No. 25-5241

In the Supreme Court of the United States

CLARENCE FRY,

Petitioner,

v.

BILL COOL,* Warden,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

I. Did the Sixth Circuit correctly defer to the Ohio court of appeals' judgment that the trial court did not violate Fry's right to testify?

II. Should this Court create a new right to a pre-waiver colloquy between the trial judge and the defendant before the defendant waives his right to testify?

III. Did the Sixth Circuit correctly defer to the Supreme Court of Ohio's judgment that the trial court did not violate Fry's right to present mitigation evidence?

LIST OF PARTIES

The Petitioner is Clarence Fry, an inmate at the Ross Correctional Institution.

The Respondent is Bill Cool, the Warden of the Ross Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

In addition to the proceedings listed in the petition, the Supreme Court of Ohio denied Fry's application to reopen his direct appeal, *see State v. Fry*, No. 2006-1502, 136 Ohio St. 3d 1403 (June 26, 2013), this Court denied *certiorari* following Fry's unsuccessful state postconviction-relief proceedings, *see Fry v. Ohio*, No. 19-6535 (U.S. Supreme Court) (*certiorari* denied January 13, 2020), and the Sixth Circuit denied rehearing *en banc* after it affirmed the district court's denial of his petition for a writ of habeas corpus, *see Fry v. Shoop*, No. 23-3270 (6th Cir.) (rehearing *en banc* denied February 28, 2025).

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INTRODUCTION

State courts are fully capable of ascertaining and applying federal law. They do it every day—especially in criminal cases where so much is governed by the federal Constitution. Recognizing this fact, and in the interests of federalism and finality, Congress enacted the Antiterrorism and Effective Death Penalty Act to restrict federal courts' ability to overturn state-court convictions on federal habeas review. Under AEDPA, "federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 575 U.S. 312, 316 (2015).

Against this backdrop, Clarence Fry submits various factual and legal questions to this Court that flow from his habeas case. None are worthy of this Court's sustained attention.

In his first and third questions presented, Fry claims that the Sixth Circuit erred as a matter of law in its fact-driven review under AEDPA. So he is asking this Court to engage in error correction in an area of well-settled law that depends uniquely on the facts of his case. But this Court should not—and generally does not—use its limited resources to correct such errors. In his second question, he claims that he has identified two splits in the lower courts and proposes two new procedural rules to resolve them. But they are not true splits. And even if they were, this Court does not announce new procedural rules on habeas review.

Beyond all that, the Sixth Circuit—applying deference under AEDPA—got the various answers right in this case. It follows that this Court's review is not justified.

JURISDICTION

The district court had jurisdiction over Fry's petition for a writ of habeas corpus under 28 U.S.C. §2254(a). The Sixth Circuit had jurisdiction under 28 U.S.C. §1291. And this Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT

Twenty years ago, Clarence Fry stabbed Tamela Hardison to death in front of her grandson. *State v. Fry*, 125 Ohio St. 3d 163, 165–66 (Ohio 2010). After he fled, police found and arrested him in West Virginia a few days later. *Id.* at 166. He was brought back to Ohio and charged with several counts, including aggravated felony murder with two death-penalty specifications. *Id.* at 163.

At trial, the State presented a thorough case with dozens of witnesses. *See* Trial Tr., R.14-2, PageID#6111–13. When the State rested, Fry's lawyers informed the court that they planned on calling one witness. They "categorically and emphatically" told the court that Fry himself would not testify. *Fry*, 125 Ohio St. 3d at 183. So they presented Fry's case through the one witness and rested. Fry had no problem expressing his thoughts on various matters throughout the trial—for example, "[h]e chuckled when Hardison's six-year-old grandson testified about seeing the murder, ate candy during the proceedings, made a threatening gesture to someone in the back of the courtroom, and disrupted the courtroom during sentencing until an officer removed him," Pet.App.A-13—but he did not indicate to the court that he wanted to testify at any point during the trial, *id.* The court therefore excused the jury to deliberate after Fry rested without testifying.

The jury found him guilty of all charges and death-penalty specifications. Pet.App.A-23.

Because the death penalty was a sentencing option, the trial court held a mitigation hearing. Fry told the court that he would not be presenting any mitigation evidence and that he forbid both his lawyers and any family or friends from presenting any, either. Pet.App.A-10. The court then conducted an extensive inquiry to determine whether Fry's waiver was knowing and voluntary. Pet.App.A-11.

It first told Fry that if he waived his right to present mitigation evidence, he was probably waiving his right to argue on appeal that his lawyers were ineffective in the sentencing phase. Trial Tr., R.14-2, PageID#6545–46. Fry said that was fine. *Id.* The court then told him that "all [he] need[s] is one juror out of 12" to determine that a sentence less than death is appropriate. *Id.*, PageID#6549. He responded: "I wouldn't trust these people no farther than I can spit. The hell with them, Your Honor. Let's just get this out of the way." *Id.* The court again advised Fry that he had the right to present mitigation evidence and he confirmed that he understood. *Id.*, PageID#6549–50. The court then explained exactly what mitigation evidence is and what it is used for in the sentencing phase of a death-penalty case, and then asked Fry to explain back to the court his understanding of mitigation evidence. *Id.*, PageID#6550–51. Fry explained: "Anything that's in my favor about my character, my history, that shows that, hey, this guy really don't deserve to die." *Id.* The court again reiterated the importance of mitigation evidence in a death-penalty case, telling him that he "would give the jury some additional reasons as to why [he] should

not be put to death," and asking him, "Do you understand that?" *Id.*, PageID#6553. He retorted: "I wouldn't give them the time of day." *Id.*

Eventually, after yet again confirming that Fry understood that refusing to present mitigation evidence to the jury "undoubtedly makes it more likely, or could make it more likely, that this jury will return a verdict of death instead of a recommendation of life imprisonment," the court asked him whether he still refused. *Id.*, PageID#6554–55. He confirmed that he did, *id.*, ultimately stating his understanding for the record: "Your honor, I feel that if I don't put on any evidence in this mitigation thing, these little 12 people, they'll probably give me the death penalty and they'll probably send me to death row, and we probably gonna get this thing appealed," *id.*, PageID#6561. After exhausting its inquiry and giving Fry time to talk with his lawyers and his mother, Fry persisted in his refusal to present any mitigation evidence, and the court accepted his waiver. *Fry*, 125 Ohio St. 3d at 190; Pet.App.A-213; Trial Tr., R.14-2, PageID#6604. Fry also refused to give an unsworn statement to the jury after the court informed him that he could, *id.*, PageID#6567–68, but eventually allowed his lawyers to proffer his potential mitigation evidence to the court and to make a statement to the jury, *id.*, PageID#6558, 6607–08.

The jury then recommended a death sentence and the court imposed one. Pet.App.A-23.

Fry appealed to the Supreme Court of Ohio. He raised 20 propositions of law, including presentation-of-mitigation-evidence and right-to-testify issues that mirror those he raises in this petition. *See* Pet.App.A-24–26. The Supreme Court of Ohio

considered all of Fry's arguments and ultimately affirmed his conviction and death sentence. *Fry*, 125 Ohio St. 3d at 203.

Rather than seek this Court's review on direct appeal, Fry proceeded directly to the Summit County court of common pleas to try for state postconviction relief. His petition for postconviction relief raised 14 claims for relief, including right-to-testify and presentation-of-mitigation-evidence claims that correspond to the ones he raises now. *See* Pet.App.A-27–29. The court of common pleas denied his petition because his claims were barred by res judicata—the Supreme Court of Ohio considered and rejected them all. Pet.App.A-207; Pet.App.A-234–38. Fry appealed and the court of appeals affirmed in part and reversed in part. It reversed in part because Fry's postconviction argument that he was denied the right to testify at trial relied on evidence outside of the record on direct appeal. Pet.App.A-216. The court of appeals remanded the case to the court of common pleas to consider Fry's new evidence.

Back in the court of common pleas, Fry and the State presented evidence regarding his right to testify at trial during two evidentiary hearings. In these hearings, Fry testified that he and his trial lawyers constantly disagreed about whether he should testify, that he wanted to testify the entire time, and that he began to "shut down" as his trial approached because he "was through" and "had nothing to discuss" with his lawyers. Pet.App.A-185–86. Consistent with his shutting down, he also acknowledged staying silent when he heard the defense rest and the court dismiss the jury. Pet.App.A-186. There was some evidence presented that Fry may have suggested to his lawyers that he wanted to testify as late as the day before his

lawyers told the court that he did not want to testify. Pet.App.A-183. But his lawyers testified that, towards the end of his trial, Fry was "unequivocal" that he did not want to testify, and that, when they assured the court that Fry did not want to testify, they were "certain that [he] did not want to testify." Pet.App.A-182–84.

After those hearings, and after considering both the new and old evidence, the court of common pleas again denied Fry's petition for postconviction relief, finding no credible evidence that Fry was denied his right to testify at trial. Pet.App.A-201–02. Fry again appealed, but this time the court of appeals affirmed in full. Pet.App.A-175. Fry then filed a discretionary appeal in the Supreme Court of Ohio and a petition for *certiorari* in this Court. Both were denied. Pet.App.A-32–33.

Fry then moved to the federal courts. He filed a petition for a writ of habeas corpus in the district court with two dozen claims for relief, including the issues that Fry now raises in this petition. Pet.App.A-34–36. After laying out its limited role as a federal habeas court under AEDPA, it conducted a comprehensive review of his claims under the deferential standard required by AEDPA. The district court denied Fry's petition for habeas relief. Pet.App.A-154. But it granted him a certificate of appealability for five of his claims: three ineffective-assistance-of-counsel claims that he has abandoned before this Court and the two trial-court-error claims that endure into this petition. *Id.* He appealed all five of those claims to the Sixth Circuit. Pet.App.A-6.

The Sixth Circuit unanimously affirmed the district court's judgment in full. Pet.App.A-14. It first held that Fry's ineffective-assistance-of-counsel claims failed

under AEDPA. Pet.App.A-6–12. Then, relevant to the claims of trial-court error that he now asks this Court to review, the Sixth Circuit held that Fry's right-to-testify and presentation-of-mitigation-evidence claims failed under AEDPA, too. It concluded that "[t]he testimony of Fry's two trial lawyers supports the state court's rulings" regarding his right to testify, and that Fry failed to cite any "on-point Supreme Court case requiring the trial court to" ask Fry directly whether he wanted to testify. Pet.App.A-13. And the Sixth Circuit also concluded that the state court's "review of the record support[ed] its conclusion" that the trial court did not violate Fry's rights by accepting his mitigation waiver "under AEDPA review," and that it "kn[e]w of no Supreme Court precedent that required the trial court to do more [than it did] before accepting Fry's waiver." Pet.App.A-14.

Fry has since dropped his ineffective-assistance-of-counsel claims and is now asking this Court to review his claims of trial-court error. Pet.i.

REASONS FOR DENYING THE WRIT

Fry's petition seems to be in tension with itself. In his first question presented, he asks this Court to "grant certiorari, vacate the judgment below, and remand th[is] case to state court[] for a new trial," Pet.15, 22, because he thinks the Ohio court of appeals unreasonably applied clearly established federal law and unreasonably determined facts on the record before it. But in his second question presented, Fry asks this Court to announce two new constitutional rules of procedure to resolve what he claims are two circuit splits. And in his last question presented, he asks this Court to reverse the Sixth Circuit on his presentation-of-mitigation-evidence issue after a full review. Regardless of their tension with one another, none of these questions are

worthy of this Court's limited resources. Consider them in the order he presents them.

I. Fry's right-to-testify question provides no basis for a summary ruling and only presents this Court with an opportunity for error correction through an AEDPA lens.

In his first question presented (styled I.a in his petition), Fry tries to run the AEDPA gauntlet. He claims both that the trial court factually erred in concluding that he had waived his right to testify at trial. And he claims that the trial court legally erred by failing to comply with clearly established federal law when it did not ask him directly whether he wanted to testify. He claims that the Ohio court of appeals—the last Ohio court to consider his claim on the merits after new evidence was introduced into the record in his postconviction proceedings—was unreasonable when it rejected these claims on the merits that this Court should summarily vacate his convictions and remand this case to state court for a new trial. Not only should this Court not grant a summary ruling on this question, it should not take this question for a full review, either.

A. This Court should not issue a summary ruling on Fry's right-to-testify claims.

Start with Fry's request that this Court issue some kind of summary ruling, though he appears to confuse which mechanism (grant-vacate-remand or summary reversal) he wants. *See* Pet.15, 22 ("This Court should grant certiorari, vacate the judgment below, and remand the case to state courts for a new trial."). Fry does not provide this Court with any basis to grant any kind of summary ruling in his first question presented.

If he is seeking summary reversal, his right-to-testify claims are not the kind of claims that this Court typically grants summary reversal for. This Court only grants such relief when a court of appeals commits an error that is obvious in light of settled law. *See, e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam); *Pavan v. Smith*, 582 U.S. 563, 567–68 (2017) (Gorsuch, J., dissenting). That did not happen here. The Sixth Circuit correctly identified AEDPA as the governing law and properly applied it to Fry's right-to-testify claims. *See* Pet.App.A-13. Fry argues that the Sixth Circuit's review under AEDPA was "erroneous, and clearly so." Pet.20. But he is wrong because, for reasons explained below, not only did the Sixth Circuit not commit an obvious error, it got its AEDPA review right. *See below* 11–15.

Regardless, summary reversal would not be appropriate in this case. For this Court to determine that there was an unreasonable determination of facts, it would need to conduct an in-depth review of the entire record, which is not something for which summary reversal is suited. And if this Court were to determine that there was a legal error, it would need to break new AEDPA ground, for which summary reversal is also not conducive. Summary reversal is therefore inappropriate here.

Alternatively, if Fry is asking this Court to grant, vacate, and remand his right-to-testify claims, those claims are similarly not the kind of claim that this Court normally "GVRs." This Court employs this mechanism when it is clear that the court of appeals did not fully consider some relevant issue below—usually because there has been some development since it decided the case. *Lawrence v. Chater*, 516 U.S. 163, 166–68 (1996) (per curiam). When such a development "reveal[s] a reasonable

probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," a GVR may be appropriate. *Id.* at 167. But a GVR is not appropriate here because there has been no such development. Like he did in the Sixth Circuit, Fry bases his argument here on AEDPA and the "undisputed record of this case." Pet.19–20. There have been no developments in AEDPA or this case's record since the Sixth Circuit issued its judgment in January. And there is no reason to think that it would change its mind if given the opportunity for further consideration. In fact, the Sixth Circuit had the opportunity to give this case further consideration when Fry asked for rehearing *en banc*. Order, R.54-1. It passed, "conclud[ing] that the issues raised in [his] petition [for rehearing *en banc*] were fully considered upon the original submission and decision of the case." *Id.* A GVR is therefore inappropriate as well.

And to the extent that Fry is asking this Court to summarily vacate all lower court judgments and his conviction and then remand to state court for a new trial, this Court has no procedural mechanism to do, or tradition of doing, anything of the sort. Fry therefore provides this Court with no basis to grant any kind of summary ruling.

B. This Court should not grant full review of Fry's right-to-testify claims either.

This Court should not take Fry's first question presented for full review either. In arguing that this Court should take it, he contends that the Sixth Circuit got its review of his right-to-testify claim wrong under AEDPA. *See* Pet.19–22. In other words, he is seeking error correction with respect to its fact-bound application of AEDPA. But "[a] petition for a 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." Sup. Ct. R. 10. This principle weighs heavily against taking this question.

Fry's first question does not have any additional qualities that make it worth this Court's sustained attention, either. *See id.* Most important, the question only implicates well-settled law. AEDPA review for fact-driven claims that were rejected on the merits in state court is all but set in stone. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011); *Burt v. Titlow*, 571 U.S. 12, 18–20 (2013); *Andrew v. White*, 604 U.S. 86, 92 (2025) (per curiam). There is nothing to clarify here. The Sixth Circuit simply applied well-settled law.

And even if there was something to clarify about how to review claims rejected by state courts on the merits with AEDPA deference, this case is a bad vehicle to do so because the Sixth Circuit's AEDPA review was plainly correct. It is worth briefly considering why.

1. Recall the last reasoned decision on the merits. On postconviction review, and after receiving new evidence in the record during postconviction proceedings, both the court of common pleas and court of appeals rejected Fry's right-to-testify claims. The Court of Appeals for the Ninth District—the last Ohio court to consider his right-to-testify claim on the merits—specifically held that "[a] waiver of Mr. Fry's right to testify could … be inferred from his conduct and presumed from his failure to alert or inform the trial court of his desire to testify." Pet.App.A-172–73. Thus it held that the trial court correctly determined the facts and correctly applied federal law. *Id.*

That decision gets AEDPA deference unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or it "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(d). Though Fry argues that the Ohio court of appeals' decision was both, he is wrong.

2. First consider whether the Ohio court of appeals' decision was contrary to or an unreasonable application of clearly established federal law. Fry identifies two of this Court's cases that he claims the Ohio court of appeals unreasonably applied: *Rock v. Arkansas*, 483 U.S. 44 (1987), and *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Rock*, this Court held that "a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock*, 483 U.S. at 49. And in *Zerbst*, this Court generally said that courts should "indulge every reasonable presumption against waiver" of constitutional rights. *Zerbst*, 304 U.S. at 464. But there is also, of course, a strong presumption that a defendant's trial lawyer is acting reasonably and in the defendant's best interests. *See Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). That is why, even though this Court has not explicitly said so, federal courts of appeals are in near universal agreement that trial courts can generally presume that a defendant has waived his right to testify when he does not testify and does not notify the court that he wants to testify. *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000) (citing *United States v. Ortiz*, 82 F.3d 1066, 1069 n.8 (D.C. Cir. 1996) (collecting cases from the First, Third, Fourth, Seventh, Eighth,

Ninth, and Eleventh circuits saying that trial courts need not always ask the defendant himself if he is waiving his right to testify)). The Supreme Court of Ohio agrees, too. *State v. Bey*, 85 Ohio St. 3d 487, 499 (1999).

Fry argues that the Ohio court of appeals unreasonably applied this Court's holdings in *Rock* and *Zerbst* and that those cases required the trial court to ask him directly whether he wanted to testify. Pet.15, 19. This argument fails; the right to testify and a reasonable presumption against waiver are general principles that Fry invited the lower courts to refine with an affirmative requirement that trial courts directly ask defendants whether they are waiving their right to testify. But courts "cannot refine or sharpen a general principle of [this Court's] jurisprudence into a specific legal rule that this Court has not announced." *Lopez v. Smith*, 574 U.S. 1, 7 (2014) (quotation omitted). So the Ohio court of appeals did not contradict these holdings when it concluded that Fry was not denied his right to testify. It concluded that the trial court could presume that Fry waived his right to testify by resting his case without telling the trial court that he wanted to testify. Pet.App.A-172–73. That conclusion was a reasonable application of clearly established federal law.

On federal habeas review, the federal courts all agreed that the Ohio court of appeals' application of clearly established federal law was reasonable. The district court thoroughly considered the record and ultimately held that the Ohio courts "reasonably determined … that, based on Fry's silence, the trial court properly presumed Fry waived his right to testify, with no obligation to inquire further of him on the record," and that the trial court did not unreasonably "contravene or missappl[y]" clearly

established federal law—that is, *Rock* and *Zerbst*. Pet.App.A-116. The Sixth Circuit agreed and affirmed. Pet.App.A-13–14.

The federal habeas courts were correct. Viewed with the deference required under AEDPA, a fairminded judge could say that the court of appeals' decision constituted a reasonable application of clearly established federal law because *Rock* and *Zerbst* provide only general principles, and Fry has not identified any "on-point Supreme Court case requiring the trial court" to ask a defendant directly whether he wants to testify. Pet.App.A-13. AEDPA therefore prohibits habeas relief on the basis that the state-court decision was contrary to or an unreasonable application of clearly established federal law. The Sixth Circuit got it right.

3. Next consider whether the Ohio court of appeals' decision was the result of an unreasonable determination of the facts based on the record before it. The record speaks for itself. The State rested its case in chief on Thursday, June 8, 2006. Trial Tr., R.14-2, PageID#6230. Fry was set to start presenting his case the next day, *id.*, PageID#6231–32, but the court postponed Fry's presentation of evidence until the following week because the one witness he planned to call did not appear on Friday, *id.*, PageID#6280, 6285. In seeking this continuance, Fry's lawyers told the court: "I can tell you categorically and emphatically that Mr. Fry, the defendant, is not going to testify." *Id.*, PageID#6280.

After returning on Monday with the missing witness, Fry's lawyers reiterated to the court that Fry "ha[d] not wavered in his opinion that he would not testify." *Id.*, PageID#6325. One of his lawyers spent several hours with him over the weekend

and relayed to the court that "he indicated that he did not want to testify." *Id.* And they told the court that "he was unequivocally against testifying Friday afternoon." *Id.* The court inquired further: "If there was any vacillation, the [c]ourt would ask [Fry] on the record. But you are indicating to the [c]ourt that he has decided of his own volition not to testify?" *Id.* Fry's lawyer confirmed: "That's correct." *Id.* After examining the witness, the defense rested in Fry's presence. Pet.App.A-186. And as Fry himself noted, he never told the court that he wanted to testify. *Id.*

On this record, the Ohio court of appeals determined that Fry did not want to testify at trial. Pet.App.A-172–73. A fairminded judge could say that the Ohio court of appeals' decision regarding Fry's right to testify was reasonable, as both the district court and Sixth Circuit held. AEDPA therefore prohibits habeas relief on the basis that the state-court decision was the result of an unreasonable determination of the facts. The Sixth Circuit got it right again.

One final note on this question. Fry spends much of his petition discussing evidence that supports his claims in the lower courts for ineffective assistance of counsel. He specifically argues that, "at his trial, [his] counsel unilaterally waived [his] right to testify" and that his "[t]rial counsel affirmatively misled the trial court concerning [his] clear wishes that he be permitted to testify in his own defense." Pet.16. But having lost on this ineffective-assistance-of-counsel claim in both courts below, *see, e.g.*, Pet.App.A-8–10 (Sixth Circuit); Pet.App.A-57–67 (district court), Fry dropped it from this petition. That is not a surprise: ineffective-assistance-of-counsel claims viewed with AEDPA deference require federal habeas courts to be "doubly

deferential" to state courts. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). So now, Fry is not asking that this Court review his *trial counsel's* performance. Rather, he is asking this Court to review whether the *trial court* erred in a way that warrants habeas relief. *See* Pet.i. Any discussion about whether Fry's trial lawyers were ineffective is irrelevant here. His right-to-testify question presented to this Court thus only addresses what the trial court knew and whether its actions were reasonable in light of what it knew. And for the reasons discussed above, this Court should not take it.

Because Fry's right-to-testify question presented does not provide a basis for a summary remand, does not present any issue of law for this Court to clarify on full review, and, even if it did, would be a bad vehicle for clarification, this Court should not grant *certiorari* on this question.

II. There are no disagreements among the lower courts as Fry asserts and, even if so, they are not presented in this case so they should not be resolved on habeas review.

In his second question presented (styled I.b in his petition), Fry claims that there are two splits in the lower courts that this Court should resolve in this case. First, he claims that the lower courts disagree on whether the denial of a defendant's right to testify is a structural error. And second, he claims that lower courts disagree about the proper procedure to protect the right to testify. Neither purported split warrants this Court's attention.

For one thing, neither of Fry's claimed splits is properly presented by this case. Both presuppose that there was an error in the trial court. But if this Court took this case, it would not be reviewing whether there was an error in the trial court. It would

be reviewing whether the Sixth Circuit correctly applied AEDPA deference on federal habeas review. And by Fry's own logic, if there really is disagreement in the lower courts, then AEDPA prohibits federal courts from granting habeas relief because "their diverging approaches to the question[s] illustrate the possibility of fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 422 n.3 (2014). Put simply: disagreement among lower courts indicates that law is not "clearly established" as is required for relief under AEDPA. Therefore, Fry's argument precludes habeas relief under the second question presented. That is enough of a reason to not take this question.

Now consider the claimed splits themselves. Neither is the kind of true split that this Court is typically concerned with. Take the first—that there is disagreement among lower courts about whether improperly denying a defendant the right to testify is a structural error. Fry cites three cases to establish this "split." On the no-structural-error side of the split, he cites *Solomon v. Curtis*, 21 F. App'x 360, 363 (6th Cir. 2001) ("[T]he district court in this case erred in overturning the Michigan Court of Appeals' ruling that the denial of the defendant's right to testify was harmless rather than structural error."). Several more circuits are on this side, too. *See, e.g.*, *id.* at 362–63 (citing cases from the Fifth, Seventh, and Ninth Districts). On the structural-error side of the split, he cites a district court opinion—*Carter v. Clarke*, 667 F.Supp.3d 163, 201 (W.D. Va. 2023) ("[T]he court finds that Carter's attorney committed structural error by not telling Carter he had a constitutional right to testify, and not allowing him to testify despite his clearly expressed wish to do so."). And

in between, he claims that "the Seventh Circuit has refused to explicitly determine whether structural error occurs when the actions of defense counsel leads to the denial of the right to testify," Pet.25, citing *Hartsfield v. Dorethy*, 949 F.3d 307, 314 (7th Cir. 2020). But a "split" between several courts of appeals and one district court is not the kind of split that this Court typically resolves. *See* Sup. Ct. R. 10. This issue should have the chance to percolate before this Court considers taking it for review.

Fry's second "split" is not a split at all. He claims that different courts have different procedures for accepting a defendant's waiver of his right to counsel. He identifies four categories: (1) courts that hold that trial courts are required to directly ask a defendant whether he is waiving his right to testify, Pet.26–27; (2) courts that hold that trial courts can presume waiver of the right to testify when the defendant does not testify and does not notify the court that he wants to testify, Pet.27; (3) courts that hold that whether the trial court needs to directly ask a defendant whether he is waiving his right to testify depends on the circumstances of the case, *id.*; and (4) courts that have not expressed an opinion on the issue, *id.* This is not a split because each of these categories falls within the broad principles of *Rock* and *Zerbst*—that defendants have the right to testify and that courts indulge reasonable presumptions against waiver. *See above* 12. This Court should not take this question to mandate one of several valid procedures under federal law.

Further, even if one of these "splits" were the kind of split that this Court normally resolves, this case would be a bad vehicle to resolve it because the Sixth Circuit did not consider either issue in this case. This Court is generally "a court of final review

and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (quotation omitted) (per curiam). It "[o]rdinarily[] … do[es] not decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quotation omitted). The Court should not depart from this longstanding practice here. It would benefit from a considered lower-court decision on these issues before deciding them itself.

What is more, even if these were true splits and even if this Court was willing to decide the issues without the benefit of a lower-court decision, Fry wants this Court to resolve the issues by announcing two new procedural rules that he proposes. Specifically, he wants this Court to hold "that a colloquy with capital defendants is required for the right [to testify] to be waived," and "that the denial of the right [to testify] in a capital case creates a structural error." Pet.29. But this Court should not announce these new procedural rules in this case. That is because "new procedural rules do not apply retroactively on federal collateral review," *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021), and this Court does not "announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case," *Teague v. Lane*, 489 U.S. 288, 316 (1989) (plurality). Fry is here on federal collateral review. Thus, the new procedural rules he proposes now cannot apply retroactively to him, and therefore this Court should not announce them. Habeas review under AEDPA is not where this Court makes law.

Because Fry's second question presented does not actually present the issues that he wants this Court to resolve, because the lower courts are not truly split on these

issues, because there is no lower-court decision addressing these issues, and because this Court should not announce Fry's proposed new procedural rules on habeas review, this Court should not grant *certiorari* on this question.

III. Fry's presentation-of-mitigation-evidence question only presents this Court with an opportunity for error correction through an AEDPA lens.

Fry takes another run at the AEDPA gauntlet in his third question presented (styled II in his petition). He claims that the trial court erred in concluding that he waived his right to present mitigation evidence. And he argues that the trial court failed to comply with clearly established federal law by not doing more to assure itself that Fry's waiver was voluntary, knowing, and intelligent. And he argues that the Supreme Court of Ohio—the last Ohio court to consider this claim on the merits, on direct appeal—was unreasonable when it rejected these claims on the merits and that he is therefore entitled to habeas relief. Again, this question is not worth this Court's attention for the same reasons his first question is not.

Fry asks for error correction with respect to the Sixth Circuit's application of AEDPA. Pet.31–32. He concedes as much by arguing that the Sixth Circuit erred in concluding that, "because this Court has not clearly established a specific procedure for a trial court to follow when a defendant seeks to waive mitigation evidence in a capital trial," the Supreme Court of Ohio did not "contraven[e]" or "misappl[y]" "federal law in violation of [AEDPA]." Pet.31. Because this Court "rarely grant[s]" *certiorari* "when the asserted error" stems from a purported "misapplication of a properly stated rule of law," it should not grant *certiorari* on this question. Sup. Ct. R. 10.

This question has no other quality identified by Rule 10 that would make it worth this Court's time. *See id.* There are no conflicts and AEDPA is well settled.

And, like his right-to-testify question, even if there was something to clarify about AEDPA deference to state courts, Fry's presentation-of-mitigation-evidence question is a bad vehicle for this Court's review because the Sixth Circuit's review was correct. Fry claims that the trial court incorrectly determined that he waived his right to present mitigation evidence during the sentencing phase of his trial and that it had a duty under clearly established federal law to conduct further inquiry into the facts and circumstances of his waiver. Pet.29–31. The Supreme Court of Ohio considered these claims and rejected them. *Fry*, 125 Ohio St. 3d at 189–91. It held that the trial court was not required to conduct a more extensive inquiry than the already "comprehensive" one it conducted and that it correctly concluded as a matter of fact that Fry waived his right to present mitigation evidence. *Id.* at 190. This holding is due AEDPA deference unless it "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "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(d).

Fry identifies *Payne v. Tennessee*, 501 U.S. 808 (1991) and *Johnson v. Zerbst*, 304 U.S. 458 (1938) as cases that the Supreme Court of Ohio unreasonably applied. This Court held in *Payne* that defendants have the right to present mitigation evidence during the sentencing phase of a death-penalty case. *Payne*, 501 U.S. at 822. (Although they are not required to present such evidence. *See Schriro v. Landrigan*, 550

U.S. 465, 478–80 (2007).) And recall that in *Zerbst*, this Court generally said that courts should "indulge every reasonable presumption against waiver" of constitutional rights. *Zerbst*, 304 U.S. at 464. Notably, though, "[this Court] ha[s] never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce [mitigation] evidence." *Schriro*, 550 U.S. at 479.

The Supreme Court of Ohio complied with *Payne* and *Zerbst*. It correctly applied those holdings when it concluded that the trial court's "comprehensive" inquiry regarding his right to present mitigation evidence properly respected that right. *See Fry*, 125 Ohio St. 3d at 190. The federal habeas courts agree. Pet.App.A-120–21 (district court); Pet.App.A-14 (Sixth Circuit). And the federal habeas courts were right. Again, the record speaks for itself. *See above* 3–4 (discussing the trial court's lengthy inquiry into Fry's mitigation-evidence waiver).

Because Fry's presentation-of-mitigation question presented does not provide a basis for a summary remand, does not present any issue of law for this Court to clarify on full review, and, even if it did, this case is a bad vehicle for clarification, this Court should not grant *certiorari* on this question.

CONCLUSION

This Court should deny Fry's petition.

Respectfully submitted,

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