No. 10–851

In The
Supreme Court of the United States

CLARICE STOVALL,
Petitioner,

v.

SHAREE MILLER,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the timing for "clearly established" law is set at the end of direct review consistent with the line drawn in *Teague* – and reviewed de novo when the state court did not make a ruling on the *Crawford* claim – or at another point, in a case in which the state conceded throughout habeas that the line should be drawn at the end of direct review?

2. Whether the Sixth Circuit erred in finding that a letter, written by a jilted lover and former police officer, accusing the defendant of murder, which was placed with evidence intended for the police to make sure the defendant "will get what's coming," was testimonial under *Crawford v. Washington*?

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STATEMENT OF THE CASE

On November 8, 1999, Bruce Miller was found dead at his business, B&D Auto, near Flint, Michigan. Within 24 hours of Miller's death, the police had a suspect: John Hutchinson. Together, Hutchinson and Miller were the targets of an ongoing criminal investigation for tampering with vehicle identification numbers. According to Hutchinson's brother, Hutchinson had threatened to "dispose" of Bruce Miller, and stated after the murder that he had, in fact, "disposed of Bruce Miller." (Tr. IV, 1187, 1191–92, 1203–04).

Three months after Miller's death, on February 11, 2000, former police officer Jerry Cassaday shot himself in his Missouri apartment. (Tr. I, 232–34). In the course of cleaning up the apartment, his brother Mike Cassaday found a briefcase under Jerry's bed with four sealed envelopes on it. One of the envelopes was addressed to Jerry's attorney and bore Jerry Cassaday's handwritten instruction: "Mike, do not open alone." (Tr. II, 347). Mike Cassaday testified that earlier Jerry had warned Mike that if "anything ever happens to me there is – there is a briefcase under – under the bed at home. . . . [G]et a hold of the briefcase and you will know what to do with it then." (Tr. II, 356). Following Jerry's handwritten instructions, Mike Cassaday did not open the briefcase until he was in the presence of his brother's attorney.

In another of the envelopes with the briefcase, Cassaday enclosed a suicide letter confessing to the murder of Bruce Miller. This typewritten letter also accused Bruce Miller's wife and Cassaday's former lover, Respondent Sharee Miller: "I drove there and

killed him. Sharee was involved and helped set it up. I have all the proof and am sending it to the police. She will get what's coming." (Tr. II, 352). Over objection, the prosecution read the accusation into evidence (Tr. II, 351–53), and emphasized its importance in closing (Tr. V, 1376).

Cassaday and Respondent Miller met before Bruce Miller's death and had an ongoing affair. Respondent rebuffed Cassaday after Bruce Miller's murder. At their initial meeting, Miller lied to Cassaday, claiming that she was a wealthy business owner. This began a pattern of fantasy and tall tales that Miller would continue throughout their relationship. Especially in their online relationship, Miller pretended to lead a different life than the one she actually led. The State has continually focused on these fantastic lies, as it still does in its Petition, to detract from the weakness of its case against Miller and the unconstitutional admission of the suicide letter.

Cassaday was an ex-police officer with a history of drug abuse, alcohol abuse, and depression that began long before he met Miller. (Tr. II, 402). He was also experienced in computer technology, spent hours online, and had multiple on-line sexual relationships. (Tr. IV, 1073–74).

Under the suicide letter, inside the briefcase was a nine-page printout of an alleged Instant Message (IM) conversation between Cassaday and Miller. The transcript purported to be a record of Cassaday and Miller's plan to murder Bruce Miller. Paul Albee, a computer scientist who examined Cassaday's computer, testified that, on a scale of one to ten, the difficulty of forging or manipulating an IM record

was "about two, you simply need to know the existence of the option to save it and probably a three to actually make the changes. If you're familiar with the word processor, you can make these changes." (Tr. IV, 1082; *see also* Tr. II, 520 (testimony of prosecution witness that falsifying the IM would be "fairly easy" for someone savvy with computers)).

Miller has always maintained her innocence.

The jury deliberated for two full days and returned a guilty verdict at 6:13 p.m. on Friday, December 22, 2000. (Tr. VII, 1478).

The Michigan Court of Appeals affirmed on June 24, 2003. Pet. App. 76a. Miller challenged the suicide letter's admission under state evidentiary rules and the Confrontation Clause. On appeal, the State argued, in part, that the note was properly admitted under the catch-all exception to the hearsay rule,[1] which requires that the evidence "is more probative on the point for which it is offered than any other evidence that the proponent can procure." MICH. R. EVID. 803(24) (catch-all exception, availability immaterial); MICH. R. EVID. 804(b)(7) (catch-all exception, declarant unavailable). The state appellate court agreed. It held that the letter was properly admitted under the "catchall" exception to the hearsay rule and denied Miller's claim, citing to Michigan authority following the then-existing precedent of *Ohio v. Roberts*, 448 U.S. 56 (1980). Pet. App. 78a–80a. Miller requested leave to appeal to the Michigan Supreme Court. While that application

[1] Michigan Court of Appeals, People's Brief on Appeal, at 6. At the time of trial, MICH. R. EVID. 804(b)(7), which includes the catch-all exception, was codified as MICH. R. EVID. 804(b)(6). Pet. App. 78a n.3.

was pending, on March 8, 2004, this Court decided *Crawford v. Washington*, 541 U.S. 36 (2004).

The Michigan Supreme Court denied Miller's application on April 1, 2004. Pet. App. 75a. Miller filed a motion for reconsideration, which specifically asked the court to reconsider in light of *Crawford*. The court denied the motion for reconsideration without comment on June 30, 2004. Pet. App. 74a.

Miller filed a habeas corpus petition in federal district court. The magistrate judge's report and recommendation determined, among other things, that the habeas court should apply *Crawford v. Washington* to the Confrontation Clause challenge to the suicide letter's admission. Petitioner did not file objections to the report and recommendation. The district court granted the writ. Pet. App. 48a. The warden appealed, arguing the Confrontation Clause question pursuant to *Crawford*. The U.S. Court of Appeals for the Sixth Circuit affirmed, Pet. App. 2a–47a, and denied the State's application for rehearing or rehearing *en banc*. Pet. App. 1a.

REASONS FOR DENYING THE PETITION

I. The question of the temporal cutoff for "clearly established" law is rarely relevant, was abandoned by Petitioner, and was correctly decided below.

A. The question presented very rarely arises.

Petitioner requests this Court's review of the question whether "clearly established" law under 28 U.S.C. § 2254(d)(1) is the Supreme Court law in effect at the time of the last explained state court decision or, cohering with the twenty-year-old rule in *Teague*, at the end of direct review.[2] The Court has not addressed this ten-year-old "uncertainty"[3] because it almost never matters. The question has not gone unnoticed by the lower federal courts. In fact, the federal circuit courts noted the hypothetical divergence almost as soon as *Williams v. Taylor*, in which the Court's two majority opinions used different language on this point, was issued. *See, e.g.*, *Vasquez v. Strack*, 228 F.3d 143, 148 (2d Cir. 2000), *cert. denied sub nom. Vasquez v. Mazzucad*, 531 U.S. 1166 (2001) (citing *(Terry) Williams v. Taylor*, 529 U.S. 362, 390, 412 (2000)).

Petitioner cites three circuit court cases in which it asserts this question has arisen and the timing might matter. Only one of these three cases discussed any of the other cases.[4] In the ten years since *Williams* was issued, an average of approxi-

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[2] *See Teague v. Lane*, 489 U.S. 388, 305–10 (1989) (plurality opinion).

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

[4] *See Greene v. Palakovich*, 606 F.3d 85, 95 n.7 (3rd Cir. 2010).

mately 23,000 habeas petitions have been filed each year.[5] An issue requiring attention in three out of 230,000 cases does not render this an "important matter" worthy of the Court's attention. *See* SUP. CT. R. 10(a).

This issue is not likely to arise more often going forward either. For the issue to arise, the planets must align in exactly the right way. This Court must announce a new rule. The new rule must affect a claim raised and litigated in the state court and already reviewed by the state intermediate appellate court. The new precedent must actually affect in a meaningful way the resolution of the constitutional claim in that particular case. Critically, the new precedent must be issued in the window after the state court's final substantive review of the merits, usually by the intermediate appellate court, and before direct review is "final." In cases where the state intermediate appellate court is the last court to analyze the claim and does so under the "old" law, the state supreme court must ignore the new precedent by denying discretionary review, failing to remand to the intermediate appellate court for reconsideration, and by failing to take any other

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[5] Administrative Office of the United States Courts, 2009 Annual Report of the Director, at t.C-2A (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf (2005–09); Administrative Office of the United States Courts, 2005 Annual Report of the Director, at t.C-2A (2006), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/appendices/c2a.pdf (2001–05); Administrative Office of the United States Courts, 2000 Annual Report of the Director, at t.C-2A (2001), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2000/appendices/c02asep00.pdf (2000).

action in light of the new precedent. And the relevant issue must have been preserved as a federal constitutional violation and otherwise be cognizable in habeas.

In the end, courts, including this one, have remarked on the possible inconsistency in the Court's language in *Williams v. Taylor*, yet this question, while interesting in academia, has almost no real-world impact.[6] Even if a circuit split exists, the Court should choose to ignore it, as it does in other doctrinally insignificant cases.[7]

Because the issue arises *and actually matters* so infrequently, the discussion may make for interesting academic debate; however, this is not an "important matter," SUP. CT. R. 10(a), that will affect a significant number of future cases. The Court should deny the petition.

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[6] *See also Miller*, Pet. App. 27a, 29a (Boggs, J., dissenting) (calling present situation "rare").

[7] *See, e.g.*, Trevor Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 515–16 (2001) (noting that there are "far more" circuit splits than the Court can resolve and suggesting that in one three-year period the Court denied review in over 200 cases with splits); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 193 tbl.2 (2001) (finding that the Court granted certiorari in less than half of the petitions with an apparent circuit split, which was defined relatively narrowly by, in part, requiring that the lower court explicitly identified the conflict).

B. *This case is a poor vehicle for deciding the question because Petitioner abandoned its opportunity to litigate the issue in the federal courts by failing to brief or argue the issue below.*

The State's interest in litigating this issue is of recent vintage. The magistrate judge's report and recommendation concluded that *Crawford* was applicable to this case because Respondent's conviction was not final when *Crawford* was decided.[8] The State did not object to this portion of the magistrate's report,[9] despite explicit instructions that failure to object would waive any right of appeal.[10] Having received no objections from the State on this point, the district court adopted this portion of the magistrate's report and recommendation. Pet. App. 55a–57a. The State then failed to raise the issue in its brief on appeal or in its reply brief to the Sixth Circuit. In fact, neither brief even cites *Ohio v. Roberts*, the precedent that would control this case under the State's current position. Now, having lost in both federal habeas courts, the State is attempting to resurrect an issue that it, apparently, decided was not worth raising before.

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[8] Resp. App. 16a–19a.

[9] Resp. App. 51a–52a (docket for Case No. 05-CV-73447 (E.D. Mich.)); *cf.* Docket R. No. 31–34 (listing Report, Correction, and Miller's Objection; the State never filed objections to the Report).

[10] The magistrate's order, citing *Thomas v. Arn*, 474 U.S. 140, 153–55 (1985), explicitly advised the State that failure to file timely objections would waive any right of appeal. Resp. App. 43a.

Perhaps the State did not file any objections to the magistrate's report because, only months earlier, this Court had already established that finality of state-court review is the appropriate cutoff for application of *Crawford*. *See Whorton v. Bockting*, 549 U.S. 406, 418–21 (2007) (unanimous court deciding that *Crawford* is not a "watershed" rule to be given retroactive application to cases in which direct review had ended). In the *Crawford* context, *Bockting* affirms the application of *Teague* and emphasizes the importance of the line at the finality of direct appeal. *E.g., id.* at 409, 412, 416 (marking "the time the defendant's conviction became final" as the cutoff point for new-rule jurisprudence) (internal quotation marks omitted) (quoting *Teague*, 489 U.S. at 301 (plurality opinion)).

For whatever reason, the State has waived, or forfeited, this issue by its failure to contest the report and recommendation, by arguing the case under *Crawford* in the circuit court briefings and oral argument, and by failing to raise the issue presented to this Court in its pleadings to the district court or the Sixth Circuit. The failure to file timely objections to the magistrate's report constitutes a waiver of any further right to appeal. *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir. 1981); *see also Thomas v. Arn*, 474 U.S. 140, 153–55 (1985) (affirming Sixth Circuit rule). Further, an appellant's failure to raise an issue in its opening brief constitutes waiver of that issue. *See, e.g., United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006). When the State neither objected to the magistrate's report and recommendation nor briefed the issue to the Sixth Circuit, it waived the question.

Even if the issue is not deemed waived or forfeited or the Court chose to review it anyway, reconsideration of the issue at this point would thwart the goals of the waiver doctrine, including preventing parties from "'sandbagging'" the court by initially failing to object to an issue, then deploying it later only if the party loses with the first strategy it pursued. *Arn*, 474 U.S. at 147–48.

Respondent encourages this Court to treat this case as it treated *Smith v. Spisak*. While perhaps there is "some uncertainty" about the standard, when, as here, the parties litigated the matter under *Crawford*, this Court should decline to reexamine that choice. *See Smith v. Spisak*, 130 S. Ct. 676, 681 (2010).[11]

To the extent that the Court is interested in the question presented, it should review it in a case in which the lower court had the benefit of briefing and argument – a benefit that can expose unanticipated wrinkles prior to consideration by this Court. This case, in which the State is now choosing to challenge the application of *Crawford*, after losing in the Sixth Circuit on the merits of the case, is not a proper vehicle for review of the question.

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[11] This prudential approach, to pass over the issue when the litigants assumed that the later law applied, was followed by the Ninth Circuit. *See Thompson v. Runnel*, 621 F.3d 1007, 1015 n.7 (9th Cir. 2010) ("In *Smith*, however, the Court declined to address this ambiguity because in that case, as in this one, the parties had not raised the issue. We follow the same course here.") (citation omitted).

C. *The First and Sixth Circuit approach is consistent with AEDPA, prior decisions of this Court, as well as this Court's well-established retroactivity doctrine.*

The First and Sixth Circuits determined that the "clearly established law" to be applied by the federal court ruling on a habeas petition is the law in effect when the "state-court conviction became final." *Foxworth v. St. Amand*, 570 F.3d 414, 431 (1st Cir. 2009); *Miller*, Pet. App. 10a (both quoting *Williams*, 529 U.S. at 390 (Stevens, J., for the Court)). That determination is consistent with this Court's precedent, including *Teague v. Lane*, 489 U.S. 288 (1989), and with AEDPA. In *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987), the Court required lower courts to apply rules of constitutional criminal procedure, even those that broke from the past, to all cases pending on direct review. In *Teague*, the Court limited the rules that could be applied *after a conviction was final*, in part to further considerations of comity and federalism.[12] These "basic norms of constitutional adjudication"[13] were also followed to provide consistency among similarly-situated defendants and to "protect the integrity of judicial review." *Griffith*, 479 U.S. at 323. Against this carefully-balanced backdrop, Congress enacted AEDPA, which, among other things, defined the standard of review for cases "adjudicated on the merits" and limited the

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[12] *Teague*, 489 U.S. at 308.

[13] *Griffith*, 479 U.S. at 322 ("[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."); *see also, e.g., Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (applying new rule to civil case on direct review).

federal habeas courts to use of the law of this Court, but did not address *Teague*.[14]

Petitioner favors the approach, adopted by the Third Circuit majority,[15] of applying the law at the time of the state court's last reasoned decision, which is derived from language used by Justice O'Connor for the *Williams* Court. Pet. Br. at 15 (discussing *Williams*, 529 U.S. at 412).

Petitioner suggests that Justice O'Connor meant to distinguish "clearly established law" from *Teague*

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[14] Congress can be assumed to have been aware of and to have taken this previous habeas law into account. *Cf. Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *see also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage . . . , and (2) most compatible with the surrounding body of law into which the provision must be integrated . . . .").

[15] *Greene*, 606 F.3d at 94–95. Petitioner states that the Sixth Circuit has also "adopted" this approach. Pet Br. at 13. Petitioner notes the Sixth Circuit's reference, in a footnote in *Harris v. Stovall*, to the law at the time of the "relevant state court decision." 212 F.3d 940, 945 n.2 (6th Cir. 2000) (discussed in Pet. Br. at 13–14). In this *dicta*, *Harris* cited the Justice O'Connor language in stating, without explanation, that cases decided after the defendant's *trial* could not be relied on, even though the Sixth Circuit reviewed the state court of appeals' decision. *Id.* at 943. *Harris* also quoted the subsequent statement by Justice O'Connor, equating *Teague*'s "old rules" with "clearly established law." *Id.* at 944 (citing *Williams*, 529 U.S. at 412). The *Harris* court neither recognized the potentially contradictory language in *Williams v. Taylor*, nor needed to reach this issue to resolve the case.

on timing grounds. Pet. Br. at 10. Petitioner reads far too much into Justice O'Connor's language in *Williams*.[16] In context, Justice O'Connor was not attempting to overrule the understanding of which law applies set forth in *Teague*, especially since the timing issue was not presented in *Williams*. Instead, Justice O'Connor was merely explaining that "clearly established law" under AEDPA referred only to the decisions of the U.S. Supreme Court, unlike previous law, which included examination of lower federal court decisions. That Justice O'Connor's opinion was not intended to overrule or modify *Teague* is confirmed by this statement: "[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law' . . . under § 2254(d)(1)." *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court). Any remaining doubt as to Justice O'Connor's intent is dispelled by the fact that she joined that portion of Justice Stevens' opinion for the Court which stated that a habeas petitioner should "seek[] to apply" the clearly established law "at the time his state-court conviction became final." *Williams*, 529 U.S. at 390 (Stevens, J., for the Court).

A contrary rule to the one followed by the First and Sixth Circuits would lead to more legal uncertainty and unnecessary practical problems. First, the approach taken by the Third Circuit majority would force habeas courts, and unrepre-

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[16] *Williams*, 529 U.S. at 412 ("Throughout this discussion the meaning of the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' has been put to the side. 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.").

sented petitioners, to jump through different timing hurdles for purposes of *Teague* retroactivity and for "clearly established" law, with no basis in AEDPA's statutory language or precedent for making any distinction.

Additionally, Petitioner's approach calls into question the continued vitality of *Teague*. *Teague* is premised on the assumption that the end of direct review is the turning point for purposes of habeas. If the opinion of the state court, and not the finality of direct review, is the relevant cutoff that gives appropriate deference to the state court, there would be no logical impediment to allowing "new rules" of criminal procedure to be applied in state collateral review and reviewed on habeas under those "new rules."[17] Further, this Court has consistently affirmed *Teague* "retroactivity" doctrine, even after the passage of AEDPA,[18] including the obligation of

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[17] *See Frazer v. South Carolina*, 430 F.3d 696, 706 & n.6 (4th Cir. 2005) (citing Justice O'Connor's language in *Williams v. Taylor* for the proposition that this language *extends* what is "clearly established" law beyond *Teague* to also include "new rules" that are determined before the state court's *post-conviction* decisions).

[18] *See, e.g., Danforth v. Minnesota*, 552 U.S. 264, 266–68 (2008) (using *Teague* and *Griffith* to discuss new constitutional rules and "watershed" rules of criminal procedure; determining that *Teague* does not constrain state courts' authority to give broader effect to new rules of criminal procedure); *Whorton v. Bockting*, 549 U.S. 406, 416–21 (2007) (applying *Teague* and *Griffith* to conclude that *Crawford* is not a watershed rule requiring retroactive application); *Day v. McDonough*, 547 U.S. 198, 206 (2006) (approving of *Teague*'s nonretroactivity rule in exhaustion of state remedies context); *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004) (citing *Teague* and *Griffith* in holding that *Ring v. Arizona* was a new procedural rule that did not apply retroactively and did not announce a watershed rule).

states to apply new constitutional rules to cases that are still pending on direct review. A contrary rule would permit states to undermine the implementation of this Court's rules while the case is still active in the state courts.

Finally, Petitioner's assertion that the Sixth Circuit's rule would require state courts to "anticipate" a "future" decision, Pet. Br. at 17, belies the facts of this case and the usual practice of the Michigan courts. This Court issued *Crawford* on March 8, 2004, while Miller's application for leave to appeal was pending before the Michigan Supreme Court. The Michigan Supreme Court denied Miller's application on April 1, 2004. Then, Miller filed a timely motion for reconsideration, which specifically asked the court to reconsider in light of *Crawford.* The Michigan Supreme Court, instead of remanding for reconsideration in light of *Crawford*, simply denied the motion for reconsideration without comment on June 30, 2004. The Confrontation Clause question in light of *Crawford v. Washington* was squarely placed before the state courts and the state courts, for whatever reason, declined to apply *Crawford*, even though the case was still on direct appeal.

Given this procedural history, Michigan's interests were not violated by the federal courts' decision to apply *Crawford.* Under Michigan law, decisions are not final at the time of the state court of appeals decision. A court of appeals opinion does not "become effective until after the expiration of the time for filing an application for leave to appeal" in

the state supreme court.[19] Further, the state intermediate court's decisions do not take effect if a timely application for leave to appeal is filed with the state supreme court.[20]

The Michigan Supreme Court could have remanded the case back to the state court of appeals in light of important new precedent, a rule it followed in other cases involving *Crawford* and its progeny.[21] Where the state court itself normally applies this Court's new cases, it does not disrupt comity or federalism to review state court convictions under these cases in habeas.

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[19] *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 136 n.17 (Mich. 2006).

[20] *People v. Swafford*, 762 N.W.2d 902, 905 n.5 (Mich. 2009) (court of appeals decision cannot take effect when timely appeal has been filed); *Johnson v. White*, 682 N.W.2d 505, 513 (Mich. Ct. App. 2004) (timely application for leave to appeal to supreme court operates as stay of court of appeals judgment).

[21] *See, e.g.*, *People v. Bell*, 683 N.W.2d 141 (Mich., June 11, 2004) (table decision) (in a case in which the request for leave to appeal was filed before *Crawford*, vacating court of appeals judgment and, under MCR 7.302(G)(1), remanding back to court of appeals for reconsideration in light of *Crawford*); *People v. Williams*, 725 N.W.2d 669 (Mich. 2007) (remanding for reconsideration in light of *Crawford*); *People v. Stephens*, 682 N.W.2d 95 (Mich., June 30, 2004) (table decision) (same); *People v. Brown*, 679 N.W.2d 73 (Mich., April 30, 2004) (table decision) (same); *People v. Walker*, 720 N.W.2d 754 (Mich. 2006) (same, re: *Davis v. Washington*); *People v. Mileski*, 720 N.W.2d 752 (Mich. 2006) (*Davis*); *see also People v. Bell*, 689 N.W.2d 732, 734–35 (Mich. Ct. App. 2004) (on second remand) (Michigan courts follow the rule that *Crawford* applies to cases "pending on appeal" at the time *Crawford* was issued).

D. *De novo review was appropriate in the unusual circumstances of this case, and the standard of review is not outcome determinative.*

The Sixth Circuit reviewed de novo the central question of whether or not the statement was testimonial, as the state court had "no analysis or conclusion" on this question. *Miller*, Pet. App. 14a (citing *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). As the circuit court found, "[I]t is not coherent to defer to a state-court conclusion when the state court applied an analytical framework that has been explicitly overruled and that does not apply to this case." The panel continued, "While echoing the denial of relief would close the case, it serves neither comity nor federalism to defer to a conclusion made on an inapposite legal question." Pet. App. 14a.

As an initial matter, this question is of no import in this case, because the outcome would be the same under either the de novo or "unreasonable application" standard of review. Pet. App. 61a–62a.

Petitioner suggests that this case raises a question that this Court recently settled in *Harrington v. Richter*, 131 S. Ct. 770 (2011). Petitioner is mistaken. This case is not governed by *Richter* because, unlike the decision of the California Supreme Court which summarily rejected an ineffective assistance claim governed by *Strickland v. Washington*, 466 U.S. 668 (1984), there is no question that the last decision on the merits in this case, that of the Michigan Court of Appeals, did not apply *Crawford*. There is, therefore, no state court decision applying *Crawford* to which the federal courts could defer.

This subsidiary issue is even less significant than the timing question, both in this case and as a doctrinal matter. Petitioner cites no cases other than three circuit court cases that generally define "adjudication on the merits." Pet. Br. at 16–17.

II. The Sixth Circuit's decision is consistent with *Crawford* and relief was appropriate.

A. The Confrontation Clause question does not merit this Court's review.

On the Confrontation Clause violation, Petitioner merely disagrees with the lower court's application of law to the unusual facts of this case. The Court should not review this question.

Petitioner cites no circuit split or other division of authority in this area. *See* Pet. Br. at 18–24. Petitioner does not, and cannot, assert that the application of *Crawford* to the unusual facts of this case will illuminate any future cases. *Cf., e.g., Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964) (stating that petitioner can point to "a considerable number of suits [that] are pending in the lower courts which will turn on resolution of these issues"). This unique case might be "worthy of a soap opera,"[22] because of the bizarre and convoluted nature of the facts, but the straightforward application of *Crawford* to these facts does not present "compelling reasons" for this Court to review the case. SUP. CT. R. 10.

Contrary to Petitioner's characterization, the Sixth Circuit did not rely solely on the declarant's

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[22] *Miller*, Pet. App. 26a (Boggs, J., dissenting).

occupation and training in law enforcement, *cf.* Pet. Br. at 21, but instead properly looked to the circumstances surrounding the statement to determine that it was testimonial. *Miller*, Pet. App. 18a–22a. Petitioner simply disagrees with the application of *Crawford* to the never-to-be-seen-again facts of this case. *Cf.* SUP. CT. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). There is no reason to review the circuit court's decision.

B. The statement in this case is testimonial.

In any event, the suicide letter, given the unusual facts and circumstances of this case, is testimonial. The letter was made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52 (internal quotation marks omitted). The principal mark of a testimonial statement is an accusation made to law enforcement or others with an eye toward the use of those statements in court. The letter is as plain an accusation as possible, so that Miller "will get what's coming." Cassaday, a former police officer (Tr. V, 1248), not only anticipated that the statements in the letter – confessing to a murder and accusing Miller of the same murder – would be used to prosecute Miller, he intended that outcome. And indeed they were.

Cassaday left the letter on a briefcase at his house when he committed suicide and included in the briefcase a work-up of the case against Miller, including materials to prove his relationship with Miller and alleged IM transcripts of his online

conversations with Miller. Also on top of the briefcase was a note warning, "do not open alone," along with the name, address, and phone number of Cassaday's attorney. (Tr. II, 347, 360). Cassaday had prepared these materials for law enforcement in advance; Cassaday told his brother that if anything should happen to Cassaday, his brother should get a briefcase under Cassaday's bed, and his brother would "know what to do with it." (Tr. II, 356–57). The briefcase was exactly where Cassaday told his brother it would be. (Tr. II, 347).

Crawford made abundantly clear that letters to police or other officials accusing someone of wrongdoing are testimonial. The Court described the conviction of Sir Walter Raleigh for treason as one of the "most notorious instances of civil-law examination" in which a defendant was convicted without being allowed to face his accuser. *Crawford*, 541 U.S. at 44. Raleigh's conviction was based on a letter his accuser wrote to law enforcement; at trial, the letter was used to convict Raleigh, though Raleigh was not allowed to confront his accuser in open court. *Id.* By leaving the suicide letter where it was sure to be recovered by law enforcement, Cassaday made his letter just like the letter written by Sir Walter Raleigh's accuser. As that case was, Miller's inability to confront her accuser is an instance of "justice . . . degraded." *Id.* (internal quotation marks omitted).

Below, Petitioner essentially agreed that if the suicide letter had been found *inside* Cassaday's briefcase, instead of on top of it, the statement would be testimonial. *See, e.g.*, Sixth Circuit Court of Appeals, Final Brief for Respondent-Appellant, at 33. Whether the letter was sitting on top of the briefcase

or inside the briefcase is immaterial to Cassaday's intention that it be used to make sure that Miller was prosecuted for the murder of her husband and would "get what's coming." Certainly, the lower court's decision that this difference is not dispositive does not merit review by this Court.[23]

Additionally, Petitioner's current assertion that the suicide letter is not linked to the briefcase is a shift from the State's position at trial. For example, in its opening statement, the prosecution certainly lumped the suicide note with the briefcase, stating that there is a "series of letters on this briefcase," including the suicide note, then stated that the family "go[es] to the authority. They take the briefcase, they take the suicide note." (Tr. I, 150–51). There was no dispute at trial that the letter was, in fact, with the briefcase and that Cassaday intended to preserve a chain of custody so that the letter, along with the other materials in the briefcase, could be used in the prosecution of Miller.

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[23] As the Sixth Circuit put it: "[I]n light of everything else that Cassaday, a former police officer, did to prepare the case against Miller, 'a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.' *Cromer*, 389 F.3d at 675. Because Cassaday took care to assemble, preserve, and arrange delivery to the police of the IM printout and disk images, and because the suicide note was placed atop the briefcase and contained a direct accusation of Miller, it was foreseeable that the authorities would use the note against her. On this basis, the suicide note was testimonial . . . ." Pet. App. 19a–20a (citation omitted).

C. *The lower court's finding that Petitioner waived harmless error is unremarkable.*

The Sixth Circuit's decision on harmless error does not create or reflect a circuit split, is not inconsistent with AEDPA, and does not merit this Court's review. Instead, the Sixth Circuit's decision on harmless error is unsurprising, as it is consistent with the law of this Court, AEDPA, and other circuits.

As an initial matter, Petitioner obscures the fact that the Sixth Circuit found that Petitioner waived its challenge to harmless error by failing to argue it in the district court. Pet. App. 23a–24a. This is identical to the treatment of a state's failure to litigate this issue in other circuit courts.[24] Further, the Sixth Circuit, consistent with other circuits, did not constrain future panels from considering harmless error *sua sponte*, even when waived by the State; however, circuit courts, consistent with the lower court here, have set a high bar for invoking this option. *See, e.g.*, *Nelson v. Quarterman*, 472 F.3d 287, 332 (5th Cir. 2006) (Dennis, J., concurring).

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[24] *See, e.g.*, *United States v. Giovannetti*, 928 F.2d 225 (7th Cir. 1991) (cited by Petitioner below); *Nelson v. Quarterman*, 472 F.3d 287, 332 (5th Cir. 2006) (Dennis, J., concurring) ("[T]he state bears the burden of showing that a preserved error was harmless. In addition, the state can waive harmless error by failing to raise the issue in a timely and unequivocal manner in the district court.") (citation omitted); *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) (waived because failed to raise in district court); *Lam v. Kelchner*, 304 F.3d 256, 269–70 (3d Cir. 2002) (same); *United States v. Langston*, 970 F.2d 692, 704 n.9 (10th Cir. 1992) (same, but court reached issue); *United States v. Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991) (same).

Instead, Petitioner asserts that the Sixth Circuit "excused" an actual prejudice requirement, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and *Fry v. Pliler*, 551 U.S. 112 (2007). Pet. Br. at 24–27.

In *Brecht*, the question before the Court was what standard to use when undertaking a harmless error analysis. The Court adopted the standard of *Kotteakos v. United States,* 328 U.S. 750, 776 (1946), which, relevant to this case, "places the burden on prosecutors to explain why those errors were harmless." *Brecht*, 507 U.S. at 640 (Stevens, J., concurring). This aspect of the *Kotteakos* harmless error standard was not new. In fact, "the original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State] . . . to prove that there was no injury . . . ." *Chapman v. California*, 386 U.S. 18, 24 (1967) (citing 1 J. WIGMORE, EVIDENCE § 21 (3d ed. 1940)). *Fry v. Pliler*, cited by Petitioner, Pet. Br. at 25, confirmed that federal habeas courts should use the "more forgiving standard of review" of *Kotteakos/Brecht*, over the *Chapman* harmless error standard, regardless of whether the state court has reviewed for harmless error. *Fry*, 551 U.S. at 116–18. *Fry* did not address, however, the situation where the state had waived its assertion of harmless error.

In other words, the lower court's opinion correctly reflected a long line of this Court's cases and common law history by placing the burden of asserting harmless error on the prosecution. *See also* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 31.2(a), at 1512 (5th ed. 2005) ("Like other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise

unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense.").

AEDPA underscores this allocation of the harmless error burden. While AEDPA expressly changed the existing rules for some waivers, *see, e.g.*, 28 U.S.C. § 2254(b)(3) (requiring express waiver by state in different circumstance), it did not address harmless error or suggest that the state must make an explicit waiver. *Cf. Jones v. Bock*, 549 U.S. 199 (2007) (in PLRA context, usual pleading and affirmative defense rules should apply unless expressly changed by relevant statute).

Finally, the State's assertion of harmless error rings hollow when the State forcefully asserted in the Michigan courts that the evidence was significant. For example, in closing arguments, the prosecutor urged the jury to "evaluate that suicide note," and warned it to "not take the suicide note lightly." (Tr. V, 1376). Additionally, on appeal in state court, the State argued, in part, that the note was properly admitted under the catch-all exception to the hearsay rule,[25] which requires that the evidence "is more probative on the point for which it is offered than any other evidence that the proponent can procure." MICH. R. EVID. 803(24) (catch-all exception, availability immaterial); MICH. R. EVID. 804(b)(7) (catch-all exception, declarant unavailable). Indeed, the State later noted, "Throughout this case the People have asserted that the suicide note of Jerry Cassady was admissible pursuant under MCR [*sic*] 804(b)(7). This position was asserted in the motion in limine prior to

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[25] Michigan Court of Appeals, People's Brief on Appeal, at 6.

trial and on appeal as well."[26] Notwithstanding its present, inconsistent, position, the State itself consistently recognized in the Michigan courts the substantial effect that the admission of the suicide letter had on the outcome of the trial. Pet. App. 24a n.11 (summarizing State's arguments).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[26] Michigan Court of Appeals, Appellee's Answer in Opposition to Appellant's to [*sic*] Motion for Rehearing, at 2.

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