No. 10-851

In The
Supreme Court of the United States

CLARICE STOVALL, WARDEN
Petitioner,

v.

SHAREE MILLER
Respondent.

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

REPLY BRIEF

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Mark G. Sands
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF

Miller does not dispute and therefore concedes a significant split among the Circuits regarding a question of substantial and recurring significance—whether the "established law" for purposes of an AEDPA analysis is the law in effect when a state-court decision becomes final, or alternatively, when the last state opinion is issued on the merits. Despite Miller's contrary protestations, it is not unusual for this Court's jurisprudence to change between an intermediate state appellate court's merits determination and a state supreme court's denial of a petition for discretionary review. That is why no less than three circuits have issued conflicting opinions addressing the question in the last two years alone. Compare *Greene v. Palakovich*[1] (holding that "established law" is determined at the time the last state opinion is issued on the merits) with Pet. App. 2a[2] (determination should be made at the time when a state-court decision becomes final) and *Foxworth v. St Amand*[3] (same); cf. *Smith v. Spisak*[4] (noting "uncertainty" regarding this issue).

This question is squarely presented for the Court's review by virtue of the fact that the Sixth Circuit fully addressed the issue in its published opinion, a decision that is now binding within the Circuit. Moreover, as explained below, the Sixth Circuit's reasoning is substantially undercut by this

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[1] *Greene v. Palakovich*, 606 F.3d 85, 98 (3d Cir. 2010).

[2] *Miller v. Stovall*, 608 F.3d 913 (6th. Cir. 2010).

[3] *Foxworth v. St Amand*, 570 F.3d 414, 431 (1st Cir. 2009).

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

Court's recent decision in *Harrington v. Richter*,[5] which issued after the Petition was filed. Accordingly, the Court should grant review of the first question presented.

The second issue presented—whether the Sixth Circuit erred in concluding that Respondent's lover's suicide note was testimonial under *Crawford v. Washington*[6]—also raises a question of undisputed significance: which party bears the burden of proving that an alleged constitutional error caused "prejudice" warranting relief under AEDPA § 2254(d). The better reading of § 2254(d) is that the burden always remains on the habeas petitioner. The Sixth Circuit's interpretation of § 2254(d) improperly assumes constitutional harm and shifts the burden to the government to demonstrate that error was harmless. Contra *Brecht v. Abrahamson*[7] (habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'") (citation omitted). It is therefore appropriate for the Court to grant review of the second question presented as well.

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[5] *Harrington v. Richter*, 131 S. Ct. 770 (2011).

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

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

I. This Court should grant review and hold that the time to determine "clearly established Federal law" for purposes of AEDPA is when the last state-court opinion is issued on the merits.

A. The question of what constitutes "clearly established Federal law" is one that impacts many potential cases.

Resolving the question of when to determine "clearly established Federal law" affects thousands of pending habeas cases throughout this country. For example, in 2009 there were 2,224 cases filed in the Michigan Supreme Court, 69% of which were criminal cases. Relying on a period of 120 days to process applications to disposition, that means that in Michigan alone, there are on average 504 criminal cases pending before the Supreme Court on any given day. So when this Court issues a routine decision, there are hundreds of cases in Michigan and thousands of cases nationwide that are in the exact same posture as this case—where the intermediate appellate court has reached a decision based on a former standard and the case is now on discretionary review with a state court of last resort.

The decision of the Sixth Circuit, if replicated, would force those courts of last resort to review and issue an opinion in every case implicated or potentially implicated by this Court's new precedent or else risk the federal courts treating habeas review as though it were direct review. Contrary to Miller's claim of rarity, the question of what constitutes "clearly established Federal law" is one that may impact hundreds or

thousands of cases every year until this Court finally resolves the question, as evidenced by the recent spate of conflicting circuit-court decisions.

B. The first question presented is fully preserved for this Court's review.

Miller argues that the Court should decline to answer the question of when to determine "clearly established Federal law" because that question was not preserved for review. Res. Br. 8. Miller is wrong. The Sixth Circuit expressly decided the issue presented in a published opinion that is now binding on all courts within the Circuit. Pet. App. 13a ("We therefore hold that Miller's claim is governed by *Crawford*, not *Roberts*."). And this Court does not hesitate to review any issue actually decided by the lower court.[8] Given the Sixth Circuit's detailed treatment of this issue, see Pet. App. 8a-13a; Pet. App. 28a-33a (Boggs, J., dissenting), this case presents a perfectly appropriate vehicle for review.

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[8] E.g., *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010), citing *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379 (1995).

C. The Sixth Circuit's reasoning below has been severely undermined by this Court's (post-Petition) decision in *Harrington*.

1. Under the Sixth Circuit's rule, a decision on the merits applying the relevant law is entitled to less deference under AEDPA than a summary order.

The Sixth Circuit concluded below that the deference due to a state-court decision on the merits under AEDPA does not apply where there is new, intervening "clearly established Federal law" that is released between the time of the last reasoned state-court decision and the time the state conviction becomes "final." Pet. App. 14a. According to the Sixth Circuit, AEDPA deference was inappropriate because "there is simply no analysis or conclusion on the central legal question to which to defer." Pet. App. 14a. *Harrington* undercuts that reasoning.

At issue in *Harrington* was whether a one-sentence summary order of the California Supreme Court was entitled to deference under AEDPA. This Court undertook its analysis by noting that the plain language of 28 U.S.C. § 2254 applies where there is a decision which resulted from an adjudication.[9] However, there is "no text in the statute requiring a statement of reasons."[10] Rather, § 2254 "applies when a 'claim,' not a component of one, has been

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[9] *Harrington*, 131 S. Ct. at 784.

[10] *Id.*

adjudicated."[11] In other words, the critical question is whether the claim presented to the state court involved an "adjudication on the merits" under § 2254(d).

The question presented in this case poses a separate but related issue—whether § 2254(d) applies to a case that was adjudicated on the merits based on a then-binding decision of this Court. Contrary to the Sixth Circuit's conclusion, the fact that there was "no analysis" from the Michigan Court of Appeals on the issue of whether the suicide note was testimonial under *Crawford* is of no moment. Indeed, the peculiar result of the Sixth Circuit's holding is that a state-court decision on the merits, applying the then-relevant law, is entitled to less deference under AEDPA than a summary order.

Similarly, the Sixth Circuit's reliance on the fact that the Michigan Court of Appeals did not look at a specific component of the Confrontation Clause claim—namely whether the suicide note was "testimonial"—is inconsistent with *Harrington*'s focus on the adjudication of "claims."[12] This Court should grant certiorari to determine whether the reasoned decision of the Michigan Court of Appeals that the suicide note did not violate the Confrontation Clause was the adjudication of a "claim" under *Harrington* and, therefore, subject to deference under § 2254(d).

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[11] *Id.*

[12] *Harrington*, 131 S. Ct. at 784.

2. The Sixth Circuit's ruling implicates the internal nature of judicial review for the Michigan courts.

Another reason the Sixth Circuit recited for affixing "clearly established Federal law" at the time a conviction becomes final was that to do otherwise would allow a state Supreme Court "to insulate lower state-court judgments from meaningful review and deny defendants the benefit of doctrinal changes to which they are generally entitled on direct review." Pet. App. 13a.

But this Court expressly rejected the same reasoning in the context of summary orders in *Harrington*. In *Harrington*, this Court noted that there was "no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings, because applying § 2254(d) in those cases will encourage state courts to withhold explanations for their decisions."[13] Rather, this Court noted that opinion-writing practices are generally informed by state-specific needs, such as the need to concentrate resources on cases where opinions are needed the most.[14] The possibility that a state court might decline to review a case in order to "insulate" itself from collateral review is too remote to justify carving out an exception to AEDPA deference.

Moreover, the Sixth Circuit's decision is not consistent with the nature of review in the Michigan Supreme Court. Rather, the Sixth Circuit's decision

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[13] *Harrington*, 131 S. Ct. at 784.

[14] *Id.*

will essentially force the Michigan Supreme Court to sit in error-correction or risk having state convictions subject to de novo review in the federal courts.

The Michigan Supreme Court is not an error-correcting court.[15] The Michigan Supreme Court does not "insulate" the lower courts when it denies leave to appeal because it is not required to hear any case unless it addresses an issue of significant importance to the State.[16] Indeed, the Sixth Circuit would force the Michigan Supreme Court to essentially sit as an intermediate court every time there was a change in "clearly established Federal law" after a decision on the merits was reached by the Michigan Court of Appeals—even when the new law made no difference in that case—or risk allowing the federal courts to treat habeas review as if it were direct review.

D. Justice O'Connor's definition of "clearly established Federal law" is consistent with this Court's holdings that *Teague* and § 2254 require distinct inquiries.

Finally, Miller argues that the Sixth Circuit's approach is consistent with the distinction between "old rules" and "new rules" drawn by this Court in *Teague v. Lane*.[17] Specifically, Miller cites with approval language from *Terry Williams v. Taylor*,[18]

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[15] *Halbert v. Michigan*, 545 U.S. 605, 617 (2005).

[16] Just as the defendant in *Halbert*, Miller could have ensured "meaningful review" by filing a petition for a writ of certiorari with this Court, which she elected not to do.

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

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

that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law' . . . under § 2254(d)(1)." Res. Br. 13.

Miller ignores the fact that more recently, this Court has held that "the AEDPA and *Teague* inquiries are distinct."[19] It follows then that not all "old rules" under *Teague* constitute "clearly established Federal law" under AEDPA.

This Court noted in *Horn* that while a habeas petitioner can only obtain relief under the AEDPA standard, there was no clearly established federal law that suggested that AEDPA relieves the courts from "addressing properly raised *Teague* arguments," which are distinct from the habeas claims:

> Rather, this Court noted that "if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state."[20]

In other words, this Court concluded that a habeas petitioner must show that he is entitled to relief under AEDPA *and Teague*.

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[19] *Horn v. Banks*, 536 U.S. 266, 272 (2002).

[20] *Horn*, 536 U.S. at 272.

The same reasoning applies here. Because *Teague* and AEDPA require distinct inquiries, there is no basis for the Sixth Circuit's conclusion that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law' . . . under § 2254(d)(1)." The fact that *Crawford* is an "old rule" under *Teague* does not, on its own, entitle Miller to habeas relief. Rather, Miller must also establish that she is entitled to relief under § 2254—by showing that the reasoned decision of the Michigan Court of Appeals was "contrary to" or an "unreasonable application of" "clearly established federal law." *Teague* does not support the Sixth Circuit's conclusion that it was relieved from analyzing the instant habeas petition under AEDPA. Rather, *Horn* makes clear that the Sixth Circuit should have first determined whether *Teague* applied and then conducted a separate review under § 2254. This is the point that Judge Boggs made in his dissent on this issue:

> The majority opts for the Stevens formulation, primarily on the ground that it matches up with the temporal dividing line between "old rules" and "new rules" which the Supreme Court established in *Teague*...While this symmetry may be superficially pleasing, I see no a priori reason why the temporal divide between old and new rules for purposes of *Teague* must align with the relevant temporal divide for purposes of AEDPA. To the contrary, it makes perfect sense that the respective dividing lines should differ, for,

> as the majority acknowledges, the Supreme Court has observed that "[t]he AEDPA and *Teague* inquiries are distinct." Maj. Op. at 8 (quoting *Horn v. Banks*, 536 U.S. 266, 272, (2002)).[21]

This is an issue of jurisprudential significance.

II. This Court should also grant review to clarify that the burden of proving prejudice under § 2254(d) is always on the habeas petitioner seeking relief.

Embedded in the second question presented is another issue of immense importance: whether the burden to prove § 2254(d) prejudice rests with the habeas petitioner or the prosecution. Pet. 24-29. Miller attempts to avoid this issue entirely by reframing it as asking who has the burden to prove harmless error. Res. Br. 22-24. Miller's analysis ignores the relevant statutory text.

Section § 2254(a) provides that a federal court may only entertain a claim that a habeas petitioner "is in custody in violation of the Constitution or laws or treatises of the United States." The better reading of this language is provided by a dissent from Justice Thomas in *O'Neal v. McAninch*,[22] noting that the burden of proving causation must always remain with the plaintiff (habeas petitioner):

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[21] Pet. App. 31a.

[22] *O'Neal v. McAninch*, 513 U.S. 432, 445 (1995).

> Establishing causation is thus an essential element of the plaintiff's case in chief. Under the majority's rationale, however, the habeas petitioner need not prove causation at all; once a prisoner establishes error, the government must affirmatively persuade the court of the harmlessness of that error. *Ante*, at 444. Without explaining why it favors habeas plaintiffs over other plaintiffs, the Court thus treats the question of causation as an affirmative defense.

This case is the right vehicle to visit this assignment of burdens, where the other evidence of Miller's guilt of murder was compelling and the admission of the suicide note was harmless. As Judge Boggs noted in his dissent, below, "[i]t is beyond debate that if the jury believed this [instant message] transcript was authentic, the case would be open-and-shut, and the suicide note would have been entirely cumulative." Pet. App. 44a (Boggs, J., dissenting).

The practical effect of the Sixth Circuit's ruling is to relieve Miller of her burden of proving prejudice, thus vacating on non-dispositive technical grounds the otherwise valid conviction of a defendant who manipulated her lover to kill her own husband. That result cannot possibly be what Congress intended when it adopted AEDPA. The Court should grant review to decide the important question of which party bears the burden of proving AEDPA prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court should grant the petition, vacate the decision of the Sixth Circuit, and remand to the court of appeal for reconsideration in light of *Harrington*.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Mark G. Sands
Assistant Attorney General
Appellate Division

Attorneys for Petitioner

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