No. _____

IN THE
Supreme Court of the United States

PATRICK D. REED,

Petitioner,

v.

HAROLD MAY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Confrontation Clause prohibits trial testimony that relays an absent declarant's out-of-court "inculpating statements." *Crawford* v. *Washington*, 541 U.S. 36, 65 (2004). When the prosecution asserts that an inculpating statement is being used for a purpose other than its truth and the trial court issues a limiting instruction, the statement remains barred by the Confrontation Clause unless its admission is necessary to the trial's "truth-seeking function" and there are "no alternatives" to using the inculpating statement. *Tennessee* v. *Street*, 471 U.S. 409, 415-17 (1985).

Petitioner Patrick Reed was convicted of drug-possession charges in state court. At trial, a police officer testified that a confidential informant said that "Mr. Reed concealed narcotics" on the roof of a six-person residence. Mr. Reed never had the chance to confront the informant who accused him of committing a crime. But the prosecution asserted that the inculpatory statement was being used to explain the course of the officer's investigation to the jury, and the trial court issued a limiting instruction to that effect—even though a non-incriminating statement would have equally explained the course of the officer's investigation. A divided Sixth Circuit panel denied Mr. Reed's petition for a writ of habeas corpus.

The question presented is:

Whether, as three circuits hold in conflict with the Sixth Circuit, clearly established law prohibits an officer's testimony about an absent declarant's expressly incriminating statements for the asserted reason of providing background context about an investigation.

PARTIES TO THE PROCEEDING

1. Petitioner Patrick D. Reed was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Harold May, in his official capacity, was the defendant in the district court and the appellee in the court of appeals.

2. Petitioner is an individual.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), the following proceedings are directly related to this case:

- *State* v. *Reed*, No. 2016-CR-0224 (Ohio Ct. Com. Pl.) (judgment entered Mar. 13, 2018).
- *State* v. *Reed*, Nos. E-18-017, E-18-018 (Ohio Ct. App.) (judgment entered Jan. 17, 2020).
- *State* v. *Reed*, No. 2020-0359 (Ohio) (appeal not accepted Aug. 18, 2020).
- *Reed* v. *Wainwright*, No. 3:21-cv-799 (N.D. Ohio) (judgment entered July 25, 2023).
- *Reed* v. *May*, No. 23-3686 (6th Cir.) (judgment entered Apr. 11, 2025).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick D. Reed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's April 11, 2025, opinion is available at 134 F.4th 455. App. 1a-34a. The district court's order denying a writ of habeas corpus is unpublished but available at 2023 WL 4744288. App. 35a-48a. The magistrate judge's report and recommendation is unpublished but available at 2023 WL 3727318. App. 49a-88a. The Ohio Supreme Court's order declining to accept the appeal is unpublished but available at 150 N.E.3d 958 (table). App. 117a. The Ohio Court of Appeal's opinion is unpublished but available at 2020 WL 261697. App. 89a-116a.

JURISDICTION

The Sixth Circuit issued its judgment on April 11, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The federal habeas statute, 28 U.S.C. § 2254(d)(1), provides in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

INTRODUCTION

This case presents a question of far-reaching legal and practical significance that has divided the lower courts: Whether, under clearly established law applying the Confrontation Clause, testifying police officers purporting to provide background context about the course of their investigation can relay expressly incriminating out-of-court statements from an absent declarant.

The State of Ohio's prosecution of drug charges against petitioner Patrick Reed delivered a one-two punch of such incriminating statements. Its opening statement previewed that a detective had information that Mr. Reed "hides his drugs outside in the gutters of his house." App. 15a. The detective then testified that a confidential informant told police that "Mr. Reed concealed narcotics" on the roof of that house. App. 140a. But Mr. Reed never had the chance to exercise his Sixth Amendment right to confront the informant who accused him of possessing the narcotics for which he was convicted. Nevertheless, the trial court admitted the statement and told the jury to consider the statement as background context to "explain what the officer did during the investigation"—*i.e.*, why the police's search included the roof. App. 109a.

In conflict with three other circuits, a divided Sixth Circuit held that admitting the detective's testimony did not violate clearly established Confrontation Clause law. The court reached that decision by misapprehending two controlling legal principles from this Court's Sixth Amendment precedent. First, the Confrontation Clause generally prohibits testimony that relays an absent declarant's out-of-court "inculpating statements." *Crawford* v. *Washington*, 541 U.S. 36, 65 (2004). Second,

if the prosecution asserts that an inculpating statement is being used for something other than its truth and the trial court issues a limiting instruction, the statement remains barred by the Confrontation Clause unless it is necessary to the "truth-seeking function" of a trial and "no alternatives" are available. *Tennessee* v. *Street*, 471 U.S. 409, 415-17 (1985). Here, the confidential informant's statement was inculpating: It expressly accused Mr. Reed of possessing drugs. That statement was not necessary to the truth-seeking function of a trial: Mr. Reed never questioned why the police searched the roof. And there were available alternatives to provide background context on the course of the police's investigation: The detective could have testified that an anonymous informant told the police that *someone* concealed narcotics on the roof, which would have explained why police searched the roof without incriminating Mr. Reed. Under clearly established law, Mr. Reed's Confrontation Clause rights were violated, and he was entitled to habeas relief under 28 U.S.C. § 2254(d)(1).

As the dissent below observed, the panel decision not only conflicts with this Court's precedent but also "creates a circuit split." App. 15a (Stranch, J., dissenting). The Fifth and Seventh Circuits granted habeas relief where, as here, a police officer's testimony relayed incriminating out-of-court statements by confidential informants and the prosecution asserted that the statements were providing only background context on the police investigation. *Taylor* v. *Cain*, 545 F.3d 327, 335-36 (5th Cir. 2008); *Jones* v. *Basinger*, 635 F.3d 1030, 1044 (7th Cir. 2011). And the Second Circuit granted habeas relief where, as here, a police officer's testimony relayed

incriminating out-of-court statements and the state court issued a limiting instruction telling the jury to consider the statements only for background context. *Orlando* v. *Nassau Cnty. Dist. Attorney's Off.*, 915 F.3d 113, 126 (2d Cir. 2019).

The ramifications of this entrenched split extend far beyond Mr. Reed. The Confrontation Clause secures criminal defendants' right to test the veracity of statements accusing them of a crime. Prosecutors using course-of-investigation testimony to "[b]ackdoor[ ] highly inculpatory" testimony is a "recurring" problem that threatens this cherished constitutional right. *United States* v. *Sharp*, 6 F.4th 573, 582 (5th Cir. 2021). If the Sixth Circuit's decision is left standing, state prosecutors will be free to introduce expressly inculpating out-of-court statements from absent declarants under the guise of providing background context on the course of an investigation—even when the defendant doesn't question the propriety of that investigation, and even when non-incriminating statements would equally explain the investigation. As Judge Easterbrook has cautioned, "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule." *United States* v. *Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004). Confirming the Confrontation Clause's scope would ensure consistent, uniform outcomes for state-court criminal defendants across the country who are most in need of the Sixth Amendment's protections.

This Court should grant the petition and reverse the Sixth Circuit.

STATEMENT OF THE CASE

1. In 2016, officers executed a search warrant at a residence in Ohio. App. 94a. At least six people lived in that residence. App. 100a. Patrick Reed was not present at the time of the search; instead, he was staying at a motel. App. 94a. While officers were searching the residence, they found a receipt for that motel. *Ibid.* The officers went to the motel and brought Mr. Reed back to the residence to continue the search. App. 95a.

Based on a confidential informant's tip that Mr. Reed hid drugs in a green bean can in a gutter on the roof, the officers searched the gutter and found narcotics. App. 109a. This confidential informant's testimony was the only direct evidence that linked these narcotics to Mr. Reed. See App. 112a. For example, "there was no scientific evidence to confirm" that Mr. Reed had "physically handled any of the items seized during the . . . execution of the search warrant." App. 97a. And one witness testified that she lived at the residence with five others, and that although Mr. Reed "came through," he "did not live there." App. 100a. Otherwise, the prosecution had only "circumstantial" evidence that did not point to Mr. Reed specifically, such as a digital scale in the kitchen and another in a bedroom. App. 95a; see App. 30a (Stranch, J., dissenting).

Mr. Reed was indicted on seven counts, four of which were related to the drugs found on the roof. App. 52a. Mr. Reed was tried in January 2018. App. 56a.[1]

[1] Mr. Reed's trial also included charges from a second, earlier indictment. The facts underlying that indictment are not relevant to this petition.

2. During Mr. Reed's trial, the prosecution presented testimony that a confidential informant had provided a tip expressly incriminating Mr. Reed in the alleged possession of drugs on the roof. App. 109a. Yet the confidential informant was never called to testify, and Mr. Reed did not get an opportunity to confront that individual through cross-examination. See App. 107a.

The prosecution first previewed the informant's incriminating assertion in its opening statement, telling the jury that the police "had information that *the defendant* hides his drugs outside in the gutters of his house." App. 15a (emphasis added). Then, during its case-in-chief, the prosecution called Detective Brotherton of the local police department to testify. App. 55a, 139a. On direct examination, the prosecution asked Detective Brotherton about his search of the roof: "Could you explain . . . why you looked on the roof and what—how did you get there?" App. 139a. Over Mr. Reed's objection, Detective Brotherton detailed that "[w]e had information . . . from a confidential source that *Mr. Reed* concealed narcotics in several different locations," one of which "may be in the gutter" because Mr. Reed had "recently been robbed for narcotics." App. 140a (emphasis added). The trial judge then told the jury that "you're not to interpret that to mean . . . what's asserted is the truth, but you're only to weigh that in conjunction with why this officer did what he did in his investigation." App. 140a-141a.

The jury convicted Mr. Reed on all counts. App. 3a. The state court sentenced him (for both indictments) to a total of 27 years and three months of incarceration. App. 62a. Of that sentence, 13 years were for the four counts related to the drugs

found on the roof, which Mr. Reed is serving consecutively to the sentences on his other counts. App. 126a-134a.

3. Mr. Reed appealed his conviction to the Ohio Court of Appeals. See App. 89a. As relevant here, Mr. Reed argued that the admission of Detective Brotherton's testimony about the confidential informant's out-of-court tip violated the Confrontation Clause. App. 107a. The court rejected that argument based on the "[p]resum[ption] that the jury followed the court's instructions" to consider the testimony "only to explain what the officer did during the investigation." App. 109a. The Ohio Supreme Court declined to accept Mr. Reed's appeal without opinion. App. 117a.

4. Mr. Reed timely filed a habeas corpus petition, seeking relief under the Antiterrorism and Effective Death Penalty Act ("AEDPA") because the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Mr. Reed raised, among other claims, a violation of his rights under the Confrontation Clause. App. 49a. A magistrate judge denied the habeas petition, although it acknowledged that "the Ohio Court of Appeals' rejection of Reed's . . . claim was arguably based on flawed reasoning." App. 77a. The district court agreed, denied Mr. Reed habeas relief, and granted a certificate of appealability. App. 35a-36a, 47a-48a.

5. A divided Sixth Circuit panel affirmed.

The majority concluded that there was no Confrontation Clause violation under clearly established federal law. App. 2a, 6a. The majority opinion accepted at

face value that the statements at issue were "not hearsay" because they were "admitted to explain *why* the police searched the roof." App. 6a. And the majority reasoned that there was no Supreme Court case specifically establishing that inculpating course-of-the-investigation testimony was "an illegitimate non-hearsay purpose under the Confrontation Clause." App. 7a. The majority held that the Supreme Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), was distinguishable because it involved statements admitted under a "hearsay exception," not "non-hearsay statements." App. 8a. The majority then turned to this Court's decision in *Tennessee* v. *Street*, 471 U.S. 409 (1985), which it found supported the Ohio courts' decision because it involved nonhearsay testimony. App. 9a. And although this Court recently held that "[g]eneral legal principles can constitute clearly established law for purposes of AEDPA," *Andrew* v. *White*, 145 S. Ct. 75, 81-82 (2025), the panel majority concluded that the "general" principles from this Court's cases gave the state court freedom to admit the incriminating anonymous tip, without any indication that a state court could ever cross the line from reasonable to unreasonable in this context, App. 11a.

Judge Stranch dissented, explaining that the majority's decision (1) "allows state courts to adopt an unreasonable interpretation of the Supreme Court's Confrontation Clause jurisprudence," (2) "ignores several key constitutional precedents," and (3) "creates a circuit split where none need exist." App. 15a.

According to Judge Stranch, the majority "blatantly overlook[ed] the fact that the Supreme Court has established rules governing when a particular statement

which could be incriminating if taken for its truth may, nonetheless, be admitted for an alternative purpose." App. 18a-19a. Elaborating on *Street*, the dissent explained that the "key" to whether testimony that would otherwise violate the Confrontation Clause may be offered is whether it has a "legitimate, distinctive, and limited purpose" other than the truth of the matter asserted. App. 19a.

Judge Stranch then concluded that the state courts acted contrary to this clearly established law when they presumed that the jury followed the court's instructions without inquiring into whether there was a separate legitimate, distinctive, and limited purpose for the evidence. App. 20a-21a. She also concluded that the Ohio courts unreasonably applied this clearly established law. App. 21a. Exact "factual symmetry" between a case from this Court and the state-court case "is not a requirement," and state courts act unreasonably if they refuse to apply a clearly established rule "to a novel factual pattern." App. 22a. And that is what happened here: "[T]he unreasonable nature of the Ohio court's decision is clear" because it assumes that state courts can "admit any evidence of a police investigation provided the State alleges that it is offering the testimony only to explain that investigation." App. 25a. Under that theory, "almost every piece of relevant testimonial hearsay" would be "admissible." *Ibid.*

In short, the dissent agreed with several "sister circuits that it is unreasonable under" this Court's precedent "for a state court to hold that the admission of an out-of-court accusation does not violate the Confrontation Clause simply because the

prosecution asserted the evidence would explain the course of the investigation." App. 26a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision creates a circuit split. The Seventh, Fifth, and Second Circuits have recognized that under clearly established law, the prosecution may not solicit inculpating out-of-court statements to provide background context unless the inculpating statements are necessary for the jury to understand a disputed issue in the trial. See, e.g., *Jones* v. *Basinger*, 635 F.3d 1030, 1046 (7th Cir. 2011); *Taylor* v. *Cain*, 545 F.3d 327, 335-36 (5th Cir. 2008); *Orlando* v. *Nassau Cnty. Dist. Attorney's Off.*, 915 F.3d 113 (2d Cir. 2019). The Sixth Circuit forged its own path. It held that clearly established law does not prohibit a prosecutor from introducing, through a detective's testimony, incriminating out-of-court statements if those statements "show why the police took certain actions." App. 12a.

The Sixth Circuit also contravened this Court's precedents. Under *Crawford* v. *Washington*, testimonial incriminating statements are generally prohibited by the Confrontation Clause. 541 U.S. 36, 53-54 (2004). If the prosecution asserts that the statement is being used for a purpose other than the truth of the matter asserted, the Confrontation Clause still bars that statement unless its introduction is necessary to the jury's understanding and non-incriminating alternatives are "not available." *Tennessee* v. *Street*, 471 U.S. 409, 414-15 (1985). Applying those clearly established principles, there is only one reasonable conclusion: The detective's testimony that a confidential informant accused Mr. Reed of possessing drugs violated the

Confrontation Clause. That testimony was expressly incriminating. And the incriminating detail was not necessary for the jury to understand why the police searched the roof: Mr. Reed never called into question the propriety of the investigation. Moreover, non-incriminating alternatives were available if the propriety of the investigation had been an issue, such as testimony that a confidential informant said *someone* kept his or her drugs on the roof. In upholding the state court's contrary conclusion, the Sixth Circuit "blatantly overlook[ed] the fact that" this Court "has established rules governing" the admissibility of such statements. App. 18a (Stranch, J., dissenting).

This Court's review is urgently needed. Using course-of-investigation testimony to "[b]ackdoor[ ] highly inculpatory" testimony is a "recurring" problem that threatens cherished constitutional rights. *United States* v. *Sharp*, 6 F.4th 573, 582 (5th Cir. 2021). If the Sixth Circuit's decision is left standing, it will incentivize prosecutors to ratchet up this practice—especially against state criminal defendants most in need of federal constitutional protections. And it will leave defendants in different jurisdictions with different Sixth Amendment rights at trial, undermining the interest in constitutional rights applying equally nationwide.

This Court should grant review, clarify the scope of the Confrontation Clause, and restore uniformity to the Sixth Amendment.

I. There Is An Entrenched Circuit Split On Whether Incriminating Out-Of-Court Statements Offered As "Background" Evidence Can Violate The Confrontation Clause.

The Sixth Circuit's decision "create[d] a circuit split" because it conflicts with "[s]everal other circuits." App. 15a, 17a (Stranch, J., dissenting). The Seventh, Fifth, and Second Circuits have all held that, under clearly established federal law, the Confrontation Clause is violated when testifying officers relay incriminating statements by absent declarants under the guise of explaining the course of their investigation or background context. *Taylor*, 545 F.3d at 335; *Jones*, 635 F.3d at 1046; *Orlando*, 915 F.3d 113. The Sixth Circuit takes the opposite view.

This Court should grant certiorari to resolve the conflict among the circuits on this important question.

1. The Fifth Circuit holds that when a detective "testifie[s] about highly incriminating information from [an] unidentified eyewitness" under the guise of providing background context, with no opportunity to cross-examine the eyewitness, the defendant is "denied his right to confront the witness." *Taylor*, 545 F.3d at 335. In that case, an officer testified at trial that he spoke to an unidentified witness during his investigation and then developed the criminal defendant as a suspect. *Id.* at 329. The government defended the police officer's testimony, arguing that it was "not inadmissible hearsay" because it "explained only his course of action" during his investigation. Respondent-Appellant Br. 20, 2007 WL 6136641 (5th Cir. Sept. 21, 2007).

The Fifth Circuit flatly rejected that argument. The detective's "testimony indicating that an unidentified, nontestifying witness identified the defendant as 'the perpetrator' . . . was hearsay." *Taylor*, 545 F.3d at 336. "[T]he admission of such hearsay statements against a criminal defendant violates the Confrontation Clause." *Ibid.* And this principle was "well established" under federal law—at the time, the more government-friendly standard laid out in *Crawford*'s precursor, *Ohio* v. *Roberts*, 448 U.S. 56 (1980)—so the state court's contrary ruling entitled the defendant to habeas relief. *Taylor*, 545 F.3d at 335; see also *Jones* v. *Cain*, 600 F.3d 527, 537 & n.9 (5th Cir. 2010) (granting habeas relief where officer relayed incriminating statements purportedly to "show how [the detective] performed his investigation," and explaining that any limiting instruction likely "would have been futile" because the incriminating statements "were only marginally relevant—if at all—to any purported non-hearsay purpose").

Similarly, the Seventh Circuit has granted habeas relief—twice—when a testifying officer relays incriminating statements from out-of-court declarants under the guise of providing background context. *Jones*, 635 F.3d at 1046; *Richardson* v. *Griffin*, 866 F.3d 836 (7th Cir. 2017).

In *Jones*, detectives testified that an absent declarant claimed the defendant had confessed to a murder, and the state court admitted that testimony, with a limiting instruction, for the asserted "non-hearsay" purpose of explaining the course of the detective's investigation. 635 F.3d at 1037, 1047. The Seventh Circuit held

that the state court's decision "unreasonably applied" the "governing legal rules in" *Crawford* and *Street* by admitting that testimony. *Id.* at 1044.

To start, the "probative value of a tip on which an investigation was based is 'marginal, at best,'" to determining the defendant's guilt or innocence unless the criminal defendant has challenged the propriety of that investigation. 635 F.3d at 1046. Moreover, "none of the incriminating substance" of the absent declarant's statement was "necessary" to "prevent the jury from being confused" about the course of the detective's investigation. *Id.* at 1047. To the extent the jury "would be confused if it did not know exactly why the police started investigating" the defendant, "that fear could have been assuaged" by a *non*-incriminating "statement that the police acted 'on information received from'" the absent declarant. *Ibid.* And a "limiting instruction" could not justify the admission of such an "overwhelmingly incriminating" statement purportedly offered "for some marginally-relevant collateral purpose." *Id.* at 1055. The state court's "unthinking, expansive application of the 'course of investigation' exception" therefore "effectively undermine[d] the Confrontation Clause" and unreasonably applied this Court's precedents. *Id.* at 1046. So the Seventh Circuit granted habeas relief. *Ibid.*

In *Richardson*, the Seventh Circuit again granted habeas relief after a state court admitted similar testimony. There, a testifying officer purporting to "describe the course of his investigation" explained that an unnamed witness told him that "Chris," the name of the defendant, was the shooter. 866 F.3d at 839. The prosecution "tried to justify the admission of" the officer's testimony "as an account

of the course of" the officer's investigation. *Id.* at 840-41. But the "state had no need to explain why" the declarant "used the name 'Chris'" for the jury to understand why the officer's investigation followed the path that it took. *Id.* at 841. Allowing that testimony, the court held, "goes well beyond the boundaries the Supreme Court has established" in its Confrontation Clause jurisprudence. *Ibid.* So the Seventh Circuit granted habeas relief. *Ibid.*

Likewise, the Second Circuit granted habeas relief where a state court admitted, with a limiting instruction, an inculpatory out-of-court statement that purportedly provided background context. *Orlando*, 915 F.3d 113. There, a testifying detective relayed an absent declarant's "facially incriminating statement" that the defendant was an accomplice to a murder. *Id.* at 122. The state court reasoned the prosecution could "use this evidence only to 'explain the detective's actions'" and to "show[ ] 'context' for why" the defendant changed his statement under questioning by the detective. *Id.* at 122, 125. The state court then "gave the jury a limiting instruction," ordering the jury to "completely disregard any statement allegedly made by" the absent declarant. *Id.* at 117-18. The Second Circuit held that the state court unreasonably applied this Court's precedents, which do not permit the admission of an out-of-court incriminating statement "merely because it may have some purpose other than for its truth." *Id*. at 126 n.19. The prosecution's "need for the purported 'context' was of little importance." *Id.* at 125. To the extent context would be helpful, the prosecution could have elicited testimony to fill any "narrative gap" without expressly incriminating the defendant. *Ibid.* Because admitting this testimony

"would eviscerate the core protection" of the Confrontation Clause, habeas relief was warranted. *Id.* at 126.

2. The Sixth Circuit broke from its sister circuits by holding that it is reasonable for a state court to admit an officer's testimony relaying an absent confidential informant's inculpatory statement simply because the prosecution asserted the evidence would explain the course of the investigation.

All of the relevant facts apply equally "across both those cases and this case." App. 24a n.2 (Stranch, J., dissenting). Like the testifying officer's statements in *Taylor*, *Jones*, *Richardson*, and *Orlando*, the testifying officer's statements here expressly inculpated Mr. Reed in the crime. App. 140a. Like the prosecution in *Taylor*, *Jones*, and *Richardson*, the prosecution introduced these statements for the purported purpose of explaining to the jury why the officer's investigation unfolded the way that it did. App. 139a. Like the state courts in *Jones* and *Orlando*, the state court here issued a limiting instruction that told the jury to consider the testimony only for the purported background context. App. 141a. But like the defendants in *Taylor*, *Jones*, and *Richardson*, Mr. Reed never disputed the course of the officer's investigation; he never challenged why the detective went on the roof. App. 11a. And like the prosecution in *Taylor*, *Jones*, *Richardson*, and *Orlando*, the prosecution here could have provided background context to the jury without relying on incriminating statements from the officer. See App. 140a.

Yet unlike these cases the Sixth Circuit denied habeas relief, breaking with the Second, Fifth, and Seventh Circuits. It arrived at that conclusion by searching

for, and failing to find, on-all-fours precedent from this Court. In the Sixth Circuit's view, *Crawford* "expressly disclaimed that the Confrontation Clause applied to non-hearsay statements." App. 8a. And the "Supreme Court hasn't said that explaining a police officer's conduct isn't a legitimate non-hearsay purpose." App. 7a. Because this Court hasn't issued an opinion that "squarely control[s]" the specific factual circumstances here, the state court could not have unreasonably applied clearly established law. App. 8a.

That decision cannot be reconciled with *Taylor*, *Richardson*, *Jones*, or *Orlando*. The Second, Fifth, and Seventh Circuits examined the same legal principles from this Court's cases—and concluded that the state courts "unreasonably applied those rules," *Jones*, 635 F.3d at 1044, and "well established" principles, *Taylor*, 545 F.3d at 335, by admitting statements "well beyond the boundaries the Supreme Court has established," *Richardson*, 866 F.3d at 841. The Sixth Circuit therefore stands alone in holding that state courts reasonably apply clearly established law when they allow incriminating out-of-court statements for so-called "background context." Only this Court can resolve the conflict and restore uniformity to this important question about the scope of the Confrontation Clause.

II. The Sixth Circuit's Decision Is Wrong.

The Sixth Circuit's decision is a wide-reaching blow to the confrontation right this Court clearly defined in *Crawford*. It creates a Sixth Amendment loophole by permitting the prosecution to smuggle in inculpating, out-of-court statements so long as the prosecution slaps the label of "background context" on them. That result

cannot be squared with this Court's precedents or the Confrontation Clause's original meaning. For that reason, the state court's decision was an unreasonable application of clearly established federal law that warrants habeas relief under 28 U.S.C. § 2254(d)(1).

A. Clearly Established Federal Law Prohibits The Admission Of Inculpating Statements Where Non-Incriminating Alternatives Are Available.

To decide whether to grant habeas relief, a court must first identify "clearly established Federal law." 28 U.S.C. § 2254(d)(1). Clearly established law is the "legal rule or principle" on which this Court has relied "to decide a case." *Andrew* v. *White*, 145 S. Ct. 75, 81 (2025). "General legal principles can constitute clearly established law" and need not be confined to their "facts." *Id.* at 82. This Court has clearly established key Confrontation Clause principles in *Crawford* and *Street*.

The Sixth Amendment's Confrontation Clause guarantees that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Under the Confrontation Clause, the prosecution cannot introduce statements that are testimonial and used for the truth of the matter asserted, unless the witness is unavailable and there was a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 54. And *Crawford* was clear: "[I]nculpating statements . . . given in a testimonial setting . . . trigger" the Confrontation Clause. *Id.* at 65.[2] Where there is no opportunity to cross-examine the

[2] The Warden conceded in the court of appeals that the out-of-court anonymous tip at issue here was "testimonial." App. 5a.

declarant of such "inculpating statements," "the single safeguard missing is the one the Confrontation Clause demands." *Ibid.* That "bright-line rule[]" provides predictability for courts, the prosecution, and criminal defendants alike. Michael R. Dreeben, *Prefatory Article: The Confrontation Clause, the Law of Unintended Consequences, and the Structure of Sixth Amendment Analysis*, 34 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxxvi (2005).

To be sure, the Confrontation Clause does not bar out-of-court statements when they are used "for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 59 n.9 (citing *Street*, 471 U.S. at 414). But where, as here, the testimony "expressly implicat[es]" the defendant, the prosecution cannot simply assert that the incriminating statement is being used for something other than its truth and rely on a limiting instruction from the state court. *Richardson* v. *Marsh*, 481 U.S. 200, 208 (1987). Instead, the non-truthfulness purpose must be "legitimate," "distinctive," and "limited." *Street*, 471 U.S. at 417.

This Court in *Street* explained when a statement can be used for such purpose. The government's key piece of evidence was a confession from the defendant. 471 U.S. at 411. At trial, the defendant argued that this confession was coerced. *Id.* at 411-12. In response, an officer testified about an accomplice's confession to illustrate that the two confessions varied, which would show that the defendant's confession was not coerced. *Id.* at 415-17. And the trial court issued a limiting instruction telling the jury to consider the statement "only" for purposes of "rebut[ting]" the defendant's arguments. *Id.* at 412. Only "[i]n *this context*," this Court held, the

detective's testimony was offered for the "distinctive and limited purpose" of impeachment, not to prove the government's case. *Id.* at 417 (emphasis added).

Of particular importance here, this Court articulated two reasons why the Confrontation Clause was not violated. First, because the defendant had claimed his confession was coerced, excluding the accomplice's confession would have "impeded" the jury's task of "evaluating the truth of" the defendant's testimony—a result "at odds with the Confrontation Clause's very mission" of advancing the "accuracy of the truth-determining process in criminal trials." *Street*, 471 U.S. at 411-12, 415-16. And second, there were "no alternatives" to impeach the defendant's story; only the incriminating statement from the accomplice's confession would suffice. *Id.* at 415. If the prosecution had instead edited the accomplice's confession to avoid incriminating the defendant, it "would have been more difficult for the jury to evaluate" whether the defendant's confession "was a coerced imitation" of his accomplice's confession. *Id.* at 416. As *Street* shows, this Court has "thoroughly examined the use of the out-of-court confession and the efficacy of a limiting instruction" to make "sure that an out-of-court statement was introduced for a '*legitimate*, nonhearsay purpose' before relying on the not-for-its-truth rationale to dismiss the application of the Confrontation Clause." *Williams* v. *Illinois*, 567 U.S. 50, 105-06 (2012) (Thomas, J., concurring in the judgment) (quoting *Street*, 471 U.S. at 417); see also *Jones*, 635 F.3d at 1052 (explaining that *Street* "sharply limits the circumstances in which" incriminating out-of-court statements "may be introduced into evidence for a non-hearsay purpose").

The limits imposed in *Crawford* and *Street* are consistent with the original understanding of the Confrontation Clause. The "Confrontation Clause was historically designed to protect" criminal defendants "where the government tries to railroad a defendant . . . and to circumvent proof in open court." Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 Harv. J.L. & Pub. Pol'y 45, 50 (2011). One way to railroad a defendant is to smuggle incriminating evidence into a trial under the guise of providing background context. But the Founders developed rules to prevent that kind of end-run. The "framing-era treatises and manuals" and "post-framing American cases all present a strikingly consistent treatment of" testimony relaying out-of-court statements: They imposed a "virtually total ban" on such testimony. Thomas Y. Davies, *Not "the Framers' Design": How the Framing-Era Ban Against Hearsay Evidence Refutes the* Crawford-Davis *"Testimonial" Formulation of the Scope of the Original Confrontation Clause*, 15 J.L. & Pol'y 349, 351, 424 (2007). As Chief Justice Marshall explained, the "constitutional claim to be confronted with the witnesses against him" would be a meaningless formality "if mere verbal declarations, made in his absence, may be evidence against him." *United States* v. *Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694); see also, e.g., *Demoney* v. *Walker*, 1 N.J.L. 33, 33 (N.J. 1790) ("If hearsay evidence be admitted, though the justice direct the jury to pay no regard to it, it is error.").

The Founders recognized "only two exceptions" from this general rule: One allowed out-of-court statements "to be used to corroborate (or impeach) the testimony a witness had already given at trial," and one allowed such statements to "prove the

general existence of a conspiracy—but not to prove the defendant's personal involvement in it." Davies, *Not "the Framers' Design,"* 15 J.L. & Pol'y at 402 (citing 2 William Hawkins, *Pleas of the Crown* 431 (1721)). Neither exception was a broad invitation to inculpate the defendant by purporting to provide background context. To the contrary, it was "incumbent on courts to be watchful of every inroad" on the general principle excluding out-of-court statements. *Burr*, 25 F. Cas. at 193. As this Court observed more recently, the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54.

B. The Admission Of The Officer's Testimony Violated The Confrontation Clause Under Clearly Established Law.

The Sixth Circuit held that because the prosecution offered the out-of-court statement that Mr. Reed possessed drugs in a gutter on the roof to explain why the detective went on the roof, the statement was not offered for the truth of the matter asserted and therefore did not fall clearly within the protection of the Confrontation Clause. App. 11a. In the Sixth Circuit's view, *Crawford* and *Street* did not clearly establish that out-of-court statements purportedly offered as "background" can violate the Confrontation Clause. The majority's decision is an "outlier" that would "effectively abrogate" this Court's precedent. App. 26a (Stranch, J., dissenting).

1. The detective's testimony relaying the confidential informant's tip was an "inculpating statement[]." *Crawford*, 541 U.S. at 65. Half of Mr. Reed's sentence turned on possession of drugs found on the roof of a residence. The confidential informant's tip expressly implicated Mr. Reed in that crime. In its opening statement,

the prosecution highlighted that the detective "had information" that "the defendant hides his drugs outside in the gutters of his house." App. 15a. And on direct examination of the detective, over the objection of Mr. Reed's counsel, the prosecution elicited testimony that the narcotics were "located in the gutter on top of the garage." App. 139a. When asked "how or why" the detective "looked on the roof" and how they "g[o]t" there, the detective responded that a confidential informant told him that Mr. Reed "concealed narcotics in several different locations," including "in the gutter" of the roof of the garage. App. 139a-140a. This statement accusing Mr. Reed of a crime falls in the heartland of the Confrontation Clause's right "to be confronted with the witnesses against him." *Burr*, 25 F. Cas. at 193.

Moreover, there was no "legitimate, distinct, and limited purpose" other than the truth of the matter asserted. App. 28a (Stranch, J., dissenting); see *Street*, 471 U.S. at 417. Neither of the reasons that *Street* articulated to admit testimony is present here. First, admitting the informant's tip did nothing "to advance 'the accuracy of the truth-determining process.'" 471 U.S. at 415. The defendant in *Street* accused the police of coercing his confession, opening the door for the prosecution to test the veracity of that defense. *Ibid.* By contrast, Mr. Reed never questioned the reason the police searched the roof. See App. 26a; App. 139a-141a.

Second, the prosecution had non-incriminating "alternatives" available to achieve its purported goal of providing background context. *Street*, 471 U.S. at 415. In *Street*, a redacted or modified version of the accomplice's confession would have made it "more difficult for the jury" to evaluate whether the defendant's confession

was coerced. *Id.* at 416. By contrast, the prosecution here could have simply elicited that an informant said a person was storing drugs on the roof. See App. 26a; App. 139a-141a. That testimony would just as effectively explain why the police searched, without incriminating Mr. Reed.

Because this Court's holdings are clear, courts of appeals time and again have concluded that testimony like the officer's here is unconstitutional. The officer's testimony that an anonymous informant accused Mr. Reed of possessing drugs on a roof is a textbook example of a detective "testif[ying] about highly incriminating information from [an] unidentified eyewitness," which is "reinforced" by "[t]he prosecution's reference to that testimony in" an opening statement. *Taylor*, 545 F.3d at 335. And where, as here, the "propriety of the investigation was never really at issue," the prosecution cannot claim the testimony is being offered to explain the course of an officer's investigation. *United States* v. *Holmes*, 620 F.3d 836, 841 (8th Cir. 2010). That "nonhearsay justification fails because, by recounting a 'witness's statement to the police that the defendant is guilty of the crime charged,' the officer has introduced an intolerably high risk that the jury will take that statement as proof of the defendant's guilt." *Sharp*, 6 F.4th at 582 (quoting *Jones*, 930 F.3d at 377; citing *Taylor*, 545 F.3d at 336). In this context, there is "no plausible reason for the introduction of [the incriminating] statements other than to establish their truth." *Williams*, 567 U.S. at 104 (Thomas, J., concurring in the judgment).

Plus, there is no "need to go into the damning details of what the [informant] told" the officer to explain the course of an investigation. *Holmes*, 620 F.3d at 842.

Instead, the officer could tell the jury "more generally that a tip prompted him" to take the steps he is describing, without testifying that the tip accused the defendant of committing the crime. *Sharp*, 6 F.4th at 582. When an officer "could have explained the circumstances leading to [the defendant's] arrest without divulging the details from the tip," Judge Duncan has explained, the Constitution requires the officer to stop there—rather than proceeding to incriminate the defendant. *United States* v. *Sarli*, 913 F.3d 491, 500 (5th Cir. 2019) (dissenting in part); see also *United States* v. *Hinson*, 585 F.3d 1328, 1337 (10th Cir. 2009) (similar); *United States* v. *Benitez-Avila*, 570 F.3d 364, 368–69 (1st Cir. 2009) (similar). After all, the key question at trial was to whom the drugs found on the roof belonged.

As Judge Jerry Smith has cautioned, "prosecutors [should] take note" that this Court's precedent does not permit "an exception" to cross-examination "that would swallow th[e] rule." *United States* v. *Hamann*, 33 F.4th 759, 764 (5th Cir. 2022). Yet the Sixth Circuit sanctioned exactly that result. By allowing a detective to "relay[] an out-of-court statement of the most damaging kind" with "no opportunity to confront [the] accuser," the Sixth Circuit allowed the prosecution's "explaining-the-investigation" purpose to "end run around the confrontation right." *Sharp*, 6 F.4th at 582. That decision cannot be squared with the Confrontation Clause or this Court's cases applying it. In Judge Easterbrook's words, "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the

defendant's rights under the sixth amendment and the hearsay rule." *United States* v. *Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004).

2. Because the confidential informant's out-of-court tip was an inculpating statement under *Crawford* and the prosecution had non-incriminating alternatives available under *Street*, the state court's decision admitting the testimony relaying the out-of-court statement "involved an unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

The Sixth Circuit held otherwise by raising the bar required to show habeas relief. The majority reasoned that *Crawford* permits out-of-court statements where a purpose is given other than to prove the truth of the matter asserted. App. 8a. And it reasoned that *Street*'s "bottom line supports the Ohio courts' decision" because "limiting instructions can avert Confrontation Clause problems when there's a legitimate non-hearsay purpose." App. 9a. Because this Court has never specifically said that incriminating "course-of-the-investigation testimony" is barred by the Confrontation Clause, the majority reasoned, this Court's precedents don't "squarely control the question presented" and habeas relief was foreclosed. App. 8a-10a.

This Court recently rejected the approach adopted by the Sixth Circuit below. "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court," and it is "mistaken" to limit this Court's precedent "to its facts." *White*, 145 S. Ct. at 81-82. "AEDPA," this Court has held, "does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti* v. *Quarterman*, 551 U.S.

930, 953 (2007) (internal quotation marks omitted). So "even a general standard may be applied in an unreasonable manner." *Ibid.* The Sixth Circuit's requirement of "perfect factual symmetry" before granting habeas relief therefore misapplied the habeas statute. App. 22a (Stranch, J., dissenting).

Nor did the majority attempt to *apply* the holding of *Crawford* and *Street* to determine whether admitting the out-of-court anonymous tip was "objectively unreasonable" under that precedent. *Penry* v. *Johnson*, 532 U.S. 782, 793 (2001). The majority did not, for example, ask whether there were "no alternatives" to explain why the police searched the roof without incriminating Mr. Reed. *Street*, 471 U.S. at 415. Without "thoroughly examin[ing]" the testimony to make "sure that an out-of-court statement was introduced for a '*legitimate*, nonhearsay purpose' before relying on the not-for-its-truth rationale," *Williams*, 567 U.S. at 105-06 (Thomas, J., concurring in the judgment), the majority tacitly approved prosecutors' ability to introduce *any* incriminating testimony so long as the prosecution can identify some purpose other than the truth of the matter asserted that is facially non-frivolous. That theory "would make almost every piece of relevant testimonial hearsay admissible." App. 25a (Stranch, J., dissenting).

As explained above, *Crawford* and *Street* supply clearly established legal principles that lead to only one reasonable conclusion: Admission of the incriminating out-of-court statements by a nontestifying witness violated Mr. Reed's Confrontation Clause rights. See *supra* at 22-26. The Sixth Circuit's conclusion that the state court's decision was reasonable therefore was wrong.

III. The Question Is Recurring And Important.

The Court should grant this petition because the question presented is both recurring and important.

At both the state and federal levels, the prosecution often wants to give some context about its investigation to the jury. So it is "common for the lead investigator in a case to testify about the course of his investigation." *State* v. *Neal*, 1996 WL 28765, at *9 (Ohio Ct. App. Jan. 23, 1996); see also Hugh M. Mundy, *Course Correction: A Proposal to Limit the Admissibility and Use of "Course of Investigation" Testimony in Criminal Trials*, 6 UCLA Crim. Just. L. Rev. 135, 136-37 (2022) (stating that it is a "common scenario" for "law enforcement witnesses" to "testify to out-of-court statements to give 'background' for their subsequent actions").

When that background context is not incriminating, there's no Confrontation Clause problem. The testimony serves its purpose of informing the jury, without accusing the defendant of criminal conduct through an out-of-court statement. But where, as here, the testimony directly implicates the defendant, Confrontation Clause protections are implicated.

Course-of-investigation testimony is not new and can be traced back as early as the rise of public prosecutions themselves. In the sixteenth century, the English Parliament enacted the Marian bail and committal statutes, which created a scheme that allowed justices of the peace to serve as "back-up prosecutors." John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 Am. J. Legal Hist. 313, 323 (1973). When there were no private accusers, the justices of the peace "would

investigate" and "orchestrate prosecution," and "[a]t the trial . . . could testify about [their] investigation." *Ibid.* And when witnesses against a defendant were unavailable, the justices of the peace would serve as "the principal witness against the prisoner, and detail[] at length the steps which he had taken to apprehend him." *Id.* at 326. This "testimony could persuade a jury which would otherwise acquit." *Ibid.* As this Court recognized in *Crawford*, admission of such evidence under the Marian statutes was one of "the principal evil[s] at which the Confrontation Clause was directed." 541 U.S. at 50.

Precisely because course-of-investigation testimony is common, "[b]ackdooring highly inculpatory hearsay via an explaining-the-investigation rationale is a recurring problem." *Sharp*, 6 F.4th at 582. Because the problem so frequently occurs, courts and commentators have been warning that "course of investigation" testimony has been "an area of 'widespread abuse'" in criminal prosecutions for decades. *United States* v. *Sallins*, 993 F.2d 344, 346 (3d Cir. 1993) (quoting 2 *McCormick on Evidence* § 249, at 104 (4th ed. 1992)); see also *Jones*, 635 F.3d at 1046 (explaining that "thirty years ago, we cautioned" of the "dangers of prejudice and abuse posed by the 'course of investigation' tactic"). Only this Court can definitively resolve this lingering issue.

The question presented is also exceptionally important to criminal defendants facing a trial, prosecutors trying to convict them, and courts attempting to adjudicate a person's guilt or innocence. That the Confrontation Clause guards a fundamental right necessary for a fair trial is beyond settled. "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those

liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965). But, as the Sixth Circuit decision below shows, prosecutors can easily circumvent that right by clever nomenclature: Call otherwise inadmissible testimony "course of conduct" and it eliminates a defendant's Confrontation Clause objection. Taking that reasoning to its logical conclusion, a detective could testify that he "start[ed] investigating the defendant" because "[a]n eyewitness told [him] that the defendant was the shooter." *Sharp*, 6 F.4th at 582. The Confrontation Clause should not be so easily breached—especially for state criminal defendants, who are most in need of federal constitutional protections at trial. Cf. *Davis* v. *Alaska*, 415 U.S. 308, 320 (1974) (holding that a state's interest in protecting the confidentiality of a juvenile offender "must fall before the" Confrontation Clause "right of petitioner to seek out the truth in the process of defending himself").

Without a decision from this Court, moreover, criminal defendants across the country will have different Confrontation Clause rights. Within the Sixth Circuit, a state court can deny criminal defendants the right to confront at trial absent declarants whose incriminating statements are relayed by a testifying officer—with no recourse in federal court. By contrast, criminal defendants in the Second, Fifth, and Seventh Circuits would be able to confront the same absent declarants. The circuits involved in this split make up nearly forty percent of all federal appeals, so

this split has a wide-ranging impact. See Federal Judicial Center, U.S. Court of Appeals Statistical Tables for the Federal Judiciary (June 30, 2024).[3]

Such inconsistent application of rights undermines the interest in having a uniform constitutional interpretation. This Court has long recognized the "necessity of *uniformity*" in constitutional interpretation "throughout the whole United States, upon all subjects within the purview of the constitution." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816). Having "the constitution of the United States . . . be different in different states" would result in "public mischiefs" that are "truly deplorable." *Id.* at 348. A defendant's constitutional rights to a fair trial, when his or her liberty is at stake, should not turn on where the defendant faces a trial.

Finally, this Court has recognized the importance of answering questions similar to those raised by this petition. This Court has repeatedly reviewed cases raising Confrontation Clause challenges. See *Smith* v. *Arizona*, 602 U.S. 779 (2024); *Samia* v. *United States*, 599 U.S. 635 (2023); *Hemphill* v. *New York*, 595 U.S. 140 (2022); *Woods* v. *Etherton*, 578 U.S. 113 (2016); *Ohio* v. *Clark*, 576 U.S. 237 (2015). Likewise, this Court has repeatedly granted habeas cases to resolve whether the state court's decision was a reasonable application of clearly established federal law. See *White*, 145 S. Ct. at 80; *Brown* v. *Davenport*, 596 U.S. 118 (2022); *Dunn* v. *Reeves*, 594 U.S. 731 (2021); *Shinn* v. *Kayer*, 592 U.S. 111 (2020); *Wilson* v. *Sellers*, 584 U.S. 122 (2018); *Dunn* v. *Madison*, 583 U.S. 10 (2017); *McWilliams* v. *Dunn*, 582 U.S. 183

[3] Available at https://www.uscourts.gov/data-news/data-tables/2024/06/30/statistical-tables-federal-judiciary/.

(2017); *Woods*, 578 U.S. at 118; *Davis* v. *Ayala*, 576 U.S. 257 (2015). This Court should grant review to resolve the important question raised here, too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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