No. 11-

Supreme Court of the United States

JOHN MOTLEY, WARDEN
Petitioner,

v.

SAMUEL ARTHUR YENAWINE,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Louisville police interviewed Yenawine about having killed Brian Tinell and about having set fire to the building where they both lived. During the questioning, Yenawine said, "I might need to speak with my lawyer about whether I should talk with you," and handed the officers a business card bearing the name of his wife's attorney, William "Bill" Butler. A few days before this interview, Attorney Butler had accompanied Yenawine's wife, Wendy, to the homicide office, where she provided a statement implicating her husband in Tinell's death and the arson. During Wendy's interview, Butler told police that he might have a conflict of interest in representing both Samuel and Wendy Yenawine. After the police explained the conflict of interest to Yenawine and again provided him *Miranda* warnings, Yenawine waived his rights and made incriminating statements.

The questions presented are:

1. Whether the Sixth Circuit contravened 28 U.S.C. § 2254(d)(1) when it granted habeas relief on the ground that Yenawine unambiguously invoked his right to counsel during interrogation?

2. Whether Yenawine's request for an attorney was "unambiguous or unequivocal" such as to preclude the use of his incriminating statements to police under *Miranda v. Arizona,* 396 U.S. 868 (1969) and *Davis v. United States,* 512 U.S. 452 (1994)?

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PETITION FOR A WRIT OF CERTIORARI

John Motley, Warden of the Eastern Kentucky Correctional Complex, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported but can be found at *Yenawine v. Motley,* 2010 WL 4643310 (6th Cir. 2010). Petitioner's Appendix ("App.") 1a-3a. The opinion of the Supreme Court of Kentucky is unreported but can be found at *Yenawine v. Commonwealth,* 2005 WL 629007 (Ky. 2005). App. 38a-56a. The Jefferson Circuit Court's Findings of Fact and Conclusions of Law from the suppression hearing can be found in Petitioner's Appendix, App. 57a-74a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered the judgment from which relief is sought on November 17, 2010. App. 1a-3a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

> "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."

Sixth Amendment to the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

28 U.S.C. § 2254(d)(1)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Facts

The victim, Brian Tinell, lived in an apartment adjacent to Yenawine's house, a large, two-floor building with Tinnel's one-story apartment in the rear. The Yenawines rented the house, and Tinell rented the apartment. The first story of the house consisted of several large rooms used for "Brooke and Wendy Modeling," an adult entertainment business. The upstairs consisted of bedrooms for the Yenawines and their children. The apartment at the back of the house did not have an access door into the main building when the Yenawines first rented the house. Because the house did not have a kitchen, but the apartment did, the Yenawines and Tinell agreed to cut a door in a wall to allow access. In exchange for use of the kitchen, Yenawine's wife, Wendy Yenawine, agreed to pay Tinell's rent and employ him as a bodyguard for her business.

In the early morning hours of January 10, 2001, firefighters responded to a fire in the building. Yenawine, his wife, and their three children were rescued from the front porch roof of the burning building. After extinguishing the fire, firefighters found Tinell's body in the apartment attached to the back of the residence. Arson investigator Sgt. Kevin Fletcher examined the premises and concluded that the fire originated in the back apartment. Sgt. Fletcher recovered two metal containers of PVC glue and cleaner, and a knife in the back apartment near Tinell's body. Sgt. Fletcher determined that the fire

spread from its point of origin in the apartment to the large rooms of the first floor of the house, and from there up the steps and wall spaces to the second floor. An autopsy on Tinell's body revealed that his death was caused by knife wounds, rather than by exposure to fire.

B. Procedural History

1. Jefferson Circuit Court

Before Samuel Yenawine ever spoke with police officers, his wife, Wendy, visited the Louisville Police Homicide Office, accompanied by Attorney William "Bill" Butler, for a separate interview, in which Wendy implicated Yenawine in the crimes. At that time, Attorney Butler told the police officers that he might have a conflict of interest in representing both Samuel and Wendy Yenawine.

Yenawine was indicted on January 18, 2001, for murder and arson. He turned himself in to police the next day. Police officers read him his rights under *Miranda v. Arizona,* 396 U.S. 868 (1969), and Yenawine indicated that he understood them.

During the suppression hearing conducted in the state trial court, Det. Yates described how the police officers addressed Yenawine's request for counsel and his subsequent agreement to speak with the officers, as follows:

> Det. Yates: When we brought Mr. Yenawine back over to speak with him in the Homicide Office, we were in an

interview room. Det. Phelps and myself, we sat there, and asked Mr. Yenawine — or Det. Phelps asked Mr. Yenawine would he like to tell us what happened. And he sat for a few seconds, and he says, 'I might need to speak with my attorney about it first.' And he pulled out a small, tattered business card that had Mr. Butler's name on it. And he was asked, is Bill Butler his attorney? And he said, 'Yes.' And we explained to him that Mr. Butler told either Det. Phelps or Brown that he was not his attorney, but was Wendy — his wife's — attorney.

Trial judge: Wait a minute. Repeat what you just said, sir, so that I am sure to understand it.

Det. Yates: Okay. When he was asked who his attorney was, he just pulled out a business card — tattered business card — that had Mr. Bill Butler's name on it. And Det. Phelps asked him, was Bill Butler his attorney? And he said, 'Yes.' And we explained to him that we were informed that Bill Butler was not his attorney, but he was his wife's attorney — Wendy's.

Prosecutor: Now, at that point in time, did Mr. Yenawine say, 'I don't want to speak until I speak to my lawyer.'

Det. Yates: No, sir. He did not say a word. He took a deep breath and started to cry a little bit — started smoking a

cigarette. A couple of minutes passed where basically nothing was said — it was almost dead silent, because he had started to cry and kept shaking his head. And may have said something about, you know, 'I'm going to miss my kids.' And then Det. Phelps asked him, 'Well, do you want to talk to us? Do you want to say anything to us?' And he didn't say anything. He just sat there and kept shaking his head again. He said, 'Well, okay.' And at that point, she started to get the tape recorder together. And he was like looking at the tape and then Det. Phelps — and I interjected at some point that the reason why we were going on tape was to make sure that we accurately said or portrayed what he was going to say. We didn't want to write it down and misquote him. That's where it started.

Prosecutor: And did he agree to that?

Det. Yates: Yes, he did.

Prosecutor: And then once you went on tape — and the court can obviously read the transcript — you read him his rights again, and he waived those rights. Is that accurate?

Det. Yates: Det. Phelps did, yes.

Prosecutor: Now, at any point in time prior to going on tape, after this mention about 'I might need to discuss a lawyer,' did he ever say, 'I want a lawyer.'

> Det. Yates: No, sir, he did not.
>
> Prosecutor: When you told him that it was your understanding that Mr. Bill Butler represented Wendy and not him, did he ever say, 'Well, I want to talk to Bill Butler?'
>
> Det. Yates: No, sir, he did not.
>
> Prosecutor: Did he ever say, 'Well, if that's the case, detective, I want to talk to another lawyer or a public defender?'
>
> Det. Yates: No, sir, he did not.
>
> Prosecutor: At any point in time, from the time you picked him up in Clark County, Indiana, to the time you concluded the second interview with Mr. Yenawine, did you ever make any promises to him regarding leniency, or expectations regarding leniency, if he were to cooperate with the police?
>
> Det. Yates: No, sir, I did not.

App. 7a-11a.

During the suppression hearing, Yenawine, who bore the burden of proof, did not develop the question as to whether any of the police officers *actually read* the printed instructions on the back of the business card. Neither the trial judge nor the majority opinion of the Kentucky Supreme Court directly addressed this issue, apparently because Det. Yates only indicated that he saw "a small, tattered business card that had Mr. Bill Butler's name on it." App. 8a. Yenawine's counsel did not raise this specific issue during the suppression hearing. The Kentucky Supreme Court

found, "It is not clear whether Butler actually represented Yenawine." App. 48a. Nevertheless, the back of Butler's business card stated:

> My lawyer has told me not to talk to anyone about my case, not to answer any questions and not to reply to any accusations. Call my lawyer if you want to ask me any questions. I do not agree to answer any question without my lawyer present. I do not agree to waive any of my constitutional rights.

App. 61a, FN 4.

Once police officers explained Butler's conflict of interest to Samuel Yenawine, he did not request that another attorney be present during the questioning. App. 71a. Instead, officers again asked Yenawine whether he wanted to speak with them, and Yenawine said, "Well, okay." App. 20a, 71a-72a. He told how he and the victim were in the apartment at the back of the building smoking marijuana on the night of the fire. Later that night, Yenawine walked upstairs to his bedroom where his wife was asleep. According to Yenawine, after about an hour or so, he heard floorboards creaking from the direction of his children's room. He went to investigate and saw Tinell sneaking out of the room. Yenawine, afraid that Tinell had molested his children, followed Tinell downstairs to his apartment. Yenawine claimed that when he confronted Tinell, Tinell came at Yenawine with a knife. A fight ensued, and Yenawine stabbed Tinell six times and slashed his throat.

In his taped statement, Yenawine continued to describe the night's events. Stating that he was confused and disoriented by the fight with Tinell, Yenawine took off his bloody clothes and piled them in the center of the room. He then placed a cardboard box on top of the clothes, poured PVC glue and cleaner on that, and lit a fire. Yenawine went back upstairs, showered, dressed, and laid down in his bed with his wife. Yenawine explained that Mrs. Yenawine awoke, felt her throat burning, and shook him. After trying various ways to get out of the house, Yenawine was able to get himself and his family through the front window and onto the porch roof, where they were rescued by firefighters.

The state trial judge denied Yenawine's motion to suppress these statements, finding that Yenawine had not "clearly and unequivocally" requested counsel. App. 72a, 74a. Yenawine's statements were later used at trial.

At trial, the medical examiner testified that cuts on Yenawine's hands were consistent with defensive wounds caused by fending off a knife attack. Yenawine's recorded statement was presented to the jury. Arson investigators and firefighters testified and confirmed the fire's origin as being consistent with Yenawine's statements.

Apparently believing Yenawine's self-defense theory, the jury acquitted him of the homicide charge. However, the jury convicted him of arson in the first degree (KRS[1] 513.020), four misdemeanor counts of wanton endangerment in the second degree

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[1]Kentucky Revised Statutes.

(KRS 508.070), tampering with physical evidence (KRS 524.100), and being a persistent felony offender in the second degree (KRS 532.080(2)).

For the arson charge, Yenawine was sentenced to imprisonment for life, and he appealed. His sentences for wanton endangerment, tampering with physical evidence, and being a persistent felony offender merged with his sentence for arson.

2. Kentucky Supreme Court

The Kentucky Supreme Court affirmed Yenawine's convictions for wanton endangerment in the second degree, tampering with physical evidence, and of being a persistent felony offender in the second degree. App. 44a. Having considered *United States v. Davis*, 512 U.S. 452 (1994), the Kentucky Supreme Court expressly disagreed with *Abela v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004) and ruled, "We believe *Abela* is wrong and is not binding precedent on this Court." App. 44a. The Kentucky Supreme Court found that Yenawine's request for counsel was not "unambiguous or unequivocal" such that a reasonable police officer would have understood it as such. App. 44a. The Kentucky Supreme Court ruled that the trial judge erred in failing to give a jury instruction on arson in the third degree and accordingly reversed his conviction for arson in the first degree. App. 42a-43a.

3. United States District Court

Yenawine filed a petition for writ of habeas corpus in the United States District Court for the Western

District of Kentucky at Louisville. The magistrate initially recommended that the writ should be granted, disagreeing with the Kentucky Supreme Court's determination that his request for counsel was not an "unambiguous and unequivocal request." App. 22a, 35a-37a. The respondent filed objections to the magistrate's report, and the United States District Judge ultimately ruled that the Kentucky Supreme Court's opinion did not result "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," as required by 28 U.S.C. § 2254 and thus rejected the magistrate's conclusions of law and denied the writ of habeas corpus, ruling as follows:

> Under this standard [i.e., *Davis v. United States,* 512 U.S. at 459], it was not unreasonable for the Supreme Court of Kentucky to conclude that Yenawine's statements did not amount to a clear and unambiguous request for counsel that would have forced the officers to cease questioning him. Five days prior to Yenawine's interrogation, Attorney Butler told the police that he may have a conflict of interest in representing Yenawine. When Yenawine asked for 'my' attorney and handed over Butler's business card, he was informed that Butler was not 'his' attorney. The police then asked him if he wanted to speak with them or not in light of this

information, and Yenawine replied, 'Well, okay.' After being read his rights, Yenawine replied that he understood them, and never expressed any desire for counsel. Thus, the circumstances surrounding Yenawine's statements reflect that Yenawine's alleged invocation of counsel was not clear and unambiguous.

In the Court's view, it was not an unreasonable application of federal law for the Kentucky Supreme Court to conclude that this scenario falls squarely within the rule of *Davis*. Therefore, there is no basis for concluding that the admission into evidence of petitioner's subsequent statements was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U.S.C. § 2254(d)(1).

The Court notes that this is a close call. The standard of review mandated by AEDPA is the driving force that causes the Court to reach this conclusion. The Kentucky Supreme Court identified the correct legal principle of 'whether Yenawine had made an ambiguous or unequivocal request for counsel.' The facts leaves enough room to make a strong argument for positive or negative response to that question. As a trial judge, the Court may have concluded

> differently. However, viewing the facts of this case, the Court cannot say the Kentucky Supreme Court's decision was contrary to or amounted to an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.

App. 20a-21a.

4. United States Court of Appeals for the Sixth Circuit

Yenawine then appealed to the United States Court of Appeals for the Sixth Circuit which reversed with directions to grant the writ of habeas corpus. App. 1a-3a. The Sixth Circuit ruled as follows:

> We conduct *de novo* review of a district court's denial of habeas corpus. *Abela v. Martin*, 380 F.3d 915, 924 (6th Cir. 2004). In *Abela*, this court granted habeas relief to a petitioner who gave a statement that was used at trial and solicited under facts that are strikingly similar to those of this case: (1) the petitioner was under police interrogation when he stated, '[M]aybe I should talk to an attorney'; (2) the petitioner named his attorney and gave the police officer his attorney's business card; and (3) shortly thereafter, the police continued questioning the petitioner and he gave a

> statement. *Id.* at 919. The court held that the state-court decision admitting *Abela's* statement at trial was contrary to clearly established federal law. *Id.* at 927. *Abela* thus controls the outcome in this case. We therefore must hold that the state-court decision allowing the use of Yenawine's statement at trial was contrary to clearly established federal law.

App. 2a-3a.

Abela v. Martin

The facts of *Abela v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004) were as follows: (1) during custodial interrogation, Abela said, "maybe I should talk to an attorney by the name of William Evans;" (2) he showed Evans' business card to an officer; (3) the officer left the interrogation room, apparently to contact Evans; (4) after a few minutes, the officer returned to the interview room; (5) Abela signed a waiver of his *Miranda* rights; and (6) the officer resumed questioning. In a 2 to 1 decision, the Sixth Circuit ruled that Abela's *Miranda* rights were violated. App. 75a-106a. Dissenting, Judge Siler, stated, "Abela's statements do not constitute an unequivocal request for counsel as required under *Davis*." *Abela*, at 931, citation omitted.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT CONTRAVENED 28 U.S.C. § 2254(d)(1) BY GRANTING HABEAS RELIEF ON THE GROUND THAT YENAWINE UNAMBIGUOUSLY INVOKED HIS RIGHT TO COUNSEL DURING INTERROGATION.

28 U.S.C. § 2254(d)(1) states that federal habeas courts may not grant habeas relief unless the state court decision "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*" (emphasis added). This Court has ruled that a "federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor,* 529 U.S. 362, 411 (2000). This Court has previously found error where the "Court of Appeals cited its own precedent in support of its conclusion," rather than those of the Supreme Court. *Carey v. Musladin,* 549 U.S. 70, 73 (2006). In other words, the "unreasonable application" inquiry is not subjective because it does not allow the federal court "to ultimately substitute[ ] its own judgment for that of the state court." *Woodford v. Visciotti,* 537 U.S. 19, 25 (2002).

In the case at bar, the Sixth Circuit did not sufficiently explain how *Davis v. United States,* 512 U.S. 452 (1994) differs from the case at bar but instead relied upon its own precedent and substituted its own

independent judgment for that of the Kentucky Supreme Court when it ruled as follows:

> In *Abela* [*v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004)], this court granted habeas relief to a petitioner who gave a statement that was used at trial and solicited under facts that are strikingly similar to those of this case: (1) the petitioner was under police interrogation when he stated, '[M]aybe I should talk to an attorney'; (2) the petitioner named his attorney and gave the police officer his attorney's business card; and (3) shortly thereafter, the police continued questioning the petitioner and he gave a statement. *Id.* at 919. The court held that the state-court decision admitting *Abela's* statement at trial was contrary to clearly established federal law. *Id.* at 927. ***Abela* thus controls the outcome in this case. We therefore must hold that the state-court decision allowing the use of Yenawine's statement at trial was contrary to clearly established federal law.**

App. 2a-3a, emphasis added. Curiously, the somewhat skeletal opinion of the Court of Appeals did not explain — or appear to even be cognizant of — several crucial facts: (a) that Wendy Yenawine's attorney had told police officers that he believed he had a conflict of interest in representing Yenawine; (b) that the police

explained this particular attorney's unavailability to Yenawine; (c) that the police again asked Yenawine if he wanted to speak to them; and (d) that the police, for a second time, read him *Miranda* warnings (including the right to counsel), which he waived. App. 1a-3a. By contrast, the United States District Court described the facts with more specificity, as follows:

> When Yenawine asked for 'my' attorney and handed over Butler's business card, he was informed that Butler was not 'his' attorney. The police then asked him if he wanted to speak with them or not in light of this information, and Yenawine replied, 'Well, okay.' After being read his rights, Yenawine replied that he understood them, and never expressed any desire for counsel. Thus, the circumstances surrounding Yenawine's statements reflect that Yenawine's alleged invocation of counsel was not clear and unambiguous.

App. 20a.

The first inquiry should be whether the habeas petitioner's constitutional challenge in state court was governed by clearly established federal law. A threshold determination that no holding of the Supreme Court required application to the factual context presented by the petitioner's claim is dispositive in the habeas analysis. See generally *Carey v. Musladin,* 549 U.S. 70, 77 (2006), *accord House v. Hatch,* 527 F.3d 1010, 1017 (10th Cir. 2008)

("*Musladin* has now dispelled the uncertainty: The absence of clearly established federal law is dispositive under § 2254(d)(1)."). State courts are entitled to resolve "an open question in [Supreme Court] jurisprudence" without triggering federal court review under AEDPA. See *Musladin,* 549 U.S. at 76; *cf. Renico v. Lett,* ___ U.S. ___, 130 S.Ct. 1855, 1866 (2010) ("AEDPA prevents defendants — and federal courts — from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."). If Supreme Court cases "give no clear answer to the question presented," a state court's resolution of a constitutional question may not serve as a basis for habeas relief. *Wright v. Van Patten,* 552 U.S. 120, 128 (2008) (*per curiam*).

This Court has recently emphasized that whether federal law is clearly established for the purpose of the habeas statute is not simply a function of the clarity of the particular legal principle relied upon by a petitioner but also of the clarity of that principle's application to the facts of the petitioner's case. This Court has cautioned that reviewing courts must be careful not to improperly turn the Court's context-specific holdings into "blanket rule[s]." See *Thaler v. Haynes,* ___ U.S. ___, 130 S.Ct. 1171, 1175 (2010). Rather, the federal habeas courts must look for Supreme Court precedent that either "squarely addresses the issue" in the case or that articulates legal principles that "clearly extend" to the new factual context. See *Van Patten,* 552 U.S. at 123-25 and *Musladin,* 549 U.S. at 77 (denying habeas petition where no holding of the Supreme Court "required" the application of precedent to distinguishable facts).

Some of the federal habeas courts remain confused regarding the proper standard of habeas review. In the last five terms, this Court has overturned five federal grants of habeas corpus on the ground that the cited Supreme Court precedent had not been clearly established in the factual context presented. See *Berghuis v. Smith,* ___U.S. ___, 130 S.Ct. 1382, 1392-94 (2010) (holding that the Supreme Court's "pathmarking decision" in *Duren v. Missouri,* 439 U.S. 357 (1979) "hardly establishes — no less 'clearly' so — that [the petitioner] was denied his Sixth Amendment right" on distinguishable facts); *Thaler,* 130 S.Ct. at 1175 (reversing a grant of habeas relief where "[t]he part of [the Supreme Court's precedent] on which the Court of Appeals relied concerned a very different problem"); *Van Patten,* 552 U.S. at 125 (reversing grant of habeas where Supreme Court precedent did not "squarely address[ ]" the question at issue); *Schriro v. Landrigan,* 550 U.S. 465, 478 (2007) (reversing grant of habeas where Supreme Court had never addressed "a situation in which a client interferes with counsel's efforts to present mitigating evidence"); and *Musladin,* 549 U.S. at 77 (noting a "contrast" between existing Supreme Court precedent involving "state-sponsored courtroom practices" and the conduct "to which Musladin objects" involving "private-actor courtroom conduct").

In the case at bar, the Sixth Circuit's decision, and the *Abela* decision upon which it relied, flouted the AEDPA. Given the widespread confusion among the lower courts regarding the application of *Davis* and the manifest ambiguity of Yenawine's statement, the Sixth Circuit should have deferred to the Kentucky Supreme

Court's ruling. The Sixth Circuit's failure to abide by the AEDPA warrants this Court's review, as does the need to clarify how *Davis* applies to statements of this type. Last term, in *Berghuis v. Thompkins*, ___ U.S. ___, 131 S.Ct. 2250 (2009) this Court utilized the AEDPA to clarify *Miranda* law and stated, "The state court's decision rejecting Thompkins' *Miranda* claim was thus correct under *de novo* review and therefore necessarily reasonable under the more deferential AEDPA standard of review, 28 U.S.C. § 2254(d)." *Thompkins,* 131 S.Ct. at 2264. In the present case, the Sixth Circuit also stated that it conducted a *de novo* review of the issue. App. 2a. But in *Harrington v. Richter,* ___ U.S. ___, 131 S.Ct. 770, 786 (2011), this Court made it clear that *de novo* review does not supplant the deferential standard of the AEDPA.

The "unreasonable application" clause of 28 U.S.C.§ 2254(d)(1) permits a state prisoner to obtain habeas corpus relief if the state courts, in affirming the prisoner's conviction, identified the correct governing principle of constitutional law from the decisions of the Supreme Court, but unreasonably applied that principle to the facts at hand. *Williams,* 529 U.S. at 407-08. *Woodford v. Visciotti,* 537 U.S. 19, 25 (2002) holds that the federal court should not "ultimately substitute[ ] its own judgment for that of the state court." The key question for the federal court when conducting an unreasonable application analysis is whether the challenged decision of the state court was *objectively unreasonable,* not whether the decision was simply erroneous or incorrect. *Wiggins v. Smith,* 539 U.S. 510, 518 (2003) (holding that mere error by state court will not justify issuance of a writ; rather, the

state court's application of federal law "must have been objectively unreasonable"). The independent judgment of the reviewing habeas court as to whether the decision of the state court is merely erroneous or incorrect is not determinative. In the present case, the Kentucky Supreme Court declined Yenawine's argument, by a vote of 5 to 2, and Yenawine has not sufficiently shown that the Kentucky Supreme Court's determination was an unreasonable application of federal law as determined by the Supreme Court of the United States.

The Sixth Circuit blindly followed its 2 to 1 decision in *Abela v. Martin*, 380 F.3d 915 (6th Cir. 2004) when it stated that *Abela* involved "strikingly similar facts" and that *Abela's* holding that his request was unambiguous "thus controls the outcome of this case." In contrast, the United States District Court described *Abela* "somewhat similar" to the present case. The facts of *Abela* were as follows: (1) during custodial interrogation, Abela handed officers his attorney's business card and said, "maybe I should talk to an attorney by the name of William Evans;" (2) the officer left the interrogation room, apparently to contact Evans; (3) after a few minutes, the officer returned to the interview room; (4) Abela signed a waiver of his *Miranda* rights; and (5) the officer resumed questioning. In a 2 to 1 decision (with Judge Siler dissenting), the Sixth Circuit ruled that Abela's *Miranda* rights were violated. App. 75a-106a.

In considering Yenawine's direct appeal, the Kentucky Supreme Court provided a thorough discussion of the relevant case law, including *Miranda v. Arizona,* 396 U.S. 868 (1969); *Davis v. United States,*

512 U.S. 452 (1994); and *Edwards v. Arizona,* 451 U.S. 477 (1981). App. 43a. The Kentucky Supreme Court previously found that Yenawine's statement to police detectives that he "might need to speak with my lawyer about whether I should talk with you," was not an unequivocal and unambiguous request for counsel. Indeed, the Kentucky Supreme Court took notice of the Sixth Circuit's opinion in *Abela v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004) but concluded, "We believe *Abela* is wrong and is not binding precedent on this Court." In granting Yenawine habeas relief, the Sixth Circuit did not provide a sufficient legal analysis to explain why *Abela* is correct, in light of precedents of this Court. Rather, it contravened 28 U.S.C. § 2254(d)(1) and supplanted its own analysis.

The Sixth Circuit effective held that the police officers, the state trial judge, the Kentucky Supreme Court, and the United States District Judge (App. 15a) were all "objectively unreasonable" in their determination that Yenawine did not clearly assert his right to counsel.

II. This Court Should Grant *Certiorari* to Resolve the Conflict Among the United States Circuit Courts of Appeal Over What Constitutes an "Unambiguous or Unequivocal" Request for Counsel.

In *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court ruled that the police must cease interrogation of a suspect in custody, once the suspect has requested counsel. In *Edwards v. Arizona,* 451 U.S. 477, 486 FN 9 (1981), this Court ruled that a suspect's equivocal

request for counsel does not require the police to stop questioning. In *Davis v. United States,* 512 U.S. 452, 460 (1994), this Court adopted "an objective inquiry" test to determine whether a suspect has clearly asserted his right to counsel and noted:

> Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' But if a suspect makes a reference to an attorney that is ambiguous or equivocal in **that a reasonable officer in light of the circumstances would have understood** only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. '[T]he likelihood that a suspect would wish counsel to be present is not the test for applicability of *Edwards*').
>
> * * *
>
> Rather, the suspect must unambiguously request counsel. As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.'

Davis, 512 U.S. at 459, emphasis added, citations omitted.

In *Davis*, this Court found the statement, "Maybe I should talk to a lawyer" to be ambiguous. The present case involves a similar statement, "I might need to speak with my lawyer about whether I should talk with you," and for that reason, the Kentucky Supreme Court ruled that the police did not have to stop their interrogation. The United States District Court, in essence, found that Yenawine's handing over the business card of the attorney whom he mistakenly thought represented him did not convert the ambiguous statement into an unambiguous statement. App. 18a. The Sixth Circuit, however, reached the opposite conclusion and granted habeas relief. App. 1a-3a.

In *Davis,* this Court noted that Davis himself "reinitiated" the police interrogation and further ruled, "we decline to adopt a rule requiring officers to ask clarifying questions." *Id.,* at 458, 461.

> But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.
>
> * * *
>
> [The suspect] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the

> statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Id, at 459, *citing McNeil v. Wisconsin,* 501 U.S. 171, 178 (1991).

In the case at bar, Attorney Butler had accompanied Yenawine's wife, Wendy, to the Louisville Police Homicide Office for an interview, previous to the one in question, in which Wendy implicated her husband in the crimes. Attorney Butler told the police that he might have a conflict of interest in representing both Samuel and Wendy Yenawine. App. 71a, FN 11. Once police officers explained Butler's conflict of interest[2] to Samuel, he did not request that another attorney be present during the questioning. App. 71a. Yenawine's statement that he "might need" to speak to his lawyer is functionally equivalent to the suspect's request in *Davis.* The Kentucky state courts correctly denied the motion to suppress Yenawine's statements because Yenawine did

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[2]The Sixth Circuit's opinion contains a factual error, stating Yenawine was "mistakenly informed" of Attorney Butler's conflict of interest. App. 1a. The state trial judge made no such finding and, in fact, noted that Butler acknowledged during sworn testimony that he had told the police "he might have a possible conflict of interest . . . Butler did not appear at Yenawine's arraignment as his counsel because of the possible conflict of interest between his two clients." App. 61a, FN 5. Factual determinations of the state courts are entitled to deference. 28 U.S.C. § 2254(e)(1).

not unambiguously and unequivocally request counsel. In fact, after being informed of the attorney's conflict of interest, Yenawine changed his mind and decided to talk with police. App. 71a. Police then once again asked him if he wanted to speak with them and again provided him with his *Miranda* warnings (including the right to counsel), which he waived, and Yenawine nonetheless confessed to the officers. App. 71a-72a. The Kentucky Supreme Court's application of *Davis* to this case was certainly not an unreasonable application of federal law — the Sixth Circuit has simply substituted its judgment for that of the Kentucky Supreme Court.

A. The Circuit Courts of Appeal are divided as to the application of *Davis'* objective test — what a reasonable police officer would perceive to be an unambiguous and unequivocal request for counsel.

In *Griffin v. Lynaugh,* 823 F.2d 856 (5th Cir. 1987), *cert. denied,* 484 U.S. 1079 (1988), a murder suspect told police during custodial interrogation, "I think I want to talk to my lawyer." *Id.* 823 F.2d at 858. The suspect specified that he wanted to talk to "Mr. Jennings." *Id.* at 858. After being permitted to speak with Jennings, Griffin advised the police, "Mr. Jennings had told him he was not going to represent him." *Id.* at 859. Griffin did not indicate that he wanted another lawyer, so police officers advised him of his *Miranda* rights and began to interrogate him, and Griffin provided incriminating statements. *Id.* at 859-60. The Fifth Circuit ruled

Griffin's request to speak with a particular attorney, who ultimately was not available, was not an invocation of the general right to counsel. *Id.* at 863.

Other circuits have explored similar questions and also have found the suspect's request for counsel to have been ambiguous. *Burket v. Angelone,* 208 F.3d 172, 198 (4th Cir. 2000) ("I think I need a lawyer."); *Van Hook v. Anderson,* 488 F.3d 411, 414 (6th Cir. 2007) (*en banc*) ("[M]aybe I should have an attorney present," but suspect reinitiated interrogation the next day); *United States v. Shabaz,* 579 F.3d 815, 818 (7th Cir. 2009) ("am I going to be able to get an attorney?"); *Clark v. Murphy,* 331 F.3d 1062 (9th Cir. 2003) ("I think I would like to talk to a lawyer."); *United States v. Fouche,* 776 F.2d 1398, 1405 (9th Cir. 1985) ("I might want to talk to a lawyer."); and *United States v. Zamora,* 222 F.3d 756, 765-66 (10th Cir. 2000) ("I might want to talk to an attorney."). *Zamora* and *Fouche* were similar to Yenawine's statement, "I might need to speak with my lawyer about whether I should talk with you."

The above opinions of the Fourth, Fifth Seventh, Ninth, and Tenth Circuits thus conflict with the opinion of the Sixth Circuit in *Abela v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004), as well as the Sixth Circuit's holding in the present case.

B. The Circuit Courts of Appeal are divided as to whether producing a lawyer's business card is a sufficient assertion of the right to counsel, particularly where the specific attorney is not available.

The Seventh Circuit has more specifically explored the question of whether producing a lawyer's business card constitutes an assertion of the Sixth Amendment privilege. *United States ex rel. Adkins v. Greer,* 791 F.2d 590 (7th Cir. 1986) (suspect initially produced attorney's business card and declined to speak with police but later reinitiated interrogation) and *Quadrini v. Clusen,* 864 F.2d 577 (7th Cir. 1989) (by showing his attorney's business card to detectives, defendant did not invoke his right to counsel because he spoke with police after receiving *Miranda* warnings). In both of these cases, the Seventh Circuit found producing the business card to have been an ambiguous assertion of the right to counsel, especially after police provided *Miranda* warnings. In *Griffin v. Lynaugh, supra,* the Fifth Circuit ruled that a suspect's request for a specific attorney, who was not available, was an ambiguous or equivocal request.

The opinions of the Fifth and Seventh Circuit, taken together, conflict with the Sixth Circuit's opinion in *Abela* and the case at bar.

In the present case, the Sixth Circuit relied upon its own decision in *Abela,* where a suspect gave a statement that was used at trial and solicited under facts that are somewhat similar to those of this case: (1) the petitioner was under police interrogation when he stated, '[M]aybe I should talk to an attorney'; (2) the

petitioner named his attorney and gave the police officer his attorney's business card; and (3) the police left the interrogation room presumably to contact the attorney but shortly after returned and continued questioning the petitioner and he gave a statement. *Id.* at 919. The Sixth Circuit held that the state-court decision admitting Abela's statement at trial was contrary to clearly established federal law. *Id.* at 927. *Abela* is an incorrect determination of federal law. Nonetheless, *Abela* differs from the present case because (1) the officers left the interrogation room under the pretext of contacting Abela's attorney, (2) the officers in *Abela* did not tell Abela that his counsel was unavailable, and (3) there is no reason to believe that Abela reinitiated the police interrogation after again having been provided his *Miranda* rights, which Yenawine waived.

Applying this Court's specific holding in *Davis v. United States,* the Kentucky Supreme Court objectively determined that the police reasonably believed that Yenawine was not asserting his right to counsel. The Sixth Circuit fell short of actually finding that the Kentucky Supreme Court's opinion "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," in contravention of 28 U.S.C. § 2254(d)(1).

Moreover, protections afforded to criminal defendants under the United States Constitution should not differ from one circuit to another, and the outcome of this case would have been different had other circuit courts of appeal reviewed the issue. The

issue is one of national importance that will continue to recur.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of *certiorari*.

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