Supreme Court, U.S.
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In The
Supreme Court of the United States

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CLARICE STOVAL

Petitioner,

v.

SHAREE MILLER

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The issue in State court was whether Sharee Miller's rights under the Confrontation Clause were violated by the admission of a suicide note from her lover, who had conspired with Miller to murder Miller's husband. The Michigan Court of Appeals rejected the Confrontation Clause claim by applying clearly established Supreme Court precedent. After the last decision on the merits, but while Miller's application was pending in the Michigan Supreme Court, this Court released its decision in *Crawford v. Washington* that modified the standard for evaluating Confrontation Clause claims. The Michigan Supreme Court denied leave without opinion. Based on *Crawford*, Miller sought reconsideration, which was denied without opinion, and the conviction then became final. The questions presented are as follows:

I. Whether the Sixth Circuit erred in concluding that the "established law" under the Antiterrorism and Effective Death Penalty Act (AEDPA) is based on the law at the time the State conviction becomes final – and in determining therefore that the State court decision was not entitled to any deference – rejecting that the "established law" is determined at the time of the last State court decision on the merits as held by the Third Circuit.

II. Even if reviewed de novo, did the Sixth Circuit err in concluding that the suicide note here was "testimonial" under principles explained in *Crawford v. Washington* and therefore that Miller was entitled to relief.

PARTIES TO THE PROCEEDING

Petitioner is Warden Clarice Stoval of the Michigan Department of Corrections.

Respondent is Sharee Miller, a State prisoner convicted by a jury of conspiracy to commit first-degree murder and second-degree murder.

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JURISDICTION

The Sixth Circuit entered judgment on June 22, 2010, and denied rehearing en banc on September 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be grated with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
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> (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
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> (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

As recognized by this Court in *Smith v. Spisak*,[1] there is ongoing uncertainty of the meaning of the phrase "clearly established Federal law" as discussed in *Terry Williams v. Taylor*.[2] In *Williams*, there were separate majority opinions, defining the phrase differently.[3] This petition provides this Court the opportunity to resolve that uncertainty.

Because of this continuing uncertainty there is now an undeniable circuit split on the issue. The Third Circuit – adhering to Justice O'Connor's majority opinion in *Williams* – has held that the phrase relates to United States Supreme Court precedent "as of the time of the relevant state-court decision."[4] Whereas the First Circuit and the Sixth Circuit here – following Justice Stevens's majority opinion in *Williams* – have held that the phrase means the "law that was clearly established at the time the State-court conviction became final."

The Sixth Circuit then applied de novo review to the question despite the merits decision of the Michigan Court of Appeals. This approach undermines deference and comity contemplated under AEDPA. As noted by the dissent in the Sixth Circuit, the result of

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[1] *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010).

[2] *Terry Williams v. Taylor*, 529 U.S. 362 (2000).

[3] *Williams*, 529 U.S. at 412 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ, and by Scalia, J., except as to the footnote); 529 U.S. at 390 (Stevens, J., joined by Souter, Ginsburg, Breyer, O'Connor, and Kennedy, JJ.).

[4] *Williams*, 529 U.S. at 412.

the Michigan Court of Appeals was not "contrary to" *Crawford v. Washington*.[5]

Even if reviewed de novo, the statement was not "testimonial" under *Crawford* since the Sixth Circuit wrongly applied this Court's definition of "testimonial" evidence. It did so by relying heavily on the declarant's occupation (or former occupation) as a police officer. Rather, the proper analysis is whether the statement, based on the circumstances surrounding the statement, could reasonably be believed to be available for a later trial. In the circumstances here, the suicide note was not such a statement.

Finally, separate from *Crawford*, Miller was still not entitled to relief here where there was no showing that there was any actual prejudice. According to the Sixth Circuit, Miller was relieved of her burden under AEDPA because the State failed to specifically argue in district court that the introduction of the suicide note was "harmless." But a habeas petitioner under AEDPA should not be entitled to relief unless she demonstrates that she is in custody because of that constitutional violation. This is particularly troublesome in this case because evidence of Miller's guilt is overwhelming.

This Court should grant the petition.

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[5] *Crawford v. United States*, 541 U.S. 36, 51-52 (2004).

STATEMENT OF THE CASE

Sharee Miller ("Miller") was charged with and convicted by a jury of conspiracy to commit first-degree murder and second-degree murder for the November 8, 1999 shooting death of her husband, Bruce Miller ("Bruce"), at the hands of her boyfriend Jerry Cassaday. The conviction was largely based on e-mail and instant message conversations between Miller and Cassaday.

The record at trial demonstrates that Miller falsely claimed that she was pregnant with Cassaday's baby and that she miscarried due to being beaten by Bruce. Pet. App. 79a-80a. Just days before the murder, Miller sent an e-mail to Cassaday claiming that Bruce raped her, had someone else kidnap and rape her, and as a result miscarried Cassaday's twins. But Miller admitted at trial that she was never pregnant and that she did not miscarry due to physical abuse at Bruce's hands. She also admitted at trial to sending a number of threatening e-mails to Cassaday purporting to be from Bruce.

Most significantly, the evidence included a transcript demonstrating that Miller and Cassaday planned the murder during an instant message conversation the night before. The prosecutor presented overwhelming evidence that the instant message transcript was authentic. Records from America Online established that both Cassaday and Miller were online at the exact time the instant-message transcript indicates their conversation took place. The instant messages accurately describe the layout of the junkyard where Bruce was murdered, and

Cassaday had no way of knowing this information independently. Pet. App. 47a-48a.

And according to the instant message transcript, Miller planned to call Bruce's workplace once around 5:00 p.m., then call him back and keep him on the phone to insure his solitary vulnerability to the impending murder. Pet. App. 47a. Miller would then call Cassaday and "[l]et it ring once" to signal that the coast was clear. Finally, she would call Bruce back and keep him on the phone "just until he says [Cassaday] pulled up" at the door. Pet. App. 47a. This timeline was consistent with Miller's phone records. Pet. App. 47a. Finally, the police found the name of a lawyer written on an envelope in Miller's home that matched both the misspelling of the name and the erroneous transposition of his phone number contained in the instant messages. Pet. App. 48a. The circumstances of the murder were consistent with the instant messages.

Cassaday committed suicide several months after the murder. After his body was discovered, Cassaday's family found a briefcase addressed to an attorney with a note indicating it should not be opened alone. The briefcase was opened in the presence of an attorney and contained the e-mails and instant messages that formed the basis of Miller's conviction. The family also found, in separate packaging, three other envelopes, addressed to Cassaday's parents, ex-wife, and his son. Only the letter to Cassaday's parents was turned over to the police.

On direct appeal, the Michigan Court of Appeals denied Miller's claim that the introduction of the suicide note violated the Confrontation Clause. The

Michigan Court of Appeals affirmed Miller's conviction on June 24, 2003. The Michigan Supreme Court denied Miller's application for leave to appeal on April 1, 2004. Less than a month before the denial, on March 8, 2004, this Court released its decision in *Crawford v. Washington*.[6] Miller filed a motion for reconsideration in the Michigan Supreme Court based on *Crawford*. That motion was denied and Miller did not seek a petition for certiorari in this Court.

Miller filed a federal habeas petition, which the district court granted. Pet. App. 50a. The United States Court of Appeals for the Sixth Circuit affirmed, and then denied rehearing. Pet. App. 1a, 2a. Specifically, the Sixth Circuit concluded that *Crawford* applied because Miller's conviction was not "final" before this Court issued that decision. The Sixth Circuit then held that the Michigan Court of Appeals decision on the Confrontation Clause was entitled to no deference under AEDPA because the Michigan Court did not analyze Miller's claim under *Crawford*. Under its de novo review, the Sixth Circuit held that because Cassaday was a former police officer and took steps to preserve evidence, he would have reasonably anticipated that the suicide note – which he did not try to preserve – would also be presented at trial.

Finally, the Sixth Circuit held that the State waived harmless-error analysis by failing to raise it in the district court. The Sixth Circuit was wrong in this conclusion, but its determination meant that it gave no consideration to the overwhelming evidence of Miller's guilt. Essentially, the Sixth Circuit held that Miller

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[6] *Crawford*, 541 U.S. at 36.

was entitled to a new trial regardless of whether she was actually harmed by the alleged constitutional error.

REASONS FOR GRANTING THE PETITION

I. This Court should clarify the meaning of "clearly established Federal law" in 28 U.S.C. § 2254(d) and hold that it refers to this Court's decisions at the time of the relevant State court decision.

This Court should grant certiorari and resolve the "uncertainty" it previously identified in *Spisak*, which has played out both within and between the circuits.

Moreover, this Court has granted certiorari on the issue whether AEDPA deference applies to summary disposition of claims.[7] And this case presents the related question whether any AEDPA deference applies where the last reasoned State court decision was based on Supreme Court precedent that was subsequently modified by this Court. This Court should grant certiorari to clarify how federal courts should address habeas cases based on decisions of this Court that come out after the last reasoned State court decision.

A. There currently is uncertainty in the law on this question.

In *Smith v. Spisak*, this Court recognized that there is "some uncertainty" regarding the definition of the phrase "clearly established Federal law" under AEDPA.[8] That "uncertainty" derives from the two competing definitions of the term set forth by this

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[7] *Harrington v. Richter*, 130 S. Ct. 1506 (2010).

[8] *Smith*, 130 S. Ct. at 681.

Court in *Williams v. Taylor* – the seminal case defining this phrase. In a majority opinion authored by Justice O'Connor, this Court defined the phrase "clearly established Federal law" as constituting holdings of the United States Supreme Court *at the time of the relevant State court decision*:

> That statutory phrase refers to the holdings, as opposed to the dicta, *of this Court's decisions as of the time of the relevant state-court decision.* In this respect, the "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1). See, *e.g.*, *Stringer v. Black*, 503 U.S. 222, 228, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992) (using term "old rule"). The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence.[9]

Justice Stevens, joined by three other justices, argued that the phrase "clearly established Federal law" requires federal habeas courts "to deny relief that is contingent upon a rule of law not clearly established at

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[9] *Williams*, 529 U.S. at 412 (emphasis added).

the time the state conviction becomes final."[10] This definition did not enjoy majority support.[11]

But Justice Stevens used this same definition in part III of the *Williams* opinion (which was joined by a majority), stating that "[t]he threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."[12] Yet, in the cases that follow *Williams*, this Court has routinely cited the Justice O'Connor formulation as the definition of "clearly established Federal law."[13]

B. There is a circuit split on this issue.

The "uncertainty" created by these dueling definitions has extended to the circuits.

In specific, the Third Circuit recently resolved an intra-Circuit split between the Justice O'Connor and Justice Stevens's definitions in favor of looking at

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[10] *Williams*, 529 U.S. at 380.

[11] *Williams*, 529 U.S. at 403-404.

[12] *Williams*, 529 U.S. at 390.

[13] *See Carey v. Musladin*, 549 U.S. 70, 74 (2006)(stating that clearly established federal law "refers to the holdings, as opposed to the dicta, of this Court's decisions at the time of the relevant state-court decision"); *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) ("[w]e look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision'"); and *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("In other words, 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision").

the last State court merits decision.[14] The Third Circuit undertook its analysis by noting that the Stevens definition was based on his belief that 28 U.S.C. § 2254(d)(1) codified the Supreme Court's decision in *Teague v. Lane*.[15] But the Third Circuit noted that subsequent cases suggest that *Teague* and § 2254(d)(1) are distinct inquiries.[16]

More significantly, the Third Circuit reasoned that the Justice O'Connor definition is consistent with § 2254(d)(1)'s focus on the reasonableness of the "decisions" of the State courts. The Third Circuit reasoned that a "decision" results from a State court's adjudication "on the merits" of a claim.[17] Thus, the question under AEDPA is whether the State court's resolution of a habeas petitioner's claim on the merits is "contrary to" or an "unreasonable application of" existing federal law. Since a State court cannot unreasonably apply a Supreme Court decision that did not exist when it reached a decision on the merits, the Third Circuit concluded that "the statute, read in the most straightforward fashion, requires that the relevant Federal law be 'clearly established' at the time of that state-court decision."[18]

On the other hand, the First Circuit has concluded that the date a criminal defendant's

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[14] *Greene v. Palakovich*, 606 F.3d 85, 94 n. 6 (3d Cir. 2010).

[15] *Teague v. Lane*, 489 U.S. 288 (1989).

[16] *See Horn v. Banks*, 536 U.S. 266, 272 (2002)(noting that "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct").

[17] *Greene*, 606 F.3d at 98.

[18] *Greene*, 606 F.3d at 98.

conviction became final is the relevant date to determine what constitutes "clearly established Federal law."[19] The First Circuit reasoned that Justice O'Connor's opinion in *Williams* did not indicate any intention to modify or undercut *Teague*. Moreover, the First Circuit quoted Justice O'Connor for the proposition that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal Law' as determined by the Supreme Court under § 2254(d)(1)."[20]

According to the First Circuit, this is consistent with Justice O'Connor joining the portion of *Williams* that repeated the Stevens definition. The First Circuit concluded that "finality, not the date of the last reasoned decision, is the principal determinant of whether a 'new' rule can be applied to an 'old' case."[21] Therefore, the First Circuit held that "clearly established Federal law" applies up to the time that a criminal defendant's conviction becomes final, i.e., when the time for filing a petition or certiorari has lapsed or when a petition for certiorari has been decided.[22]

The Sixth Circuit has actually adopted *both* approaches. In *Harris v. Stovall*, the issue was whether the habeas petitioner was entitled to free copies of transcripts from the prior trial of his codefendants to use for impeachment purposes.[23] The State trial court

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[19] *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009).

[20] *Foxworth*, 570 F.3d at 431, quoting *Williams*, 529 U.S. at 412 (O'Connor, J.).

[21] *Foxworth*, 570 F.3d at 431.

[22] *Foxworth*, 570 F.3d at 431.

[23] *Harris v. Stovall*, 212 F.3d 940, 945 (6th Cir. 2000).

denied his request and the Michigan Court of Appeals affirmed by summary order. The Sixth Circuit noted that there was no United States Supreme Court case law that supported the habeas petitioner's claim that he was entitled to those documents. The Sixth Circuit also noted that even if the Supreme Court had come out with a decision supporting such a requirement after his trial, he could still not rely on it because a rule must be "clearly established" "as of the time of the relevant state court decision."[24] In other words, the Sixth Circuit recognized in *Harris* that it is the State court's decision which must be "unreasonable" – not the State court's failure to predict a subsequent change in the law.

In the instant case, however, the Sixth Circuit appears to have repudiated *Harris*.[25] Like the First Circuit, the Sixth Circuit decided to adopt the Justice Stevens definition in large part because Justice O'Connor joined part III of the *Williams* decision and because of Justice O'Connor's remark that an "old rule" in *Teague* will constitute "clearly established Federal law" under § 2254(d)(1).[26] According to the Sixth Circuit, therefore, the controlling case in reviewing the Michigan Court of Appeals decision in habeas for what was clearly established Supreme Court precedent was

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[24] *Harris*, 212 F.3d at 945 n. 2.

[25] *Miller v. Stovall*, 608 F.3d 913, 919-920 (6th Cir. 2010).

[26] *Miller*, 608 F.3d at 920.

Crawford, even though *Crawford* was decided more than nine months later.[27]

Under the Justice O'Connor definition, reasonableness must be determined by looking to "clearly established Federal law" *at the time of the decision*. This is consistent with this Court's post-*Williams* cases defining the phrase. In *Lockyer v. Andrade*, this Court defined "clearly established Federal law" as "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."[28]

Relying on Justice O'Connor's definition, the decisions of the Third Circuit is better reasoned. It demonstrates greater respect for the principle of comity for the State courts of an independent sovereign that underlies AEDPA. Under the Sixth Circuit's analysis, in order to ensure that the federal courts will not sit as if on direct review, the Michigan Supreme Court here would had to have granted reconsideration regardless whether the issue was jurisprudentially significant in order to enjoy the deference accorded under AEDPA. The State courts should not have to change their internal standards of review to ensure that their decisions will not be subject to second guessing.

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[27] *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007). In *Whorton v. Bockting*, this Court held that *Crawford* was a new rule and, therefore, applied on direct review. Thus, if Miller had filed a petition for certiorari with this Court after the Michigan Supreme Court denied relief, *Crawford* would have governed.

[28] *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

C. Even under the Justice Stevens definition, Miller should only be entitled to habeas relief if the Michigan Court of Appeals decision was objectively unreasonable under *Crawford.*

Under § 2254(d), a federal habeas court "shall not" grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings" unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." In applying this standard even under the Justice Stevens definition, the issue is whether the decision of the Michigan Court of Appeals was "unreasonable" in light of the subsequent *Crawford* decision.

But the Sixth Circuit held instead that the Justice Stevens definition freed it from all constraints set forth for habeas review under AEDPA and that it could review Miller's claims de novo.[29] This position is without support from *Williams* and is inconsistent with the language of the statute.

The deferential review standards of § 2254(d)(1) apply to "any claim that was adjudicated on the merits in State court proceedings." The Second and Ninth Circuits defined "adjudication on the merits" as "a decision finally resolving the parties' claims . . . that is based on the substance of the claim advanced, rather

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[29] *Miller*, 608 F.3d at 921-922 ("Given this procedural posture, AEDPA deference to the state courts is inappropriate because there is simply no analysis or conclusion on the central legal question to which to defer").

than on a procedural or other ground."[30] Or, as put by the Seventh Circuit, a merits adjudication "is perhaps best understood by what it is not; it is not the resolution of a claim on procedural grounds."[31]

Here, the Michigan Court of Appeals adjudicated Miller's claim "on the merits" when it held that introduction of the Cassaday suicide note did not violate the Confrontation Clause under pre-*Crawford* standards, applying *Ohio v. Roberts*.[32] The decision of the Michigan Court of Appeals was not "contrary to" *Crawford* because *Crawford* did not exist. Therefore, the question is whether the subsequent *Crawford* decision has the effect of nullifying AEDPA deference.

The Sixth Circuit in this case has essentially held that because the Michigan Court of Appeals failed to anticipate the future *Crawford* decision, it would treat this case as if Miller's claim had never been considered at all. But that is not even consistent with how the Sixth Circuit – and other circuits – treats summary orders that dispose of cases on the merits.[33] Rather, in the Sixth Circuit, "unreasoned" decisions on the merits are afforded a "modified" form of AEDPA deference.[34] Under "modified" AEDPA deference as explained by prior decisions of the Sixth Circuit, a

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[30] *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004), quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

[31] *Muth v. Frank*, 412 F.3d 808, 815 (7th Cir. 2005).

[32] *Ohio v. Roberts*, 448 U.S. 56 (1980).

[33] *See, e.g., Fullwood v. Lee*, 290 F.3d 663, 677 (4th Cir. 2002); *Cornwell v. Bradshaw*, 559 F.3d 398, 412-413 (6th Cir. 2009); *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2005); and *Pickens v. Gibson*, 206 F.3d 988, 997 (10th Cir. 2000).

[34] *Cornwell*, 559 F.3d at 412-413.

court conducts an independent review of the record in order to determine whether the unexplained decision is contrary to, or involved an unreasonable application of, clearly established federal law.[35] As the dissent to the Sixth Circuit here suggested, deference is accorded to the decision itself.[36] If that deference would have been accorded to the result of the Michigan Court of Appeals decision, there would have been no basis on which to conclude that the decision was contrary to or an unreasonable application of clearly established Supreme Court precedent.[37]

II. The Sixth Circuit's determination that the statements at issue here were "testimonial" is not consistent with *Crawford*, and therefore Miller was not entitled to relief.

Even if reviewed without any deference to the State court decision, Miller was not entitled to relief for two reasons. First, there was no violation of *Crawford*. Second, Miller never demonstrated actual prejudice, a requirement for relief under 28 U.S.C. § 2254, even where the State failed to raise the claim of harmlessness in the district court.

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[35] *Cornwell*, 559 F.3d at 412-413.

[36] *Miller*, 608 F.3d at 932 (Boggs, J., dissenting)("Even under the majority's timing rule, however, I would still accord the state court's result as to Miller's Confrontation Clause claim – i.e., the Michigan Court of Appeals's holding of no Sixth Amendment violation – the same degree of deference as we would afford it if that court had simply been silent as to its reasoning.").

[37] *Miller*, 608 F.3d at 932 (Boggs, J., dissenting)("As I have stated, I would review Miller's claim applying AEDPA deference, and under that standard, I would find her claim without merit.").

A. The suicide note was not testimonial.

In *Crawford v. Washington*, this Court drew a distinction between "testimonial" and "nontestimonial" hearsay statements, holding that the Confrontation Clause only ordinarily bars the former where a defendant does not have an opportunity to cross-examine the declarant.[38] While the Supreme Court did not specifically define "testimonial," it did provide three possible "formulations for the core class of 'testimonial' statements":

> [1] ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;
>
> [2] extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [and]
>
> [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[39]

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[38] *Crawford v. Washington*, 451 U.S. 36, 59 (2004).

[39] *Crawford*, 541 U.S. at 51-52 (internal quotations and citations omitted; paragraph breaks added).

In adopting *Crawford*, this Court sought to return the Confrontation Clause to its historical roots. The Court noted that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations against the accused."[40] This Court cited as a prime example of "testimonial" statements the infamous accusation letter used in the 1603 trial of Sir Walter Raleigh.

In Raleigh's Case, Lord Cobham, Raleigh's alleged accomplice, wrote a letter indicating that Raleigh was the instigator of the plot to remove King James I from the English throne. The letter was used as evidence against Raleigh, despite the fact that Raleigh's request to challenge Cobham in person was denied.[41] But what made the use of the letter so odious was that it was written by Cobham to the prosecutor. And the notion of a "formal" statement permeates the *Crawford* opinion. As noted by the Court, "testimony" typically includes "a solemn declaration or affirmation made for the purpose of establishing or proving some fact."[42] Similarly, the Second Circuit has defined "testimonial" statements as "a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings."[43]

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[40] *Crawford*, 541 U.S. at 50.

[41] Chambers, *The Book of Days*, p 513 (1832).

[42] *Crawford*, 541 U.S. at 51.

[43] *United States v. Saget*, 377 F.3d 223, 228 (2d Cir. 2004).

But in this case, the Sixth Circuit held that because Cassaday was a former police officer and because he took precautions to ensure other evidence was preserved and given to the police, he would have reasonably expected that the suicide note written to his parents (and presumably the notes written to his son and ex-wife) would have been used at Miller's trial. Pet. App. 23a ("Any reasonable person, particularly one with Cassaday's training, who prepared the briefcase would anticipate the prosecutorial importance of [the suicide note]"). But this conclusion turns logic on its head – because Cassaday took steps to preserve evidence, he would not have reasonably expected that statements that he did not try to preserve would also be presented at trial.

Cassaday's former occupation, alone, does not render his statement testimonial. At issue in *Davis v. Washington* was whether statements made to police during a 911 call or at a crime scene are "testimonial."[44] This Court explained that the determination whether a statement is "testimonial" depends upon the circumstances under which it was made:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and

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[44] *Davis v. Washington*, 547 U.S. 813 (2006).

> the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[45]

Simply put, the circumstances matter in determining whether a given statement is akin to Lord Cobham's accusatory letter.

Here, the Sixth Circuit disregarded the language of the suicide note, the fact that the suicide note was kept separately from the evidence that was designed to be turned over to the police, and did not adequately consider the fact that Cassaday wrote three letters – to his parents, his ex-wife, and his son – and that two of those letters were never turned over to the police. When looked at within the totality of the circumstances, the Sixth Circuit's analysis cannot be squared with *Crawford*.

Initially, the language of the suicide note contradicts the Sixth Circuit's conclusion that a former police officer would have anticipated that it would be used against Miller. The note details to "mom and dad" about why he was depressed; why he could not seek treatment for that depression; why he wanted to commit suicide; why suicide was a preferable option to confessing and going to prison;[46] and how he wanted his affairs to be wound up. The note does not ask his mother and father to turn the note over to the police.

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[45] *Davis*, 547 U.S. at 822.

[46] Cassaday explained in the suicide note that "an ex-cop cant go to prison. Im not strong enough to do it that way." (Vol. II, December 14, 2000, pp. 352-353).

Rather, the note states that "Sharee was involved and helped set it up, *I have all the proof and I am sending it to the police.* She will get whats coming." Pet. App. 5a. Cassaday indicates his intention in his own words – that he would send the relevant information to the police. Since the note does *not* ask his parents to forward the letter to the police, it is reasonable to infer that he would not have anticipated the note being used at trial.

Had Cassaday so intended, he would have treated the suicide note in the same careful manner he treated the evidence that he did intend the police to find. Mike Cassaday testified that his brother called him two days before Bruce's murder and alluded to the documents that would later be discovered – documents that were placed in the briefcase long before the suicide note was ever written.

Moreover, Cassaday went to great pains to preserve a chain of evidence – an action you would expect from a former police officer who intended that evidence to be produced at trial. Cassaday included a note on the briefcase stating "Mike, do not open alone" and addressed the briefcase to the attention of an attorney. The fair inference is that the information contained within the briefcase was designed for the police (testimonial), whereas the information in the envelope was personal, separate and not designed for the police (non-testimonial).

None of the precautions taken by Cassaday to preserve the evidence in the briefcase were taken to "preserve" his personal letters to his family. The note in question – one of three notes – was contained within

a stand-alone envelope addressed to "mom and dad," and it did not include the exhortation that it not be opened alone. The record does not indicate that the other notes – written to Cassaday's child and ex-wife – were ever turned over to the police, nor does the Sixth Circuit explain why the "intent" for those letters is distinguishable from the letter written to "mom and dad." That is, of course, because Cassaday's treatment of the suicide letter was plainly inconsistent with how a former police officer would treat evidence he would reasonably expect to be used in a criminal prosecution. This Court should grant the petition.

B. The Sixth Circuit's refusal to review the claim of error for harmlessness is inconsistent with AEDPA.

Under AEDPA, habeas relief is only available to a habeas petitioner who is "in custody in violation of the Constitution or laws or treaties of the United States."[17] Thus, merely showing that a constitutional error occurred – as the Sixth Circuit did here – should not be a sufficient basis to grant the petition. Rather, as explained by this Court in *Brecht v. Abrahamson*, Miller should also establish that the error had "substantial and injurious effect" on the jury's verdict:

> The test under [*Kotteakos v. United States*, 328 U.S. 750, 776 (1946)] is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Under this standard, habeas petitioners may

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[17] 28 U.S.C. § 2254(a).

> obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States v. Lane*, 474 U.S. 438, 449; 88 L. Ed. 2d 814; 106 S. Ct. 725 (1986).[48]

This standard was reiterated in *Fry v. Pliler*, in which this Court held that the *Brecht* standard governed even where the State court did not reach the issue of harmlessness – as here – because it rejected the claim that there was a constitutional violation in the first instance.[49] If there is "virtual equipoise" on the issue of harmlessness, i.e., the evidence of harm is equally divided, the court should treat the error as if it affected the verdict.[50]

Moreover, the reasoning of three Justices of the Court in a dissent demonstrates the flaw in the Sixth Circuit's analysis of allowing a habeas petitioner to be released based solely on a showing of constitutional error. In *O'Neal v. McAninch*, Justice Thomas, joined in dissent by Chief Justice Rehnquist and Justice Scalia, reasoned that a federal habeas court may not upset the results of a criminal trial unless it concludes

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[48] *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

[49] *Fry v. Pliler*, 551 U.S. 112, 120 (2007).

[50] *Fry*, 551 U.S. at 121 n. 3, quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)(internal quotes omitted).

that a constitutional error was harmful.[51] Justice Thomas undertook his analysis by noting that a habeas prisoner seeks release under 28 U.S.C. § 2254(a); which states in plain terms that a prisoner must be in custody "in violation of the Constitution."

Consistent with the dissent in *McAninch*, the plain language of § 2254 indicates that there must be some sort of nexus between the constitutional error and incarceration. Indeed, almost every other civil plaintiff bears the burden of establishing causation.[52] It cannot be that a plaintiff's burden is less stringent under habeas review, where the plaintiff is seeking to undo the finality of a conviction and sentence. In fact, the Sixth Circuit's decision to decline to review for harmlessness based on its finding of waiver strikes at the very idea that habeas corpus is an "extraordinary remedy" and that undoing a State conviction should only be countenanced in rare circumstances.[53] In short, the Sixth Circuit's action here cannot be reconciled with the language of AEDPA, or the general requirement that a civil plaintiff establish causation, or the extraordinary nature of the writ.

Yet, the Sixth Circuit excused the "actual prejudice" requirement in this case, instead granting

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[51] *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995) (Thomas, J., dissenting). This Court in *O'Neal* was evaluating the circumstance in which the court harbored "grave doubts" about whether the claimed error was harmless. In such circumstances, this Court concluded that when the question of harmlessness is so evenly balanced as to be in virtual equipoise, the petitioner must win because the State bears the burden to establish harmlessness.

[52] *O'Neal*, 513 U.S. at 446 (Thomas, J., dissenting).

[53] *Brecht*, 507 U.S. at 633.

habeas relief based on the mere showing of error. According to the Sixth Circuit, Miller was relieved of having to show "actual prejudice" because the State failed to raise a harmless-error argument in its initial answer in the federal district court. The decision by the Sixth Circuit is all the more troubling because Miller herself understood the State's answer to raise the issue, as demonstrated in her responsive pleading arguing that admission of the suicide note was "not harmless error." Pet. App. 43a.

Miller cannot establish "actual prejudice" because the instant messages between her and Cassaday the night before the victim's murder constitute overwhelming evidence of guilt. The instant messages between Miller and Cassaday demonstrate their agreement to murder Bruce Miller. The conversation started with Miller inciting Cassaday by sending him pictures of a bruised torso – allegedly of herself caused by Bruce Miller – and including the inflammatory statement that Bruce beat her in order to "hurt the babies." Pet. App. 47a-49a, 79a. Miller admitted at trial that she lied to Cassaday twice about being pregnant and about Bruce Miller causing her to miscarry.

The prosecutor also presented overwhelming evidence that the instant messages were authentic. Records from America Online established that both Cassaday and Miller were online at the exact time that the instant-message transcript indicates their conversation took place. As noted, the instant messages accurately describe the layout of the junkyard where Bruce was murdered and Cassaday had no way of knowing this information independently.

And according to the instant-message transcript, Miller planned to call Bruce's workplace once around 5:00 p.m., then call him back and keep him on the phone to isolate him. Miller would then call Cassaday and "[l]et it ring once" to signal him. At this point, she would call Bruce back, keeping him on the phone "just until he says [Cassaday] pulled up" at the door. Pet. App. 47a-48a.

This Court should grant certiorari to determine whether a habeas court can grant relief based solely on the existence of a constitutional error, or whether a habeas petitioner must establish that she is actually "in custody" because of such an error.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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