No. 22-6821

In the Supreme Court of the United States

JAMES MAMMONE,

Petitioner,

v.

CHARLOTTE JENKINS, Warden

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

AEDPA generally prohibits federal courts from awarding habeas relief based on claims that state courts already "adjudicated on the merits," 28 U.S.C. §2254(d), except when the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1). Did the Ohio Supreme Court contradict or unreasonably apply U.S. Supreme Court precedent when it rejected Mammone's argument that pretrial publicity about his case presumptively prejudiced the jury, denying him a fair trial under the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment, pursuant to *Rideau v. Louisiana*, 373 U.S. 723 (1963)?

LIST OF PARTIES

The Petitioner is James Mammone III, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution, who is automatically substituted for the former Warden. *See* Fed.R.App.P. 43(c)(2); Sup. Ct. R. 35.3.

LIST OF DIRECTLY RELATED PROCEEDINGS

In addition to the proceedings listed in the petition, the state trial court denied a petition for postconviction review in *State v. Mammone*, Case No. 2009CR0859 (Court of Common Pleas for Stark County, Ohio, December 14, 2011).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statute

INTRODUCTION

James Mammone seeks to overturn a Sixth Circuit decision correctly denying him relief under the Antiterrorism and Effective Death Penalty Act (AEDPA). In a case fully litigated through the Ohio Supreme Court, the AEDPA standard should take center stage. But Mammone mentions the AEDPA standard as an afterthought near the end of his petition. *See* Pet.26. As far as what the petition does highlight—a merits argument about presumed prejudice from pretrial publicity—this Court has vacated a conviction based on that theory only once in the sixty years since crystalizing that theory in *Rideau v. Louisiana*, 373 U.S. 723 (1963). And not long ago, the Court addressed the standards for such claims, in *Skilling v. United States*, 561 U.S. 358 (2010). Even if the Court saw a need to refine the law of presumed prejudice, this AEDPA-governed case is not the place to do so. *See White v. Woodall*, 572 U.S. 415, 422 n.3 & 426 (2014). Indeed, AEDPA's lens means that the questions presented are not really presented.

Mammone's petition confirms the mismatch between his questions presented and the questions the Court would need to answer. He notes that "courts around the country disagree" about components of his argument. Pet. 15; *see id*. at 25. That all but concedes that the Ohio Supreme Court's ruling on this point is not an unreasonable application of this Court's cases, and therefore confirms that this case does not offer the Court a chance to consider the questions presented.

Even beyond the AEDPA-created mismatch, this a poor vehicle to address the law of presumed prejudice. First, the jury heard almost exactly the same information that Mammone cites as the main source of prejudice. Mammone highlights his

confession to a local newspaper; yet the jury heard similar, and lengthier, confessions at trial when it heard Mammone's statement to police and Mammone's own statements in open court at mitigation. It makes little sense to probe the boundaries of presumed prejudice when the jury heard the allegedly prejudicing information from unchallenged sources. Second, Mammone's petition asks this Court to presume prejudice despite a state-court fact finding to the contrary. Yet Mammone never invokes the relevant statutory standard governing federal habeas review of state-court fact-finding. *See* 28 U.S.C. §2254(d)(2), (e)(1). Finally, the Ohio Supreme Court got the law of presumed prejudice right, even without AEDPA's filter, so review under AEDPA is unnecessary

The Court should deny the petition.

STATEMENT

1. After sending multiple text messages to his ex-wife while driving around with their five-year-old daughter and three-year-old son, James Mammone killed his children with a butcher knife while the children were strapped in their car seats. Pet.App.35a. Later that same morning, he drove to his former mother-in-law's house and shot her in the shoulder, beat her in the face with a lamp, and shot her again in the face, killing her. Pet.App.35a–36a. He then went to his ex-wife's residence and tried to set her boyfriend's truck on fire. He next broke into the house, but left when he became concerned that her boyfriend might have a gun. Pet.App.36a. According to his confession to police, Mammone drove around with the children's bodies "for several hours," *id.*, before deciding to turn himself in. During that time Mammone called a friend and left a voicemail admitting that he had killed his children. Pet.App.

33a. Mammone also called his ex-wife, admitting that he had killed her mother and their children. Pet.App.21a. Police apprehended Mammone later that morning when he stopped at his apartment with his dead children still in the back seat of the car. Pet.App.37a.

After his arrest, Mammone waived his *Miranda* rights and fully confessed to police. The jury would later hear the audiotape of that confession at trial. Pet.App.34a. Forensic evidence, witness testimony, and text messages with his ex-wife and others from the hours before, and immediately after, the murders corroborated key elements of Mammone's confession. Pet.App.37–38a; Pet.App.29a–34a.

The State charged Mammone with three counts of aggravated murder (one for each victim). Pet.App. 28a; Pet.App.255a–58a. Mammone moved for a change of venue, citing pretrial publicity, including in the local newspaper. The main item his counsel highlighted when moving for a change of venue was a published letter Mammone sent to the local newspaper confessing to the crimes. While the trial court was concerned about the letter, the court concluded that the level of pretrial publicity it triggered had not been so pervasive as to require granting the motion without conducting a searching voir dire and attempting to seat a jury. PetApp.40a. The trial court advised Mammone at that time that he was welcome to refile a motion to change venue as the case progressed, but Mammone never did. Pet.App.41a.

At trial, Mammone elected not to present a defense contesting his guilt of the murders, preferring to ask the jury for a penalty other than a death sentence. Pet.App.38a. The jury found Mammone guilty on all counts, including the

aggravating factors that made him eligible for a death sentence. Pet.App.39a. At the sentencing-phase hearing, a psychologist testified on Mammone's behalf, Pet.App.93a–96a, and Mammone gave a five-hour unsworn statement, which "[f]or the most part, . . . amplified his confession statement to police officers[.]" Pet.App.78–79a; *see also* Pet.App.87a–92a. The jury recommended a death sentence for each of the three aggravated murders, which the trial court then imposed. Pet.App.39a.

2. On direct appeal, the Ohio Supreme Court affirmed. Pet.App.28a. Relevant here, Mammone claimed that the trial court deprived him of due process and a fair trial when it denied his motion to transfer venue due to pretrial publicity. Pet.App.39a. He argued that media coverage of the murders so saturated the county in which he was tried that the trial court should have presumed prejudice and transferred venue. His argument focused on a confession letter that he sent to the local newspaper after his arrest, which the newspaper published four months before his trial. Pet.App.40a. His written confession to the newspaper was not admitted at trial. Pet.App.45a n.1.

The Ohio Supreme Court rejected Mammone's argument. It first observed that "'[a] presumption of prejudice'" from pretrial publicity "'attends only the extreme case.'" Pet.App.42a (quoting *Skilling v. United States*, 561 U.S. 358, 381 (2010)). That follows, the Court explained, from the reality that "'pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.'" Pet.App.41a (quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976)).

The Ohio Supreme Court the compared Mammone's case to the lone example of this Court finding presumed prejudice based solely on pretrial publicity. Pet. App.44a (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963)). The Court acknowledged that "the publication of the [confession] letter on the front page" of the newspaper was the "most troublesome" aspect of the pretrial publicity. Pet.App.44a. But it went on to contrast the facts in *Rideau*—repeated television broadcasts of the defendant's 20-minute confession weeks before his trial—with the Canton newspaper's publication more than four months before trial of the written confession that Mammone had sent to the paper. Pet.App.44a–45a. More specifically, the court contrasted "seeing and hearing the confession [on television]" versus reading about it in the paper, compared the fourth-month gap here versus the weeks-long gap in *Rideau*, and distinguished the "roughly one-third of the entire local population" that viewed Rideau's interrogation versus the smaller readership of the newspaper that published the confession. The court noted that only one of the four newspapers that residents of Stark County commonly subscribed to published the letter, and that even that paper had published it only once. Pet.App.45a. At bottom, the Ohio Supreme Court's found that "Mammone failed to establish a level of exposure in Stark County similar to the exposure in *Rideau*." *Id.* As far as other pretrial publicity, the Ohio Supreme Court concluded that "other adverse pretrial publicity and social media" were "insufficient" to trigger a presumption of prejudice, because extensive coverage "would apply to nearly every homicide case," and Mammone pointed to no evidence that the adverse social-media comments he cited were "'representative of the hundreds of thousands

of individuals who [were] eligible to serve as jurors.'" Pet.App.44a n.1 (citation omitted).

3. Mammone next sought federal habeas corpus review. *See* Pet.App.112a, 151a. The District Court denied relief, but granted a certificate of appealability on the pretrial-publicity claim. Pet.App.162a, 167a; Pet.App.252a–53a. Mammone appealed. The Sixth Circuit, viewing the case through AEDPA, affirmed. Pet.App.114a–17a, 140a. The Sixth Circuit first concluded that the Ohio Supreme Court had identified the right precedent, agreeing that cases like *Estes v. Texas*, 381 U.S. 532 (1965) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) did not govern because they involved media disruption of the trial itself, not pretrial publicity alone. Pet.App.116a. The Sixth Circuit detected no AEDPA error in the Ohio Supreme Court's analysis. Rather, the unanimous panel reasoned that, because this Court had "not addressed Mammone's situation, in which a defendant first caused and later protested pretrial publicity," the Ohio Supreme Court was well within the bounds of reasonably applying this Court's cases. Pet. App.117a.

REASONS FOR DENYING THE WRIT

The petition raises merits questions that the Court cannot reach without first resolving AEDPA questions that the petition barely mentions. Plus, the case is a poor vehicle to address presumed prejudice from pretrial publicity because the petition does not challenge the Sixth Circuit's holding refusing to disturb the state court's factual finding of no prejudice; nor does the petition confront the fact that the jury heard a confession much like that aired in pretrial publicity.

I. This case is governed by AEDPA, but the questions presented are not AEDPA questions.

Mammone's petition raises two merit questions about presumed prejudice from pretrial publicity. But this habeas case does not squarely raise those questions. It instead involves whether the Ohio Supreme Court reasonably applied this Court's existing precedent. Because that AEDPA question stands between the Court and the questions presented, Mammone's unwillingness to show how he satisfies AEDPA's standards makes certiorari review inappropriate. Indeed, Mammone all but concedes that he cannot satisfy AEDPA. He asks the Court to fault the Ohio Supreme Court for refusing to extend *Rideau*. He also asks the Court to step in and resolve lower-court disagreement. Both are plainly improper under AEDPA, and show the gap between the questions presented and the questions the Court can address.

A. Because the Sixth Circuit decision correctly applies AEDPA to this case, the Court cannot reach the questions presented.

The Court can only confront the questions presented if it reviews the Ohio Supreme Court's decision *de novo*. And it can only conduct that review after first concluding that the Ohio Supreme Court's holding is "contrary to" or an "unreasonable application of" this Court's precedents. Because the Ohio Supreme Court's holding is neither, the questions presented are beyond the scope of any certiorari review.

1. Recall what AEDPA requires. AEDPA generally bars courts from awarding habeas relief based on claims that state courts already "adjudicated on the merits." 28 U.S.C. §2254(d). In those circumstances, a federal court may grant habeas relief only if the decision adjudicating the claims in question:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§2254(d)(1)–(2).

For any claim a state court adjudicated on the merits, if a petitioner can show that his case falls into one of these two categories, then federal courts may review his claim *de novo*. But few claims will fall into either category. For example, only the most flagrant of legal errors results in a decision that is "contrary to," or involves "an unreasonable application of," "clearly established Federal law." 28 U.S.C. §2254(d)(1). The phrase "clearly established Federal law," within the meaning of §2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In other words, "dicta cannot supply a ground for relief." *Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022).

A state court's decision is "contrary to" this Court's holdings only if: (1) "the state court applie[d] a rule that contradicts the governing law set forth in [this Court's] cases," *Williams*, 529 U.S. at 405; or (2) "the state court confront[ed] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [its] precedent." *Id.* at 406. A state court's decision can be deemed an "unreasonable application" of a Supreme Court holding only if the application is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded

disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). As to any species of legal error, "the more general the rule at issue—and thus the greater the potential for reasoned disagreement among fair-minded judges—the more leeway state courts have in reaching outcomes in case-by-case determinations." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (alterations accepted); *see also Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Section 2254(d)(2) is no easier to satisfy. It allows courts to award habeas relief only in cases in which the record "compel[s] the conclusion that the [state] court had no permissible alternative" but to arrive at the conclusion other than the one it reached. *Rice v. Collins*, 546 U.S. 333, 341 (2006). Thus, Section 2254(d)(2) is not satisfied if "'reasonable minds reviewing the record might disagree' about the finding in question." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (quoting *Rice*, 546 U.S. at 341–42 (alterations accepted)).

2. Now turn to the clearly established law. The United States Constitution guarantees a defendant in a criminal case the right to a fair trial before an impartial jury. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961). But that guarantee does not require that would-be jurors must remain ignorant of a notorious crime. *United States v. Tsarnaev*, 142 S. Ct. 1024, 1034 (2022); *Irvin*, 366 U.S. at 722. Informed citizens generally are aware of notorious crimes in their communities. *Tsarnaev*, 142 U.S. at 1034. To satisfy the impartial-jury guarantee, the trial judge must be satisfied that jurors have "'no bias or prejudice that would prevent them from returning a verdict

according to the law and evidence.'" *Id.* at 1034 (quoting *Connors v. United States*, 158 S. Ct. 408, 413 (1895)).

Prejudice from publicity that invades the guarantee of an impartial jury may be either actual or presumed. This case involves presumed prejudice. Such prejudice—which excuses the defendant from showing actual prejudice—"attends only the extreme case." *Skilling v. United States*, 561 U.S. 358, 381 (2010). It arises only when press coverage "utterly corrupted" the trial. *Murphy v. Florida*, 421 U.S. 794, 798 (1975); *see also Dobbert v. Florida*, 432 U.S. 282, 303 (1977). For example, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Court presumed prejudice from media involvement during trial because the television, radio, and print media had effectively taken over the courtroom, creating "bedlam" and a "carnival atmosphere" during the trial itself, *id.* at 355, 358; *see also Skilling*, 561 U.S. at 382 n.14; *Estes v. Texas*, 381 U.S. 532, 536 (1965). Although the trial itself violated due process, the Court concluded that the "'months [of] virulent publicity about Sheppard and the murder'" before trial did "not alone deny due process." *Skilling*, 561 U.S. at 380 (quoting *Sheppard*, 384 U.S. at 354).

The Court has presumed prejudice based exclusively on pretrial media coverage only once in the 60 years since solidifying the doctrine in *Rideau v. Louisiana*, 373 U.S. 723 (1963). In *Rideau*, the morning after the defendant's arrest for a bank robbery, kidnapping, and murder, law enforcement filmed a 20-minute "interview" between the sheriff and Rideau, during which he admitted to committing those crimes. 373 U.S. at 724. The local television station broadcast this confession on

three consecutive days, with many in the small community having seen and heard it. *Id.* During that interview, which the Court repeatedly enclosed in skeptical quotation marks, Rideau had no access to counsel, and therefore no warning about his right to remain silent. *See id.* at 724 (Rideau was arraigned "some two weeks later" and lawyers were appointed to represent him). Two members of the jury that convicted Rideau were deputy sheriffs of the parish in which he was arrested and tried. *Id.* at 725. Three other members of the jury had acknowledged having seen Rideau's televised interview at least once. *Id.* In all, the Court called the proceedings in that case a "kangaroo court," and drew support from a case involving a coerced confession. *See id.* at 726 (citing *Brown v. Mississippi*, 297 U.S. 278, 285 (1936)).

No case since *Rideau* has added up to the extraordinary circumstances necessary to presume prejudice—circumstances, that is, that prevent the state trial judge from even *attempting* to seat a jury. Among those cases are holdings rejecting presumed prejudice despite: (1) a retrial after a publicized confession had been thrown out for inadequate *Miranda* warnings; (2) a trial where eight of twelve jurors admitted that they had read or heard something about the case before the trial; (3) extensive coverage of a notorious felon's indictment for robbery, murder, and other crimes, including statements he made to the press; (4) substantial media publicity about the defendant's murders and torture of his children; and (5) the nationwide publicity about a large corporation's collapse, in connection with the criminal trial of one of its longtime executives. *Patton v. Yount*, 467 U.S. 1025, 1027 (1984); *Mu'Min v. Virginia*, 500 U.S. 415, 417, 429–30 (1991); *Murphy v. Florida*, 421 U.S. 794, 796, 798–99

(1975); *Dobbert*, 432 U.S. at 303; *Skilling*, 561 U.S. at 367, 381–85. In these many different settings, the Court has yet to find another example of where the lower courts should have presumed jury prejudice from pretrial publicity.

3. These just-discussed principles show why Mammone's petition does not offer the Court a chance to confront the questions presented. Despite six decades of auditions, *Rideau* remains the last holding of this Court finding presumed prejudice from pretrial publicity. But Mammone's questions presented aim to extend and expand that holding, not refine how federal courts grade state courts' application of what *Rideau* held.

Recall that the Ohio Supreme Court adjudicated Mammone's pretrial publicity claim on the merits. So Mammone must show that the Ohio Supreme Court either contradicted or unreasonably applied this Court's precedent, or that it unreasonably determined the facts. Mammone makes no argument about the facts found by the state courts, so he must show the kind of legal error AEDPA contemplates under 28 U.S.C. §2254(d)(1).

The Ohio Supreme Court plainly operated within AEDPA's guardrails. It started by correctly identifying the "governing law," *Williams*, 529 U.S. at 405, when it concluded that *Rideau* was the "most relevant" precedent for its analysis, Pet.App.44a. It did not confront "a set of facts that are materially indistinguishable from a decision of this Court," *Williams*, 529 U.S. at 406, when it reviewed a newspaper confession to a bigger community against a record of careful voir dire (which revealed dozens of jurors who knew nothing of the case) rather than, as in *Rideau*, a

television broadcast of a suspect's uncounseled confession beamed into the homes of one-third the entire population of the jurisdiction. Pet.App.45a–46a. Finally, the Ohio Supreme Court's holding cannot be fairly described as an obvious error "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. The Ohio Supreme Court drew on an en banc Sixth Circuit decision, and even Mammone concedes that the Ohio Supreme Court's decision aligns with how the Fourth Circuit has treated defendant-generated publicity. *See* Pet.App.45a; Pet.15–16.

As AEDPA directs, the Ohio Supreme Court had wide leeway in applying *Rideau's* very general rule that some especially egregious pretrial publicity requires a court to presume juror prejudice. *See Renico*, 559 U.S. at 776. As *Skilling* recognizes, juror prejudice from publicity arises in "diverse settings." 561 U.S. at 379. Those diverse settings give state court's wide berth to determine whether the facts before them meet the high threshold for presumed prejudice. The facts before the Ohio Supreme Court looked nothing like *Rideau*. The careful jury selection here resembling nothing of the "kangaroo court" described in *Rideau*. 373 U.S. at 726. No potential juror saw Mammone personally confess "in detail to the crimes with which he was later to be charged." *Id.* And no juror witnessed the police interrogate an uncounseled Mammone while he was "flanked" by law-enforcement officers. *Id.* at 725. Press coverage of Mammone's confession, in short, did not render his trial a "'hollow formality'" in which prejudice from the publicity must be presumed. *Id.* at 726.

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Because the Ohio Supreme Court operated well within AEDPA's deference-conferring mandate, any questions about what this Court's precedents mean on direct or *de novo* review are not squarely before the Court. Mammone wants the Court to make new law; he does not ask the Court merely to apply what *Rideau* mandates. Certiorari is not appropriate.

B. The Petition's arguments for certiorari *confirm* that AEDPA blocks review of the *de novo* issues in the questions presented.

Many of Mammone's arguments for review actually confirm that AEDPA stands as an immovable barrier to reviewing the questions presented. For starters, Mammone asks this Court to fault the Ohio Supreme Court for "unreasonably refus[ing] to extend *Rideau* and *Skilling* to a new context where it should apply." Pet.26. Mammone also argues that this Court's review is "necessary" because courts "around the country diverge" as to some of the issues he raises. Pet.25. Both of those requests are improper under AEDPA.

1. Mammone criticizes the Ohio Supreme Court for "unreasonably refus[ing] to extend" the holding in *Rideau* and *Skilling*. Pet.26 (quotation omitted). For starters, *Skilling* affords Mammone no foundation to show unreasonable application as its only holding is that the publicity there involved no presumed prejudice. 561 U.S. at 381–85. As for a refusal to "extend" Rideau, Mammone asks for something that AEDPA does not allow: refusing to extend this Court's precedent does not count as an "unreasonable application" of precedent. *White v. Woodall*, 572 U.S. 415, 426 (2014). AEDPA does not "license" federal courts to "treat the failure to" extend this Court's cases "as error." *Id.* That is, federal courts may not "use an AEDPA case as

an opportunity to pass on the wisdom of extending precedents in new ways." *Brown*, 142 S. Ct. at 1530.

Other parts of Mammone's petition confirm what he says explicitly at its end—this Court should review the Ohio Supreme Court's refusal to "extend" precedent about presumed prejudice from pretrial publicity. For example, Mammone slights the Ohio Supreme Court for distinguishing his print confession from Rideau's televised confession. Pet.18–19. But Mammone's rule would extend *Rideau*. The distinction of print and TV flows directly from *Rideau*, which recoiled at a thrice broadcast "trial" in which nearly one third of the jurisdiction "saw" Rideau confess. 373 U.S. at 724, 726.

In another place, Mammone criticizes the Ohio Supreme Court for factoring in Mammone as the source of the key piece of pretrial publicity. Pet.14–15. Recall that he sent his confession to a local newspaper. Again, Mammone's rule would extend, not apply, *Rideau*. The *Rideau* majority, explained that "no one has suggested that it was Rideau's idea" to televise his interrogation. 373 U.S. at 723. In other words, if it had been Rideau's idea, the case might have come out another way.

2. Mammone makes a second argument that confirms his petition is at war with AEDPA. As a reason for review, he observes that "courts around the country diverge" about how to answer at least some of his questions presented, and urges this Court to take this case to "bring these decisions in line with this Court's precedent." Pet.15, 25. But acknowledging that the lower courts have taken different approaches in applying *Rideau* effectively concedes that "fairminded jurists" can disagree, and

have disagreed, about the meaning of this Court's precedent. *White*, 572 U.S. at 422 n.3; *see also Carey v. Musladin,* 549 U.S. 70, 76 (2006). That puts a full-stop on this Court's ability to review the questions presented, which take no account of AEDPA. *See, e.g.*, *Harrington*, 562 U.S. at 103.

Less explicitly, another part of the Petition reveals its tension with AEDPA's governing standards. Mammone claims that the Ohio Supreme Court broke from this Court's established precedent when it confirmed its no-prejudice finding by citing the trial judge's careful voir-dire procedures. Pet.16–18. But *Rideau* establishes no such rule. As the later *Skilling* decision explains, this Court has not yet resolved whether voir dire is available to rebut any prejudice initially presumed from media coverage. 561 U.S. at 385 n.18. When the Court's cases leave a question "open," AEDPA prevents a federal court from reviewing a state court's decision reasonably filling in that gap. *See White*, 572 U.S. at 421. What is more, lower courts are not of one mind about whether courts may look to the voir dire transcript when assessing presumed prejudice. *Compare*, *e.g., Coleman v. Kemp*, 778 F.2d 1487, 1541 n.25 (11th Cir. 1985), *with Foley v. Parker*, 488 F.3d 377, 387 (6th Cir. 2007). Any disagreement in the lower courts, of course, shows that AEDPA controls this case, and that the de-novo review the questions presented require is not available. *See White*, 572 U.S. at 422 n.3

II. The Petition contains other barriers that counsel against granting review.

Other problems infect Mammone's petition. For starters, the petition rests on the idea that the Ohio Supreme Court used illegitimate factors and bright-line rules

to reject his presumed-prejudice claim. Pet.ii. But the Ohio Supreme Court did not treat any factor as dispositive or as a bright-line-rule. It instead considered several "factors" that distinguished *Rideau*. Pet.App.45a. The mismatch between what Mammone claims and what the Ohio Supreme Court actually did cuts against certiorari review. *Cf. City & Cnty. of San Francisco, Calif. v. Sheehan,* 575 U.S. 600, 609 (2015) (dismissing question presented for mismatch between cert-stage and merit-stage brief).

Second, Mammone never challenges the Sixth Circuit's decision to credit the Ohio court's factual findings about the juror's credibility and impartiality. *See* Pet.App.117a. Indeed, Mammone never even cites the relevant AEDPA provisions that deal with state-court factfinding. *See* 28 U.S.C. §§2254(d)(2), (e)(1). Because Mammone does not challenge the facts that undermine his claim for presumed prejudice, this is a poor case to evaluate the rules for showing presumed prejudice. *Cf. Gamache v. California,* 562 U.S. 1083, 1084–85 (2010) (Sotomayor, J., respecting denial of certiorari) (review not warranted if answering the question presented will not change the outcome). Because granting Mammone relief would require this Court to contravene the state-court factual finding of no prejudice, and because Mammone makes no argument challenging that fact-finding, his petition is a poor vehicle to consider any questions about presumed prejudice.

Finally, Mammone's prejudice analysis overlooks and entirely fails to grapple with the confessions that the jury did hear during his trial. The jurors heard a sound recording of him confessing to police shortly after his arrest that he committed the

murders. Pet.App.45a, n.2; *see also* Pet.App.34a–37a. The jury also heard the phone message Mammone left a friend the morning of the murder, in which he also confessed to killing his children. Pet.App.33a. And the jurors heard his "five-hour unsworn statement" during which "he confessed in great detail as part of the mitigation phase of the trial." Pet.App.45a, n.2; *see also* Pet.App.78a. In light of what the jury heard, it makes little sense to ponder the contours of presumed prejudice that the record so directly rebuts.

III. Mammone's other arguments for review fall short.

As explained above, the questions presented are not really presented because they ask direct-review questions in a case that all agree AEDPA governs. The balance of the petition—which is almost exclusively a merits argument—fares no better in making a pitch for certiorari.

Mammone puts great weight on *Rideau*'s statement that, under the circumstances there, "the question of who originally initiated the idea of a televised interview is, in any event, a basically irrelevant detail." 373 U.S. at 726; *see* Pet.15–16. But that statement does not prohibit considering as one factor in the totality-of-the-circumstances analysis a defendant's role in creating the publicity of which he complains. Instead, it must be read in the context of the Court's concern that the repeatedly broadcast interrogation would appear to the television audience as a "trial." *See Rideau*, 373 U.S. at 726–27. The Court's additional comment that "no one has suggested that it was Rideau's idea, or even that he was aware of what was going on when the sound film was being made," *id.* at 725, suggests the opposite of what

Mammone claims; it suggests that under a different set of facts, the defendant's participation in creating the publicity may *not* be "irrelevant."

Mammone's is on no stronger footing when he contends that the Ohio Supreme Court contravened *Rideau* by considering the voir dire transcript. Pet.16–18. *Rideau* simply explained that there was no need in that case to "paus[e] to examine a particularized transcript of the voir dire examination," 373 U.S. at 727, in light of the defendant's televised interrogation (before he was afforded counsel), which many people in that community saw. *Rideau* did not *forbid* a court faced with a claim of prejudicial pretrial publicity from examining the *voir dire* transcript when considering whether pretrial publicity presumptively prejudiced the jury pool. *Cf. Sheppard*, 384 U.S. at 354 n.9 (commenting on the voir dire examination). Nor does *Skilling* hold that reviewing a *voir dire* transcript is out of bounds for a presumptive prejudice claim. *See* 561 U.S. at 384 ("[H]indsight shows the efficacy of [the extensive screening questionnaire and follow up *voir dire*].")

Mammone's observations about the record, Pet.21–23, do not rebut the Ohio Supreme Court's observation that the articles and comments he complains of were posted four months before the trial, Pet.App.45. While the news articles and any comments remained available online, that falls short of showing that potential jurors looked at them months after the fact. And the Ohio Supreme Court's determination that his generalized claims about pretrial publicity were "insufficient to trigger a presumption of prejudice," Pet.App.44a n.1, belies Mammone's assertion that the courts failed to consider the pretrial publicity as a whole, Pet.21.

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In the end, Mammone argues that his trial should be presumed unfair because the potential jurors were well aware of the murder charges against him. But that is insufficient under *Rideau*. "One who is reasonably suspected of murdering his children cannot expect to remain anonymous." *Dobbert*, 432 U.S. at 303.

CONCLUSION

The Court should deny Mammone's petition for a writ of certiorari.

Respectfully submitted,

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