No. 18-8132

# In the Supreme Court of the United States

ANTHONY D. PHILLIPS, PETITIONER

v.

NOAH NAGY, WARDEN

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

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

1. Should this Court grant certiorari to determine the correct standard of review in this case, where the Court of Appeals chose the standard more favorable to the petitioner and thus necessarily held that the petitioner would lose under either standard?

2. Should this Court grant certiorari to perform error correction where the court of appeals applied the correct standards to factbound claims, but the petitioner disagrees with the results?

3. Is a habeas petition under 28 U.S.C. § 2254(d) an appropriate vehicle to announce a new constitutional rule, especially when the rule, if adopted, would not change the outcome of the case?

## PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Anthony Phillips, a Michigan prisoner. The named respondent below was Bonita Hoffner, Phillips's former warden. Phillips is now housed at Lakeland Correctional Facility, where his warden is Noah Nagy.

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The order of the Michigan Supreme Court denying Phillips's application for leave to appeal, Pet. App. 65a, is reported at 838 N.W.2d 151 (Mich. 2013). The opinion per curiam of the Michigan Court of Appeals affirming Phillips's conviction, Pet. App. 66a–82a, is unreported but available at 2013 WL 2223388. The trial court's written order denying Phillips's motion for new trial, Pet. App. 83a, is unreported. The trial court's ruling on the record denying Phillips's motion for new trial, Resp. App. 1a–8a, is unreported.

## JURISDICTION

The State agrees that this Court has jurisdiction to consider the petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him, . . . and to have the assistance of counsel for his defence.

28 U.S.C. § 2254(d) provides:

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.

## INTRODUCTION

This petition raises three distinct questions, two of which do not affect the outcome of this appeal, and the third of which seeks only error correction. None of the questions are worthy of a grant of certiorari.

In 1987, Anthony Phillips broke into the home of Lacey Tarver, beat him to death, and ransacked his home for valuables. After the initial investigation, Phillips was a suspect in the murder, but the evidence was not strong enough to prosecute. Some twenty years later, after technology improved, DNA testing of blood found at the scene confirmed Phillips's presence. A jury found Phillips guilty of first-degree murder.

The jury heard evidence of a jacket that had been seized from Phillips's home. The jacket had a bullet hole and a blood stain, and the blood was the same type as Phillips and Tarver. Unfortunately, it was learned after trial that the jacket had been seized from Phillips's home the year prior, and indisputably had nothing to do with the murder.

Phillips moved for a new trial, which was denied, and appealed unsuccessfully in the Michigan courts. He then came to the federal courts seeking habeas relief and was similarly unsuccessful. Now he presents three questions to this Court.

First, Phillips asks this Court to resolve the question of the appropriate standard of review of a claim that was decided by the state courts under plain-error review. If the habeas court excuses the default and reaches the merits, does AEDPA's deferential standard apply or is review de novo? While this question has divided the Sixth Circuit, Phillips has identified no inter-circuit split that calls for this Court's

intervention. But more to the point, this case is an improper vehicle for the question because the court below applied the standard more favorable to Phillips, and Phillips still lost. If this Court wishes to resolve the question, it should wait for a case in which the standard of review matters.

Second, Phillips expresses disagreement with the court of appeals about its rejection of some of his habeas claims. And that is all. He has identified no legal errors, no splits in authority, no questions of jurisprudential significance. He simply asks this Court to examine the fact-specific questions that have already been rejected by every court to examine them so far and to reach a different result. This is quintessential error correction, and not worthy of certiorari. The decision below was also correct on the merits.

Third, Phillips disagrees with the state court's and district court's rejection of his claim of insufficiency of the evidence. While this looks at first like another request for mere error correction, the argument appears to ask this Court to overrule its prior holdings and establish a new rule that, in resolving an insufficiency claim, reviewing courts should only look to the evidence that was properly admitted, ignoring evidence that was admitted erroneously. Phillips has made no argument as to why this Court should abandon its long-standing precedent on this point. But that aside, there are two reasons this case is a bad vehicle to examine the issue. First, this is a habeas case and therefore not the correct forum to announce a new constitutional rule. And second, neither of the courts that decided Phillips's insufficiency claim considered the improperly admitted evidence, so even under his rule, he would still lose.

## STATEMENT OF THE CASE

This case arises from Anthony Phillips's 1987 murder of Lacey Tarver in Tarver's Detroit home.

### A. The murder and trial.

Anthony Phillips's sister Carmen Allen dated Lacey Tarver for a time. Pet. App. 2a. The two broke up around Thanksgiving 1986, and Allen moved out. *Id.* Phillips visited Tarver's home at times, including one visit a week before Tarver was murdered. *Id.*

On March 4, 1987, Tarver's brother discovered his dead body in Tarver's home. *Id.* A basement window was shattered and there was blood around the broken window. *Id.* Tarver's body was fully clothed and leaning against a bedroom wall surrounded by blood—he appeared to have been killed from blows to the head consistent with those from the head and claw of a hammer. *Id.* The house appeared to have been ransacked, and several pieces of electronic equipment were missing, as well as a wallet and car keys. *Id.*

Investigators collected blood samples from a shard of glass from the bedroom window, a tissue found on the kitchen table, and a checkbook. Pet. App. 3a. At the time of the initial investigation, DNA testing technology was not available. Pet. App. 3a n.1. Blood-type testing of the samples showed that the blood on the tissue and checkbook was Type O, the same as both Phillips and Tarver. Pet. App. 3a. The technician could not determine the blood type on the shard of glass. *Id.*

Investigators also analyzed nine fingerprints collected during the investigation. *Id*. One of these came from a Band-Aid box in one of Tarver's bathrooms, and was determined to be Phillips's fingerprint. *Id*. Investigators found peeled strips from a Band-Aid on the floor of that bathroom. *Id*. On the basis of this initial investigation, Phillips was identified as a suspect in the murder, but the prosecutor determined the evidence was not sufficient to proceed. *Id*.

About twenty years later, the Detroit Police Department submitted the evidence collected from the scene for additional testing. *Id*. The blood on the shard of glass was still too faint to test. Pet. App. 3a–4a. The blood on the tissue and checkbook, however, could be tested for DNA. Pet. App. 4a. The blood on the tissue had reportable data for 12 of 13 genetic markers, and all 12 matched Phillips. *Id*. The chance of a random unrelated African-American man having the same degree of match is 1 in four quadrillion. *Id*. (This is roughly the population of half a million Earths, or the African-American male population of about eleven billion Detroits.)

The blood on the checkbook only had reportable data for 3 of the 13 markers, but again all 3 matched Phillips. *Id*. The chance of a random unrelated African-American man having the same degree of match is 1 in 211.7. *Id*.

After the DNA results implicated Phillips, he was charged with first-degree felony murder. *Id*. In addition to the DNA and fingerprint evidence described above, the prosecution also admitted testimony about a jacket that had been seized in Phillips's home while executing a search warrant. Pet. App. 4a–5a. The jacket had blood on it, which was tested for blood type and found to be Type O—again, that of both

Phillips and Tarver. Pet. App. 69a. The jacket was destroyed sometime between the initial testing and the later DNA testing of the blood samples. Pet. App. 5a.

The jury found Phillips guilty of first-degree murder, and he was sentenced to life in prison without the possibility of parole. Pet. App. 6a.

**B. The motion for new trial.**

After trial, it was discovered that the jacket discussed at trial was not in fact seized during the investigation of the Tarver murder, but the year before, during another investigation of Phillips for a different crime. *Id*. Phillips filed a motion for new trial, raising several claims including claims of prosecutorial misconduct and ineffective assistance of trial counsel relating to the jacket. The trial court held a hearing over the course of several days. Augustus Hutting, the assistant prosecuting attorney who tried the case, testified on the third day of the hearing. 6/16/2011 Hr'g Tr. at 5–29. Hutting acknowledged that he received the return to the search warrant of Phillips's home following Tarver's murder and that the return indicated that nothing was seized there. *Id*. at 7–8. Hutting testified that he believed the return was mistaken, because of the report he received from the serologist who was testing the blood samples. *Id*. at 12–13, 18–19. The report said that the jacket was seized from Phillips's home, which was true, and that it was received by the laboratory after Tarver's murder, which was also true. *Id*. at 18. From this, Hutting inferred incorrectly that the jacket was seized after Tarver's murder and that the warrant return was mistaken. *Id*. at 18–19.

After hearing the testimony, the trial court observed that Hutting had placed very little weight on the jacket in his arguments at trial. *Id*. at 37–38. Hutting did not mention the jacket in his main closing argument, but only in rebuttal. *Id.* The court observed that "out of 31 pages [of both closing and rebuttal] he spends exactly 16 lines on the jacket which apparently I said when I denied the defense motion in limine [to exclude the jacket], I said it seems to me that the jacket has very little evidentiary value and indeed it did." *Id*. at 37. The court continued to observe that "the jacket, in the context of all the other evidence in the case [is] really extremely unremarkable. I mean it's just, it's a—it's, it's a useless piece of evidence really." *Id*. at 38. The court noted that the jury was aware there was a bullet hole in the jacket and that "there was no indication that there were any shots fired in the [Tarver] killing." *Id*. And the court concluded its remarks on the point by saying, "So, you know, when you . . . look at that jacket as evidence compared . . . to the DNA evidence and the fingerprint on the Band-Aid can, and I mean it's just. It's nothing. It's pissant evidence." *Id*.

After Phillips testified on the fourth day of the hearing, the State called defense trial counsel Sequoia DuBose to testify the following day as a rebuttal witness. 6/28/11 Hr'g Tr. at 3. The trial court informed DuBose that Phillips, by testifying, had willingly waived any privilege with respect to any conversations the two had had. *Id*. at 4. DuBose found this waiver to be "problematic." *Id*. at 4–5. He told the court that he did not intend to disclose the contents of any conversations he had with Phillips. *Id*. at 5–7. When the court ordered DuBose to testify, DuBose responded, "Your

Honor, I have kept my client's conversation secret for 25 years, and it is my intent to keep 'em for 25 more of my life expectancy. I cannot reveal what those conversations were, your Honor, in all due respect." *Id.* at 7. After further discussion, DuBose continued to refuse to testify and was jailed for civil contempt. *Id.* at 9–15.

The trial court then ruled on the motion. It held that Hutting's explanation as to why he made a mistake as to when the jacket was received was "utterly and completely plausible." Resp. App. 6a. The court then noted the limited relevance of the jacket and the "overwhelming" nature of the other evidence:

> [T]hat was just one of many pieces of evidence that came in against Mr. Phillips during the course of the trial. But far more noteworthy and important than the jacket was the DNA. His DNA which was found in blood splatters in various important places in the home. And then, of course, his fingerprint on the Band-Aid box, the bloody fingerprint on the Band-Aid box.
>
> So *the evidence against the defendant during the course of the trial was pretty overwhelming*. The jacket in the big scheme of things was virtually unimportant or non-important. And the admissibility of that jacket, rightfully or wrongfully, was in my view not outcome determinative at all.
>
> This case would have turned out the same way with that jury whether that jacket had gone into evidence or not. The jacket didn't mean a darn thing to the outcome of the case.

Resp. App. 7a (emphasis added).

The court went on to hold that Hutting had not committed prosecutorial misconduct, nor had DuBose rendered deficient performance, but that the mistakes of both attorneys had been understandable under the circumstances. Resp. App. 7a–8a. The court held that to find DuBose performed deficiently "would hold Mr. DuBose to a just completely unrealistic if not fantastical standard," and so the court did not "find

that he was ineffective in not picking up on the fact that 23 years later, this jacket, there was some indication that the jacket might have been confiscated in '86 rather than in '87." Resp. App. 8a.

### C. Direct appeal in the Michigan courts.

Phillips appealed by right to the Michigan Court of Appeals, raising ten claims of error, including a challenge to the sufficiency of the evidence, claims of denial of the right to present a defense and the right of confrontation, and claims of prosecutorial misconduct and ineffective assistance relating to the admission of the jacket. The Michigan Court of Appeals affirmed Phillips's conviction in an unpublished opinion per curiam. Pet. App. 66a–82a.

In rejecting Phillips's sufficiency challenge, the court held that the evidence provided a reasonable basis on which to believe that Phillips murdered Tarver:

> The evidence showed that someone entered Tarver's house by breaking a basement window. During this process, that individual cut himself, as there was blood on the shattered window glass. A tissue with blood on it was on the kitchen table. Expert testimony showed that defendant's DNA matched the DNA on the bloody tissue on 12 of 13 loci. Defendant's fingerprint was on a box of Band–Aids in the bathroom, and it appeared that a Band–Aid was recently used. The box was sitting on the bathroom sink and there were the peeled strips from the back of the Band–Aid on the bathroom floor. In addition, there was blood on a checkbook in the dresser drawer in the southeast bedroom of the home. Expert testimony showed that the defendant's DNA matched the DNA on the checkbook on 3 of 13 loci. While any of this evidence alone might not be sufficient to support defendant's conviction, taken as a whole and drawing all reasonable inferences in favor of the jury verdict, it was sufficient. See *Kissner*, 292 Mich App at 534. *It was reasonable for the jury to infer that defendant left the bloody tissue on the kitchen table after he cut himself breaking into Tarver's basement, used a Band–Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after killing Tarver.*

Pet. App. 71a–72a (emphasis added).

The court did not mention the jacket in its sufficiency analysis. *Id*.

The court applied plain-error review to reject Phillips's claims of denial of the right to present a defense and the right to confrontation, because they had not been preserved by a proper objection at trial. Pet. App. 72a, 74a.

In rejecting Phillips's prosecutorial misconduct claim, the court deferred to the trial court's findings that Hutting's testimony was credible:

> At the post-trial evidentiary hearing, the trial prosecutor testified that he did not know that police seized the jacket in 1986, before Tarver's murder, until defendant filed his motion for a new trial. The trial court had the opportunity to observe the prosecutor testify at the evidentiary hearing and found his testimony credible. This Court "will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Eisen*, 296 Mich App at 331. Thus, there is no evidence that the trial prosecutor knowingly presented false testimony. See *Aceval*, 282 Mich App at 389.

Pet. App. 77a.

The court also noted the "low probative value" of the jacket:

> As defense counsel argued, the prosecution could not establish that it belonged to defendant. The jacket had two suspected bullet holes through it, but there was no evidence that Tarver's murder involved the use of a gun or that there was a struggle. Instead, other evidence directly linked defendant to Tarver's murder, including his fingerprint on the Band–Aid box, the bloody tissue, and the blood on the checkbook. This evidence standing alone was more than sufficient to allow a rational juror to convict defendant beyond a reasonable doubt.

*Id*.

In rejecting the claim that DuBose was ineffective for failing to investigate the seizure of the jacket, the court declined to rule on the performance prong, allowing only that counsel's performance "may have fallen below an objective standard of

reasonableness," but agreed with the trial court that Phillips had failed to show a reasonable probability of a different outcome had counsel objected. Pet. App. 80a–81a.

Phillips sought leave to appeal to the Michigan Supreme Court, raising nine of the ten claims he raised in the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal in a standard order, without a dissent. Pet. App. 65a.

### D. Federal habeas proceedings

After his state-court appeals failed, Phillips filed a petition for habeas corpus in the Eastern District of Michigan, raising eight claims for relief. The State responded, arguing that some of Phillips's claims were procedurally defaulted and that all of them were meritless. The district court did not rule on the procedural-default argument, finding that "the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of petitioner's defaulted claims, [such that] it would be easier to consider the merits of these claims." Pet. App. 38a n.1.

The district court did consider, however, whether AEDPA's limitations on federal habeas review applied to the defaulted claims, noting a conflict *within* the Sixth Circuit on the question. Pet. App. 38a (citing *Fleming* v. *Metrish*, 556 F.3d 520, 532 (6th Cir. 2009); *Frazier* v. *Jenkins*, 770 F.3d 485, 496 n.5 (6th Cir. 2014); *Trimble* v. *Bobby*, 804 F.3d 767, 777 (6th Cir. 2015)). The district court ultimately concluded that AEDPA deference did apply to the defaulted claims.

In rejecting the insufficiency claim, the district court pointed to several pieces of circumstantial evidence that could have allowed a jury to "reasonably infer[ ] that

petitioner left the bloody tissue on the kitchen table after he cut himself breaking into Mr. Tarver's basement, used a Band-Aid to cover his wound, and left his blood on the checkbook while ransacking the southeast bedroom, either before or after murdering the victim." Pet. App. 42a. The district court did not mention the jacket in its sufficiency analysis. Pet. App. 39a–42a.

The district court also rejected several of Phillips's arguments relating to evidence about the jacket. In rejecting a claim that testimony about the jacket violated his rights under the Confrontation Clause, the court held, "Officer Braxton's testimony about the search warrant and the jacket recovered from petitioner's house was harmless error because the jacket did not implicate petitioner in the murder, particularly where there was other ample evidence linking petitioner to the crime." Pet. App. 49a (citation omitted).

In rejecting Phillips's claim that the prosecutor knowingly elicited false testimony about the jacket, the court held, "Petitioner is not entitled to relief on his claim because he failed to show that Officer Braxton intentionally testified falsely about seizing the jacket . . . ." Pet. App. 52a. The district court concluded that the prosecution was mistaken, not lying, about the jacket, and without a knowing presentation of false testimony, Phillips could not show a constitutional violation. Pet. App. 52a–53a. Further, the court held, "Petitioner is also not entitled to relief because the jacket was not material to petitioner's conviction, because it was not a 'crucial link' in the case against petitioner. The jacket was never linked to the murder or even to petitioner." Pet. App. 53a (citation omitted).

And in rejecting Phillips's claim that counsel was ineffective for not presenting evidence about when the jacket was seized, the court held that Phillips could not show prejudice "because the jacket was not incriminating." Pet. App. 61a.

Having rejected all of Phillips's claims on the merits, the district court denied the petition and denied a certificate of appealability. Pet. App. 63a.

Phillips appealed to the Sixth Circuit, which granted a certificate of appealability on four claims: one claim that the trial court improperly limited cross-examination, and three claims relating to Ofc. Braxton's testimony about the jacket—under the Confrontation Clause, prosecutorial misconduct, and ineffective assistance of trial counsel. (8/7/12 6th Cir. Order at 12.)

The State again argued procedural default. The court held that even if the claims were defaulted, Phillips's claim of ineffective assistance of counsel would serve as good cause to excuse the default, concluding, "Because we would reach the merits of those claims regardless of default, we proceed straight there." Pet. App. 10a n.6.

The court also grappled with the question whether to apply AEDPA deference to the defaulted claims. Pet. App. 9a–10a. The court ultimately decided not to resolve the perceived ambiguity "because none of Petitioner's unpreserved claims can survive even de novo review." Pet. App. 10a (citing *Trimble* v. *Bobby*, 804 F.3d 767, 777 (6th Cir. 2015)).[1]

[1] Judge KETHLEDGE, concurring, disagreed with this portion of the court's opinion, and would have held that AEDPA deference applied to the unpreserved claims. Pet. App. 29a (citing *Stewart* v. *Trierweiler*, 867 F.3d 633 (6th Cir. 2017)).

Applying de novo review to the unpreserved claims, the court held that each was without merit. The court held that the trial court's limitations on cross-examination did not violate the Constitution because they did not implicate Phillips's substantial rights. Pet. App. 12a–13a. The court held the Confrontation Clause claim to be without merit because the hearsay declarant testified at trial and was subject to cross-examination. Pet. App. 13a. And the court rejected the claim of prosecutorial misconduct because "Phillips ha[d] not presented any evidence that Hutting knowingly sought to present false evidence, and nothing in the record supports that conclusion." Pet. App. 14a–15a.

Turning to Phillips's claim of ineffective assistance of counsel, the court held that, because the Michigan Court of Appeals relied only on the prejudice prong to reject the claim, that was the only portion of the claim to which AEDPA deference was owed. Pet. App. 15a–16a (citing *Rayner* v. *Mills*, 685 F.3d 631, 638 (6th Cir. 2012); *Moss* v. *Olson*, 699 F. App'x 477, 481–82 (6th Cir. 2017)).

The court proceeded to examine the claim by reviewing the performance prong de novo and the prejudice prong under AEDPA deference. Pet. App. 16a–22a. The court held that Phillips's defense counsel performed deficiently by failing to investigate the issue of the jacket and learn that it was unrelated to Tarver's murder. Pet. App. 16a–20a.[2] The court then turned to the prejudice prong, noting that its "inquiry is limited to 'whether the [Michigan] Court of Appeals' determination is an

[2] Judge KETHLEDGE disagreed with this conclusion as well and would have held, even on de novo review, that counsel did not perform deficiently. Pet. App. 29a.

unreasonable application of clearly established Federal law.' " Pet. App. 20a (citing *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 404–05 (2000)).

The court of appeals found the Michigan Court of Appeals' prejudice analysis "not without flaw," Pet. App. 21a, and, answering a question not before it, opined that, "if we were reviewing this prong de novo, we would hold that the admission of the jacket prejudiced Phillips," Pet. App. 22a. Turning to the question presented, however, the court held that the Michigan Court of Appeals' resolution of the prejudice prong was not unreasonable. *Id*. The court considered the reasoning of the Michigan Court of Appeals, and noted that that court

> considered the jacket at multiple points and noted that, even without the jacket, the rest of the physical evidence directly linked Phillips to the scene of the murder. And given that the murderer's identity was the key issue at trial, it is reasonable to find that the probative value of these direct links outweighed that of the jacket.

*Id*.

On this basis, the court held that Phillips was not entitled to relief.[3]

Phillips moved for rehearing en banc, and no judge of the Sixth Circuit requested a vote on the suggestion. Pet. App. 64a.

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[3] Judge MOORE, writing in dissent, disagreed with the court's conclusion that the Michigan Court of Appeals' prejudice analysis was reasonable. Pet. App. 24a–28a.

## REASONS FOR DENYING THE PETITION

### I. The court of appeals rejected Phillips's unpreserved claims de novo, without AEDPA's restrictions, making this case a poor vehicle to resolve the first question presented.

The first question presented does not present a circuit split, but only an intra-circuit dispute, one that does not govern this case because the court of appeals applied the more favorable standard to Phillips and still denied him relief. And as an additional matter, the State continues to press the point that the claims here were defaulted.

#### A. The standard that Phillips seeks would have no bearing on the outcome of this case, as his claim failed under de novo review.

Phillips offers his petition as an opportunity for this Court to resolve a conflict within the Sixth Circuit, and (according to Phillips) among the circuits, on the correct standard of review to apply to a habeas claim that was rejected by a state court applying plain-error review. But the court below reviewed the unpreserved claims de novo, so the question whether AEDPA deference applies does not matter in this case.

Phillips has not identified a split worthy of this Court's attention. It is true that there is division within the Sixth Circuit on the question. See discussion at Pet. App. 9a–10a (citing *Stewart* v. *Trierweiler*, 867 F.3d 633, 638 (6th Cir. 2017) (AEDPA deference does apply); *Frazier*, 770 F.3d at 496 n.5 (AEDPA deference does not apply); *Fleming*, 556 F.3d at 532 (AEDPA deference does apply). But the other courts of appeals appear to agree that deference is warranted. As Phillips points out, the Eleventh Circuit has held "that AEDPA deference may apply to a state court's plain-error

ruling." *Lee* v. *Comm'r*, *Ala. Dep't of Corr.*, 726 F.3d 1172, 1208 (11th Cir. 2013). Phillips also recognizes that the Third Circuit has held that when a state court denies relief on procedural grounds but provides an alternative merits-based justification for its decision, that alternative holding is entitled to AEDPA deference. *Rolan* v. *Coleman*, 680 F.3d 311, 321 (3d Cir. 2012). And he cites *Stephens* v. *Branker*, in which the Fourth Circuit reached the same holding. 570 F.3d 198, 208 (4th Cir. 2009).

The Second Circuit has held that an alternative merits adjudication is entitled to AEDPA deference, *Zarvela* v. *Artuz*, 364 F.3d 415, 417 (2d Cir. 2004) (though it has drawn a distinction where the state court has said, " '*if* the merits were reached, the result *would be* the same,' " holding that this "contingent observation" is not a merits adjudication, *Bell* v. *Miller*, 500 F.3d 149 (2d Cir. 2007)). The Tenth Circuit applies AEDPA deference in cases where the state court has applied plain-error review, "to the extent that the state court finds the claim lacks merit under federal law." *Douglas* v. *Workman*, 560 F.3d 1156, 1170–71 (10th Cir. 2009) (citing *Cargle* v. *Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003)).

The consensus outside the Sixth Circuit, then, is that when the state court applies plain-error review and also discusses the merits of the claim, the alternative merits discussion is an adjudication on the merits, which entitles the state court's decision to deference under AEDPA. This is also the prevailing view within the Sixth Circuit, *Stewart*, 867 F.3d at 638; *Fleming*, 556 F.3d at 532; *Brooks* v. *Bagley*, 513 F.3d 618, 624–25 (6th Cir. 2008), though it is admittedly not unanimous, *Frazier*, 770

F.3d at 496 n.5. The Sixth Circuit here did not provide this deference and still rejected the claim.

Thus, even for the disagreement that is confined within the Sixth Circuit, this is not the vehicle for resolving it. If this Court wishes to resolve the question, it should wait for a case in which the court below reached a holding on the question and that holding made a difference to the outcome of the case. This is not that case. Here, the court below noted the disagreement on the question, decided to review the unpreserved claims de novo, and determined that the State prevailed under either standard. Pet. App. 10a.

And review of the court of appeals' resolution of these claims shows that the court properly applied the de novo standard. None of the three sections examining the unpreserved claims even cite—much less show any sign of deference to—the Michigan Court of Appeals' ruling. Pet. App. 10a–15a. And in rejecting Phillips's claim of prosecutorial misconduct, the court explicitly relied on Sixth Circuit precedent for the applicable standard. Pet. App. 13a–15a and 14a n.8. This would have been improper under deferential review, because "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court,' 28 U.S.C. § 2254(d)(1). It therefore cannot form the basis for habeas relief under AEDPA." *Parker* v. *Matthews*, 567 U.S. 37, 48–49 (2012).

And so there is no way for this Court to grant meaningful relief. If Phillips prevails on this argument, the result will be that de novo review was appropriate, but it will not change the outcome because the Sixth Circuit has already determined that

Phillips's appeal fails under that standard. If the State prevails, the result will be that deferential review was appropriate, but that will not change the outcome either, because that standard is much more favorable to the State.

### B. The unpreserved claims are also defaulted.

In addition to the problems with Phillips's first question, there is another complication that makes this case a poor candidate for this Court's small and discretionary docket.

Several of Phillips's claims are barred by procedural default. The Sixth Circuit's holding that the default was excused by ineffective assistance of counsel, Pet. App. 10a, was erroneous. The court held that, because it would have found counsel ineffective without AEDPA deference, that holding would excuse the procedural default. But the court below only found trial counsel ineffective for his failings relating to the jacket testimony. The court made no findings of ineffectiveness relating to the rulings on the unpreserved claims. If certiorari is granted, this Court will need to properly adjudicate the procedural default question relating to these claims.

## II. The state and federal courts that have examined Phillips's claims of error have concluded that he is not entitled to relief and thus Phillips raises no significant questions but seeks only error correction.

In the second question Phillips brings to this Court, he disagrees with the result reached by every court to have examined his claims so far. But these are fact-bound questions of no jurisprudential significance. They do not merit certiorari.

### A. The state and lower courts' rejection of Phillips's claim of prosecutorial misconduct depend on a finding that the prosecutor did not know the testimony about the jacket was false.

Phillips's first argument in this section relates to the claim of prosecutorial misconduct in presenting testimony relating to the jacket. The state trial court held an evidentiary hearing on this claim and made findings of credibility and fact, determining that Hutting did not know that the jacket had been seized in an earlier search. Of the 15 judges and justices on the five courts where Phillips has already presented this claim, not one has found any factual or legal error in the trial court's findings and holding. Phillips has not identified any significant errors of law or splits in authority on governing questions. He simply wishes this Court to examine his claim a sixth time and reach a different conclusion.

Phillips contends that his case is "practically indistinguishable from" *Miller* v. *Pate*, 386 U.S. 1 (1967). The cases are similar only superficially—in *Miller*, as here, there was evidence of an apparently blood-stained piece of apparel used at trial. And in *Miller*, as here, it was discovered after trial that the apparel had nothing to do with the murder. In *Miller*, it turned out that the "blood-stained" shorts were in fact stained only with paint. *Id.* at 5.

But this case is distinguished from *Miller* in one crucial respect. In *Miller*, "[i]t was . . . established that counsel for the prosecution had known at the time of the trial that the shorts were stained with paint." *Id.* at 6. Counsel for the State argued in habeas proceedings that " 'everybody' at the trial had known that the shorts were stained with paint," so no one had been misled, which this Court found to be "totally belied by the record." *Id.* This Court found that "[t]he prosecution deliberately

misrepresented the truth," and granted habeas relief because "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the *knowing* use of false evidence." *Id.* at 6–7 (emphasis added) (citing *Mooney* v. *Holohan*, 294 U.S. 103 (1935)).

Here, however, the prosecutor did not know that the jacket had been seized from Phillips's home before the murder. This factual finding by the state trial court is not only entitled to the normal deference reviewing courts give to trial-court findings of fact, but also to the deference Congress has prescribed in 28 U.S.C. § 2254(e)(1). Phillips has not "rebut[ted] the presumption of correctness by clear and convincing evidence," *id.* and he has not shown entitlement to relief.

### B. Because Paula Lytle testified at trial, admission of hearsay statements she made did not violate the Confrontation Clause.

Briefly, Phillips asserts that the use of serologist Paula Lytle's report at trial violated the Confrontation Clause. It did not. The Confrontation Clause is implicated only where the testimonial hearsay statements of "witnesses absent from trial" are admitted. *Crawford* v. *Washington*, 541 U.S. 36, 59 (2004). Lytle testified; she was not "absent from trial." Pet. App. 13a; 8/24/10 Trial Tr. at 137–82.

### C. The state courts and lower federal courts were correct to hold that Phillips has not shown prejudice on his ineffective assistance claim, and this issue is a factbound one of no significance.

The third argument Phillips makes in this section is that his trial counsel was ineffective for failing to discover that the jacket had nothing to do with the murder and failing to move to exclude it on that basis.

A claim of ineffective assistance of counsel is governed by the familiar two-pronged standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984). The first prong, deficient performance, requires the petitioner to show that counsel's performance "fell below an objective standard of reasonableness." *Id*. at 688. The second prong, prejudice, requires the petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. " 'Surmounting *Strickland*'s high bar is never an easy task,' " and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010)). On habeas review, ineffective-assistance claims are entitled to double deference due to the combined effect of *Strickland* and § 2254.

Under this doubly deferential standard, the court below determined that Phillips had not shown that the Michigan Court of Appeals' holding on prejudice was unreasonable. The court did exactly what it should have under AEDPA, which was *not* to "treat[ ] the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review," but rather to "determine what arguments or theories supported . . . the state court's decision; and then . . . ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102.

As with his prosecutorial misconduct claim, Phillips has not identified any significant legal errors that led to the decision below, nor has he identified any splits in authority whose resolution might affect his case. He simply disagrees with the

majority below and agrees with the dissent and hopes this Court will step in to correct what he sees as an error in adjudicating his claim. But as Supreme Court Rule 10 explains, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." While the State disputes that there has been a misapplication, even as framed, the second question in the petition seeks only error correction and should be denied.

### D. The State continues to press the claim that Phillips' trial counsel was not deficient and adds another reason to decline review.

Phillips's ineffective-assistance claim does not depend solely on the prejudice prong. The State disagrees with the majority below and maintains that Phillips has not shown that counsel performed deficiently in relying on the laboratory report which led both the prosecutor and defense counsel to infer, mistakenly but reasonably, that the jacket was seized after Tarver's murder. This issue has evenly divided the four judges who have decided it.[4] The trial court held that counsel's mistakes were reasonable, Resp. App. 7a–8a, and Judge KETHLEDGE, writing in concurrence below, agreed, Pet. App. 29a. The majority below, however, held that counsel performed deficiently. Pet. App. 16a–20a. If this Court grants certiorari, it will need to adjudicate not only Phillips's argument that the court of appeals erred on the prejudice prong,

[4] The Michigan Court of Appeals and the district court rejected this claim solely on the prejudice prong and did not reach a holding on the performance prong.

but also the State's alternate basis for affirmance, that the court of appeals majority erred on the performance prong.

Moreover, because the Michigan Court of Appeals adjudicated the ineffective assistance claim on the merits, AEDPA deference should have been afforded to the claim, not only to the prejudice prong of the claim. After all, "§ 2254(d) applies when a 'claim,' not a component of one, has been adjudicated." *Richter*, 562 U.S. at 98. If certiorari is granted on the ineffective assistance claim, the State will ask this Court to overrule *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005) and *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003) (or to recognize that these cases were implicitly overruled by *Richter*), and hold that, when a claim of ineffective assistance of counsel is adjudicated on the merits by a state court, AEDPA deference applies to that *claim* (i.e., both prongs of the claim), not only to the prong the state court explicitly adjudicated. See *Hodges* v. *Colson*, 727 F.3d 517, 537 n.5 (6th Cir. 2013).

In sum, due to yet another alternate grounds for affirmance, this case does not present a clean vehicle to decide the claim on which Phillips seeks review.

## III. Phillips asks this Court to overrule *McDaniel* v. *Brown* and *Lockhart* v. *Nelson* and change the constitutional standard governing claims of insufficiency of evidence; but because this case arises under § 2254, it is not an appropriate vehicle to create a new constitutional rule and apply it to a conviction that has already become final.

Finally, Phillips challenges the sufficiency of the evidence against him. The Michigan Court of Appeals held that the evidence was sufficient, Pet. App. 71a–72a, the district court confirmed that this holding was not only reasonable but correct, Pet.

App. 41a–42a, and neither the district court nor the court of appeals considered the question debatable enough to grant a certificate of appealability.

The only argument Phillips makes that elevates this claim out of the realm of error correction is his assertion that this Court should "establish the standard for a *Jackson* claim where the jury decided the facts based on legal and illegally introduced evidence." Pet. 31. But this Court has held that in reviewing the sufficiency of the evidence, " 'a reviewing court must consider all of the evidence admitted by the trial court,' regardless of whether that evidence was admitted erroneously." *McDaniel* v. *Brown*, 558 U.S. 120, 131 (2010) (quoting *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988)).

Phillips appears to prefer a rule that would exclude improperly admitted evidence from the evidence that can be considered in assessing the sufficiency of the evidence. But this case is a poor vehicle for such a rule for two reasons.

First, this case arises on habeas review and this claim is governed by 28 U.S.C. § 2254(d). Habeas review is not the proper forum to announce new constitutional rules and apply them to invalidate state-court rulings that were valid when they were decided. "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a § 2254 proceeding, new constitutional commands." *Engle* v. *Isaac*, 456 U.S. 107, 128 n.33 (1982). Because *McDaniel* and *Lockhart* were the law at the time the Michigan Court of Appeals adjudicated the insufficiency claim, that adjudication was not contrary to, or an unreasonable application of, any clearly established federal law in place at that time. See *Greene* v. *Fisher*, 565 U.S. 34, 37–40 (2011).

Second, application of Phillips's preferred rule would not change the result in this case. Although the Michigan Court of Appeals and the district court were permitted to consider testimony about the jacket in deciding whether sufficient evidence had been admitted to sustain the conviction, neither court actually did so. Both courts only considered the other evidence against Phillips and neither court mentioned the jacket testimony. Pet. App. 41a–42a; 71a–72a. If this Court were to hold that reviewing courts are forbidden from considering improperly admitted evidence in sufficiency challenges, it would not change the outcome of this case. And so, this argument is similar to Phillips's first argument discussed above—even if he prevails on the argument, he still loses the appeal.

If this Court wishes to reconsider *Lockhart* and *McDaniel* (and Phillips has not given this Court any reason to do so), it should wait for a case where improperly admitted evidence made the difference between insufficient and sufficient evidence.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 2019

STATE OF MICHIGAN
THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

v File No. 10-2233-01

ANTHONY DIQUET PHILLIPS,
Defendant.
_____/

POST CONVICTION
BEFORE THE HONORABLE MICHAEL M. HATHAWAY
Detroit, Michigan - June 28, 2011

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THE COURT: All right. I am ordering you to answer those questions forthwith, Mr. DuBose.

I take it you're submitting yourself to custody?

THE WITNESS: Yes, sir, your Honor.

THE COURT: I'm citing you for civil contempt.

And the deputies will remove Mr. DuBose and put him in the back for failure to follow a direct order.

All right. Well, we'll have to deal with Mr. DuBose.

All right. I'm prepared to rule on the motion though anyway.

We will deal with Mr. DuBose some other time.

Mr. Lawrence, I know that I have not yet ruled on the issue of whether or not Mr. DuBose was effective or ineffective for failing to do something about the 1986 search warrant return.

Well, let me, let me sort of review the record on this issue.

There's also a claim of prosecutorial misconduct in connection with this whole issue. And we've heard the testimony of Mr. Hutting and I, I think I'm accurate in sort of summarizing the whole issue this way.

Mr., Mr. Phillips was charged with assault with

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intent to great bodily harm in connection with an incident that occurred in 1986. Sometime just before shortly after he was charged, the police obtained a search warrant for his home. And in the course of that search they found a leather jacket. The

leather jacket had a bullet hole in it, and there was some blood evidence around the bullet hole.

The jacket apparently, and I'm, I'm sort of reconstructing these facts the best I can from the police evidence, but I think we pretty much all agree now that the, the jacket was confiscated in 1986 by the police. It was kept in evidence pending the defendant's trial on the GBH case. The trial itself I think happened sometime in '87. But also in '87 the defendant became a person of interest in a 1987 homicide. And at some point in March of 1987, the police conducted a search of the defendant's premises, same premises that they had searched the year before and they found nothing.

And there is in fact a search warrant return from the homicide file indicating that an Investigator Kramer led the search and he signed a return indicating that nothing was recovered.

Now, in a date in May -- help me with this. Was it May 16th, 1987? May 17th, maybe.

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Anyway, that jacket that was recovered in the '86 search was dug out of property and taken to the Police Lab for laboratory analysis. The jacket was taken to the lab one day after the fruitless search of the defendant's home in 1987.

The lab report which ultimately was admitted into evidence in the murder case says May 17th. I may not have the date right, but I think it's May 17th.

MR. WILLIAMS: That's March 12th, your Honor.

THE COURT: March 12th. Okay. I didn't get it right. March 12th.

The lab report is dated March 12th or 13th?

MR. WILLIAMS: The reference in the report is to March 12th.

THE COURT: Okay. March 12th.

MR. WILLIAMS: Yeah.

THE COURT: Or was that the search date?

MR. WILLIAMS: The --

THE COURT: Well, anyway --

MR. WILLIAMS: The search date was March 11th.

THE COURT: March 11th. Okay.

March 12th the lab references receipt of the leather jacket in question and says simply the jacket was recovered in a search of and then they give the defendant's home address.

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Of course, the lab doesn't say that it was recovered last year from that present -- from that premises. It just says it was taken and they reference the date of the fruit -- the fruitless search which was the day before the jacket was delivered to the lab.

So by the shea-rest coincidence the jacket that was found in '86 is taken to the Police Lab the day after the fruitless search of the defendant's home in '87.

So 23 years later when Mr. Hutting is trying this case, the defendant having not been charged with the homicide originally in 1987, 23 years later when he's trying the case he finds in his slightly cold file a search warrant that says what I just said it says. And he testified under oath that he just assumed that the jacket had been

taken in the search of the defendant's home that had occurred the day before the jacket was delivered to the lab.

Now, yes, his file also contained a search warrant return that said nothing was taken. Mr. Hutting dismissed that apparent conflict at the time as a police error, as a mistake, as a bookkeeping mistake saying that, you know, I've seen plenty of cases in my career where the police, especially the Detroit Police, make a mistake in tabulating what they obtained in a search or

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saying that they didn't get anything in the search when in fact they did or vice versa. Anyway, he explained that, and frankly explained it to my satisfaction.

I find absolutely no evidence whatsoever of prosecutorial misconduct in Mr. Hutting's mistaken belief that the, the lab report implied that the jacket in question was taken from Mr. Phillips' home after the, the 1987 search or in the 1987 search.

Now, it, it's also, I guess, a matter of record in the murder trial that the jacket itself was destroyed not long after it was analyzed. And the only analysis that was done of the jacket was blood type. And apparently it was type O blood that the lab report referenced, and that it turns out is the defendant's blood type. Surprise.

I mean bullet holes in the shoulder of the jacket, so that's not a surprise. Although the murder victim in the '87 case also had type O blood.

So the finding of type O blood on that jacket really didn't have a whole lot of evidentiary value or impact.

Moreover, there hadn't been any evidence that Mr. Phillips had been shot in the '87 homicide or that he did any shooting. The victim in the homicide was killed with a, a multiple knife wounds.

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There was no evidence that any gunshots had been fired by either party. So the fact that there was a gunshot -- a bullet hole in the leather jacket and the bullet hole had type O blood, which was the defendant's type, was what went into evidence. It turned out to be a mistake. That jacket actually would have been in police custody at the time of the '87 homicide. But I find it utterly and completely plausible Mr. Hutting's explanation of that and how that mistake was made.

And Mr. DuBose as defense lawyer had -- of course, he saw the search warrant return. He saw that the return said nothing was taken. He also saw the lab report. He apparently drew the same inference from the lab report that Mr. Hutting claims he did and that I probably would of under the same circumstances or anybody involved in the case. And the lab may not have known when the jacket had been taken for that matter.

But, anyway, I do remember that there was a discussion on the record about the admissibility of the jacket. I, I note from the record that I read that Mr. DuBose objected to the admission of the jacket. Not on the grounds that it couldn't conceivably been in his client's possession at the time of the homicide, but rather that it had limited relevance. We had some conversation about that on the record. I tended to

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agree that the jacket had limited relevance, but I ultimately ruled that it was, it -- the problems with it really went to weight rather than admissibility. I let it in.

And then, you know, that was just one of many pieces of evidence that came in against Mr. Phillips during the course of the trial. But far more noteworthy and important than the jacket was the DNA. His DNA which was found in blood splatters in various important places in the home. And then, of course, his fingerprint on the Band-Aid box, the bloody fingerprint on the Band-Aid box.

So the evidence against the defendant during the course of the trial was pretty overwhelming. The jacket in the big scheme of things was virtually unimportant or non-important. And the admissibility of that jacket, rightfully or wrongfully, was in my view not outcome determinative at all.

This case would have turned out the same way with that jury whether that jacket had gone into evidence or not. The jacket didn't mean a darn thing to the outcome of the case.

And, and but, but just virtuously I'll say, too, that I don't find that there was any prosecutorial misconduct in Mr. Hutting's inference about when that

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jacket was confiscated, or frankly any ineffective assistance of counsel on the part of Mr. DuBose for not appreciating that the jacket or knowing that the jacket had been taken in '86 and not '87. And I -- it may also be because it came out last time that Mr. DuBose actually represented the defendant in his 1986 GBH case and then represented him again 24 years later, 23 years later in the homicide case which is

before me. And I don't think anybody, any reasonable lawyer can possibly expect or suggest that Mr. DuBose should have remembered that in the 1986 GBH case that there was a search warrant return that documented the confiscation of the jacket in question. That's just -- that would hold Mr. DuBose to just completely unrealistic if not fantastical standard.

So I, I don't find that he was ineffective in not picking up on the fact that 23 years later this jacket, there was some indication that the jacket might have been confiscated in '86 rather than in '87. So on that issue the motion for new trial is denied.

Now, that I believe addresses Roman numeral nine in the defendant's brief.

The exhibit or rather Roman numeral ten is still -- according to my notes I haven't ruled on that yet. Is that correct?