No. 18-___

In the Supreme Court of the United States

TIM SHOOP, Warden,

Petitioner,

v.

AHMAD FAWZI ISSA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE

QUESTIONS PRESENTED

At Ahmad Issa's 1998 trial, two witnesses described statements that their friend (and Issa's accomplice) made to them about Issa's involvement in a murder-for-hire scheme. Before *Crawford v. Washington*, 541 U.S. 36 (2004), the Ohio Supreme Court rejected Issa's Confrontation Clause challenge to the admission of this hearsay. It held that these statements bore sufficient indicia of reliability, and that they could therefore be admitted without violating the Confrontation Clause under then-binding precedent. *See Ohio v. Roberts*, 448 U.S. 56 (1980); *Idaho v. Wright*, 497 U.S. 805 (1990). In 2018, notwithstanding AEDPA's deferential standards, the Sixth Circuit disagreed and granted Issa relief under 28 U.S.C. § 2254. The Sixth Circuit concluded that it could grant § 2254 relief *without* deciding whether the admission of these statements violated the Confrontation Clause. That was so, the court held, because their admission violated the Clause as it was understood under the now-overruled *Roberts* regime applicable at the time of Issa's trial.

This case presents two questions:

1. If a state prisoner's conviction is constitutional under now-binding Supreme Court precedent, can a federal court nonetheless award habeas relief on the ground that state courts misapplied now-overruled Supreme Court precedents that governed at the time of trial?

2. Did the Sixth Circuit correctly hold that the Ohio Supreme Court failed to consider the totality of the circumstances surrounding the challenged hearsay, and that its decision was therefore "contrary to" *Idaho v. Wright* under 28 U.S.C. § 2254(d)(1)?

LIST OF PARTIES

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

The Respondent is Ahmad Issa, an inmate imprisoned at the Chillicothe Correctional Institution.

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JURISDICTIONAL STATEMENT

The Sixth Circuit issued its panel decision on September 21, 2018. On December 13, 2018, it denied rehearing en banc. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment (as incorporated against the States by the Fourteenth Amendment) provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> . . .
>
> (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; 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.

28 U.S.C. § 2254.

INTRODUCTION

The Sixth Circuit's grant of habeas relief in this case is novel in one sense and familiar in another. It is novel because the court granted Ahmad Issa relief under 28 U.S.C. § 2254 *without* finding any constitutional problem with his trial. To do so, the Sixth Circuit interpreted § 2254(d)(1) as permitting federal courts to overturn state convictions that conflict with *overruled* Supreme Court precedents—even if those convictions are perfectly constitutional under *currently binding* precedent. The Court should grant review because the Sixth Circuit's conclusion departs from the views of other circuit courts, which hold that § 2254 relief is "only available to a petitioner whose constitutional claim has not been rendered nugatory by subsequent Supreme Court precedent." *Holland v. Florida*, 775 F.3d 1294, 1313 (11th Cir. 2014); *Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156, 163–64 (3d Cir. 2018), *cert. denied*, No. 18-6845 (U.S. Mar. 4, 2019).

If the Sixth Circuit had followed this out-of-circuit precedent, Issa's claim would have failed. Andre Miles told friends that Issa had hired him to murder two people. Pet.App.299a. The state court allowed the friends to testify about Miles's hearsay over Issa's Confrontation Clause objection. Pet.App.312a. Today, this hearsay does not implicate the Confrontation Clause because Miles's informal statements to friends were not "remotely testimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004). Pet.App.363a (Sutton, J., concurring in denial of rehearing en banc). But the Sixth Circuit held that the statements were inadmissible at the time of Issa's trial, under the very precedents that *Crawford* overruled. Given this change in the law, the effect of the

Sixth Circuit's ruling is to make Ohio hold a second trial where it may constitutionally admit the *very same evidence* that the circuit court found to have been unconstitutionally admitted in the first trial.

While its logic might be novel, the Sixth Circuit's decision is all too familiar in another sense. This Court has repeatedly "advise[d] the [Sixth Circuit] Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty." *White v. Wheeler*, 136 S. Ct. 456, 462 (2015) (per curiam). The Sixth Circuit nonetheless continues to grant relief conflicting with AEDPA's deferential standards. *Shoop v. Hill*, 139 S. Ct. 504, 507–08 (2019) (per curiam).

It did it again. Applying the now-outdated Confrontation Clause framework from *Ohio v. Roberts*, 448 U.S. 56 (1980), *Idaho v. Wright*, 497 U.S. 805 (1990), and *Lilly v. Virginia*, 527 U.S. 116 (1999), the Ohio Supreme Court ruled that Miles's statements were reliable considering the circumstances in which they were made. Pet.App.312a–15a. The Sixth Circuit held that this decision was "contrary to *Wright*" because the state court allegedly did not consider the "'totality of the circumstances'" and instead focused only on the fact that Miles did not make his statements to the police. Pet.App.18a. This conclusion misread the Ohio Supreme Court's decision, which rested on some "ten factors" surrounding Miles statements. Pet.App.360a (Sutton, J., concurring in denial of rehearing en banc). The Sixth Circuit's "readiness to attribute error" to the Ohio Supreme Court conflicts "with the presumption that state courts know and follow the law" and with the command "that state court decisions be given the benefit

of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

It is surely true that "[n]ot every error" "is worth correcting through the en banc process." Pet.App.366a (Sutton, J., concurring in denial of rehearing en banc). But improper awards of habeas relief under AEDPA, which upset the federalism concerns at the heart of the statute, *are* typically worth correcting. That much is clear from this Court's seemingly annual summary reversals of Sixth Circuit AEDPA decisions. And the error in this case—overturning a conviction based on the admission of evidence that would be admitted again (constitutionally) in a new trial—is especially worth correcting. In addition to creating a circuit split, the Sixth Circuit's AEDPA error raises greater federalism and comity concerns than a typical error. After all, the relief it ordered—a new trial free of any Confrontation Clause violation—will be identical to the old trial that Issa already received.

STATEMENT OF THE CASE

Linda Khriss and her husband Maher ran a Cincinnati supermarket. Pet.App.295a. In 1997, Andre Miles shot and killed Maher and his brother Ziad Khriss in the store's parking lot. Pet.App.295a. The Cincinnati police came to suspect that Linda hired Respondent Ahmad Issa, a supermarket employee, to kill the two men. They further suspected that Issa enlisted Miles to carry out the murders. Pet App. 295a. A few days before the shootings, Miles told a friend who lived close to the store, Joshua Willis, that Issa was going to pay Miles to kill someone. Pet.App.296a. Miles asked Joshua if he wanted to help in return for half of the money. Pet App. 296a.

Joshua declined, but told his sister, Bonnie Willis, what Miles had said to him. Pet.App.296a.

On the day of the murders, Miles called Joshua and confessed. Pet.App.299a. The next day, Miles told Joshua and Bonnie that Issa promised to pay him $2,000 for killing Maher, but that Issa "had to throw in an extra $1,500" because Miles also killed Ziad. Pet.App.299a. Miles explained to the Willises that Issa gave him the rifle and drove him home after Miles stowed it in their backyard. Pet.App.299a, 300a. The Willises repeatedly asked Issa to get the gun off their property, and he said that he would tell Miles to remove it. Pet.App.300a–301a. Miles did so a few days later. Pet.App.301a.

Police arrested Miles after learning that he confessed to the Willises about the murders. Pet.App.301a. Miles then confessed to the police and told them where to find the rifle that he had used. Pet.App.301a. An expert's analysis determined that this rifle, in fact, fired the fatal bullets. Pet.App.301a.

Other evidence implicated Issa in the murder-for-hire scheme. Dwayne Howard testified that he visited Issa's apartment in the days before the murders, and that Issa showed him a rifle. Pet.App.296a. After the murders, Issa told Howard not to tell anyone that he had shown Howard the rifle. Pet.App.296a. Souhail Gammoh, another supermarket employee, testified that Issa drove him home from work on the night of the murders, dropping him off at about 1:20 a.m. Pet.App.297a. Issa told Gammoh that he might return so that they could go to a bar, and Issa picked up Gammoh twenty-five to thirty-five minutes later. Pet.App.297a. After the murders, Gammoh asked

Issa where he had gone during this interlude. Pet.App.297a–298a. Issa responded: "'Don't tell the police. Tell them that we were together all the time.'" Pet.App.298a.

Ohio charged Issa, Miles, and Linda Khriss with aggravated murder and tried them separately. Pet.App.295a. A jury acquitted Linda. Pet.App.334a. Another jury convicted Issa of the aggravated murder of Maher Khriss and found the death-penalty specification that Issa committed the offense for hire. Pet.App.302a. The court sentenced him to death. Pet.App.302a. A third jury convicted Miles, who received a life sentence. Pet.App.334a.

1. At Issa's trial, the trial court invoked a state hearsay exception allowing Joshua and Bonnie Willis to describe the statements that Miles had made to them. Pet.App.309a–312a. The court subpoenaed Miles, but he refused to testify. Pet.App.310a–312a. The trial court admitted Miles's statements over Issa's hearsay and Confrontation Clause objections. Pet.App.309a.

In 2001, the Ohio Supreme Court rejected Issa's Confrontation Clause challenge to the ruling admitting Miles's hearsay. Pet.App.312a–315a. The Ohio Supreme Court recognized that the then-controlling cases authorized the admission of statements like Miles's if "the circumstances surrounding the making of the statement[s] [made] the declarant's truthfulness so clear" that cross-examination would serve little purpose. Pet.App.313a–314a (discussing *Lilly v. Virginia*, 527 U.S. 116, 136 (1999), and quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990)). The court recognized that it had to "examine the circumstances under which [Miles's] confession was made."

Pet.App.314a. It then detailed those circumstances. When giving his statements, "Miles was not talking to police as a suspect." Pet.App.314a. His statements were instead "made spontaneously and voluntarily to his friends in their home." Pet.App.314a. He "had nothing to gain from inculpating [Issa] in the crime." Pet.App.314a. He was also "admitting to a capital crime." Pet.App.314a. When doing so, he did not "attempt to shift blame from himself"; rather, he was "bragging about his role as the shooter in the double homicide." Pet.App.315a. Based on all of these circumstances, the Ohio Supreme Court found that Miles's statements were reliable and so admissible under this Court's decisions. Pet.App.315a.

2. After further state proceedings, Issa filed a federal habeas petition under 28 U.S.C. § 2254. Pet.App.177a. As relevant here, Issa asserted that the admission of Miles's hearsay violated his Sixth Amendment right to confrontation. Pet.App.179a.

A magistrate judge considered the claim and recommended denying Issa relief. Pet.App.220a–232a, 291a. The magistrate judge explained that, after the Ohio Supreme Court's decision, this Court jettisoned the *Roberts* regime in *Crawford v. Washington*, 541 U.S. 36 (2004). Pet.App.226a. *Crawford* distinguished between testimonial statements (which are subject to the Clause) and nontestimonial statements (which are not). Pet.App.226a–228a; *see also Davis v. Washington*, 547 U.S. 813, 821, 823–24 (2006). The magistrate judge determined, however, that *Crawford* did not apply retroactively to cases on collateral review under the equitable habeas rules from *Teague v. Lane*, 489 U.S. 288 (1989). Pet.App.228a (citing *Whorton v. Bockting*, 549 U.S. 406 (2007)). Regardless, Issa's statements to his friends were

nontestimonial and so "subject to the state's hearsay rules, but not the Confrontation Clause" even under the *Crawford* regime. Pet.App.228a, n.10.

Returning to the *Roberts* framework, the magistrate judge noted that courts were permitted to admit hearsay if (1) the declarant was unavailable and (2) the declarant's statements contained sufficient indicia of reliability. Pet.App.228a–230a. Starting with the first factor, the magistrate judge concluded that the prosecution had shown Miles's unavailability because he refused to testify. Pet.App.228a–229a. Switching to the second factor, the magistrate judge found Miles's statements reliable. Pet.App.229a–232a. The judge gave many reasons to support this finding, including that the statements were purely factual and arose from personal knowledge; that they were made close in time to the events in question; and that they were made between friends. Pet.App.231a–232a. The magistrate judge thus concluded that the Ohio Supreme Court reasonably applied the *Roberts* regime to Issa's claim within the meaning of § 2254(d)(1). Pet.App.232a.

The District Court agreed. Pet.App.73a–82a, 173a–174a. Like the magistrate judge, the District Court noted that *Crawford* did not apply retroactively and so it asked whether the Ohio Supreme Court had reasonably applied *Roberts* under § 2254(d)(1). Pet.App.80a–81a. The District Court concluded that the state court had shown Miles's "unavailability" by subpoenaing him to testify. Pet.App.81a. And it pointed to the same factors on which the magistrate judge relied to find "sufficient indicia of reliability surrounding the statements Miles voluntarily made to Bonnie and Joshua Willis." Pet.App.81a–82a.

3. Twenty years after Issa's conviction, a Sixth Circuit panel granted him habeas relief based on his Confrontation Clause claim. Pet.App.10a–27a, 32a.

When briefing Issa's Confrontation Clause claim (one of eleven appellate claims), the Warden noted that Issa could not obtain relief under *Roberts* (without any need to consider *Crawford*). App. Br., R.30, PageID#43–48 (6th Cir.). Yet a trio of earlier circuit cases—*Desai v. Booker*, 538 F.3d 424 (6th Cir. 2008), *Doan v. Carter*, 548 F.3d 449 (6th Cir. 2008), and *Jackson v. McKee*, 525 F.3d 430 (6th Cir. 2008)—had held that a petitioner in Issa's circumstances must show that the challenged hearsay violated *both* the old *Roberts* regime (under AEDPA's standards) and the new *Crawford* regime (under de novo review). Thus, early in the oral argument, the panel raised *Desai* with Issa's counsel. Or. Arg. at 6:42–6:58. During the Warden's turn at the lectern, his counsel explained that *Desai* provided a separate ground to deny relief (on top of the briefed *Roberts* arguments). A retrial under *Crawford* would allow for the admission of Miles's statements and render harmless the allegedly mistaken admission under *Roberts*'s now-outdated standards. *Id.* at 27:00–28:05.

The Sixth Circuit disagreed. The court initially rejected its cases, including *Desai*, that held that habeas petitioners cannot receive relief on a Confrontation Clause claim if the challenged hearsay would be admissible under *Crawford*. Pet.App.10a–11a, n.2. To do so, the court interpreted even earlier circuit precedent as asking only whether the challenged hearsay violated *Roberts* (without applying *Crawford*). Pet.App.10a–11a, n.2. The Sixth Circuit thus held that, when deciding whether to grant relief under § 2254, a federal court need not separately "con-

sider *Crawford* [if] the state court erred in its application of the then-governing decision in *Roberts*." Pet.App.11a, n.2. According to the court, the finding of a *Roberts*-related error alone sufficed to justify relief under § 2254. Pet.App.11a, n.2.

Turning to *Roberts*, the Sixth Circuit adopted an AEDPA argument that Issa had not expressly made—that the Ohio Supreme Court's decision was "contrary to" *Wright* under § 2254(d)(1). Pet.App.9a, n.1. *Wright*, the Sixth Circuit noted, directed courts to assess the reliability of hearsay under "'*the totality of the circumstances*.'" Pet.App.12a (quoting *Wright*, 497 U.S. at 819). The court asserted that the Ohio Supreme Court's decision was "contrary to *Wright*" because it failed to follow this mandate. Pet.App.18a. The Sixth Circuit reasoned that "the Ohio Supreme Court focused only on whether Miles made these statements to the police," Pet.App.18a, and did not "consider[] any other facts," Pet.App.18a.

This alleged error led the circuit court to review Issa's Confrontation Clause claim under the old *Roberts* regime without deference to the state court. Pet.App.19a–24a. When undertaking its de novo review, the court conceded that many factors bolstered the trustworthiness of Miles's statements, including that he made the statements to his friends, that he made the statements while at their home, that he had no reason to shift blame to Issa in that setting, and that he acted voluntarily. Pet.App.19a–20a. But the panel engaged in a "deeper examination," which it said revealed factors "suggest[ing] that [the statements were] not trustworthy." Pet.App.20a. This deeper examination consisted of two facts: First, the Willises testified that Miles "boasted and bragged frequently." Pet.App.20a; Pet.App.22a.

Second, when testifying at Linda Khriss's later trial, Miles stated that he never discussed the murders with the Willises. Pet.App.22a–24a.

The Sixth Circuit lastly concluded that the admission of Miles's statements was not harmless error. Pet.App.24a–26a. It found that the statements were important to the prosecution's case, describing them as the "only direct evidence implicating Issa in a murder for hire." Pet.App.25a. The court vacated the District Court's judgment and remanded with instructions to grant conditional relief giving Ohio 180 days to retry or release Issa. Pet.App.27a, 32a.

Judge Merritt wrote a concurrence on a different claim, suggesting that Issa's counsel were ineffective in failing to call Linda Khriss (who had been acquitted). Pet.App.27a–31a. The District Court had rejected this claim because counsel made a strategic decision not to call Linda. Pet.App.49a, 54a. Counsel thought that she was a "'dreadful witness,'" describing her as "'the world's worst loose cannon.'" Pet.App.53a (district court transcript citation omitted). Counsel also learned that jurors in Linda's trial thought that she had hired individuals to *harm* her husband. Pet.App.53a–54a. The jurors acquitted Linda because the prosecution failed to prove that she intended to *murder* her husband, and because the prosecution opposed giving any lesser-included-offense instructions. Pet.App.53a–54a.

4. The Sixth Circuit denied rehearing en banc. Pet.App.355a–356a. Judge Sutton issued a concurrence. Pet.App.357a–367a. He thought that the panel wrongly decided this case for "*two* independent reasons." Pet.App.365a. For one thing, the Ohio Supreme Court's opinion reasonably applied *Roberts*

under § 2254(d)(1). Pet.App.357a, 358a–362a, 365a. Judge Sutton explained that, far from ignoring the totality of the circumstances, the Ohio Supreme Court "considered ten factors" to justify its holding. Pet.App.360a. And a decision is not contrary to *Wright* simply because it does not use the word "totality." Pet.App.360a–361a. Judge Sutton also criticized the two factors that the panel used to overturn the state judgment. The panel's reliance on Miles's testimony at Linda's trial conflicted with the *Roberts* regime, which evaluates a statement's reliability based on the circumstances existing *at the time* it was made, not on *later* circumstances that corroborate or undermine the statement. Pet.App.361a. The Ohio Supreme Court also reasonably held that the other factor—Miles's boasting—"added authenticity" to Miles's statements. Pet.App.361a–362a.

For another thing, Judge Sutton criticized the panel for rejecting Sixth Circuit precedent requiring federal courts to ask whether the statements would be admissible under *Crawford*. Pet.App.362a–363a (discussing *Desai*, 538 F.3d at 427-28). Miles's statements were nontestimonial under *Crawford* so any error under the old regime would be "quintessentially harmless." Pet.App.364a.

Judge Sutton nonetheless concurred in the denial of rehearing en banc because of the diminishing number of cases in this case's posture—with state decisions before *Crawford* and federal habeas review after it. Pet.App.366a. He concluded: "From time to time, it's worth letting the United States Supreme Court decide whether a decision is correct and, if not, whether it is worth correcting." Pet.App.367a.

REASONS FOR GRANTING THE PETITION

The Court should grant review for three reasons. *First*, the decision below conflicts with other circuit cases recognizing that relief is unavailable under 28 U.S.C. § 2254 if a petitioner's state confinement does not violate the Constitution as interpreted by now-binding precedent. *Second*, the decision below conflicts with this Court's AEDPA cases because the Ohio Supreme Court reasonably applied the old framework from *Ohio v. Roberts*, 448 U.S. 56 (1980). *Third*, important equitable factors show that the Court should correct the Sixth Circuit's errors.

I. By granting relief without finding a constitutional violation, the Sixth Circuit created a circuit split.

The Sixth Circuit held that it could grant Issa relief under § 2254 *without* deciding whether the admission of Miles's hearsay violated the Confrontation Clause under the rules set forth by *Crawford v. Washington*, 541 U.S. 36 (2004). Pet.App.11a, n.2. The circuit court had an obvious reason to avoid *Crawford*. As the magistrate judge and Judge Sutton both recognized, Miles's private conversations with his friends were not "remotely testimonial," so those statements were not subject to the Confrontation Clause. Pet.App.363a, 228a, n.10; *Ohio v. Clark*, 135 S. Ct. 2173, 2181 (2015).

Despite the absence of any constitutional problem with Issa's trial, the Sixth Circuit gave two reasons why it could grant relief under § 2254. It initially read § 2254(d)(1) as authorizing relief if a federal court finds that a state court unreasonably applied outdated standards from overruled cases. Pet.App.10a–11a, n.2. It added that *Crawford* does

not apply retroactively under the equitable habeas rules from *Teague v. Lane*, 489 U.S. 288 (1989). Pet.App.11a (citing *Whorton v. Bockting*, 549 U.S. 406, 421 (2007)). The Court should grant review because both conclusions create a circuit split.

A. The Sixth Circuit's reading of § 2254(d)(1) conflicts with the reading that other circuit courts have given to § 2254(d)(1).

This case involves the interaction between subsections (a) and (d)(1) of § 2254. The second of these provisions, § 2254(d)(1), bars federal courts from granting relief for claims adjudicated on the merits in state court unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. This provision requires federal courts to assess a state court's decision against the cases existing at the time of the decision; they cannot second-guess state courts based on later precedent. *Shoop v. Hill*, 139 S. Ct. 504, 507–08 (2019) (per curiam). But under § 2254(*a*), courts may award habeas relief "only" to those who are "in custody in violation of the Constitution or laws or treaties of the United States." Under this provision, habeas petitioners must show that their imprisonment is unconstitutional under current standards. The two subsections thus work in tandem: petitioners are entitled to relief only if their convictions were unlawful at the time, and only if their convictions *remain* unlawful today.

Applying § 2254(d)(1) here, the Sixth Circuit held that *Crawford* came after the Ohio Supreme Court's decision, so it asked whether that decision was contrary to, or an unreasonable application of, cases from the *Roberts* era. Pet.App.10a–11a, n.2. While

that was a mundane use of § 2254(d)(1), the Sixth Circuit went further: It held that—if it found § 2254(d)(1)'s test met—it need not *additionally* consider whether the admission of Miles's hearsay violated *Crawford*. Pet.App.10a–11a, n.2. In other words, the Sixth Circuit interpreted § 2254(d)(1) as establishing not just a *necessary* condition for granting habeas relief, but also a *sufficient* one. Pet.App.10a–11a, n.2. It never considered § 2254(a).

As Judge Sutton noted, Pet.App.365a, this decision creates a circuit split. Other circuits interpret § 2254 as requiring petitioners additionally to prove a constitutional violation under the standards applicable at the time of federal habeas review. *See, e.g.*, *Mitchell v. Superintendent Dallas SCI*, 902 F.3d 156, 163–64 (3d Cir. 2018), *cert. denied*, No. 18-6845 (U.S. Mar. 4, 2019); *Holland v. Florida*, 775 F.3d 1294, 1313 (11th Cir. 2014). Most notably, the Third Circuit's *Mitchell* decision presented analogous facts, but the court came out the other way. There, a jury convicted Edward Mitchell of murder. 902 F.3d at 160. At trial, two jailhouse informants described incriminating hearsay from Mitchell's codefendant. *Id.* This hearsay led Mitchell to move for a separate trial from his codefendant under *Bruton v. United States*, 391 U.S. 123 (1968). The state courts rejected Mitchell's *Bruton* claim. *Id.* at 161.

On federal habeas review, the Third Circuit conceded that Mitchell could meet § 2254(d)(1) because the state courts unreasonably applied *Bruton* when failing to sever his trial (presumably because the codefendant's hearsay would not have been independently admissible against Mitchell under *Roberts*). *Id.* at 161–62. Yet the Third Circuit held that it could not grant relief under § 2254. *Id.* at 162–64.

Contrary to the decision below, the court reasoned that, "[w]hile it is necessary for a state prisoner to satisfy *§ 2254(d)* to make a successful habeas corpus claim, he cannot obtain habeas corpus relief unless he also makes a showing under *§ 2254(a)* that he is being held in custody in violation of the Constitution, laws, or treaties of the United States." *Id.* at 163 (emphases added). And because the codefendant's statements to the informants were nontestimonial under *Crawford*, the Confrontation Clause did not restrict their admission at trial. *Id.* at 163–64.

Ironically, when reaching this conclusion, the Third Circuit relied on the Sixth Circuit decision, *Desai v. Booker*, 538 F.3d 424 (6th Cir. 2008), that the Sixth Circuit in this case rejected. Quoting *Desai*, the *Mitchell* court noted that § 2254 relief "'is available only to state prisoners who currently are being held in violation of an existing constitutional right, not to inmates who at one point might have been able to show that [under] a since-overruled Supreme Court or lower court precedent [they] would have [been entitled to] relief.'" *Id.* at 163 (quoting *Desai*, 538 F.3d at 428). But the decision below held the opposite: it granted relief to correct what it (mistakenly) perceived to be a misapplication of *Roberts*. And it reached what the Third Circuit described as an "anomalous" remedy—a new trial that would include the same hearsay evidence (under *Crawford*) that allegedly made the original trial erroneous (under *Roberts*). *Id.* at 164 (discussing *Desai*, 538 F.3d at 428).

The Eleventh Circuit reads § 2254 in much the same way as the Third Circuit. *Holland*, 775 F.3d at 1313–14. In *Holland*, the petitioner argued that the state courts violated his right to represent himself

under *Faretta v. California*, 422 U.S. 806 (1975). The Florida Supreme Court held that Holland did not knowingly invoke his *Faretta* right because of his mental disabilities, *Holland*, 775 F.3d at 1303–04, and the Eleventh Circuit initially concluded that the state court reasonably applied *Faretta* under § 2254(d)(1), *id.* at 1306–13. As relevant here, after the Florida Supreme Court's decision, this Court held that state courts may deny defendants the right to represent themselves when they are not sufficiently competent to conduct a trial (even if competent to stand trial). *Indiana v. Edwards*, 554 U.S. 164, 167 (2008). The Eleventh Circuit held that *Edwards* "provide[d] an alternative basis for the denial of Holland's habeas petition." *Holland*, 775 F.3d at 1313. It recognized that § 2254(a) required petitioners to show a constitutional violation under the current constitutional standards. *Id.* And it explained that other circuits had held that § 2254 relief is "only available to a petitioner whose constitutional claim has not been rendered nugatory by subsequent Supreme Court precedent." *Id.*

Holland and *Mitchell* comport with statements from this Court. In *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Court recognized that, "[a]s amended by AEDPA, 28 U.S.C. § 2254 sets *several* limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Id.* at 181 (emphasis added). Section 2254(a) "permits a federal court to entertain only those applications alleging that a person is in state custody 'in violation of the Constitution or laws or treaties of the United States.'" *Id.* (quoting 28 U.S.C. § 2254(a)). And "[i]f an application includes a claim that has been 'adjudicated on the merits in State

court proceedings,' § 2254(d), an *additional restriction* applies." *Id.* (emphasis added). Thus, courts may deny relief "under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review, *see* § 2254(a)." *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010); *see also Mosley v. Atchison*, 689 F.3d 838, 853 (7th Cir. 2012); *Fritz v. Hazey*, 533 F.3d 724, 735–36 (9th Cir. 2008) (en banc); *Rose v. Lee*, 252 F.3d 676, 690–91 (4th Cir. 2001).

It is true that one Fifth Circuit decision arguably supports the Sixth Circuit's approach. *See Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008). At the habeas petitioner's trial in that case, an accomplice's girlfriend testified about incriminating statements made by the accomplice. *Id.* at 488–89, 494–96. The Fifth Circuit held that the state court's decision allowing the admission of this hearsay violated *Roberts* under § 2254(d)(1), and it granted habeas relief without separately considering whether the hearsay also violated *Crawford*. *Id.* at 501–07. Instead, it suggested that *Crawford* would govern the admissibility of this hearsay at any retrial. *Id.* at 507 n.15. To the extent this decision supports the Sixth Circuit's view, it shows that the split is even deeper and so only increases the need for review.

In sum, the Sixth Circuit's use of § 2254(d)(1) to grant relief without analyzing *Crawford* conflicts both with decisions from other circuit courts and with statements from this Court about § 2254.

B. The Sixth Circuit's reliance on *Teague*'s retroactivity rules conflicts with the way in which other courts apply *Teague*.

The Court should also grant review because the decision below conflicts with other circuit decisions about the scope of *Teague*. *Teague* held "that new constitutional rules of criminal procedure [generally] will not be announced or applied on collateral review." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). It thus leaves in place state judgments resulting from the "good-faith interpretations of existing precedents," even if the state-court decisions "are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990). This equitable limit on federal habeas exists side-by-side with § 2254's statutory limits. *Greene v. Fisher*, 565 U.S. 34, 39 (2011). It protects *the States'* interests in the finality of their judgments. *Danforth v. Minnesota*, 552 U.S. 264, 279–80 (2008). Here, Issa's case predated *Crawford*, Pet.App.8a–9a, 11a, and the Sixth Circuit noted that "*Crawford* . . . is not retroactive" under *Teague*, Pet.App.11a (citing *Whorton*, 549 U.S. at 421).

To the extent that the Sixth Circuit used *Teague*'s retroactivity rules *against the State*, its decision conflicts with circuit cases refusing to apply *Teague* in this fashion. *See, e.g.*, *Delgadillo v. Woodford*, 527 F.3d 919, 927–28 (9th Cir. 2008); *Flamer v. Delaware*, 68 F.3d 710, 725 n.14 (3d Cir. 1995) (Alito, J.); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir. 1993). In *Delgadillo*, for example, the Ninth Circuit considered a petitioner's argument that the federal courts should analyze his claim under *Roberts* (not *Crawford*) because his judgment became final before the latter case. 527 F.3d at 924. A state habeas court

had retroactively relied on *Crawford* as a ground for denying the petitioner's claim, and the petitioner argued that this state-court decision violated *Teague*. *Id.* at 923. The Ninth Circuit initially held that, under AEDPA, the state courts could reasonably choose to apply new precedent without violating *Teague*. *Id.* at 924–26 (discussing *Danforth*, 552 U.S. at 271–82). More relevant here, the Ninth Circuit noted that, even under de novo review, the petitioner "could not have required us to consider his claims under *Ohio v. Roberts* rather than *Crawford*." *Id.* at 927. Because *Teague* exists to protect the States, the Ninth Circuit reasoned, a petitioner "may not raise *Teague* to bar the application of a new rule" that would otherwise doom the petitioner's claim. *Id.* at 928.

The Seventh Circuit in *Free* reached the same conclusion. *See* 12 F.3d at 703. There, a petitioner argued that *Payne v. Tennessee*, 501 U.S. 808 (1991)—which overruled a decision barring States from using victim-impact evidence in capital cases—could not apply retroactively under *Teague*. The Seventh Circuit disagreed because *Teague* does not limit the States. The court noted: "The Supreme Court deems *Teague* a one-way street: designed as it is to protect the state's interest in the finality of criminal convictions, it entitles the state, but not the petitioner, to object to the application of a new rule to an old case." *Free*, 12 F.3d at 703 (citing *Lockhart*, 506 U.S. at 372); *see also Moore v. Anderson*, 222 F.3d 280, 285 (7th Cir. 2000) (same).

In an opinion by then-Judge Alito, the Third Circuit also relied on a Supreme Court case that postdated the petitioner's judgment (*Davis v. United States*, 512 U.S. 452 (1994)) to reject his argument that he had validly invoked his right to counsel. *See*

Flamer, 68 F.3d at 725. In a footnote, the Third Circuit explained why it could do so notwithstanding *Teague*: "*Davis* may be applied retroactively despite *Teague v. Lane* because *Teague* only applies to a change in the law that *favors* criminal defendants." *Id.* at 725 n.14. The Third Circuit has since applied the same rule in the Confrontation Clause context when a criminal judgment predated *Crawford*. *Mitchell*, 902 F.3d at 163 n.4.

As Judge Sutton pointed out in the precedent that the panel rejected, these cases follow from this Court's own decision. *Desai*, 538 F.3d at 429. In *Lockhart*, the Court rejected a petitioner's claim that his counsel had been ineffective for failing to raise an argument, because this Court's later decision had since rejected that unraised argument. 506 U.S. at 372. In response to the assertion that *Teague* barred the Court from relying on this later-in-time precedent, the Court said that *Teague* seeks to protect the States' interests, and this concern does not exist when a State invokes the later precedent. *Id.* at 372–73. Thus, "the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not." *Id.* at 373.

All told, the Sixth Circuit's use of *Teague* to avoid *Crawford* again departed from this Court's precedent while (again) creating a circuit split.

* * *

One final point. As the Sixth Circuit recognized, Pet.App.11a, n.3, the Warden's panel-stage brief did not mention *Desai*'s requirement to analyze hearsay through *Crawford*'s lens and instead argued that the Ohio Supreme Court reasonably applied the older *Roberts* standards under § 2254(d)(1). But the Sixth

Circuit addressed *Desai* at oral argument, and answered this question on the merits by holding that it need not separately analyze *Crawford* under circuit cases predating *Desai*. Pet.App.11a, n.2. Thus, this issue is properly raised here. "Even though an issue may not have been raised in the lower court, if that court actually passes on the issue sua sponte, the petitioner may properly present the question to the Supreme Court." Stephen M. Shapiro et al., *Supreme Court Practice* 465–66 (10th ed. 2013) (citing cases).

II. The Sixth Circuit's reasoning under the overruled Confrontation Clause framework conflicts with this Court's AEDPA cases.

Even if § 2254 allowed federal courts to order the release of state convicts without finding a constitutional violation, the Sixth Circuit's decision still warrants review. Its reasoning under the now-overruled *Roberts* framework conflicts with this Court's cases interpreting § 2254(d).

A. Section 2254(d)(1) bars federal courts from granting habeas relief unless a state court's decision is either "contrary to" or an "unreasonable application of" this Court's precedent. The Court has long read these phrases to cover distinct fields. *See Williams v. Taylor*, 529 U.S. 362, 405–06 (2000).

"The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* at 405 (citation omitted). So a state court's decision is "contrary to" the Court's cases in only two situations: (1) if "the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or (2) if "the state court confronts 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 405, 406. "Avoiding these [two] pitfalls does not require citation of [the Court's] cases—indeed, it does not even require *awareness* of [its] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). And when deciding whether a state court's ambiguous opinion correctly identified the governing legal rules, the Court starts with a "'presumption that state courts know and follow the law.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (citation omitted). Federal courts thus should not show a "readiness to attribute error" to state courts. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). Instead, state courts must "be given the benefit of the doubt" in federal habeas proceedings. *Id.*

Apart from the two situations covered by the "contrary to" language, a court must otherwise evaluate a claim under § 2254(d)(1)'s unreasonable-application test. This text directs courts to "assess whether the [state court's] decision 'unreasonably applies [the governing legal] principle to the facts of the prisoner's case.'" *Pinholster*, 563 U.S. at 182 (quoting *Williams*, 529 U.S. at 413). That is a difficult standard to satisfy. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The Court has repeatedly "explained that 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Williams*, 529 U.S. at 410). A state court's decision must not just be wrong, it must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond

any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Packer provides a good example of these standards in practice. There, the habeas petitioner was convicted of murder only after a state judge directed deadlocked jurors to deliberate further. 537 U.S. at 4–6. The state appellate court held that the judge's comments to the jury had not been unconstitutionally coercive, but the Ninth Circuit concluded that the state court's decision was "contrary to" this Court's cases under § 2254(d)(1). *Id.* at 7. This Court summarily reversed. It criticized the Ninth Circuit's conclusion that the state court had "'failed to apply the totality of the circumstances test'" that governs jury-coercion claims. *Id.* at 8. The Court reasoned that the state court had accounted for the relevant circumstances, and that AEDPA did "not demand a formulary statement that the trial court's actions and inactions were noncoercive 'individually and cumulatively.'" *Id.* at 9. The Court also cautioned federal courts not to apply § 2254(d)(1)'s "contrary to" language broadly in order to "evade[]" the deferential unreasonable-application test. *Id.* at 11.

B. Here, the Sixth Circuit held that the Ohio Supreme Court's decision was "contrary to" *Idaho v. Wright*, 497 U.S. 805 (1990), because *Wright* indicated that a declarant's reliability under *Roberts* "must be shown from the totality of the circumstances." *Id.* at 819; Pet.App.12a. According to the Sixth Circuit, the Ohio Supreme Court departed from this totality-of-the-circumstances test because it "focused only on whether Miles made [his] statements to the police" and did not "consider[] any other facts." Pet.App.18a. This strained reading of the state

court's decision conflicts with this Court's AEDPA cases.

In no sense did the Ohio Supreme Court "appl[y] a rule that contradicts the governing law set forth in [this Court's] cases." *Williams*, 529 U.S. at 405. It began by correctly recognizing that state hearsay rules and the federal Confrontation Clause "are not equivalent." Pet.App.312a (citing *Wright*, 497 U.S. at 814). Turning to the Confrontation Clause, it cited the plurality opinion from *Lilly v. Virginia*, 527 U.S. 116, 119 (1999), for the proposition that "an out-of-court statement made by an accomplice that incriminates the defendant, is often made under circumstances that render the statement inherently unreliable." Pet.App.313a. Under the *Lilly* plurality, it reasoned, "the circumstances surrounding the making of the statement must make the declarant's truthfulness so clear that 'the test of cross-examination would be of marginal utility.'" Pet.App.313a–14a (quoting *Lilly*, 527 U.S. at 136 (quoting *Wright*, 497 U.S. at 820)). The Ohio Supreme Court next turned to its own decisions, Pet.App.314a, which recognized that the relevant circumstances for this inquiry include "'*only those that surround* the making of the statement,'" not corroborating evidence supporting the petitioner's guilt, *State v. Madrigal*, 721 N.E.2d 52, 63 (Ohio 2000) (quoting *Wright*, 497 U.S. at 819).

After summarizing these legal principles, the Ohio Supreme Court recited the governing test: "Applying *Lilly* and *Madrigal* to this case, it is clear that in order to determine whether the admission of evidence concerning Miles's confession violated [Issa's] confrontation rights, we must examine the *circumstances under which the confession was made*."

Pet.App.314a (emphasis added). It then cited at least "ten factors" that made Miles's statements reliable. Pet.App.360a (Sutton, J., concurring in denial of rehearing en banc). These factors included *not just* that Miles was talking to friends rather than police, *but also* that Miles's statements were spontaneous and voluntary, that the statements were made at his friends' home, that Miles had nothing to gain from inculpating Issa, that he confessed to a capital crime, and that he was bragging about his own role rather than attempting to shift blame to Issa. Pet.App.314a–15a, 360a.

This analysis reasonably articulated the then-binding standards, and reasonably applied those standards to this case's facts. AEDPA requires nothing more. Indeed, "[t]he worst that can be said of the decision is that it did not say 'totality' in describing the test." Pet.App.360a–61a (Sutton, J., concurring in denial of rehearing en banc). But this Court has already criticized courts for demanding such a "formulary statement," and it has upheld state-court decisions whose "fair import" followed governing law. *Packer*, 537 U.S. at 9. After all, state courts are presumed to "know and follow the law," so any ambiguities in their opinions must "be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24.

C. "The Sixth Circuit ignored those prescriptions." *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam). *First*, it wrongly asserted that the state court "focused only on whether Miles made these statements to the police" and did not "consider[] any other facts." Pet.App.18a. "Only a most ungenerous reading of the Ohio Supreme Court's decision permits the conclusion that the court failed to consider all of the material circumstances surround-

ing [Miles's] statements." Pet.App.362a (Sutton, J., concurring in denial of rehearing en banc). The Sixth Circuit's decision exemplifies the "readiness to attribute error" to the state judiciary that this Court's cases prohibit. *Visciotti*, 537 U.S. at 24.

Only *after* citing many factors in support of its conclusion that Miles's statements were reliable did the Ohio Supreme Court make the statement that the Sixth Circuit found concerning: that its conclusion was "buttressed by Chief Justice Rehnquist's separate opinion in *Lilly*, in which he noted that in a prior case, the court 'recognized that statements to fellow prisoners, *like confessions to family members or friends*, bear sufficient indicia of reliability to be placed before a jury without confrontation of the declarant.'" Pet.App.315a (quoting *Lilly*, 527 U.S. at 147 (Rehnquist, C.J., concurring in judgment)). Yet that was not the *only* reason for the decision, as the Sixth Circuit claimed. Pet.App.314a–15a. If anything, it was an afterthought. The Ohio Supreme Court did not treat Chief Justice Rehnquist's concurrence as the binding law or otherwise misunderstand the governing *Roberts* principles. *See Packer*, 537 U.S. at 9.

Second, "[b]y mistakenly making the 'contrary to' determination and then proceeding to a simple 'error' inquiry, the [Sixth] Circuit evaded § 2254(d)'s requirement that decisions which are not 'contrary to' clearly established Supreme Court law can be subjected to habeas relief only if they are not merely erroneous, but 'an *unreasonable* application' of clearly established federal law." *Id.* at 11. The Sixth Circuit did not even attempt to meet that deferential unreasonable-application test.

Nor could it have. The Sixth Circuit admitted as much. It *conceded* that "[s]everal facts suggest that Miles's statements to the Willises are trustworthy." Pet.App.19a. The court could find his statements unreliable only by engaging in what it described as a "deeper examination." Pet.App.20a. But when different factors within a totality-of-the-circumstances test cut in different ways, it is impossible to show that one resolution or the other is objectively unreasonable. That is what the Court means when it says "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). And nothing could be more general than a rule that considers everything.

Regardless, the two factors on which the Sixth Circuit relied to trump the many factors that support Ohio fall well short of satisfying the unreasonable-application test. The Sixth Circuit initially pointed to the Willises' testimony that Miles often bragged and told stories they were not sure were true. Pet.App.20a–22a. The Ohio Supreme Court viewed Miles's bravado as bolstering—not rebutting—the reliability of his hearsay. That is because when an accomplice's statements attempt to "shift or spread the blame" to the defendant, their self-serving nature makes them less trustworthy. *Lilly*, 527 U.S. at 133 (plurality op.). Here, however, "Miles's statement was clearly not an attempt to shift blame from himself because he was bragging about his role as the shooter in the double homicide." Pet.App.315a. The Sixth Circuit simply ignored this commonsense counterpoint.

The Sixth Circuit also invoked Miles's testimony at Linda Khriss's trial—long after the statements to

the Willises—in which he denied talking to the Willises about the murders. Pet.App.22a–24a. But, as Judge Sutton explained, that factor was not a permissible one to consider. Pet.App.361a (Sutton, J., concurring in denial of rehearing en banc). The Ohio Supreme Court recognized that the "relevant circumstances in measuring the degree of reliability include "'*only those that surround* the making of the statement.'" Pet.App.314a (quoting *Madrigal*, 721 N.E.2d at 63 (quoting *Wright*, 497 U.S. at 819)). "Just as one could not say an out-of-court statement became reliable based on corroborating evidence at trial, one cannot say a statement became unreliable based on statements at a later trial." Pet.App.361a (Sutton, J., concurring in denial of rehearing en banc) (citation omitted). Indeed, Issa's brief in the Ohio Supreme Court did not even mention Miles's testimony at Linda Khriss's trial when discussing his Confrontation Clause claim. *Issa*, No. 1:03-cv-00280, R.224-2, PAGEID#5497, 5520–24. So it was at least reasonable for the Ohio Supreme Court to read *Wright* this way. And a "federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam).

In sum, the Ohio Supreme Court's decision was neither contrary to nor an unreasonable application of this Court's cases. To reach a contrary result, the Sixth Circuit relied on reasoning that this Court has repeatedly cautioned against.

III. Important equitable factors further justify the Court's review.

Setting aside the circuit split and conflict with the Court's cases, additional reasons show the need for this Court's intervention. In 2015, the Court "again advise[d] the [Sixth Circuit] Court of Appeals that the provisions of AEDPA apply with full force even when reviewing a conviction and sentence imposing the death penalty." *Wheeler*, 136 S. Ct. at 462. The Court used the word "again" because it had told the Sixth Circuit the same thing many times before. *Id.* (citing *Parker v. Matthews*, 567 U.S. 37 (2012) (per curiam); *Bobby v. Dixon*, 565 U.S. 23 (2011) (per curiam); *Bobby v. Mitts*, 563 U.S. 395 (2011) (per curiam); *Bobby v. Van Hook*, 558 U.S. 4 (2009) (per curiam)); *cf. Donald*, 135 S. Ct. at 1378; *White v. Woodall*, 572 U.S. 415, 417 (2014); *Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Metrish v. Lancaster*, 569 U.S. 351, 354 (2013); *Howes v. Fields*, 565 U.S. 499, 502 (2012); *Berghuis v. Thompkins*, 560 U.S. 370, 389 (2010); *Renico*, 559 U.S. at 776; *Berghuis v. Smith*, 559 U.S. 314, 332–33 (2010); *Smith v. Spisak*, 558 U.S. 139, 142–43 (2010); *Bobby v. Bies*, 556 U.S. 825, 837 (2009); *Bradshaw v. Richey*, 546 U.S. 74, 79–80 (2005) (per curiam); *Jackson*, 542 U.S. at 655; *Esparza*, 540 U.S. at 13; *Price v. Vincent*, 538 U.S. 634, 636 (2003).

Since 2015, however, the Sixth Circuit has continued to grant § 2254 relief that conflicts with federal habeas constraints. *See, e.g.*, *Hill*, 139 S. Ct. at 507–08; *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (per curiam); *Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016) (per curiam). And so from "time to time"—indeed, from Term to Term—this Court reminds the Sixth Circuit that § 2254 allows federal

habeas relief only for extreme malfunctions in state proceedings. Pet.App.367a (Sutton, J., concurring in denial of rehearing en banc); *see Donald*, 135 S. Ct. at 1378. This recent record of "repetitive error," *Matthews*, 567 U.S. at 49, proves that the Sixth Circuit's "taste for disregarding AEDPA" remains unabated notwithstanding this Court's instructions, *Rapelje v. Blackston*, 136 S. Ct. 388, 390 (2015) (Scalia, J., dissenting from denial of certiorari). The Court should grant review to reaffirm the importance of following its precedent—and perhaps to encourage the Sixth Circuit to police itself at the en banc stage, so that this Court need not reverse egregious errors again and again and again.

In addition, the Sixth Circuit's decision undercuts AEDPA's primary goal of fostering "federalism and comity" even more than a typical AEDPA error. *Donald*, 135 S. Ct. at 1376. By granting relief without finding a constitutional violation under *Crawford*, the Sixth Circuit has ordered a "new trial with the same evidence as the old trial." Pet.App.364a (Sutton, J., concurring in denial of rehearing en banc). Such a repeat trial—with nothing substantively different—wastes state resources without reason. The court has, in effect, "impose[d] mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013). "It disrespects" the men and women of Ohio's judiciary "to vacate and send back their authorized judgments for inconsequential imperfection of opinion—as though" the federal courts "were schoolmasters grading their homework." *Wellons v. Hall*, 558 U.S. 220, 228 (2010) (Scalia, J., dissenting).

The Sixth Circuit granted relief, moreover, based in part on a factor—Miles's testimony at Linda

Khriss's trial—that was not even *argued* to the Ohio Supreme Court on direct appeal. *Issa*, No. 1:03-cv-00280M, R. 224-2, PAGEID#5497, 5520–24. The decision thus conflicts with this Court's teachings that "state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richter*, 562 U.S. at 103.

Finally, whether § 2254 requires petitioners to prove that their state convictions violate *current* constitutional rules remains an important question even if, as Judge Sutton suggested, it has diminishing relevance in the specific *Crawford* context. Pet.App.366a (Sutton, J., concurring in denial of rehearing en banc). This general question could arise anytime the Court overrules or otherwise clarifies one of its earlier precedents. *See, e.g.*, *Holland*, 775 F.3d at 1313–14. The question is thus worthy of this Court's attention no matter how many more times it will continue to arise in the specific context of *Crawford*.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

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