No. 24-_____

In the Supreme Court of the United States

CYNTHIA DAVIS, WARDEN,

Petitioner,

v.

DAVID M. SMITH,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Due Process Clause requires exclusion of police-initiated eyewitness identification testimony in exceedingly rare cases. Exclusion of such evidence, the Court has said, is required only if the testimony poses "a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (citation omitted). This Court has done so only once, 55 years ago. *See Sexton v. Beaudreaux*, 585 U.S. 961, 966 (2018) (citing *Foster v. California,* 394 U.S. 440 (1969)). In this AEDPA-governed case, a majority of a Sixth Circuit panel concluded that the Constitution barred testimony from a victim of attempted murder identifying her attacker. The panel held that Ohio courts unreasonably applied this Court's precedent, which mandates a totality-of-the-circumstances look at reliability, even though: the victim knew the attacker; had texted with the attacker 80-plus times in the day leading up to the attack; and was expecting the attacker to arrive at her house when he did.

The Question Presented is: Did the Sixth Circuit exceed its powers under AEDPA in concluding that "*every* fairminded jurist would agree" that the Ohio court violated the Constitution? *Brown v. Davenport*, 596 U.S. 118, 136 (2022).

LIST OF PARTIES

The caption lists all parties to the proceeding.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State v. Smith*, No. 2016-P-0074, 2018 WL 6313398 (Ohio Ct. App. Dec. 03, 2018), jurisdiction declined, 157 Ohio St.3d 1564, (Ohio S. Ct. Feb. 04, 2020).
2. *Smith v. Eppinger*, No. 5:20-CV-00438-JPC, 2023 WL 4410525 (N.D. Ohio Jan. 11, 2023) (report and recommendation), *adopted by* 2023 WL 4071835 (N.D. Ohio June 20, 2023).
3. *Smith v. Davis*, No. 23-3604, 2024 WL 3596872 (6th Cir. July 31, 2024).

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INTRODUCTION

"Suppression of evidence … has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). If that is true when the Fourth Amendment's constitutional protections impose a remedy for police misconduct, then exclusion should be rarer still when the Constitution aims at the trial process, not the police practice. *See Manson v. Brathwaite*, 432 U.S. 98, 113 n.13 (1977). And it must be even rarer still when a federal court orders suppression after filtering constitutional claims through the lens of the Antiterrorism and Effective Death Penalty Act. *See, e.g.*, *Shinn v. Ramirez*, 596 U.S. 366, 377 (2022). The Sixth Circuit's impulse that an Ohio trial court violated the Constitution because it did not suppress Quortney Tolliver's identification of David Smith as the person who tried to murder her drifts so far from this Court's teachings that the Court should summarily reverse.

Quortney Tolliver knew David Smith. They had previously taken an 80-or-so mile road trip from Ravenna to Cleveland, Ohio, just a few weeks before the crime. On the day of the crime, Smith texted and called Tolliver dozens of times because Smith wanted Tolliver to get drugs for him. Those texts and calls stopped moments before the attack that left Tolliver hospitalized. Cell-site data placed Smith near Tolliver's home at the time of the attack. DNA found in Tolliver's home could not exclude Smith as the source. And one of Smith's friends testified that she dropped Smith off in Tolliver's neighborhood, only to pick him up about fifteen minutes later. In light of all this, any fair-minded jurist would have a hard time concluding

that Tolliver's identification presented "a very substantial likelihood of irreparable misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012) (citation omitted). The Sixth Circuit's judgment that "*every* fairminded jurist would agree" that the Ohio court violated the Constitution, *Brown v. Davenport*, 596 U.S. 118, 136 (2022), defies logic. Not only did the Sixth Circuit majority mishandle this Court's eyewitness-identification precedents, but its judgment rests on three classic AEDPA errors that this Court routinely corrects. This Court should grant the petition and either summarily reverse, or in the alternative, set the case for plenary merits review.

This Court may not review every circuit-court error in applying AEDPA; nor should it turn away from every such error.

OPINIONS BELOW

The District Court denied Smith's petition for habeas corpus on June 20, 2023. The opinion is available online. *Smith v. Eppinger*, No. 5:20-CV-00438-JPC, 2023 WL 4071835 (N.D. Ohio June 20, 2023). The Sixth Circuit reversed and directed the district court to issue a writ. The opinion is not published, but is available online. *Smith v. Davis*, No. 23-3604, 2024 WL 3596872 (6th Cir. July 31, 2024); Pet. App. 1a. The Sixth Circuit denied Ohio's request to stay the mandate on September 4, 2024, without comment. Pet. App. 43a. The Sixth's Circuit's mandate issued September 12, 2024.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the Sixth Circuit's final judgment under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment's Section One reads,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, §1, cl. 2–4.

The relevant statute governing the writ of habeas corpus reads,

> (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

28 U.S.C. §2254(d)(1).

STATEMENT

Quortney Tolliver was a drug dealer in Ravenna, Ohio. Trial Tr. Vol. 2, R.10-3, PageID#986–87. One day after a hearing in a downtown courthouse, she called a friend for a ride home. *Id.* at PageID#993. When the friend arrived, another person—David Smith—was driving the car. *Id.* at PageID#993–94. The trio then stopped by Tolliver's house so that she could drop off her court papers and road-tripped the 80 roundtrip miles to Cleveland to buy crack for Tolliver's friend and David Smith. *Id.* at PageID#994.

A few weeks later Smith texted Tolliver in the morning asking if she had the drugs he wanted. *Id.* at PageID#997–98. The two texted back and forth into the night about Smith getting drugs from Tolliver. Those texts included haggling about the price, with Tolliver interpreting Smith's texts to demand "a deal" on the drugs. *Id.* at PageID#1009. Near 11:00 p.m. that night, Smith texted that he would see Tolliver "tomorrow." *Id.* at PageID#1007.

The text conversation resumed the next morning around 9:00 a.m., with Tolliver telling Smith that she needed a ride to Cleveland to get the drugs that Smith desired. *Id.* at PageID#1010. As Tolliver described that morning to the jury, she had a plan to travel back to Cleveland to "get crack" for Smith. *Id.* at PageID#989–90, 992. In line with that plan, Smith texted again at about 10:00 a.m. that he would head over to "pick [Tolliver] up." *Id.* at PageID#1011. Smith texted Tolliver again at 10:40 to see if she was "ready." *Id.* at PageID#1012. After some further back and forth about whether Tolliver was receiving all the messages, Smith called Tolliver to say that he was "up the street" and asked if he could come to her house

then. *Id*. at PageID#1013. Tolliver responded that he could pick her up. *Id*.

A few minutes later, Smith "knocked on" Tolliver's screen door and she pushed it open. *Id*. at PageID#1014. Tolliver still needed to get her "shoes on and [other] stuff" so she turned away from Smith. *Id*. That is when she felt a blow to her head. She then "turned back around" and "looked at him and … got another hit" to the head. *Id*. Tolliver then "fell to [her] knees" and tried to grab her Taser, but "blacked out" instead. *Id*.

At some point, Tolliver briefly regained consciousness and stumbled out of her home screaming, which drew the attention of neighbors. *See, e.g*., Trial Tr. Vol. 8, R.10-9, Page ID#2462–64, 2466. Tolliver eventually woke up in a hospital. Trial Tr. Vol. 2, R.10-3, PageID#1014.

The investigation started immediately. Because Tolliver was still in a coma, the police tracked down Tolliver's cell-phone number from a person who had bought drugs from Tolliver. Trial Tr. Vol. 7, R.10-8, PageID#2202. A subpoena to the cell-phone company revealed that one number had texted or called Tolliver 85 times in the 24 hours before the attack. *Id*. at PageID#2209, 2211–12. That deluge of contacts ended right before the attack. *Id*. at PageID#2210. The police eventually connected the phone number to David Smith. *Id*. at PageID#2214, 2218–20.

Other facets of the investigation pointed to Smith. Cell-location data for Smith's number on the day of the attack showed him leaving the area of the state where he lived and traveling to the place where Tolliver lived. *Id*. at PageID#2223, 2230–33. That data showed the cell phone associated with Smith

communicating with a cell-phone tower less than 1,800 feet from Tolliver's home in the timeframe of the attack. *Id.* at PageID#2233–34.

DNA evidence also linked Smith to the scene. Although the quality of the samples limited analysts' ability to compare the full number of loci, two samples from Tolliver's bathroom sink matched Smith's DNA profile. A sample from the sink basin matched Smith's with a 1 in 3,914 chance that the sample was not Smith. Trial Tr. Vol. 6, R.10-7, PageID#1844. And a sample from the left faucet handle matched Smith with a 1 in 155 chance of not being Smith's. *Id.* at PageID#1846–47.

Another witness further tied Smith to the place and time of the attack. The jury heard testimony from David Smith's friend, Lisa Frame, that connected him to Tolliver's home around the relevant time. *See id.* at Page#1996, 1998, 2002. Frame testified that the "one time" Smith rode in her car involved a trip when Frame drove Smith to Tolliver's neighborhood. *Id.* at PageID#1998, 2002. On that trip, Frame drove Smith to Tolliver's neighborhood, dropped him off, circled the neighborhood for 15 to 17 minutes, and then picked him up again. *Id.* at PageID#2003–04. Smith had told Frame that the reason for the trip was for Smith to sell a gun to a friend so that Smith could use the money to buy drugs for Frame. *Id.* at PageID#2000–01. But when Smith got back in the car, he still had the gun. *Id.* at PageID#2005.

The investigation did eventually include interviewing Tolliver. The police approached her at the rehabilitation center where she was still recovering almost two months after the attack. The officer who conducted that interview explained that interviewees

like Tolliver, who are out on bond, are not always "very forthcoming with law enforcement." Trial Tr. Vol. 7, R.10-8, PageID#2245–47. That proved true for this interview, as Tolliver initially hedged about knowing Smith when shown his photo. *Id.* at PageID#2248. The officer believed she was lying to avoid implicating herself in criminal activity and to shield her mother from learning about her drug-selling behavior. *Id.*; Mot. to Suppress Tr., R. 10-1, PageID#803–04. Bearing out the officer's suspicions, in a later interview, Tolliver indicated that she was 100 percent sure Smith was her attacker. Trial Tr. Vol. 7, R.10-8, PageID#2254.

After hearing all of this and other evidence, a jury convicted Smith of attempted murder and other counts. An Ohio court sentenced him to 22 years in prison. *State v. Smith*, 2018-Ohio-4799, ¶¶3–4 (Ohio Ct. App.). On direct appeal, as relevant here, Smith challenged the trial court's decision not to suppress Tolliver's testimony identifying him as her attacker. *Id.* at ¶8.

The Ohio appeals court identified the possible due-process problem with the officer showing Tolliver Smith's picture and telling her that he believed Smith was her attacker. *Id.* at ¶36 (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967)). The court acknowledged that "the practice of showing a person a single suspect for purposes of identification, not part of a lineup, is widely condemned." *Id.* (citing *Foster v. California*, 394 U.S. 440, 443 (1969)). The appeals court concluded that the officer's "identification procedure … was impermissibly suggestive and unnecessary." *Id.* at ¶37. Once again citing this Court's precedent, the Ohio court concluded that it "must assess whether the identification was reliable under the totality of the

circumstances." *Id.* (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

The Ohio court's analysis recounted that Tolliver "had ample opportunity to view Smith at the time of her attack" as she "recalled Smith coming to her door, letting him in, and him striking her with a hammer." *Id.* at ¶48. The court also considered both that Tolliver initially said that "she was uncertain if she was recalling a dream or the actual date of her attack," and that at a later interview and in court "she was 100 percent certain … that Smith was the person who attacked her." *Id.* Finally, the court reasoned that a "strong showing of reliability can arise from the fact that a victim knew the perpetrator of a crime before the crime was committed." *Id.* at ¶47 (citation omitted). Overall, the Ohio court concluded, the "totality of the circumstances surrounding the identification" showed no violation of Smith's "right to due process" and "[s]uppression was not required." *Id.* at ¶¶48–49. The Ohio Supreme Court denied review over a single dissenting vote. *See State v. Smith*, 156 Ohio St. 3d 1452 (2019).

Smith then petitioned for a writ of habeas corpus in federal court. A magistrate recommended finding that the Ohio court's "decision was not an unreasonable application of Supreme Court precedent" as it had pointed to "several … factors that favored a finding that the eyewitness identification was reliable and considered another obviously relevant factor," Tolliver and Smith's acquaintance, "when it determined the totality of the circumstances suggested her identification was reliable." *Smith v. Eppinger*, No. 5:20-CV-00438-JPC, 2023 WL 4410525, at *19 (N.D. Ohio Jan. 11, 2023). The district court accepted that recommendation and granted a certificate of appealability.

Smith v. Eppinger, No. 5:20-CV-00438, 2023 WL 4071835, at *1 (N.D. Ohio June 20, 2023).

On Smith's appeal, the Sixth Circuit reversed over Judge Thapar's dissent. As the majority saw it, the Ohio court failed "to engage in the balancing test mandated by clearly established Supreme Court precedent." Pet. App. 31a. The majority faulted the Ohio court for not balancing what it called an "extremely weak showing of reliability" against "the immensely suggestive law enforcement procedure." Pet. App. 28a. In the majority's view, Tolliver's identification "served as the key piece of the government's evidence," so failing to suppress it meant that "any fair-minded jurist would conclude that the scale crashes to the side" of granting habeas relief. Pet. App. 31a.

Judge Thapar dissented, noting three serious problems with the majority's AEDPA approach. The dissent first described the majority opinion as a "*de novo* analysis" of the factors that merely asserted "that no fair-minded jurist could disagree with its conclusion." Pet. App. 38a. It also noted that the majority could not "find a single Supreme Court case holding that a court can't consider the victim's previous interaction with her attacker in its reliability analysis." Pet. App. 40a. Finally, it flagged that the majority misapplied AEDPA "by targeting the state court's reasoning rather than its bottom-line decision." Pet. App. 39a.

The warden moved to stay the mandate, but the Sixth Circuit denied that request without comment. Pet. App. 43a.

REASONS TO GRANT THE PETITION

Two headlines point to summary reversal. First, the Sixth Circuit majority granted habeas relief that will exclude eyewitness testimony in a scenario unmentioned in this Court's cases on the topic. Second, the Sixth Circuit majority committed three classic AEDPA errors that this Court routinely corrects through summary reversal. If the Court does not summarily reverse, it should instead grant plenary review.

I. By policing police misconduct, the Sixth Circuit defied this Court's precedents that require excluding eyewitness testimony only when it presents an intolerable risk of misidentification.

The Sixth Circuit majority's hair-trigger exclusion—executed in an AEDPA case—cannot be justified under this Court's holdings. More than 40 years ago, this Court rejected a per-se rule of exclusion whenever police misconduct tainted eyewitness-identification testimony. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Rather than per-se exclusion, the Court adopted a totality approach that allows such testimony if, "despite the suggestive aspect, the out-of-court identification possesses certain features of reliability." *Id.* at 110. The testimony's "reliability is the linchpin in determining" its "admissibility." *Id.* at 114. The test can also be stated this way: absent "'a very substantial likelihood of irreparable misidentification,'" eyewitness identification "evidence is for the jury to weigh." *Id.* at 116 (citation omitted). Importantly, the Court did not "establish a strict exclusionary rule or new standard of due process." *Id.* at 113. Instead, exclusion is only appropriate when "the

likelihood of misidentification … violates a defendant's right to due process." *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

The Court reaffirmed this test in 2012. "An identification infected by improper police influence," the Court reiterated, "is not automatically excluded." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012). Indeed, "the exclusion of such evidence is the exception to the rule that favors the admissibility of eyewitness identification for the jury's consideration." *United States v. Saint Louis*, 889 F.3d 145, 153 (4th Cir. 2018) (citation omitted). And with exclusion as the exception, "even highly dubious eyewitness testimony" should "be[] admitted and tested in the crucible of cross-examination." *United States v. Scheffer*, 523 U.S. 303, 334–35 (1998) (Stevens, J., dissenting). After all, "evidence with some element of untrustworthiness is customary grist for the jury mill." *Manson*, 432 U.S. at 116.

Both when announced and today, the rule favoring admissibility and leaving exclusion as the exception rests on at least four considerations. First, a rule of per-se exclusion "denies the trier reliable evidence" and "may result, on occasion, in the guilty going free." *Id.* at 112. Second, precisely "because of its rigidity," a rule of per-se exclusion "may make error by the trial judge more likely than the totality approach." *Id.* Third, because "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest," exclusion is not a favored remedy. *Id.* at 113 n.13. Fourth, absent "the substantial likelihood of irreparable misidentification," courts should be "content to rely upon the good sense and judgment of American juries." *Id.* at 116. In short, in those "cases in which the identification is

reliable despite an unnecessarily suggestive identification procedure," exclusion would be "a Draconian sanction." *Id.* at 113. Put another way, the touchstone is "fairness as required by the Due Process Clause of the Fourteenth Amendment," not a "strict exclusionary rule." *Id.* at 113.

The Court's approach to police-involved eyewitness-identification testimony matches the Constitution's approach to evidence more broadly. The Constitution generally addresses evidentiary reliability through "procedural rather than … substantive guarantee[s]." *See Crawford v. Washington*, 541 U.S. 36, 61 (2004). In several contexts, the Court has rejected claims that the Constitution wards off supposedly "inherently unreliable" evidence by excluding it instead of relying on the Constitution's robust procedures to protect criminal trials from unreliable evidence. *See, e.g.*, *Perry*, 565 U.S. at 236, 245 (eyewitness testimony unrelated to police interrogation); *Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009) (statement to jailhouse informant); *Dowling v. United States*, 493 U.S. 342, 354 (1990) (evidence related to acquitted conduct).

These cases showcase the Court's "unwillingness to enlarge the domain of due process," *Perry*, 565 U.S. at 246, and corresponding willingness to rely on the Constitution's many procedural measures that assure reliable criminal trial process instead. Those include, among others, the Confrontation Clause, which "ensure[s] the reliability of the evidence against a criminal defendant," *Maryland v. Craig,* 497 U.S. 836, 845 (1990), by tapping into cross-examination, "the 'greatest legal engine ever invented for the discovery of truth,'" *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted). They also include the right to counsel, without which, "a criminal trial cannot reliably

serve its function as a vehicle for determination of guilt or innocence." *Rose v. Clark*, 478 U.S. 570, 577–78 (1986); *Powell v. Alabama*, 287 U.S. 45, 58–59 (1932). And they include the right to a jury, which "furnishes some assurance of a reliable decision." Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 4 (1966) (quotation marks omitted). In short, the Due Process Clause plays "a limited … role" in policing evidence admission "in view of the other lines of defense against unreliable evidence." *Desai v. Booker*, 732 F.3d 628, 630–31 (6th Cir. 2013) (Sutton, J.). The targeted "aim of the requirement of due process" has long been viewed "not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

If anything, the Court's increased focus on the original meaning of the Constitution's criminal-procedure guarantees has moved away from standards that empower judges to decide if evidence is reliable. *Crawford*, of course, overtured previous precedent that let judges deny "the admission of unreliable out-of-court nontestimonial statements." *Whorton v. Bockting*, 549 U.S. 406, 420 (2007). *Crawford*'s method casts doubt on the *Manson-Biggers* approach, where judges police evidentiary reliability, because such policing replaces "the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Crawford*, 541 U.S. at 62; *see Perry,* 565 U.S. at 249 (Thomas, J., concurring).

All this signals that exclusion to remedy possible evidentiary unreliability must be exceedingly rare. Compare the Fourth Amendment's well-known exclusion domain. In that space, exclusion protects a constitutional value embedded in the Fourth

Amendment. Even in the Fourth Amendment context, "[r]eal deterrent value is a necessary condition for exclusion, but it is not … sufficient" because "[e]xclusion exacts a heavy toll on both the judicial system and society at large." *Davis v. United States*, 564 U.S. 229, 237 (2011). Police-involved eyewitness testimony, by comparison, "does not in itself intrude upon a constitutionally protected interest." *Manson*, 432 U.S. at 113 n.13. That is equally true in other realms where this Court has crafted constitutionally based prophylactic rules. *See Vega v. Tekoh*, 597 U.S. 134, 149–50 (2022); *see also Michigan v. Tucker*, 417 U. S. 433, 450–452 & n.26 (1974) (fruits of un-*Miran-dized* statement can be admitted). And if exclusion is rare when it directly protects a constitutional interest, then it must be rarer still when it only indirectly serves one.

All the above casts doubt that exclusion would be required on direct review. So reviewed under AEDPA, the Sixth Circuit majority's holding deserves a red flag. *Cf. Felkner v. Jackson*, 562 U.S. 594, 598 (2011). The Sixth Circuit majority turned to exclusion as "a first impulse," not a "last resort." *Hudson*, 547 U.S. at 591. The Sixth Circuit majority's impulse stemmed from its focus on police misconduct—that is, on the classic basis for exclusion—despite this Court's direction that the rule enforces due process, not perfect police practice. *See Manson,* 432 U.S. at 133 & n.13. The majority, for example, impugned the police conduct as an "aberrant, highly corruptive procedure," Pet. App. 15a, that was "immensely suggestive," Pet. App. 28a. The misconduct, the majority opined, should bear "enormous weight" on the scales when weighed against indicia of reliability. Pet. App. 31a.

Yet, when the majority turned to the other side of the balance, it left an elbow on the side of the scale for police conduct but failed to weigh numerous signs that Tolliver's identification was spot on. After reading the Sixth Circuit majority opinion, a reader might think this Court imposes an exclusionary rule to curb police misconduct and that Tolliver's identification was the only evidence in the case. Both would be wrong.

First, this Court has consistently pegged admission of police-involved eyewitness testimony to its ultimate reliability, *despite* police misconduct. *Manson*, 432 U.S. at 113–14; *Perry*, 565 U.S. at 232. The Due process inquiry weights the "*effect*" of the police conduct on reliability against countervailing evidence showing reliability; it does not weigh misconduct itself against reliability. *Manson*, 432 U.S. at 114 (emphasis added); *Perry*, 565 U.S. at 239. The Sixth Circuit majority itched to punish police misconduct instead of following this Court's instructions to test the identification for ultimate reliability.

Second, the evidence here is suffused with reliability. The majority lobs plenty of adjectives against police misconduct, but devotes almost no words to describing the text and phone messages, the cell-location data, and the DNA, all of which tied Smith to the crime. Most arrestingly, the majority makes no mention that Smith called Tolliver minutes before the attack to announce that he was down the road from her house and asked if she was ready for him to pick her up for their planned trip to Cleveland.

*

The evidence here belies any description of the police conduct as creating "'a very substantial likelihood of irreparable misidentification.'" *Manson*, 432 U.S.

at 116 (citation omitted). Instead, "under all the circumstances," the "evidence [was] for the jury to weigh." *Id.* That would be true enough under direct review. But refracted through AEDPA's prism, no jurist faithfully applying this Court's cases and that statute should have held otherwise.

II. The Sixth Circuit's judgment commits three AEDPA errors that this Court routinely reverses in summary dispositions.

The dissent is right thrice over. Its critique of the majority identifies three ways that the judgment breaks this Court's commandments for applying AEDPA to state-court merits judgments.

A. The Sixth Circuit majority invoked AEDPA deference in name, but not in substance.

First, while the majority nominally invoked AEDPA, it conducted *de novo* review in substance. Pet. App. 23a. That, of course, is an approach this Court has repeatedly corrected. *See, e.g.*, *Shinn v. Kayer*, 592 U.S. 111, 119 (2020); *Sexton v. Beaudreaux*, 585 U.S. 961, 968 (2018); *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011). Indeed, *Sexton* corrected this methodological error as it relates to suppressing identification evidence. Although the claim there was nested within an ineffective-assistance claim, the core question was whether the Ninth Circuit properly applied AEDPA in the context of suppressing the identification. This Court summarily reversed, noting that although the indicia of reliability were mixed, the "totality of the circumstances" could be viewed as favoring the State. 585 U.S. at 967.

The Sixth Circuit majority did invoke the "fairminded jurist" standard, but it did so only after what reads like a *de novo* review of the factors for testing an identification's reliability. The majority's analysis reads as if the fairminded-jurist inquiry is "a test of its confidence in the result it would reach under *de novo* review." *Richter*, 562 U.S. at 102. That is, the majority seems to have "concluded [that] the state court must have been unreasonable in rejecting" the same conclusion the majority reached. *Id.* For example, in discussing Tolliver's opportunity to view her attacker (*see Biggers*, 409 U.S. at 199), the majority never mentions that Tolliver knew Smith beforehand, had talked to him on the phone minutes before, and knew he was on his way to her house. Yet the majority still concluded that this factor "clearly favors suppression." Pet. App. 17a.

The Sixth Circuit majority's AEDPA-last approach leaves the reader wondering "how [its] … analysis would have been any different without AEDPA." *Richter,* 562 U.S. at 101. That leaves Ohio to once again ask this Court to enforce the clear limitations that Congress and the Court have placed on federal habeas review in order "to ensure that state [criminal] proceedings are the central process, not just a preliminary step for a later federal habeas proceeding[.]" *Id.* at 103.

The Sixth Circuit's drive-by AEDPA analysis inflicts a harm on "the State and its citizens." *Shinn* v. *Ramirez*, 596 U.S. 366, 390 (2022). The Court should reverse.

B. The Sixth Circuit majority critiqued the Ohio court's opinion, not its judgment.

Second, the Sixth Circuit majority faulted the state court's opinion writing rather than its holding. The majority opinion reads like a professor grading 1L exams. That grading fails this Court's instructions to lower courts conducting habeas review. Those instructions include the reminder that "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300 (2013); *see Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Instead, a writ of habeas corpus is directed at the state-court *judgment*. A court issuing the writ simply gives the state court an opportunity to "replace an invalid judgment with a valid one." *See Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring).

The majority flunked the Ohio court for "halfheartedly devoting a couple of sentences" to the reliability analysis; its "glaring omission" of a factor the majority thought relevant; its "cursory" reliability discussion; and its "fail[ure] to balance" reliability and suggestibility as the majority would have. Pet. App. 23a, 26a, 28a. None of those criticisms address the Ohio court's judgment. Perhaps the biggest tell that the Sixth Circuit majority trained its fire on the Ohio court's reasoning, not its judgment, is that it framed the problem as the Ohio appellate court "fail[ing] to salvage the trial court's erroneous reasoning." Pet. App. 29a. To the Sixth Circuit majority, the Ohio *trial* court's "erroneous original decision" committed original sin that the Ohio appeals court failed to absolve. Pet. App. 29a. The Sixth Circuit's approach contradicts this Court's instruction that federal habeas courts look to

the "last state court to decide a prisoner's federal claim." *Wilson v. Sellers*, 584 U.S. 122, 125 (2018). Whatever criticism the majority had of the Ohio appellate court, that court decided Smith's federal claims in "a reasoned opinion," *id.*, so turning to the trial opinion was entirely out of bounds.

The Sixth Circuit majority's grading also unfairly evaluated the Ohio court opinion even on its own terms. The Ohio court cited all this Court's key cases in the area, *Foster*, *Biggers*, *Manson,* and *Perry*. 2018-Ohio-4799 ¶¶10, 36, 37, 42. The Ohio court *agreed* that the police engaged in "improper" conduct when interacting with Tolliver. *Id.* at ¶¶37, 49. The Ohio court enumerated the so-called *Biggers* factors for evaluating reliability. *Id.* at ¶40. The Ohio court explained why the *Biggers* factors "are better suited" for stranger identifications, which this was not. *Id.* at ¶47. Finally, the Ohio court distinguished the one time this Court ruled that an identification must be excluded. *Id.* (discussing *Foster*, 394 U.S. 440, as a stranger case). All in all, the Ohio court should have graded out well. Even looking to the opinion instead of the judgment, it is impossible to say that the Ohio court went astray so that "*every* fairminded jurist would agree" it deserved an F. *Davenport*, 596 U.S. at 136.

Finally, the Sixth Circuit majority's "analysis overlook[ed] arguments that would otherwise justify the state courts result," *Richter*, 562 U.S. at 102. Pet. App. 23a. Most salient here, the majority overlooked the landslide of texts and calls between Tolliver and Smith that should have decisively weighted the reliability side of the scale. Recall that one of those calls from Smith to Tolliver took place minutes before the attack. In that call, Smith announced that he was "up

the street" from Tolliver's house and then asked if he could come to her house to pick her up. Trial Tr. Vol. 2, R.10-3, PageID#1013.

"Ohio and its citizens deserve better," *Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting), than the Sixth Circuit's AEDPA defiance on this second axis. This Court should reverse.

C. The Sixth Circuit majority relied on its own precedent to grant habeas relief.

Third, the Sixth Circuit majority deviated from AEDPA when it turned to its own precedent to support its grant of habeas relief. The majority's approach directly contradicts this Court's repeated reversals of circuit courts following the same path, including the Sixth Circuit. This Court has "emphasized, time and again, that the Antiterrorism and Effective Death Penalty Act … prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" *Lopez v. Smith*, 574 U.S. 1, 2 (2014) (citation omitted); *see Kernan v. Cuero*, 583 U.S. 1, 8 (2017).

The Sixth Circuit majority relied on its own precedent to justify granting habeas relief. The majority first noted that "[e]very case in this Circuit" permitting acquaintance eyewitness testimony "involved a significantly closer relationship" than that between Tolliver and Smith. Pet. App. 24a. As the majority saw it, habeas relief was required because Sixth Circuit "precedent [had] never deemed such a tenuous relationship close enough to confer reliability." *Id.* The Sixth Circuit majority thus "erred by consulting its own precedents, rather than those of this Court, in assessing the reasonableness of the" Ohio court's

decision. *Parker v. Matthews*, 567 U.S. 37, 48 (2012); *see White v. Woodall*, 572 U.S. 415, 420 n.2 (2014).

If anything, this Court's cases about eyewitness identification point opposite the Sixth Circuit majority's conclusion. For example, the key case rejecting a "per se" exclusionary rule described the reliability issue as arising when "the witness must testify about an encounter with a *total stranger*." *Manson*, 432 U.S. at 109, 112 (emphasis added). An earlier case likewise set the stage by observing that "identification of *strangers* is proverbially untrustworthy." *United States v. Wade*, 388 U.S. 218, 228 (1967) (emphasis added). These statements invoke a fair debate on whether the usual analysis for eyewitness testimony—the *Biggers* factors—about a stranger even applies when the victim previously knew the identified perpetrator. The Fourth Circuit, for example, thinks that these "'*Biggers* factors' are best suited to evaluate the reliability of an identification made by an eyewitness who had one discrete run-in with the perpetrator." *United States v. Ross*, 72 F.4th 40, 49 n.8 (4th Cir. 2023).

Many cases track the Fourth Circuit's observation and conclude that when an acquaintance offers an eyewitness identification, any due-process concerns about admitting the evidence are easily met. *See, e.g., United States v. Damsky*, 740 F.2d 134, 140 (2d Cir. 1984); *United States v. Osorio*, 757 F. App'x 167, 170 (3d Cir. 2018); *United States v. Velasquez*, No. 2:11-CR-77(12)-PPS-APR, 2013 WL 4048538, at *8 (N.D. Ind. Aug. 8, 2013); *United States v. Robertson*, No. 17-CR-02949-MV, 2020 WL 85134, at *10 (D.N.M. Jan. 7, 2020); *cf. United States v. Morsley*, 64 F.3d 907, 917 (4th Cir. 1995); *see also Johnson v. City of Cheyenne*, 99 F.4th 1206, 1221 (10th Cir. 2024) (collecting

acquaintance cases); Nathan R. Sobel, *et al.*, Eyewitness Identification: Legal & Practical Problems §6:6 n.6 (2d ed. 2024) (same). The Sixth Circuit majority's holding is hard to reconcile with these cases, even though this Court's "totality of the circumstances" test means a sharp circuit split will almost certainly never arise.

Strikingly, the Sixth Circuit's own cases decided before the decision below aligned with the many cases holding that any due-process concern is easily satisfied when the witness knew the perpetrator. In a habeas case, for example, the Sixth Circuit reasoned that "any prior acquaintance with another person substantially increases the likelihood of an accurate identification." *Haliym v. Mitchell*, 492 F.3d 680, 706 (6th Cir. 2007). Before that, in a direct-review case, the Sixth Circuit explained that "it is material whether the witness was familiar with the defendant, because the more familiar the person, the more reliable the identification." *United States v. Crozier*, 259 F.3d 503, 511 n.2 (6th Cir. 2001); *see also United States v. Beverly,* 369 F.3d 516, 539 (6th Cir. 2004); *Moss v. Hofbauer*, 286 F.3d 851, 862 (6th Cir. 2002). Despite this wealth of authority highlighting the salience of Tolliver knowing Smith before the attack, the Sixth Circuit majority countermanded the Ohio court's judgment.

To be sure, the Sixth Circuit majority pointed to the one case in which this Court held that the Due Process Clause required excluding the eyewitness identification. Pet. App. 30a; *see Foster*, 394 U.S. 440. Wielding *Foster*, the majority harpooned the police conduct in this case as "even worse than the identification procedure" there. Pet. App. 30a. But that disregards this Court's teaching that the Due Process

Clause does not mandate exclusion "if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances." *Perry*, 565 U.S. at 232. The Sixth Circuit majority let the police's conduct drive the analysis without weighing the other factors favoring reliability. By all indications, *Foster* involved a stranger—the night manager of a Western Union office—who observed the defendant during the robbery. 394 U.S. at 441. That hardly sets it up as a guide to this case, which includes several reasons to credit Tolliver's identification that were absent in *Foster*. Recall that Tolliver knew Smith from a previous roundtrip car ride to Cleveland; Tolliver had exchanged dozens of texts and phone calls with Smith in the 24 hours before the attempted murder; Smith had called Tolliver minutes before to tell her that he was on the way to her house; and the barrage of communication between Smith and Tolliver ceased moments before the attack. *See* above 4–5. The Sixth Circuit majority thought this case presented a "clear application of *Foster*." Pet. App. 30a. But, as dozens of cases have observed, when a witness knows the offender, the reliability calculus occupies a different analytical landscape. *Foster* is no guide in that terrain. And no other case from this Court puts the Ohio court's analysis beyond "fair-minded" debate. *Davenport*, 596 U.S. at 136.

Applying this Court's precedent "in name only" is grounds for summary reversal. *See Maryland v. Kulbicki*, 577 U.S. 1, 2 (2015). This third AEDPA error is yet another reason to reverse.

* * *

The Constitution leaves the question of evidentiary reliability largely to process. Only once has this

Court held that the Constitution required suppressing the kind of evidence involved here regardless of process. The Sixth Circuit's holding breaks new ground on the topic, but AEDPA is Congress's judgment that federal courts may not enlarge the Constitution's guarantees when reviewing state criminal convictions.

No Circuit can spare the judicial resources to correct every panel error, even every AEDPA panel error. The Sixth Circuit has said as much. *See, e.g.*, *Issa v. Bradshaw*, 910 F.3d 872, 877–78 (6th Cir. 2018) (Sutton, J., concurring in denial of en banc rehearing); *Mitts v. Bagley*, 626 F.3d 366, 370–71 (6th Cir. 2010) (Sutton, J., concurring in denial of en banc rehearing), *panel op. reversed by*, *Bobby v. Mitts*, 563 U.S. 395, 400 (2011). The Sixth's Circuit's renewed "taste for disregarding AEDPA," *Rapelje v. Blackston*, 577 U.S. 1019, 1021 (2015) (Scalia, J., dissenting from denial of certiorari), marks this as a case that calls out for summary reversal.

CONCLUSION

The Court should grant the petition for certiorari and summarily reverse, or in the alternative, set the case for plenary review.

Respectfully submitted,

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