No. 24A_____

In the Supreme Court of the United States

CYNTHIA DAVIS, WARDEN.

Applicant,

v.

DAVID M. SMITH,

Respondent.

APPLICATION TO STAY OR RECALL THE SIXTH CIRCUIT'S MANDATE PENDING WARDEN CYNTHIA DAVIS'S PETITION FOR A WRIT OF CERTIORARI

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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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To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

The Warden seeks recall and stay of the Sixth Circuit's mandate because the judgment of that court orders an imminent new trial in an attempted-murder case. The Sixth Circuit's judgment clashes with two lines of this Court's precedent. The incompatibility between the judgment below and this Court's cases makes certiorari at least likely. And Ohio will suffer harm absent an order recalling and staying the mandate because it will soon need to start planning for a retrial that should not happen.

The core question here is what the Constitution has to say about admitting eyewitness testimony when it arises from sub-par policework. The Court long ago answered that the Due Process Clause requires courts to monitor such evidence only for "'a very substantial likelihood of irreparable misidentification.'" *Manson v. Brathwaite,* 432 U.S. 98, 116 (1977) (citation omitted). Absent that, eyewitness-identification "evidence is for the jury to weigh." *Id*. That rule—quite pointedly—does not parallel the Fourth Amendment's exclusionary regime, which does aim to right the constables' blunders. *See id.* at 113 & n.13. When a defendant alleges error from inclusion of such evidence at trial, he faces an uphill climb. And when he makes that argument to a federal habeas court after a state court he faces an uphill cliff. *See, e.g.*, *Brown v. Davenport*, 596 U.S. 118, 136 (2022).

The Court has only once concluded that the Due Process Clause required exclusion. *See Foster v. California*, 394 U.S. 440, 443 (1969). And in that case and others, the eyewitness and the defendant were strangers to each other. *Manson*, 432 U.S. at 109, 112; *United States v. Wade*, 388 U.S. 218, 228 (1967). The Sixth Circuit's

judgment that the testimony here had to be excluded despite the victim and defendant knowing each other would merit certiorari even if it arrived here on direct review.

But the case is here under the Antiterrorism and Effective Death Penalty Act. In that posture the Sixth Circuit's innovation in the law of eyewitness-testimony exclusions is out of bounds. *See, e.g.*, *White v. Woodall*, 572 U.S. 415, 427 (2014). The Court should recall and stay the Sixth Circuit's mandate to facilitate review of the already-filed certiorari petition.

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption.

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, 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). The Sixth Circuit denied Ohio's request to stay the mandate on September 4, 2024, without comment. The Sixth Circuit's mandate issued September 12, 2024. The Sixth Circuit's opinion, judgment, order, and mandate are in the appendix to this application.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to stay the Sixth's Circuit's judgment under Supreme Court Rules 22 and 23, and under 28 U.S.C. §2101(f). *See* 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.

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

Someone tried to kill Quortney Tolliver in her home. Two or three weeks earlier, Tolliver had met David Smith. R. 10-3, PageID#993. She met him when he drove her and another woman to Cleveland to buy crack. R. 10-3, PageID#994.

On the day of the attack, Smith texted at about 10:00 a.m. that he would head over to "pick [Tolliver] up." *Id.* at 1011. Smith texted Tolliver at 10:40 to see if she was "ready." *Id.* at 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 asking if he could come to her house then. *Id.* at 1013. Tolliver responded that he could. *Id.*

A few minutes later, Smith "knocked on" Tolliver's screen door and she pushed it open. *Id.* at 1014. Smith still needed to get her "shoes on and other stuff" so she

turned away from Smtih. *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.* Tolliver survived, but spent weeks recovering. Trial Tr. Vol. 2, R.10-3, PageID#1014.

Because Tolliver weas still in a coma when the investigation began, the police discovered Tolliver's cell-phone number from a person who had bought drugs from Tolliver. Trial Tr. Vol. 7, PageID#2202. A subpoena to the cellphone company revealed that one number had texted or called Tolliver 85 times in the 24 hours before the attack. *Id.* at PageID#2209, 2212. That deluge of contacts ended right before the attack. *Id.* at 2210. The police eventually connected the phone number to Smith. *Id.* at 2214, 2218–19, 2220.

Other data also pointed to Smith. Cell-location data for Smith's number showed him leaving the area of the state where he lived and traveling to the place where Tolliver lived. *Id.* at 2223, 2231–32. That data showed the cellphone associated with Smith communicating with a cellphone tower less than 1,800 feet from Tolliver's home in the timeframe of the attack. *Id.* at 2233–34.

DNA evidence, too, 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. Trial Tr. Vol. 6, R. 10-7, PageID#1844, 1847.

Furthermore, a witness connected Smith to Tolliver's home at the relevant time. *See id.* at PageID#1996. A witness testified that the "one time" Smith rode in her car involved a trip when she 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#2004. Smith had told Frame that the reason for the trip was for Smith to sell a gun to a friend and then 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.

Finally, the police approached Tolliver at the rehabilitation facility 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." R. 10-8, PageID#2247. That proved true for this interview, as Tolliver initially hedged about knowing Smith when shown his photo (and his photo alone). *Id.* at 2248. But the officer believed she was lying. *Id.* at 2248, 2297; R. 10-1, PageID#802. But in a later interview, Tolliver indicated that she was 100 percent sure Smith was her attacker. R.10-8, PageID#2254.

An Ohio jury convicted Smith of attempted murder and other crimes, and a judge 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 identification of Smith 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. 263, 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 (1972)).

The Ohio court's *Biggers* 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.* The Ohio court also 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). All told, 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* 156 Ohio St. 3d 1452 (2019).

Smith then petitioned for a writ of habeas corpus in federal court. A magistrate's recommendation concluded that the Ohio court's "decision was not an unreasonable application of Supreme Court precedent" as the court had "identified several *Biggers* factors that favored a finding that the eyewitness identification was reliable and considered another obviously relevant factor," Tolliver and Smith's acquittance, "when it determined the totality of the circumstances suggested her identification was reliable." *Smith v. Eppinger*, No. 5:20-CV-00438, 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 (N.D. Ohio June 20, 2023).

On Smith's appeal, the Sixth Circuit reversed, over a dissent by Judge Thapar. As the majority saw it, a writ of habeas corpus should issue because the Ohio courts failed "to engage in the balancing test mandated by clearly established Supreme Court precedent." App. 35 (references are to the Appendix to this Application). 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." App. 23. In the majority's view, the 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. App. 25.

The dissent noted three problems with the majority's AEDPA approach. It described the majority opinion as a "*de novo* analysis of the *Biggers* factors" that then "states that no fair-minded jurist could disagree with its conclusion." App. 31. It also observed that "the majority can't 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." App. 33. In addition, the dissent explained that the majority misapplied AEDPA "by targeting the state court's reasoning rather than its bottom-line decision." App. 32.

The Warden moved to stay the mandate, but the Sixth Circuit denied that request without comment. App. 38.

The warden filed a petition for certiorari, which the Court docketed on October 15, 2024, as Case No. 24-421.

REASONS TO GRANT THE APPLICATION

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). Ohio can show each factor.

I. The Court is reasonably likely to grant certiorari and reverse because the Sixth Circuit's judgment dramatically misapplied AEDPA.

The Court is likely to grant certiorari and reverse for two reasons.

A. The Sixth Circuit's command that a state court exclude eyewitness testimony deviates from this Court's precedent directing that exclusion is rare.

When police misconduct taints eyewitness testimony, the question is whether using that evidence violates the Constitution. 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 … 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. In announcing that rule, 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's totality-of-the-circumstances review for testimony that poses "a very substantial likelihood of irreparable misidentification," *Simmons v. U.S.*, 390 U.S. 377, 381–82 (1968), makes a circuit-split unlikely. When reviewing "each case … on its own facts," *id.* at 381, a court might give more or less weight to the witness's prior

acquaintance with the defendant. But along that spectrum, anyone would be hard-pressed to define a point that splits the decisions into two camps. Short of dueling categorical rules that acquaintance status is always or never relevant, the decisions in this area will be shaded, not stark.

Against that backdrop, the Sixth Circuit's judgment here is as sharp of a split as a court is likely to make. The Sixth Circuit majority did mention that Smith and Tolliver knew each other, App. 19–21, but it downplayed that fact to near irrelevance, *see id*. That charts a different course from many other cases applying this Court's precedent in this area. For example, the Fourth Circuit recently noted that the "*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, 50 n.8 (4th Cir. 2023); *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. Crozier*, 259 F.3d 503, 511 (6th Cir. 2001); *United States v. Beverly,* 369 F.3d 516, 539 (6th Cir. 2004); *Moss v. Hofbauer*, 286 F.3d 851, 862 (6th Cir. 2002); *United States v. Velasquez*, No. 2:11-CR-77, 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); *see also Johnson v. City of Cheyenne*, 99 F.4th 1206, 1221 (10th Cir. 2024) (collecting acquaintance cases); Eyewitness Identification: Legal & Practical Problems §6:6 n.6 (2d ed. 2024) (same).

The Sixth Circuit majority's holding is out of step with these many other holdings. And that is a classic reason this Court grants certiorari. *See, e.g.*, *Lindke v. Freed*,

601 U.S. 187, 194 (2024); *Wooden v. United States*, 595 U.S. 360, 365 (2022). The likelihood of review shoots up even more when a court forges new law when reviewing a state conviction under the Antiterrorism and Effective Death Penalty Act. That Act, of course, requires federal courts to measure state convictions against an existing body of this Court's cases, not to innovate new rules of law. *See, e.g.*, *White v. Woodall*, 572 U.S. 415, 427 (2014); *Shoop v. Hill*, 586 U.S. 45, 50 (2019).

B. The Sixth Circuit flouted this Court's AEDPA precedents three times over.

The Sixth Circuit not only mishandled the law of eyewitness testimony, it fumbled the law that sets the rule of decision for federal habeas courts. It did so in three ways.

First, the Sixth Circuit invoked AEDPA in name only. App. 19–21. As relevant here, AEDPA bars a federal court from granting a habeas writ unless "*every* fair-minded jurist would agree" that a state court violated the Constitution. *Brown v. Davenport*, 596 U.S. 118, 136 (2022) (emphasis in original). Yet, the Sixth Circuit merely tacked this standard to the end of its analysis. The reader only really encounters the fairminded-jurist standard after several paragraphs detailing how the Ohio court would be wrong under direct review. App. 12–19. That type of analysis is one 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, 102 (2011). The Sixth Circuit's AEDPA-as-epilogue approach leaves the reader wondering "how [its] … analysis would have been any different without AEDPA." *Richter,* 562 U.S. at 101.

Second, the Sixth Circuit majority faulted the state court's opinion-writing rather than its holding. Under AEDPA, "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). Despite that precedent, the Sixth Circuit majority looked to the Ohio's court's reasoning, not its judgment. In fact, the Sixth Circuit looked at the Ohio *trial court's* reasoning when it faulted the Ohio appellate court for "fail[ing] to salvage the trial court's erroneous reasoning." App. 24. That 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) (collecting cases).

Third, the Sixth Circuit majority cited no holding of this Court undermining the state court's logic that the totality of the reliability factors should account for the victim knowing the defendant. Instead, the Sixth Circuit measured the Ohio court's opinion against *circuit* precedent. The majority compared the Ohio decision to "case[s] in this circuit" and believed that its own "precedent [had] never deemed such a tenuous relationship" between victim and attacker "close enough to confer reliability." App. 20. Again, that flouts this Court's admonition, which it has "emphasized, time and again": 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); *see Kernan v. Cuero*, 583 U.S. 1, 8 (2017); *Parker v. Matthews*, 567 U.S. 37, 48 (2012).

II. Ohio will suffer irreparable harm preparing for a possibly unnecessary retrial absent an order recalling and staying the mandate.

Because the Sixth Circuit refused to stay its mandate, Ohio now faces a ticking clock to retry David Smith. The time on that clock expires on March 11, 2025. And Ohio will need to start preparing for trial-court proceedings well before that. Unless this Court recalls and stays the Sixth Circuit's mandate, Ohio will begin accruing the significant costs of retrying a case about a nearly decade-old attempted murder.

Those costs include material expense such as the "additional time and resources" diverted from other law-enforcement activities to the retrial. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). The costs also include the greater degree of difficulty in prosecuting the case again because the "the erosion of memory and dispersion of witnesses that accompany the passage of time" make conviction on retrial "more difficult." *Id.* The risks of a failed second prosecution imposes costs beyond the prosecutor's office. When retrial falls short because evidence is stale or unavailable, "the public suffers, as do the victims." *Edwards v. Vannoy*, 593 U.S. 255, 263 (2021). For all these reasons, federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (internal punctuation omitted); *Richter*, 562 U.S. at 103.

The Court can avoid imposing these costs on Ohio by recalling and staying the Sixth Circuit's mandate. That is exactly what the Court did in another Sixth Circuit case arising from a conditional writ of habeas corpus. *See Brown v. Davenport*, 141 S. Ct. 1288, 1288 (2021). The order in *Brown* recalled and stayed the Sixth Circuit's

mandate 92 days ahead of the pending retrial deadline there. *See Order* in No. 20A-116 (Feb. 1, 2021); Application for Recall and Stay, *id,* at 12 (Dec. 18, 2020). The equivalent date in this case is December 9, 2024. To give Ohio the same breathing room it gave Michigan, the Court should recall and stay the Sixth Circuit's mandate. On the current case schedule, the Court will not decide whether to grant certiorari before Ohio faces the same trial-preparation pressures that Michigan would have faced absent this Court's relief.

On the other side, the cost to Smith is slight. Ohio has already filed its petition for certiorari. It did so weeks ahead of the deadline. If Smith also files early, he can accelerate the case so that the gap between this Court's decision about certiorari and his retrial date is around 90 days.

CONCLUSION

The Court should recall and stay the Sixth Circuit's mandate.

Respectfully submitted,

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