia v. Carey*, the Ninth Circuit held that it does "not decide the affect [sic] of AEDPA on *Jackson* because [it] reach[es] the same result whether [it] review[es] directly under *Jackson* or whether [it] review[es] more deferentially the state court's application of *Jackson* under AEDPA's standard." *Garcia*, 395 F.3d at 1102.

The Tenth Circuit confirmed that it was divided among itself whether sufficiency claims under the AEDPA are questions of law or questions of fact. *Moore v. Gibson,* 195 F.3d 1152, 1176-77 (10th Cir. 1999). While *Williams v. Taylor* has been the textbook on AEDPA, the Tenth Circuit continued to be divided on this issue and consistently conducted a *de novo* review of the record. *Torres v. Mullin,* 317 F.3d 1145, 1151 (10th Cir. 2003); *Webber v. Scott,* 390 F.3d 1169, 1178-1179 (10th Cir. 2004); *United States v. Anaya*, 727 F.3d 1043 (10th Cir. 2013), *Hooks v. Workman*, 689 F.3d 1148, 1195 (10th Cir. 2012).

Lastly, the Sixth Circuit and First, Eighth, Ninth, and Tenth Circuits have recognized the presumption of correctness to the state court's factual determinations and yet conducted *de novo* reviews of the record. *Saxton v. Sheets,* 547 F.3d 597, 601-607 (6th Cir. 2008). *Hurtado v. Tucker,* 245 F.3d 7,

18 (1st Cir. 2001); *Sera v. Norris,* 400 F.3d 538, 543-548 (8th Cir. 2005); *Bruce v. Terhune,* 376 F.3d 950, 957-958 (9th Cir. 2004); *Boltz v. Mullin,* 415 F.3d 1215, 1230 (10th Cir. 2005).

Despite clearing some of this confusion in *Cavazos v. Smith*, 565 U.S. 1 (2011), the circuits continued to be confused on this issue. In *DiBiase v. Eppinger*, 659 F. App'x 261, 9 (6th Cir. 2016), the Sixth Circuit concluded that habeas relief based on insufficient evidence is reviewed under the unreasonable application prong of § 2254(d)(1), and the facts are reviewed *de novo*. *Id.* at 11.

The split here is a *Jackson*-related deficit further muddied by the AEDPA and the scarcity of case law. In deciding *Jackson,* this Court acknowledged the inherent deference given to the state court fact-finding during habeas reviews. Nevertheless, it acknowledged that federal courts must review the state record when considering a sufficiency-of-evidence claim. *Jackson, supra,* 443 US at 324. Justice Stevens disagreed with that standard of review in a concurring opinion, noting that "habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of guilt determinations at criminal trials." *Id.* at 333, n.5.

This Court debated that standard of review in *Wright v. West,* 505 U.S. 277 (1992). There, this Court clarified that it "rejected the principle of absolute deference" in *Brown v. Allen,* 344 US 443 (1953), explaining that *Brown* established that "a district court must determine whether the state-court

adjudication' has resulted in a satisfactory conclusion" but never explored "whether a 'satisfactory' conclusion was one that the habeas court considers *correct,* as opposed to merely *reasonable." Wright, supra,* 505 US at 287, quoting *Brown, supra,* at 463 (emphasis is in original). Justice Thomas, writing for the majority, noted the Court's continued failure to resolve whether this type of review should be *de novo* or deferential and noted that "*Jackson* itself contributed to this trend." *Id.* at 290, citing *Jackson, supra,* at 323-26.

In enacting the AEDPA, Congress attempted to settle these uncertainties by completely revamping subsection 28 U.S.C. §2254(d) and adding subsection (e). As mentioned above, Subsection (d)(1) does not allow for an assessment of facts, while (d)(2) permits review of the reasonableness of a state court's findings of fact under the constraints of (e)(1). In *Williams,* 529 U.S. 362, this Court emphasized within Subsection (d)(1), the "contrary to" and "unreasonable application of" clauses require independent analysis. *Id.* at 412-13.

These facts show that Congress intended to change federal habeas corpus practice so that a habeas court makes no direct factual inquiries by limiting factual questions to restraints under subsections 28 U.S.C. §2254(d)(2) and (e). See Justice O'Connor's opinion, *Williams,* 529 U.S. at 404. Regardless, federal habeas courts continue to review findings of fact under (d)(1) unfettered by the restraints imposed by the AEDPA and undermining the entire purpose of the habeas corpus act.

In sum, regardless of Congress' clear intent behind AEDPA, circuit courts continue to issue conflicting opinions so confusing as to prevent the predictability and the uniformity of habeas litigations and allow for a standardless sweep in which federal habeas courts are permitted to pursue their personal preferences with the absolute power to individual judges to resolve habeas appeals based on their personal convictions and beliefs. Twenty-five years have passed since the enactment of the AEDPA, and the time has come for this Court to instruct and guide the federal courts to properly analyze a claim involving due process claim under 28 U.S.C. §2254(d)(1).

V. THIS COURT SHOULD CLARIFY THE STANDARD OF REVIEW ONCE A CIRCUIT COURT CONCLUDES THAT THE STATE COURT'S OPINION IS CONTRARY TO *JACKSON V. VIRGINIA* FOR A CLAIM PRESENTED UNDER THE "CONTRARY TO" CLAUSE OF 28 U.S.C. §2254(D)(1) INVOLVING A STATE COURT'S OPINION ADJUDICATED ON THE MERITS.

This issue presents a refined question: what should a circuit court do once it establishes that a district court erred in resolving a petitioner's claim? Should it grant habeas relief, resolve the matter in the first instance, or remand the case to the district court to resolve the issue in the first instance? If so, what is the proper standard of review for a due process claim determined as contrary to *Jackson v. Virginia* under 28 U.S.C. §2254(d)(1)?

In the case at bar, the Sixth Circuit allowed an appeal to proceed to determine whether the U.S. District Court erred in resolving the Petitioner's

due process claim as an error of state law. See Order, App. B at 5. Consequently, the Petitioner proceeded under those premises and successfully presented his case, convincing two different panels on the Sixth Circuit that the state court's decision was contrary to well-established law. However, instead of remanding, the Sixth Circuit acted as a Court of First Instance, thereby foreclosing any opportunity to debate the District Court's would-be ruling. Relying on its own precedent, the Sixth Circuit relitigated a state trial and foreclosed habeas relief on the very same extreme malfunctions and grievous wrongs it identified within the state court's rulings. See *Brecht v. Abrahamson,* 507 U.S. 619, 633-35 (1993).

As mentioned above, the Sixth Circuit's ruling is a paradox of two independent conclusions utilizing the same set of facts and under the same case law. This sort of inconsistency, if not resolved by this Court, places an impossible bar against habeas relief and reduces the habeas corpus litigation to a mere formality. The Sixth Circuit's sufficiency inquiry, in particular, demonstrates the exact conduct this Court rejected in *Brecht,* 507 U.S. 619.

Even assuming that the Sixth Circuit acted adequately, the pending question remains to be the same: what does a post-AEDPA, past-AEDPA *de novo* review under 28 U.S.C. §2254(d)(1) look like? Is it limited to the record before the "last state court," or does it extend to the trial court's record? Can a federal habeas court bypass the opinions of all courts below and resolve the record independently?

In this case, the Sixth Circuit review lacks any identifiable standard and involves several approaches, most of which directly conflict with each other. As mentioned above, in misapplying the *Jackson* standard, the Sixth Circuit rejected the state supreme court's interpretations of state law and relied heavily on the prosecution's interpretations. See Order, App. A at 5-7. Not only that, but the Sixth Circuit also rejected the elements of the crime as they appeared on the jury instructions, rejected the state statute that governed the "criminal" conduct, and bypassed the rulings of each and every court below in favor of its own. The Court also refused to apply a resolved question of a state law holding that it involves "an issue of state law not cognizable on federal habeas review." *Id.* at 7. Not only that, in its "*de novo"* review, the Sixth Circuit also applied a state court's opinion in an *ex post facto* manner to one of the charges in violation of the United States Constitution. See U.S. Constitution, Article I, § 10, cl. 1; *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). Finally, the Sixth Circuit ignored the entirety of Kentucky's published case law that governs the facts as established by the state trial court. These malpractices collectively and individually require the intervention of this Court.

1. By According No Deference to The State Court's Findings of Fact, The Sixth Circuit Rendered Them Unreasonable as a Matter of Law

The Sixth Circuit's sufficiency inquiry represents a constitutional violation on several levels. First, it accorded no deference to the state court's

findings and contradicted, ignored, or reached far beyond the facts as established by the state appellate court. Second, the Sixth Circuit acted as a Court of First Instance and exclusively incorporated its own version of the facts well outside the conviction's landscape, the statute of limitations, and the double jeopardy bar. Third, it is entirely silent on the District Court's findings of fact.

By according no deference to the state court's findings, under this Court's precedent, the Sixth Circuit rendered them unreasonable. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Therefore, the Sixth Circuit was required to grant habeas relief on this basis alone. *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013); *Nash*, 258 F. App'x 765, *Supra*. Instead, the Court conducted an independent inquiry into the state court's findings of fact to render them artificially sufficient. Furthermore, by being utterly indifferent to, and silent on, the District Court's erroneous conclusions, the Sixth Circuit abated its judicial reviewing responsibility. *Beavers v. Secretary of Health,* 577 F.2d 383, 386-87 (6th Cir. 1978); *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Court's decision is entirely devoid of any language regarding the District Court's determination of facts despite concluding differently. Nevertheless, the Sixth Circuit's considerably-different factual conclusion has correctly established the child's injury, which is the central holding fact that negates Al-Maqablh's false conviction. That is, Al-Maqablh cannot be guilty of false reporting if a habeas

court concludes that his report was accurate. Beyond that, Sixth Circuit's factual conclusions are in direct conflict with that of the state appellate court, which agreed with Al-Maqablh's position on sufficiency, acknowledged it, and held that it was "correct" but denied relief under the, now-debunked-by-Two-Sixth-Circuit-panels, theory that the trial court lacks the authority to acquit even when the evidence is lacking. Order, App. E at 2. Jointly, these issues indicate an inherent malfunction within the Sixth Circuit's practice of habeas law that necessitates a review by this Court.

2. The Sixth Circuit's Resolution of the Elements of the Crime Conflicts with *Estelle, Jackson*, And *Williams*

This Court held that the elements of the crime are defined by state law. See *Jackson v. Virginia,* 443 U.S. at 324. As fully explained below, the elements of the crime, as established by the Sixth Circuit, are inconsistent with state law, those established by the District Court, those established by the state appellate court, and those on the jury instructions. Notwithstanding repeat, the Sixth Circuit's factual findings are based predominantly on a newly developed set of facts, which the court incorrectly deduced upon mining the record and impermissibly applied against the statute of limitations and double jeopardy.

The Sixth Circuit's determination of the elements of the crime is further complicated by the District Court's failure to hold an evidentiary hearing or make a credibility determination. Even if the District Court did so, the Sixth Circuit's factual findings would still fail because the factual inferences are one-

sided and in conflict with *Jackson* and *Williams*. In any event, the elements of the crime, even as determined by the Sixth Circuit, are *impossible to establish*.

3. The Sixth Circuit Arbitrarily Resolved the Elements for The Harassment Conviction Contrary to *Estelle*, *Jackson,* And *Williams*

Al-Maqablh was convicted with harassment under Kentucky Revised Statutes (KRS) 525.070(1)(e), which states in the relevant part that:

> "(1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:
> . . . .
> (e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." KRS 525.070(1)(e)

The state appellate court acknowledged the lack of evidence to satisfy the elements of the crime under this statute when it held:

> "Appellant correctly argues that under K.R.S.070(1)(e)[sic], there is a requirement of intent to alarm or annoy that serves no legitimate purpose under.[sic] However, as stated above, the trial court did not have the authority to weigh the evidence." Order, App. E, at 2. (emphasis added).

Meanwhile, the Sixth Circuit engaged in a hairsplitting approach when it resolved the elements of the harassment crime differently and rejected the state court's ruling. First, it reached far beyond the jury instructions when it determined the "course of conduct" for the harassment conviction as "threatening with calling the police and following up on that threat [.]" Order, App. A at 5. This conclusion of law does not exist in Kentucky law. It

contradicts state law and ignores the jury instructions and courts' factual findings below.

At the time of the conviction, there had been a single ruling in the Kentucky Court of Justice's database that resolved the harassment under KRS 525.070(1)(e). See the Kentucky Court of Appeals' ruling in *Morgan v. Commonwealth* 1999-CA-000936-DG (KY App., unpublished, 1999), attached here as App. G.

Morgan binds the Sixth Circuit as the only case law that existed at the time of the conviction (2017). See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). See also *Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir.1996); *Rodriguez v. Spencer*, 412 F.3d 29, 37 (1st Cir. 2005). Otherwise, the Sixth Circuit had the feasible option of certifying the question of state law to the Kentucky Supreme Court. *Thomas v. Stephenson*, 898 F.3d 693, 709 (6th Cir. 2018)

In *Morgan*, the Court of Appeals held that KRS 525.070(1)(e) "requires that there be a course of conduct or repeated acts done with the intent to harass, annoy, or alarm another person." *Morgan*, App. G at 3. In this case, the Sixth Circuit impermissibly selected two separate conducts to satisfy the "repetition" requirement beyond state law, the conviction landscape, and the opinions of the courts below. For that reason, there had been no evidence to support that element under state law as interpreted by the Kentucky Court of Appeals.

Likewise, the Sixth Circuit resolved the "serious annoyance" element contrary to state law. It established that Al-Maqablh made "baseless requests to KSP for a [wellness verification] which seriously annoyed [the victim]." Order, App. A at 5.

The Sixth Circuit resolved the "serious annoyance" element in the first instance and against the courts below's findings. It appears to have been generated to counter the Petitioner's *Morgan* argument in his counseled brief.

> "But, by the terms of the statute under which [he] was charged it is not sufficient simply for one to be offended, or to be simply annoyed * * * In absence of any testimony being offered in evidence as to serious annoyance, [his] conduct is simply not prohibited under KRS 525.070(1)(e). *Morgan*, App. G at 3-4. Emphasis in the original.

There is not a scintilla of evidence that the victim, in this case, was seriously annoyed. She admitted that she pressed these charges in retaliation of the Petitioner's action in family court. She also admitted that she used them as a bargaining chip to have the federal case against her dismissed. Regardless, the Sixth Circuit's application of law to the facts ran afoul of the case's legal landscape. In so doing, the Sixth Circuit created more constitutional issues than it resolved. Notably, the Court applied a 2018 state court's interpretations to a 2017 conviction. Guided by that case law, the Sixth Circuit cited the witness testimony to establish the missing element of *serious annoyance* even though the element itself is missing from the jury instructions and the state court's review. The Sixth Circuit inserted that element *after the*

fact and outlined a testimony to fit it despite being inconsistent with the findings and the views of the courts below.

Lastly, the Sixth Circuit retried the case regardless of this Court's warning that "habeas corpus is not to be used as a second criminal trial ..." *Williams at* 383. Because the Sixth Circuit ignored this standard, it arrived at the illogicality that defined its analyses in this case. Because the District Court made no credibility determination, held no evidentiary hearings, and made no factual findings to substantiate the Sixth Circuit's factual inquiry, it rendered its sufficiency inquiry in conflict with *Williams* and *Jackson*.

In sum, the Sixth Circuit's misconstruction and misapplication of the law and facts and selectivity in applying them to each other created more constitutional issues. It simply *reconvicted* Al-Maqablh of harassment based on an invalid application of Kentucky law and incorrect use of the factual landscape of the case. This practice should be openly rejected by this Court, particularly as a ruling by the country's fourth-largest circuit.

4. The Sixth Circuit Arbitrarily Resolved the Elements for The First Count of False Reporting Conviction Contrary to *Estelle*, *Jackson,* And *Williams*

The Sixth Circuit's factual inquiry into the first false reporting conviction fails under *Jackson* and *Estelle* because, as fully explained below, it was *impossible* to meet the elements of the crime under the state statute, even as interpreted by the Sixth Circuit. Additionally, the Sixth Circuit's review is

significantly different from the reviews of the courts below, including the District Court and both state courts.

After concluding that Al-Maqablh "(1) reported that the child had bruises * * * (2) told CHFS that the mother said that the child fell on a stick but he thought that the child had been hit * * *" and the (3) "CHFS [ ] observed and photographed the child and saw a small dot or mark on the child's face," the Sixth Circuit concluded the following:

> "a rational trier of fact could find that Al-Maqablh made a false report of child abuse to CHFS implicating Alley when he alleged that he believed that the child had been hit, knowing that he had no information to support that claim. See Order, App. A at 6.

The Sixth Circuit's conclusion here bears no resemblance to Kentucky law for several reasons. First, under Kentucky law, there is no element such as "knowing he had no [knowledge]." KRS 519.040 (1)(d) states that

> "A person is guilty of falsely reporting an incident when he …
> knowingly gives false information to any law enforcement officer with intent to implicate another." Ky. Rev. Stat. § 519.040.

Drawing contrast here would show that the statute requires the person to give information knowing that it is false. This is perhaps why child abuse reports are governed by KRS 630.010-50 and not by KRS 519.040. The Kentucky Legislature intended to protect pre-verbal and nonverbal children via reports based on subjective belief mandated and protected by KRS 620.010-

50. See *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286 (Ky. 2012). See also the Child Abuse Prevention and Treatment Act (CAPTA, P.L. 93-247).

As fully explained below, the Kentucky Supreme Court held that reporting suspected child abuse is a *duty* under Kentucky law. Nevertheless, assuming, *arguendo,* that KRS 519.040 controls the Petitioner's conduct and that the report, which the Sixth Circuit determined to be accurate, was false,[1] the elements of the crime cannot be met in this case for another reason: CPS or CHFS is not an agency defined by the Kentucky Legislature as a law enforcement agency, perhaps another reason why KRS 519.040 does not control reports made CPS.

Second, KRS 519.040 clearly requires that a person give a law enforcement officer false information. The Kentucky legislature defined a law enforcement officer as:

> "a member of a lawfully organized police unit or police force of county, city or metropolitan government who is responsible for the detection of crime and the enforcement of the general criminal laws of the state, as well as sheriffs, sworn deputy sheriffs, campus security officers, law enforcement support personnel, public airport authority security officers, other public and federal peace officers responsible for law enforcement, and special local peace officers licensed pursuant to KRS 61.360." Ky. Rev. Stat. § 15.310(3).

Similarly, under federal law, a law enforcement officer is defined as:

> "an employee occupying a rigorous position, whose primary duties are the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the

[1]Federal and State Courts in Kentucky differentiated the word unsubstantiated the word false within the meaning of KRS 620.010-50. See *Hazlett v. Evans*, 943 F. Supp. 785 (E.D. Ky. 1996), *Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286 (Ky. 2012).

> United States, or the protection of officials of the United States against threats to personal safety, as provided in 5 U.S.C. 8401(17). 5 C.F.R. § 842.802.

Clearly, law enforcement officers are universally defined as people with authority to apprehend and detain. Certainly, Kentucky's Cabinet for Health and Family Services (CHFS) is not recognized under either statute as a law enforcement agency, which makes meeting that element under KRS 519.040(1)(d) *impossible*.

Third, one of the unintended consequences from the Sixth Circuit application of the law to the facts was acknowledging the truthfulness of Al-Maqablh's "false report" as the controlling fact of the entire case. That is, the Sixth Circuit concluded that a state worker "observed and photographed the child and saw a small dot or mark on the child's face." Order, App. A at 6. This fact, which for obvious reasons was denied by the state on the habeas review, was completely ignored by the Magistrate Judge and District Judge. See Order, App. C; Recommendations, App. D. While the same fact was recognized by both state courts, the state appellate court held that the trial court lacked the authority to direct a verdict of acquittal. See Order, App. E at 2. Under Kentucky law, however, this fact required the District Court to grant habeas relief as to both false reporting counts because the state statute that the Petitioner was convicted under (KRS 519.040) does not control reports of injuries made to Kentucky's Cabinet for Health and Family Services (CHFS). KRS 620.010-50 controls reports made to CHFS. Still, the Sixth Circuit

refused to grant relief or even fault the District Court for this factual deficiency as it was required to do under its precedent. See *Lucas*, 179 F.3d 412. Regardless, the Sixth Circuit's review fails even under the inapplicable state statute (KRS 519.040) because it was impossible to establish all elements of the crime as required under *Jackson*.

5. The Sixth Circuit Failed to Adhere to *Jackson* and *Williams* When It Resolved the Elements of the Crime for The Second Count of False Reporting Conviction

The state court's conclusion was collectively viewed as contrary to *Jackson v. Virginia*. App. A at 4, App. B at4. Therefore, as discussed above, the Sixth Circuit was required to grant habeas relief. Nevertheless, for a sufficiency inquiry, the same reasons laid out in article "b" of this subsection hold here. The Sixth Circuit's resolution of the elements of the crime fails.

The Sixth Circuit resolved the second false reporting charge against federal and state law because it should have employed the standard of whether the state court's conclusion a rational trier of fact could have found all elements proven beyond a reasonable doubt was "objectively unreasonable." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). Notwithstanding repeat, Kentucky's Cabinet for Health and Family Services (CHFS) is not recognized under KRS 15.310(3) and KRS 61.360 as a law enforcement agency. This fact makes meeting the elements of the crime under KRS 519.040(1)(d) *impossible* because it specifies that a report must be made to law enforcement. The Sixth Circuit's ruling

involved rejecting the existing record and drawing its own inference against the Petitioner and in favor of the State. Inferring that Al-Maqablh made a report alleging that [the victim] "withheld visitation to hide the child's injuries knowing that this information was false" is simply an innovation to the record, statutory text, and the court's own interpretations of the statute. In this instance, the court shifted the "knowing that he had no information" principle to "knowing that the information was false." Finally, the cited statute does not control reports made to CHFS. The Sixth Circuit acted without authority when independently interpreted state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), (citation omitted). Most importantly, the Sixth Circuit limited factual inferences in favor of the state and ignored all factual inferences in the Petitioner's favor, including the controlling fact and testimony by the state's own witnesses [and CHFS worker] that there had been no report at all, let alone a false report.

6. The Sixth Circuit Acted Without Authority When Ignored the State Courts' Interpretations

The elements of the crime are defined by state law. *Jackson,* 443 U.S. at 324. Federal Courts have no authority to interpret state law. *Estelle*, 502 U.S. 67. Therefore, the Sixth Circuit acted without authority when it independently interpreted KRS 519.040 to establish its own version of the elements of the crime. Order, App. A at 6-7. In so doing, the Sixth Circuit impermissibly altered the statute's text to equate CHFS with the police. *Id.*

These unauthorized interpretations of a statutory text are an intrusion on the seminal duties of the state court, the state's legislative branch, and this Court's precedents, which is a practice that this Court should reject.

The Kentucky legislature was well aware of this issue when it enacted KRS 620.010-50 to distinguish reports of child abuse made to the CHFS on behalf of pre-verbal human beings from reports on behalf of verbal beings made to "law enforcement." Stated differently, KRS 519.040 does not control reports made to CHFS, and the Sixth Circuit recognized that Al-Maqablh called the CHFS. For this reason alone, the Sixth Circuit's resolution of the elements of the crime under KRS 519.040(1)(d) fails as it is *impossible* to establish that Al-Maqablh reported anything to "law enforcement." The lack of any case law by the Kentucky Courts under that statute supports this fact.

Should the Sixth Circuit criticize the scarcity of published state court's interpretations, the feasible option of "Question Certification to the State Supreme Court" is always available and often utilized by the Sixth Circuit. See, e.g., *Kentucky Employees Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 722 (6th Cir. 2018), *certified question answered*, 580 S.W.3d 530 (Ky. 2019).

Here the Sixth Circuit ignored every available state holding and every available option to correctly interpret state law and remain in compliance with federal habeas rules. The Sixth Circuit denied all of these options in favor of its own interpretations and, as a result, created these predicaments.

VI. *ESTELLE V. MCGUIRE* DOES NOT BAR A HABEAS COURT FROM APPLYING A RESOLVED QUESTION OF STATE LAW TO THE FACTS, CERTIFYING AN UNRESOLVED QUESTION TO THE STATE SUPREME COURT, OR DETERMINING THE INAPPLICABILITY OF A STATE STATUTE

This Court has long established that the determination of the applicable state law is a question of law to be determined by the federal court. See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Circuit Courts typically hold the same. See, e.g., *Hanley v. United States*, 416 F.2d 1160, 1164 (5th Cir. 1969). This Court also held that state courts are the ultimate expositors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). See also *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

The Sixth Circuit ran afoul of these precedents on several levels. First, it incorrectly declared that applying the state immunity statute (KRS 620.030) to the facts was a question of "state law not cognizable on federal habeas review." Order, App. A at 7. Second, it failed to address the inapplicability of KRS 519.040. Third, it even engaged in interpreting, misinterpreting, and altering the text of KRS 519.040 to satisfy the elements of the crime based on its factual findings.

Because state courts are the ultimate expositors of state law, the Sixth Circuit was bound by state-court determinations on state-law questions regarding KRS 620.030, KRS 525.070, and KRS 519.040. *See Estelle, 502 U.S. at 67-68; Mullaney, 421 U.S. at 691.*

The Sixth Circuit erred in considering the application of the immunity statute as resolving a question of state law. The Kentucky Supreme Court has determined that question in countless incidents. The Sixth Circuit needed to only apply a "resolved question of state law" to the facts.

Even if state courts have not resolved the question of law surrounding the applications and interpretations of these statutes, "[t]he *Federal Habeas Manual* notes that, where state law so permits, federal habeas courts may certify important and case-determinate questions of state law to the state's highest court." *Thomas v. Stephenson*, 898 F.3d 693, 709 (6th Cir. 2018) (quoting Brian R. Means, *Federal Habeas Manual* § 10:26 (2017), internal citations and quotation marks omitted). "Kentucky law permits federal courts to certify questions of law which may be determinative of the cause then pending before the originating court and as to which it appears to the party or the originating court that there is no controlling precedent." *Smith v. Joy Techs., Inc.*, 828 F.3d 391, 397 (6th Cir. 2016) (quoting Kentucky Rules of Civil Procedure 76.37(1), internal quotation marks omitted). The Sixth Circuit typically "[r]esort[s] to the certification procedure * * * when the question is new and state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). The Sixth Circuit elected not to do so, thereby relinquishing its constitutional duties and intruding on the responsibilities of state courts and legislators. Hence, by surrendering its habeas reviewing duties, the Sixth Circuit deprived Al-Maqablh of even more

constitutional rights and created more constitutional deprivations than the courts below. A review by this Court will clarify this particular issue will have a wide application on habeas courts.

The Sixth Circuit's failure to address the inapplicability of KRS 519.040 also requires this Court's review because the Sixth Circuit abated its responsibility of resolving a question of law. *York*, 326 U.S. 99. Likewise, by interpreting, misinterpreting, and altering the text of KRS 519.040 to fit its factual findings, the Sixth Circuit ignored this Court's precedent in *Estelle*, 502 U.S. 62, *supra.*

Children are often pre-verbal humans, and reports surrounding their safety take an entirely separate form of legislation under the incentive of the United States Congress. See 42 U.S.C. § 5106a(b)(2)(B)(vii) (2016). In Kentucky, these reports are governed by KRS 620.010-50, not by KRS 519.040. The latter regulates reports made to police, which there had been none in this case.

Under KRS 620.010-50, a person enjoys immunity when making a factual report and when making a false report in good faith. See *Peyton (supra); J. S. v Berla*, 456 S. W. 3d 19 at 23 (Ky. App. 2015); *Morgan v Bird*, 289 S.W. 3d 222 (KY App 2009). Kentucky is a mandatory reporting state, and Al-Maqablh had a duty to report these injuries expressing his subjective belief. *Id*.

In sum, the Sixth Circuit's interpretations of state law do not exist. There is no such a crime as reporting an injury or expressing subjective belief regarding that injury. There is no such a requirement as "knowing that he had no information" under state law. The Sixth Circuit acted without authority when independently interpreted state law. The Sixth Circuit erred and abused its discretion when it rejected the applicable state law and the state court's interpretations of that law. Finally, the Sixth Circuit erred in not certifying questions of state law to the state supreme court.

CONCLUSION

This habeas petition seeks vindication of deeply rooted constitutional rights and entails no social cost. It simply seeks to correct unconstitutional practices by America's fourth largest circuit.

Wherefore, based upon all of the foregoing, this Court should grant the Al-Maqablh's petition for writ of certiorari and summarily reverse the Sixth Circuit's decision.

Respectfully submitted,

Michael Slaughter,
Counsel for the Petitioner
P. O. Box 32
Westport, KY 40077.
Attny4u2@hotmail.com
(502) 585-552