No. 22-5657

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

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| DAWUD WILSON | ) Judgment sought from opinion of the United |
| Petitioner, | ) States Court of Appeals for the Sixth Circuit |
| | ) |
| Vs. | ) No. 21-3961 |
| | ) |
| LEON HILL, Warden | ) |
| Respondent. | ) |

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION(S) PRESENTED

1. Whether the state appeals court's plain error analysis amounted to a review of the merits, and thus warrants Petitioner overcoming a state procedural bar to review a constitutional issue.

## LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page.

## RELATED CASES

- *State v. Wilson*, 2018-Ohio-902, (Ohio 11th Dist. 2018) Judgment entered March 12, 2018

- *Wilson v. Wainwright*, 2020 U.S. Dist. LEXIS 258384 (N.D. Ohio 2020) Report and Recommendation entered October 26, 2020

- *Wilson v. Wainwright*, 2021 U.S. Dist. LEXIS 178046 (N.D. Ohio 2021) Judgment entered September 20, 2021

- *Wilson v. Hill*, 2022 U.S. App. LEXIS 9052 (6th Cir. 2022) Judgment entered April 4, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

## OPINIONS BELOW

This is a case which arose from **federal courts** and:

- The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 2022 U.S. App. LEXIS 9052.

- The opinion of the United States District Court appears at Appendix B to the petition and is reported at 2021 U.S. Dist. LEXIS 178046.

## JURISDICTION

This is a case which arose from **federal courts** and:

- The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(1).

- The date on which the United States Court of Appeals decided this case was April 4, 2022.

- A Petition for Rehearing, with Suggestion Rehearing En Banc was filed, but was returned to Petitioner as unfiled.

- An extension of time to file the Petition for Writ of Certiorari was granted to and including September 1, 2022 on July 25, 2022 in Application No. 22A53.

that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of facts finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

6.) ORC 2941.149- Specification that offender is a repeat violent offender

(A) The determination by a court that an offender is a repeat violent offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a repeat violent offender. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender is a repeat violent offender.)"

(B) The court shall determine the issue of whether an offender is a repeat violent offender.

7.) ORC Ann. 2911.02- Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or upon the offender's person or under the offender's control;

(2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;

(3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

8.) Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

9.) USCS Sup. Ct. 10- Considerations Governing Review of Certiorari

Review of a writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power;

(b) A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) A state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

i. **Waiver vs. Forfeiture**

This Court has repeatedly stressed that there is a difference between "**waiver**" and "**forfeiture**". See. *Hamer v. Neighborhood Hous. Serv.*, 138 S. Ct. 13, 17 (S. Ct. 2017) ("The terms waiver and forfeiture- though often used interchange-ably by jurists and litigants- are not synonymous."); *United States v. Olano*, 507 U.S. 725, 733 (S. Ct. 1993) ("Waiver is different form forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right."" Quoting Johnson v. Zerbst, 304 U.S. 458 (S. Ct. 1938))

Petitioner contends that the state court did not adequately and independently enforce a state procedural bar because the contemporaneous objection rule (Crim. R. 30(A)) purports that a party will **forfeit**- not **waive**- his/her claim if he/she does not object at the right time and with adequate specificity. The implementation of this rule is firmly rooted in this Court's decisions- before and after the state appeals court made its ruling. See. *Greer v. United States*, 141 S. Ct. 2090, 2096 (S. Ct. 2021) ("a defendant can preserve a claim of error "by informing the court" of the claimed error when the relevant "court ruling or order is made or sought." If the defendant has "an opportunity to object" and fails to do so, he **forfeits** his claim of error. *Ibid.* If the defendant later raises the **forfeited** claim on appeal, Rule 52(b)'s plain-error standard applies.");. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904 (S. Ct. 2018) ("the Court established three conditions that must be met before a court may consider exercising its discretion to correct the error...Once those three conditions have been met, "the court of appeals should exercise its discretion to correct the **forfeited** error if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."" quoting *Molina-Martinez v. United States,* 578 U.S. 189, 452 (S. Ct. 2016)); *Henderson v. United States*, 568 U.S. 266, 271 (S. Ct. 2013) (Constitutional rights "'may be **forfeited** in criminal as well as civil cases by failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" quoting *Yakus v. United States*, 321 U.S. 414 (S. Ct. 1944)); *Puckett v. United States*, 556 U.S. 129, 134 (S. Ct. 2009) ("If a litigant believes that an error occurred...he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from that error is **forfeited**.")

The implementation of this rule is also very firmly rooted in Ohio caselaw- before and after the state appeals court made its ruling. See. *State v. West*, 2022-Ohio-1556, P89 (Ohio Sup.

Ct. 2022) ("The failure to object to an alleged error at trial generally triggers plain-error analysis...This court clarified that when a defendant fails to preserve objections to a defective indictment during the course of trial, the issues are generally **forfeited** and must be reviewed under plain-error analysis..."); *State v. Montgomery*, 2022-Ohio-2211, P114 (Ohio Sup. Ct. 2022) ("Montgomery **forfeited** any challenge to A.B. remaining seated at the prosecutor's counsel table after the jury was empaneled...Because Montgomery failed to renew his objection, plain-error review applies in assessing that error."); *State v. Cambron*, 2020-Ohio-819, 831 (Ohio 4th Dist. 2020) ("When a defendant fails to preserve an objection to a particular issue at trial, '**forfeiture**' of that issue occurs."" quoting *State v. Payne*, 114 Ohio St.3d 502, 311 (Ohio Sup. Ct. 2007)); *State v. Froman*, 162 Ohio St.3d 435, 461 (Ohio Sup. Ct. 2020) ("However, defense counsel never made a contemporaneous objection, so Froman has thus **forfeited** all but plain error."); *State v. Kirkland*, 160 Ohio St.3d 389, 407 (Ohio Sup. Ct. 2020) ("The defense did not object to any of these references to the 1987 murder. Kirkland's failure to object **forfeits** this issue, absent plain error."); *State v. Madison*, 160 Ohio St.3d 232, 259 (Ohio Sup. Ct. 2020) ("Thus Madison's failure to object at trial **forfeits** this argument, absent plain error."); *State v. Myers*, 154 Ohio St.3d 405, 426 (Ohio Sup. Ct. 2018) ("Because he did not object to the trial court's question, Myers **forfeited** all but plain error."; "He concedes, however, that his counsel did not object at trial to the admission of the photographs. Thus, he has **forfeited** all but plain error."); *State v. Martin*, 151 Ohio St.3d 470, 493 (Ohio Sup. Ct. 2017) ("Accordingly, Martin's failure to object at trial **forfeits** any issue with respect to the instructions."); *State v. Osie*, 140 Ohio St.3d 131, 145 (Ohio Sup. Ct. 2014) ("Like Wesson, Osie failed to object at trial and therefore has **forfeited** all but plain error."); *State v. Payne*, 114 Ohio St.3d 502, 505 (Ohio Sup. Ct. 2007) ("Typically, if a party **forfeits** an objection in the trial court, reviewing courts may notice only "[p]lain error of defects affecting substantial rights."" quoting *Crim. R. 52(B)*)

Conversely, the Ohio appeals court ruled that Petitioner "**waived**" his right to the *Apprendi* claim, holding not in earnest that Wilson failed to timely and adequately make a contemporaneous objection, but holding in earnest that Wilson's no contest plea resulted in a "waiver" of him being able to make an *Apprendi* claim on appeal. *State v. Wilson*, at 83. "**Waiver**" contends that Petitioner "intentionally relinquished or abandoned a known right." *Olano*, at 733 That is exactly what the state court decided:

> Thus, any fact other than prior conviction that is found by a jury or admitted by the defendant *complies with Apprendi*, regardless of whether it relates to a prior or current conviction." *State v. Wilson*, at 90;
>
> "As the court in *Hunter* said, where the defendant stipulates "to all the facts necessary for the trial court to designate him as a repeat violent offender," "the trial court ha[s] no need to conduct fact-finding *** and *no Sixth Amendment violation occurred* ***." *State v. Wilson*, at 92;
>
> "Payne did not waive the jury as to the specification and did not stipulate to the necessary findings, and this court properly held the trial court's fact-finding regarding his prior and current convictions *violated Apprendi*." *State v. Wilson*, at 93.

This Court in *Johnson v. Williams*, 568 U.S. 289, 301-302 (S. Ct. 2013) decided that if "a provision of the Federal Constitution or a federal precedent was simply mentioned in passing in a footnote or was buried in a string cite" then "the presumption that the federal claim was adjudicated on the merits may be rebutted." But, if the provision of the Federal Constitution or a federal precedent were featured prominently in the state court's decision then the federal claim should stand under the *Richter* presumption that "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court has adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Richter*, at 99 This court also decided that the "*Richter* presumption is a strong one that may be rebutted only in unusual circumstances." *Johnson v. Williams*, at 302

Petitioner contends that the extensive analysis by the state appeals court of whether Petitioner's Sixth Amendment rights were violated and whether the trial court complied with *Apprendi* and *Blakely* clearly were not "simply mentioned in passing in a footnote or [were] buried in a string cite," but were a provision of the Federal Constitution and federal precedents which were "featured prominently in the state court's decision."

iii. **Adequate and Independent State Law Ground**

In the decision below, the Sixth Circuit ruled that the state appeals court actually "enforced" an adequate and independent state rule (the contemporaneous objection rule) which

served as a procedural bar to review of the issue. *Wilson v. Hill*, 2022 U.S. App. LEXIS 9052, 5 (6th Cir. 2022) Their rationale was that because "Appellant concedes he failed to raise an *Apprendi* argument in the trial court" and the state appeals court "review[ed] the issue for plain error" then the second and third prongs of *Maupin*, 785 F.2d 135, 138 were satisfied. *Wilson v. Hill*, at 5

"Moreover, we will not assume a state-court decision rests on an adequate and independent state ground when... "the adequacy and independence of any possible state law ground is not clear from the face of the opinion."" *Caldwell v. Mississippi*, at 327 quoting *Mich. v. Long*, at 1040-41 Thus, the state court's decision was not "independent" because (1) it was "interwoven with federal law" as it believed that federal law compelled it to make its ruling, See. *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 164 (at syllabus) (S. Ct. 2009) ("Far from providing a plain statement that its decision rested on state law, the state court plainly held that the decision was dictated by federal law, particularly the Apology Resolution.") (2) there was no "plain statement" that its reliance on a Federal Constitutional provision and federal precedents were being used only as "guidance," See. *Arizona v. Evans*, at 1041 ("Thus, the Arizona Supreme Court's decision to suppress the evidence was based squarely upon it interpretation of federal law...Nor did it offer a plain statement that its references to federal law were "being used only for the purposes of guidance, and did not themselves compel the result that [it] reached."" quoting *Mich. V. Long*, at 1041) and (3) there was no "plain statement" where the court clearly and expressly invoked the procedural bar (contemporaneous objection rule) or stated its reliance on any statute, rule, treatise, state constitutional provision, or caselaw in enforcing the procedural bar. In fact, the state appeals court never even mentioned the contemporaneous objection rule or Ohio Crim. R. 30(A) in the entirety of its decision. The Respondents would have this Court believe that the state appeals court was unequivocally enforcing the procedural bar, even though the face of the opinion clearly does not support this.

The state court's decision was not "adequate" because there is not "firmly established and regularly followed" Ohio caselaw concerning "waiver"- as opposed to "forfeiture"- as the trigger for the state procedural bar of contemporaneous objection- in violation of Ohio Crim. R. 30(A). "A state ground, no doubt, may be found inadequate when "discretion has been exercised to impose novel or unforeseeable requirements without fair and substantial support in prior state

Second, neither the indictment nor the recitation of the facts by the prosecutor mentioned the "serious physical harm" element, so there was no path for Petitioner to either stipulate to or admit that the crime involved the "serious physical harm" element. "Unlike the claims in *Broce*, Class' Constitutional claims here, as we understand them, do not contradict the terms of the indictment with Class' knowing, voluntary, and intelligent admission that he did what the indictment alleged." *Class v. United States*, 138 S. Ct. 798, 804 (S. Ct. 2018)

Third, the state appeals court is convoluting the separate and distinct issues of RVO designation/determination/conviction and RVO sentencing:

> "Here, during the plea hearing, appellant told the court it was his intention to plead no contest to both the charge and the specification. He also said he was admitting the truth of the facts to be presented by the prosecutor." *State v. Wilson,* at 49;
>
> "By pleading no contest and admitting he gave the teller a note saying he had a loaded gun and he would hurt her with it if necessary, appellant cannot dispute the note contained a threat that he would cause the teller harm if she did not comply with his demands." *State v. Wilson,* at 79;
>
> "Based on appellant's no contest plea and his stipulation to the indictment and the explanation of circumstances, the record supports the trial court's finding that appellant threatened to cause serious physical harm." *State v. Wilson,* at 82;
>
> "Appellant also makes an *Apprendi* argument, arguing the trial court erred in sentencing him on the RVO specification after making a factual finding that the jury did not find and he did not admit, in violation of his jury trial...Appellant is again referring to the court's finding that he threatened to cause serious physical harm. However, appellant's argument lacks merit because he waived his right to a jury trial on this issue and admitted all facts necessary to allow the court to find he was a repeat violent offender." *State v. Wilson,* at 83;
>
> "Here, in pleading no contest to the specification, appellant waived his right to a jury on that issue and essentially asked the court to determine the specification

based on his admission of the truth of the facts alleged in the indictment and contained in the prosecutor's statement of facts." *State v. Wilson,* at 87;

"In contrast, here, appellant pled no contest to robbery and the specification, thus waiving the jury as to both, and admitted all facts necessary for the RVO specification as recited in the prosecutor's statement of facts." *State v. Wilson,* at 94;

"After hearing the facts outlined by the prosecutor, appellant admitted they were true. He thus essentially admitted he threatened to cause the teller serious physical harm." *State v. Wilson,* at 95;

"Since appellant waived his right to have the jury try the specification and admitted all facts necessary to enhance his sentence as an RVO, the trial court did not commit plain error in sentencing him." *State v. Wilson,* at 97

The state court's opinion offers two misconstrued notions: (A) When a defendant pleads no contest he/she is admitting to what is **contained** in the indictment and what the prosecutor **actually says** in their statement of facts, not to what an appeals court insinuates a prosecutor's statement should have contained or should be "essentially" read to mean. (B) While the no contest plea by Petitioner did give the trial court permission to find that he was a RVO, See. *ORC Ann. 2941.149(B)* ("The court shall determine the issue of whether an offender is a repeat violent offender.") the no contest plea does not give the trial court permission to decide whether the crime involved a "serious physical harm" element. See. *ORC 2929.14(B)(2)(b)(iii)* ("any felony of the **second degree** that is an offense of violence and the **trier of fact** finds that the offense involved an attempt to cause or a threat to cause **serious physical harm** to a person or resulted in **serious physical harm** to a person.") Because the Petitioner was convicted of Robbery in the second degree, See. *ORC Ann. 2911.02(B)* ("Whoever violates this section is guilty of robbery. A violation of division(A)(1) or (2) of this section is a felony of the second degree.") and because second degree felonies require a **trier of fact** to decide the "serious physical harm" element, *Apprendi, Ring v. Arizona,* and *Blakely* all stress that the **trier of fact** in this situation must be a jury who decides the issue beyond a reasonable doubt.

Lastly, because a no contest plea admits only to what is contained in the indictment and what the prosecutor presents in their statement of facts, because neither the indictment nor the prosecutor's recitation of facts included the "serious physical harm" element, and because the underlying offense was a second degree felony to which only a jury could act as the trier of fact to decide the "serious physical harm" element, the trial court was barred from unilaterally engaging in the fact-finding of the "serious physical harm" element [There was supposed to be a separate jury trial solely to decide if the robbery offense involved "serious physical harm."] which enhanced the robbery sentence beyond the statutory maximum. See. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (S. Ct. 2000) ("Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Ring v. Arizona*, 536 U.S. 584, 602 (S. Ct. 2002) ("If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact- no matter how the state labels it- must be found by a jury beyond a reasonable doubt."); *Blakely v. Washington*, 542 U.S. 296, 301 (S. Ct. 2004) (The application of Washington's sentencing scheme violated the defendant's right to a jury find the existence of "any particular fact" that the law makes essential to his punishment.) (That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected I the jury verdict or admitted by the defendant." *Blakely*, at 303)

C. **Jurisdiction of this Court to Decide the Case**

28 USCS § 2254(d)(1) gives federal courts the jurisdiction to decide habeas claims that have been adjudicated on their merits in state courts and whose adjudication resulted in a decision that was "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst*, at 801 "As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of the federal law and our jurisdiction is not precluded." *Ake v. Oklahoma*, 470 U.S. 68, 75 (S. Ct. 1985)

See also. *Foster v. Chatman*, 578 U.S. 488, 498 (S. Ct. 2016) ("When application of a state law bar "depends on a federal constitutional ruling, the state-law prong of the court's

holding is not independent of federal law, and our jurisdiction is not precluded."" quoting *Ake v. Oklahoma*, at 75); *Quinn v. Millsap*, 491 U.S. 95, 101-102 (S. Ct. 1989) (""Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment,"" quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (S. Ct. 1938))

Petitioner asserts that if this Court does not retain jurisdiction to decide this issue there could be many more U.S. citizens' constitutional rights trampled by the courts, whom really have no concrete guidance on this issue.

## II. The Decision Below Conflicts With That Of Numerous Other United States Circuit Courts Of Appeals As To Whether A State Appeals Court Conducting A Plain-Error Analysis, Which Amounts To A Review Of The Merits, Thus Warrants A Petitioner To Overcome A State Procedural Bar To Federal Review.

Pursuant to USCS Sup. Ct. R. 10(A), "A petition for a writ of certiorari will be granted [when]...a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ***" The issue at bar is whether the United States Court of Appeals for the Sixth Circuit, in affirming the decision of the district court that Petitioner procedurally defaulted his *Apprendi* claim because the state appeals court conducted a plain-error analysis, has found itself in conflict with relevant decisions of other U.S. Circuit courts of appeals.

Because of the following reasons, Petitioner contends that this Court should conduct plenary review of the issue of whether a state appeals court conducting a plain-error analysis- which amounts to a review of the merits- warrants a petitioner overcoming a state procedural bar to federal review of a constitutional issue:

### A. Plain-Error Analysis

The Sixth Circuit stated in its opinion: "The district court concluded that Wilson failed to comply with Ohio's contemporaneous-objection rule, that the Ohio Court of Appeals enforced

that rule by applying plain-error review of his claim, and that the contemporaneous-objection rule is an adequate and independent state ground barring federal review." *Wilson v. Hill*, at 3 Thus, the Sixth Circuit reasoned that the contemporaneous objection rule was an adequate and independent state ground barring review of a federal constitutional issue simply because a state appeals court conducted plain-error analysis, regardless if, in the course of the state court's plain-error analysis, the ruling (1) reached the merits of the claim, (2) was "interwoven with federal law," *Mich. v. Long*, at 1040 or (3) contained no "plain statement" clarifying that its use of federal constitutional provisions and/or federal precedents were being used only as "guidance, and did not themselves compel the result that the court reached." *Mich v. Long*, at 1041

The Sixth Circuit's interpretation of plain-error analysis is grossly in conflict with other U.S. Circuit Courts in the following ways:

- In the Second Circuit, the court concluded that the Vermont Supreme Court's ruling was interwoven with federal caselaw, and as such, the plain-error analysis was not independent of federal constitutional law. *Roy v. Coxon*, 907 F.2d 385, 391 (2nd Cir. 1990)

- Again in the Second Circuit, the court opined, "When, as here, there is "ambiguity" in a state court opinion that "prevent[s] us form definitively concluding that" the state court relied on a state procedural bar- such as when the "opinion states that a group of contentions is either without merit 'or' procedurally barred"- we will presume that the state court reached the decision on the merits and that we are not precluded from reviewing the merits." *Garner v. Lee*, 908 F.3d 845, 859 (2nd Cir. 2018)

Similarly, the Ohio appeals court's ruling was also ambiguous because it mentioned the *Apprendi* claim was both without merit and also waived.

- Recently, the Sixth Circuit has changed its tune on plain-error analysis, "Sometimes a state court will address the merits of the underlying claim in conducting plain-error review. So long as the state court "addressed whether an error had occurred," we have held, that analysis is an adjudication on the merits of the underlying claim for AEDPA deference purposes." *Smith v. Warden*, 2022 U.S. App. LEXIS 5654, 11 (6th Cir. 2022) The court goes on to explain, "If in the course of rejecting a claim on state procedural grounds, a state court "conducts any reasoned

elaboration of an issue under federal law" and "addresses" the merits, we owe to its determination of the federal issue under AEDPA." at 12

- In the Ninth Circuit, the court ruled "a state appellate court reviewing for plain error reaches the merits of petitioner's claim." *Walker v. Endell*, 850 F.2d 470, 474 (9th Cir. 1987) The court went on to say, "In reaching its conclusion that there was no plain error, the [state] court conducted a review of the merits...effectively lift[ing] the state's procedural bar to [federal] review." at 475

- Again in the Ninth Circuit, the court held, "In Chambers, we held that "unless a court expressly (no implicitly) states that it is relying upon a procedural bar, we must construe an ambiguous state court response as acting on the merits of a claim, if such a construction is plausible."" *Smith v. Or. Bd. Of Parole & Post-Prison Supervision*, 736 F.3d 857, 860 (9th Cir. 2013) quoting *Chambers v. McDaniel*, 549 F.3d 1191, 1197 (9th Cir. 2008)

Here, the state appeals court never **explicitly** stated that it was procedurally defaulting the claim because of Petitioner's non-compliance with contemporaneous objection rule. In fact, the state appeals court never even mentioned the contemporaneous abjection rule or Ohio Crim. R. 30(A) in its entire ruling. The Sixth Circuit and the Respondent, though, would have us believe conducting a plain-error analysis, by itself, is an express and explicit reliance on the contemporaneous objection rule.

- In the Tenth Circuit, the court opined, "A state court may deny relief for a federal claim on plain-error review because it finds the claims lacks merit under federal law. In such a case, there is no independent state ground of decision and, thus, no basis for procedural bar." *Cargle v. Mullins*, 317 F.3d 1196, 1206 (10th Cir. 2003)

- Again in the Tenth Circuit, the court ruled, "When a state court applies plain error review in disposing of a federal claim, the decision is on the merits to the extent that the state court finds the claim lacks merit under federal law." *Douglas v. Workman*, 560 F.3d 1156, 1170-71 (10th Cir. 2009)

- Once again in the Tenth Circuit, the court held, "The court made the "further findings" that Williams failed to satisfy the requirements of *Strickland*- not just the requirements of plain error...Because of this, we believe that the OCCA rejected William's claims under the appropriate federal standard." *Williams v. Trammell*, 782 F.3d 1184, 1199 (10th Cir. 2015)

- In the Eleventh Circuit, the court wrote in a footnote, "When, however, as is the situation here, the appellate court, in conducting plain error review, identifies a specific constitutional claim, ignores the fact that the claim has been defaulted, and decides the claim on its merits, we treat the claim on habeas review as if the petitioner had not defaulted the claim and pass on its merits." *Peoples v. Campbell*, 377 F.3d 1208, 1235, n.55 (11th Cir. 2004)

- Again in the Eleventh Circuit, the court held, "Accordingly, we hold that when a state appellate court applies plain-error review and in the course of doing so, reaches the merits of the federal claim and concludes that there is no plain error, that decision is an adjudication "on the merits" for purposes of § 2254(d)." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1210 (11th Cir. 2013)

B. **Alternative Holding**

Even if Respondent believes that the state court's merit analysis was simply an alternative holding, the Sixth Circuit would still be in conflict with other U.S. Circuit courts of appeals in the following ways:

- In the Third Circuit, the court reasoned, "We must now determine whether AEDPA deference applies when a state court decides a claim on procedural grounds, and alternatively, on merits...The weight of authority of our sister circuits suggests that the merits analysis is owed AEDPA deference." *Rolan v. Coleman*, 680 F.3d 311, 319 (3rd Cir. 2012)

- In the Fourth Circuit, the court ruled, "Although the MAR court's primary holding- that the conflict claim was procedurally barred- was not an "adjudication on the merits" under 28 U.S.C. § 2254(d), its alternative holding was a merits ruling." *Stephens v. Branker*, 570 F. 3d 198, 208 (4th Cir. 2009)

- In the Fifth Circuit, the court held, "we hold that a robust merits analysis in the alternative is a merits determination, the court's procedural disposition did not "preclude[] a merits determination."" *Will v. Lumpkin*, 970 F.3d 566, 572 (5th Cir. 2020)

- In the Sixth Circuit, the court reasoned, "We defer to a state court's merits determination even if the state court makes an alternative holding on procedural grounds." *Porter v. Eppinger*, 2021 U.S. App. LEXIS 26020, 11 (6th Cir. 2021)

- In the Eleventh Circuit, the court held, "We join our sister circuits in holding that a state court's alternative holding is an adjudication on the merits." *Raulerson v. Warden*, 928 F.3d 987, 1001 (11th Cir. 2019)

- Again in the Eleventh Circuit, the court decided, "This "alternative holding on the merits" constitutes "an 'adjudication on the merits' within the meaning of § 2254 (d)."" *Riechmann v. Fla. Dep't of Corr.*, 940 F.3d 559, 580 (11th Cir. 2019)

- Once again in the Eleventh Circuit, the court opined, "Because the state court decided in the alternative to reject the claim on the merits, we give the decision deference under § 2254 (d)." *Sealey v. Warden, Ga. Diagnostics Prison*, 954 F.3d 1338, 1368 (11th Cir. 2020)

C. **Plenary Review**

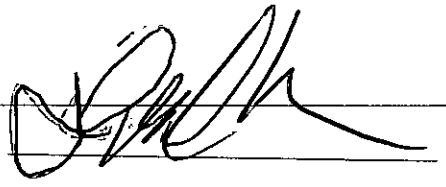
Petitioner contends that this issue of whether a state appeals court conducting a plain-error analysis of a constitutional issue, which amounts to a review on the merits, or which is perceived as an alternative holding, warrants plenary review by this Court of whether a petitioner or appellant overcomes a state procedural bar to review of the issue, because (1) there is great confusion among federal courts about how to answer this question, See. *Cargle v. Mullin,* at 1205 ("Courts addressing this question have arrived at very different answers.") and (2) this Court has never fully addressed this issue. See. *Campbell v. Burris*, 515 F.3d 172, 178 (3rd Cir. 2008) ("the United States Supreme Court has not definitively resolved the matter...")

Petitioner asserts that if this Court does not retain jurisdiction to decide this issue there could be many more U.S. citizens' constitutional rights trampled by the courts, whom really have no concrete guidance on this issue.

## CONCLUSION

In conclusion, and for the aforementioned reasons, Petitioner asks that this Petition for Writ of Certiorari be granted.

Respectfully submitted,



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