No. 24-421

In the Supreme Court of the United States

CYNTHIA DAVIS, WARDEN,

Petitioner,

v.

DAVID M. SMITH,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
Ohio Solicitor General
**Counsel of Record*
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Petitioner
Cynthia Davis, Warden

QUESTION PRESENTED

The Due Process Clause requires exclusion of police-initiated eyewitness identification testimony in exceedingly rare cases. Exclusion of such evidence, the Court has said, is required only if the testimony poses "a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (citation omitted). This Court has done so only once, 55 years ago. *See Sexton v. Beaudreaux*, 585 U.S. 961, 966 (2018) (citing *Foster v. California,* 394 U.S. 440 (1969)). In this AEDPA-governed case, a majority of a Sixth Circuit panel concluded that the Constitution barred testimony from a victim of attempted murder identifying her attacker. The panel held that Ohio courts unreasonably applied this Court's precedent, which mandates a totality-of-the-circumstances look at reliability, even though: the victim knew the attacker; had texted with the attacker 80-plus times in the day leading up to the attack; and was expecting the attacker to arrive at her house when he did.

The Question Presented is: Did the Sixth Circuit exceed its powers under AEDPA in concluding that "*every* fairminded jurist would agree" that the Ohio court violated the Constitution? *Brown v. Davenport*, 596 U.S. 118, 136 (2022).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

REPLY

This Court need not correct every lower-court judgment misapplying AEDPA's federalism-reinforcing strictures, but it should correct this one because the judgment (1) expands this Court's precedent (which AEDPA forbids), (2) is only the most recent example of the Sixth Circuit flouting AEDPA, and (3) may set an attempted murderer loose on Ohio's streets. Try as he might, Smith cannot memory-hole the Sixth Circuit's judgment. This Court should summarily reverse or grant plenary review to remind the circuit courts that AEDPA erects real roadblocks to federal courts undoing state-court convictions.

As the Petition explained, the reasons to review here are many, including the classic AEDPA errors highlighted in Judge Thapar's dissent.

Those reasons start with the Sixth Circuit believing it should vacate the jury verdict because the investigation involved "immensely suggestive" police conduct when interviewing the victim. Pet. App. 28a. This Court's precedent points the other way. This Court's cases *permit* eyewitness testimony despite police misconduct, so long as the testimony is reliable in the light of all the circumstances. *See Manson v. Brathwaite*, 432 U.S. 98, 109, 112–13 (1977); *accord Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). So under AEDPA, the Sixth Circuit had no power to erase the state-court conviction.

The Sixth Circuit only reached its precedent-inverting result by repeating AEDPA errors this Court has corrected before. Despite the dissent flagging each of these, the Sixth Circuit upended the state-court conviction only by (1) invoking AEDPA in name, not substance, (2) flyspecking the state-court opinion,

not its bottom-line judgment, and (3) mining its own precedent for support instead of applying this Court's established holdings. Pet. App. 23a, 29a, 24a.

This Court may not review every circuit error in applying AEDPA, but it should reverse this textbook example of a circuit court venturing beyond AEDPA's limits.

I. The Sixth Circuit treated police misconduct as dispositive in conflict with this Court's precedent.

Smith begins (at 3) by wrongly faulting Ohio for not discussing the police conduct in interviewing the victim here. The Petition does not linger on that conduct because it is irrelevant. The Ohio appeals court held that the police behavior "was impermissibly suggestive and unnecessary," *State v. Smith*, 2018-Ohio-4799, ¶37 (Ohio Ct. App.), and Ohio does not make an issue of that conclusion in this Court. Instead, the Petition focuses, as this Court's cases instruct, on whether the victim's testimony here is reliable "*notwithstanding* improper police conduct." *Perry*, 565 U.S. at 241. In the end, Smith's opposition supports review because it repeats one of the Sixth Circuit's errors. Smith, like the Circuit, elevates police misconduct to dispositive importance even though this Court's cases teach that eyewitness testimony tainted by police misconduct might still be admissible under the Due Process Clause. *See id.* at 232; *Manson*, 432 U.S. at 109, 112–13.

Smith doubles down (at 13–15) on his argument that the police conduct here is a reason to deny review, which again elides that neither the state court nor Ohio contest the holding of police misconduct. Smith recounts the investigative techniques that led the

state appellate court to call the interrogation "impermissibly suggestive and unnecessary." *Smith*, 2018-Ohio-4799 at ¶37. Smith thinks that makes this an unsuitable vehicle to address the Question Presented. That is wrong on two dimensions. First, the Question presented asks whether the Sixth Circuit followed AEDPA's commands, not whether the Court should modify the law about excluding eyewitness testimony. Second, even if the Court were to wade into the latter, the best case to do so is one in which misconduct is uncontested. When the misconduct is not contested, the sole focus would be on whether other evidence of reliability can cure even misconduct the federal court thought "immensely suggestive." Pet. App. 28a. The best way to craft a rule is with an easy case, not an edge case. And this is not an edge case.

Smith also endeavors (at 19) to rescue the Sixth Circuit's judgment with a strawman argument—about strawmen. Smith charges Ohio with making a strawman argument that the Sixth Circuit's judgment rests on that court's frustration with police misconduct. Smith erects the real strawman here. The Petition does not charge the Sixth Circuit with improperly *considering* the police conduct; it charges the Sixth Circuit with inappropriately *focusing* on police misconduct. Pet. 14. That focus is wrong, the Petition detailed, because reliability, not misconduct, is the touchstone for exclusion. The Petition never shies away from stating the right test: a court should weigh the effect of police misconduct on reliability against other indicia of reliability. *Id*. at 15.

Smith's further critique (at 12–13) that the Petition implicates no circuit split brushes off the many cases in which this Court has corrected circuit court judgments mishandling AEDPA review. *See, e.g*

Shinn v. Kayer, 592 U.S. 111 (2020) (per curiam); *Shoop v. Hill*, 586 U.S. 45 (2019) (per curiam); *Sexton v. Beaudreaux*, 585 U.S. 961 (2018) (per curiam); *Jenkins v. Hutton*, 582 U.S. 280 (2017) (per curiam); *Kernan v. Cuero*, 583 U.S. 1 (2017) (per curiam). Those case (and many more) show that when a circuit court misapplies AEDPA to invalidate a state-court conviction, the circuit decides "an important federal question in a way that conflicts with" this Court's decisions. S. Ct. R. 10(c).

II. The Sixth Circuit failed to engage with evidence showing that the eyewitness testimony was reliable.

Smith spends several pages (at 16–23) defending the Sixth Circuit's judgment, but repeats the circuit court's mistakes. To Smith, the Sixth Circuit's judgment follows "*a fortiorari*" from this Court's holding in *Foster v. California*, 394 U.S. 440 (1969). BIO at 17. But that assertion whistles past the difference between eyewitness cases identifying acquaintances and those identifying strangers. Nothing in *Foster* suggests the witness knew the robber. *See* 394 U.S. at 441–44. And insisting that a case about strangers "clearly establish[es]" the rule for acquaintances badly misunderstands AEDPA. *See* 28 U.S.C. §2254(d)(1). Instead, because this Court's cases have not yet "taken [the] step" to apply the rule about stranger witnesses to acquaintance witnesses, an AEDPA case is not the "time to consider" that new application. *White v. Woodall*, 572 U.S. 415, 427 (2014).

Smith further tries (at 19–20) to shore up the Sixth Circuit's holding by overreading one line in *Manson* as prohibiting courts from looking to evidence of reliability outside the witness's knowledge. To be sure,

Manson noted that evidence of that kind played "no part" in its analysis. *Manson*, 432 U.S. at 116. But that aside does not clearly establish that courts should blind themselves to evidence of reliability even though that evidence is not known to the eyewitness. *Manson* cannot be read as establishing a rule that such evidence may *not* factor into reliability. This Court has never said that the "totality of the circumstances," *id.* at 110, to be weighed against any effect of police misconduct must *exclude* anything supporting reliability if the eyewitness did not know about it. It is no surprise, then, that lower courts routinely consider what Smith calls "other evidence," BIO at 19, when testing eyewitness reliability. *See, e.g.*, *United States v. Lau*, 828 F.2d 871, 875 (1st Cir. 1987) (Breyer, J.) (considering defendant's proximity to site of drug transaction); *United States v. Rogers*, 73 F.3d 774, 778 (8th Cir. 1996) (considering other eyewitness identifications); *U.S. ex rel. Kosik v. Napoli*, 814 F.2d 1151, 1161 (7th Cir. 1987) (considering corroborating testimony); *accord United States v. Reid*, 517 F.2d 953, 967 (2d Cir. 1975) (Friendly, J.) ("other evidence connecting a defendant with the crime may be considered on the issue whether there was a substantial likelihood of misidentification"); *cf. United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996); *United States v. Bell*, 812 F.2d 188, 193 (5th Cir. 1987).

Smith rounds out (at 20–23) his misguided defense of the Sixth Circuit's judgment when he papers over the Sixth Circuit's scant attention to Smith and Tolliver's relationship. Smith contends that there is "no basis" in this Court's precedent to account for the eyewitness and the defendant knowing each other. BIO at 22. That gets AEDPA exactly backward. All this Court's cases about excluding eyewitness

identification involved strangers. The precedent thus includes no "clearly established" law about acquaintances. The relevant federal law is a cipher on this point. So under AEDPA a state court *cannot* misapply federal law by accounting for any witness-defendant familiarity. It is no defense of the Sixth Circuit to hold up what is perhaps its most significant mishandling of AEDPA's demands. *See Woodall*, 572 U.S. at 427.

In places, Smith tries to rehabilitate the Sixth Circuit's judgment by saying that it deferred to the "factual findings of the state courts." BIO at 2, 3, 11. That is an odd way to describe an opinion that never mentions a fact the Ohio trial court featured—that Smith and Tolliver called and texted 80-plus times in the 24 hours before the attempt on Tolliver's life. *See Smith*, 2018-Ohio-4799 at ¶16 (quoting trial court). Indeed, when discussing whether Tolliver's eyewitness identification was reliable, the Sixth Circuit did not even mention Smith and Toliver's familiarity with each other until the very end of its review of the *Neil v. Biggers*, 409 U.S. 188 (1972) factors. Pet. App. 23a–24a. That is a strange way to defer to a finding the state court thought signaled a "strong showing of reliability." *Smith*, 2018-Ohio-4799 at ¶47 (quotation omitted).

Smith closes out his brief with tepid defenses of how the Sixth Circuit's handled AEDPA's requirements.

To the charge (Pet. 16–17) that the Sixth Circuit invoked AEDPA in name only, Smith simply repeats that court's statements of the AEDPA standard. BIO at 24. Smith has no answer for the Petition's charge that the Sixth Circuit opinion would read identically

under de novo review. *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011).

As for the charge (Pet. 18–20) that the Sixth Circuit trained its fire on thoroughness of state-court opinion, not its bottom line, Smith dodges the core problem. The Sixth Circuit faulted the Ohio appeals court for "fail[ing] to salvage the trial court's erroneous reasoning." Pet. App. 29a. The Sixth Circuit looked at an easier target, which blinded it to an Ohio appellate opinion that cited all of this Court's key cases.

Finally, as to the Petition's concern that the Sixth Circuit improperly cited its own precedent (Pet. 20–21), Smith is silent. That should sound an alarm that the Sixth Circuit's judgment does not hew to AEDPA's requirements. *See, e.g.*, *Kernan*, 583 U.S. at 8; *White v. Wheeler,* 577 U.S. 73, 81 (2015) (per curiam) (collecting Sixth Circuit reversals).

*

Ohio and the victim here—Quortney Tolliver—deserve better from the Sixth Circuit. This Court can remind that Court that AEDPA has real bite. That lesson, which this Court taught almost every term in the recent past, seems to have faded from memory for some Sixth Circuit panels.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse, or in the alternative, set the case for plenary review.

Respectfully submitted,

DAVE YOST
Ohio Attorney General

T. ELLIOT GAISER*
Ohio Solicitor General
*Counsel of Record
MICHAEL J. HENDERSHOT
Chief Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
thomas.gaiser@ohioago.gov

Counsel for Petitioner
Cynthia Davis, Warden

NOVEMBER 2024